

7-12-2022

The Legitimacy of International Human Rights Law—Addressing the Justification Gap

Brock M. Mason

Follow this and additional works at: <https://digitalcommons.law.byu.edu/lawreview>



Part of the [Human Rights Law Commons](#)

Recommended Citation

Brock M. Mason, *The Legitimacy of International Human Rights Law—Addressing the Justification Gap*, 47 BYU L. Rev. 1825 (2022).

Available at: <https://digitalcommons.law.byu.edu/lawreview/vol47/iss6/8>

This Comment is brought to you for free and open access by the Brigham Young University Law Review at BYU Law Digital Commons. It has been accepted for inclusion in BYU Law Review by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

The Legitimacy of International Human Rights Law – Addressing the Justification Gap

*Brock M. Mason**

CONTENTS

INTRODUCTION	1825
I. LEGITIMACY ON RAZ’S SERVICE CONCEPTION	1830
A. Normative and Positive Legitimacy.....	1830
B. Raz and the Result of Legitimacy.....	1832
C. Two Conditions of a Legitimate Institution	1835
D. Tying the Strands of the Service Conception.....	1836
II. LEGITIMACY AND THE INTERNATIONAL HUMAN RIGHTS REGIME	1837
A. Comparative Advantage.....	1838
B. The Independence Condition.....	1843
III. SKETCHING A SOLUTION – THE NEED FOR A ROBUST JUSTIFICATION OF HUMAN RIGHTS	1847
CONCLUSION	1852

INTRODUCTION

Among the desired features of any legal regime, legitimacy is surely near the top. To be just, a legal system must be legitimate. Taken at its most basic level, legitimacy refers to the *authority* of the law or legal system to issue binding (or near binding) commands. The legal commands to do or refrain from some action carry a type of moral weight; they cannot simply be ignored. An illegitimate regime lacks this authority and moral weight; its prescriptions do not command the same type of obedience and respect. Without legitimacy, a law’s commands lack moral force and may amount to nothing more than unjust coercion.

The international human rights regime is no different. As a system of laws, we must know whether it is legitimate – whether

*BYU Law School, J.D. Candidate, April 2022. Brigham Young University, B.A. 2014. Fordham University, M.A. 2016, Ph.D. 2021. My thanks to Eric T. Jensen, David H. Moore, Stephen R. Grimm, Leah Blake, Emma Wilcox, and all the editors at BYU Law Review who helped improve this piece. All errors are mine.

its prescriptions carry the requisite moral and legal authority. In other words, can the commands of international law become genuinely *binding* with respect to international human rights? In some ways, this question seems to answer itself: if any legal system has legitimacy (the authority to bind), surely it is one protecting against human rights abuses. But this misunderstands the way in which a legal system can lack legitimacy. A law promoting good ends may indeed be illegitimate. The fact that a legal system attempts to protect something as important as human rights does *not*—standing alone—guarantee its legitimacy. More must be shown. But what? And why think that international human rights need any defense as a legitimate legal system?

For one thing, the international legal regime as a whole is in poor shape. True, public international law has never faced a shortage of critics.¹ But even by historical standards, recent political movements have placed international institutions under enormous scrutiny. At the popular level, survey data indicates that “citizen attitudes in most countries [concerning international organizations] have become less positive over time,” along a number of dimensions.² Some scholars describe the situation as an “unprecedented opposition to post-war international governance.”³ This opposition takes various forms, and it does not

1. One of the most common and persistent objections is that public international law is not truly “law” since it lacks a single sovereign who can issue commands and back them up with the possibility of sanction. *See, e.g.*, JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 117–18, 171 (Wilfrid E. Rumble ed., Cambridge Univ. Press 1995) (1832) (“[T]he law obtaining between nations is not positive law: for every positive law is set by a given sovereign to a person or persons in a state of subjection to its author. . . . [T]he law obtaining between nations is law (improperly so called) set by general opinion.”). Austin’s view stems from his essentialist definition of law as the command of a sovereign. But this definition alone does not secure the skepticism of public international law that Austin has become famous for, because we could accept multiple levels of sovereigns or that a group of sovereigns can bind themselves or others through collective action. Austin’s skepticism, therefore, seems to also require that a sovereign cannot be subject to any other institution, except through choice of will—i.e., a sovereign cannot be bound. But we might wonder whether this merely begs the question through analytic definition, especially in the contemporary legal context, where public international law continues to stretch into new domains.

2. David H. Bearce & Brandy J. Jolliff Scott, *Popular Non-Support for International Organizations: How Extensive and What Does This Represent?* 14 *REV. INT’L ORGS.* 187, 189 (2019) (utilizing data from the International Social Survey Programme’s National Identity module, fielded in 1995, 2003, and 2013).

3. Liesbet Hooghe, Tobias Lenz & Gary Marks, *Contested World Order: The Delegation of International Governance*, 14 *REV. INT’L ORGS.* 731, 739 (2018).

reflect a neat left-right ideological divide.⁴ Similarly, this opposition does not simply relate to particular laws or policies, though of course those issues remain prominent.⁵ Rather, many are skeptical about the value of international law and international institutions *in general*.⁶

The international human rights regime faces similar skepticism, including from those committed to the cause of human rights. For example, despite its prominent military and diplomatic presence around the world, the United States has refused to become party to some multilateral human rights treaties or to accept the jurisdiction of international tribunals that may be useful in promoting human rights.⁷ It has also accused international organizations, like the U.N. Human Rights Council, of hypocrisy and of making the cause of human rights worse rather than better.⁸ It is not hard to see why. For example, despite the glaring human rights abuses by China against the Uyghurs of Xinjiang and the people of Hong Kong, the U.N. Human Rights Council has issued no resolutions condemning China's behavior.⁹ And Michelle Bachelet, the U.N.

4. *Id.* at 737.

5. See, e.g., YANIS VAROUFAKIS, *ADULTS IN THE ROOM: MY BATTLE WITH THE EUROPEAN AND AMERICAN DEEP ESTABLISHMENT* (2017) (addressing the EU's response to the Greek debt crisis following the 2008 global recession); JACKIE SMITH & DAWN WIEST, *SOCIAL MOVEMENTS IN THE WORLD-SYSTEM: THE POLITICS OF CRISIS AND TRANSFORMATION* 52–56, 73–74 (2012) (criticizing international financial systems as insensitive to problems of inequality, development, workers' rights, and environmental concerns).

6. For example, many feminists argue that the state-centric nature of international law entrenches the power of men, because "in its current manifestations the state is a problematic institution" that overly represents the interests of men. See Hilary Charlesworth, *Feminist Critiques of International Law and Their Critics*, 13 *THIRD WORLD LEGAL STUD.* 1, 4 (1994).

7. For example, the United States is the sole country not to ratify the Convention on the Rights of the Child, despite playing a prominent role in its drafting. See *Hailing Somalia's Ratification, UN Renews Call for Universalization of Child Rights Treaty*, *UN NEWS* (Oct. 2, 2015), <https://news.un.org/en/story/2015/10/511312-hailing-somalias-ratification-un-renews-call-universalization-child-rights>. The United States has also refused to ratify the Rome Statute of the International Criminal Court and at times has used "aggressive diplomacy" to "shield American citizens, policies, and sovereignty from international oversight." Jean Galbraith, *The Bush Administration's Response to the International Criminal Court*, 21 *BERKELEY J. INT'L L.* 683, 683 (2003).

8. See Security Council Meetings Coverage, *Rising Nationalism Threatens Multilateralism's 70-Year 'Proven Track Record' of Saving Lives, Preventing Wars, Secretary-General Tells Security Council*, United Nations 8395TH Meeting (AM) SC/13570 (Nov. 9, 2018), <https://www.un.org/press/en/2018/sc13570.doc.htm>.

9. *Geneva Discords: China and America Prepare for a Human-Rights Showdown at the UN*, *THE ECONOMIST* (Jan. 8, 2022), <https://www.economist.com/china/2022/01/08/china-and-america-prepare-for-a-human-rights-showdown-at-the-un>.

High Commissioner for Human Rights, has not been granted free access to Xinjiang to investigate.¹⁰ What is more, China itself currently holds a seat on the Human Rights Council, along with some other notorious human rights abusers such as Cuba, Eritrea, Kazakhstan, Libya, Russia, Somalia, Sudan, and Venezuela.¹¹ In part because of these problems, the United States even went so far as to withdraw from the Human Rights Council in 2018,¹² though it decided to reengage in 2021.¹³

An additional worry has been around for a long time. A perennial criticism of international human rights law is that it reflects an overly “western” set of values that is being forced on the rest of the world.¹⁴ For example, when the Universal Declaration of Human Rights (UDHR) was being drafted, the Executive Board of the American Anthropological Association expressed the worry that the UDHR was nothing more than “a statement of rights conceived only in terms of the values prevalent in the countries of Western Europe and America[.]”¹⁵ Their skepticism grew out of the belief that “standards and values are relative to the culture from which they derive[.]” such that “[w]hat is held to be a human right in one society may be regarded as anti-social by another people, or by the same people in a different period of their history.”¹⁶ A slightly different – and far stronger – criticism is that even if human rights standards are universal, their specific content is not universally accepted. Human rights treaties use broad, aspirational language. Providing that language with a definite application – as

10. *Id.*

11. *Membership of the Human Rights Council for the 16th Cycle, 1 January–31 December 2022*, UNITED NATIONS HUM. RTS. COUNCIL, <https://www.ohchr.org/EN/HRBodies/HRC/Pages/CurrentMembers.aspx> (last visited Feb. 22, 2022).

12. See Gardiner Harris, *Trump Administration Withdraws U.S. from U.N. Human Rights Council*, N.Y. TIMES (June 19, 2018), <https://www.nytimes.com/2018/06/19/us/politics/trump-israel-palestinians-human-rights.html>.

13. Bill Chappell, *Biden Orders U.S. to Reengage with U.N. Human Rights Council ‘Immediately’*, N.P.R. (Feb. 8, 2021, 8:12 AM), <https://www.npr.org/2021/02/08/965314723/biden-orders-u-s-to-reengage-with-u-n-human-rights-council-immediately>.

14. See, e.g., KISHORE MAHBUBANI, CAN ASIANS THINK? (1998); Fareed Zakaria, *A Conversation with Lee Kuan Yew*, FOREIGN AFFS. (Mar./Apr. 1994), <https://www.foreignaffairs.com/articles/asia/1994-03-01/conversation-lee-kuan-yew-0>.

15. The Exec. Bd., Am. Anthropological Ass’n, *Statement on Human Rights*, 49 AM. ANTHROPOLOGIST 539, 539 (1947).

16. *Id.* at 542.

required in legal adjudication—requires more than agreement on abstractions.

The purpose of this Note is to shed light on these criticisms through the framework of legitimacy. And I will argue that, by getting clear on the normative issues, we can begin to address these criticisms for the international human rights regime. Specifically, I argue that we need a robust justificatory framework for human rights that situates them as something like *jus cogens*—international norms whose legal force derives, significantly, from their intrinsic content. In Part I of this Note, I will provide a framework for understanding these criticisms by discussing one prominent conception of legitimacy: Joseph Raz's "service conception." Raz's view has two components: (1) a legitimate legal institution must be better situated to promote just behavior than individuals (or states) acting unilaterally, and (2) this comparative advantage applies in areas where it is more important to act correctly than to act independently of the law. A legitimate legal system thus provides those under its domain with a unique moral reason to obey the laws.

In Part II, I will show how Raz's notion of legitimacy can help elucidate—and unify—the multi-faceted criticisms of the international human rights regime. Specifically, I will discuss how his independence condition captures criticisms of international law from those concerned about state sovereignty and those concerned about the indeterminateness of human rights guarantees. And I will argue that Raz's focus on comparative advantage helps elucidate a common criticism about the ineffectiveness—or outright negative effects—of the human rights enforcement and monitoring regime.

Finally, in Part III, I will address possible solutions. Having clarified some of the normative issues at stake, I will argue that we can begin to address them—especially those related to the independence condition—by providing a robust theory of the justification of human rights. Specifically, I will argue that international human rights need a justificatory framework that turns them into something like peremptory norms of international law. A peremptory norm is a non-derogable, universal standard whose legal force stems, essentially, from its intrinsic content. If human rights could gain a sufficiently strong justification that establishes them as something like *jus cogens*, then this would address concerns about state sovereignty, indeterminateness, and

even (to some weak degree) enforcement. Providing such a justification goes beyond my aims, but I hope to make clear why one is needed, for many see the *lack* of justification for human rights as a distinctive virtue. But getting clear on the demands of legitimacy suggests the opposite.

I. LEGITIMACY ON RAZ'S SERVICE CONCEPTION

A. Normative and Positive Legitimacy

First, a preliminary distinction: a law or legal institution can be legitimate in two different senses – positive and normative. A legal system is legitimate in the positive sense when it is *accepted* as legitimate or authoritative by those under its control. Legitimacy in this sense requires that those under the thumb of legal power have certain beliefs about the institution or perceive its actions in a certain way that lends it prestige.¹⁷ Positive legitimacy also normally requires the belief that one is obligated to obey the commands of the law, given the acceptance of its authority. The reasons for these beliefs can vary. But what matters on a positive account of legitimacy is whether a legal system is accepted as legitimate by those it claims to govern.

A normative conception of legitimacy focuses on whether a state *actually has* the right to rule, regardless of what people believe about it. Every citizen of the United States may believe that the U.S. legal system is legitimate (that it has the right to rule) and yet it may *not* be legitimate. What matters in a normative conception of legitimacy is specifying the conditions under which a legal institution has the right to rule – when it is legitimate – and then seeing whether a particular institution measures up. Whatever normative legitimacy requires, whether a state meets those requirements depends on facts about justice – the beliefs of citizens

17. See MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 382 (Talcott Parsons ed., A.M. Henderson & Talcott Parsons trans., The Free Press 1964) (1947) (“[T]he basis of every system of authority, and correspondingly of every kind of willingness to obey, is a *belief*, a belief by virtue of which persons exercising authority are lent prestige. The composition of this belief is seldom altogether simple. In the case of ‘legal authority,’ it is never purely legal.”). For a contemporary account in Weber’s style, see Jonas Tallberg & Michael Zürn, *The Legitimacy and Legitimation of International Organizations: Introduction and Framework*, 14 REV. INT’L ORGS. 581, 583 (2019) (conceptualizing legitimacy as “observable empirical phenomena,” rooted in “actors’ perception of an institution’s authority”).

do not matter.¹⁸ A state may be entirely legitimate from a normative point of view but lack popular support. The question of normative legitimacy is one about justice, not widespread approval.¹⁹

This is not to say that the two conceptions of legitimacy have nothing to do with one another. For example, it may be that one component of normative legitimacy requires the state to justify itself to its citizens on grounds they can accept (similar to public reason theories), in which case citizens' beliefs would be relevant though not constitutive of legitimacy.²⁰ Moreover, there is no doubting the political and moral importance of a widespread belief that a legal institution is legitimate. Without that belief, citizens are less likely to buy into the legal regime and self-regulate, creating massive problems of legal enforcement and risking violent social upheaval. And in an ideal scenario, the belief that a legal institution is legitimate would be justified on the same grounds as the facts giving rise to its legitimacy. In other words, the ideal situation is one in which a legal institution is in fact legitimate and citizens believe it is for precisely that reason. The point, though, is that

18. Not just any reason—not even any moral reason—will establish legitimacy. For example, I may have a moral reason to obey the commands of the state because, if I do not, the state will murder my family. But these more “prudential” reasons are not what establishes legitimacy. We are looking for a specific kind of moral reason to obey, one that has to do with the fact the state commanded obedience, rather than the consequences for disobeying. See Joseph Raz, *The Problem of Authority: Revisiting the Service Conception*, 90 MINN. L. REV. 1003, 1004 (2006).

19. It may even be the case that a legitimate authority is not the de facto authority. Raz gives the case of the exiled Polish government in London during 1940, which was arguably the legitimate legal authority in Poland but was not the de facto authority. *Id.* at 1005.

20. John Rawls, for example, endorsed what he called the “liberal principle of legitimacy,” which states: “[O]ur exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens as free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason.” JOHN RAWLS, *POLITICAL LIBERALISM* 137 (Expanded Edition 2005). In other words, any exercise of political power must meet this condition: it must be the result of an overall political system that all reasonable citizens can be expected to endorse. In this way, Rawls ties concerns about legitimacy with what citizens have reason to accept. But note that even on this view, Rawls does not require *actual* endorsement of a political constitution for coercive measures to be legitimate. Instead, the constitution must be one that all citizens “can . . . be expected to endorse[.]” even if they in fact reject it. *Id.* at 140. In contemporary public reason theories, this is known as idealization: coercion need not be accepted to be justified, but it must be that idealized citizens *would* accept it under the right conditions. For one example of such an account, see GERALD GAUS, *THE ORDER OF PUBLIC REASON: A THEORY OF FREEDOM AND MORALITY IN A DIVERSE AND BOUNDED WORLD* 250–77 (2011).

whatever importance we may attach to a positive account of legitimacy, normative questions are different.

I will focus on the normative conception of legitimacy, though I will briefly sketch a link between this and the positive conception through the lens of voluntary compliance with international law.

B. Raz and the Result of Legitimacy

There is no shortage of accounts specifying what it means for a legal institution to be legitimate. While important, figuring out *the* right account is not my concern here. Instead, I will focus on a particularly prominent account in the philosophical literature that has also played a role in the (somewhat limited) discussion of the legitimacy of international law.²¹ This account, known as the “service conception,” comes from Joseph Raz.²² While I will express some criticisms of the service conception, I will largely assume it as true for the sake of argument. With its focus on comparative benefits and the reasons provided by legitimate institutions, it provides a useful framework, especially since the criticisms of international human rights law often track Raz’s conditions for legitimacy.

On Raz’s service conception, the question of legitimacy equates with who has the authority to issue commands to others – who has the right to rule. Authority is not taken for granted; it must be explained and justified. We must specify the conditions under which an institution can have such authority, rather than merely assume it. This concern for legitimacy comes from understanding what authority amounts to: it allows a legal institution to issue commands that morally bind those under its power, and it can even justify using coercion to induce obedience.²³ If a legal institution is

21. See, e.g., Andreas Follesdal, *The Legitimate Authority of International Courts and Its Limits: A Challenge to Raz’s Service Conception?*, in LEGAL AUTHORITY BEYOND THE STATE 188 (Patrick Capps & Henrik Palmer Olsen eds., 2018); John Tasioulas, *The Legitimacy of International Law*, in THE PHILOSOPHY OF INTERNATIONAL LAW 98 (Samantha Besson & John Tasioulas eds., 2010).

22. See JOSEPH RAZ, THE MORALITY OF FREEDOM ch. 2 (1986); Raz, *The Problem of Authority*, *supra* note 18.

23. While this link between legitimacy and the justification of coercion is not immediate, it becomes much easier to argue that a state is justified in coercing citizens to obey when the legal regime is legitimate. As such, even if it is the case that meeting the requirements of legitimacy does not justify coercive methods, it makes that bar much easier to clear. But I will ignore these issues throughout the paper, as they are not essential to my view.

legitimate or has this authority, it has the normative power to issue commands that bind those under its domain, or at least the power to create strong moral reasons to obey.²⁴ Of course, there can be illegitimate exercises of authority—imagine any corrupt government terrorizing its citizens into compliance. But what interests Raz is the possibility of *legitimate* exercises of authority, where the fact that a legal institution requires *X* creates an obligation to do *X*.²⁵ If international human rights law is legitimate, then the fact that it requires compliance with basic human rights entails a moral obligation to comply. As an obligation, compliance is not merely a pragmatic judgment about costs and benefits. In other words, one could have reasons to obey the dictates of a tyrant (say, to avoid being murdered) that do not amount to a moral obligation. But a moral obligation has a peculiar force, one that goes beyond merely prudential considerations. A legitimate exercise of authority creates an obligation to obey precisely *because* it is a legitimate exercise of authority.

A slightly weaker version of Raz's account takes the commands of a legitimate authority to be moral reasons to obey, rather than moral obligations. John Tasioulas, while discussing Raz's account in the context of international law, goes this route: "A has legitimate authority over B when A's directives are content-independent and exclusionary reasons for action for B."²⁶ In other words, if international human rights law is legitimate, then the fact that it commands some action is itself a reason (rather than an obligation) for doing that action. Because the reason is content-independent, we do not need to analyze the specific action it commands: the mere fact that the law requires it provides a reason for obedience. And it provides a special type of reason—an exclusionary reason. An exclusionary reason is a second-order reason that "excludes" some first-order reason or reasons from consideration.²⁷ Or, as Tasioulas

24. Raz, *The Problem of Authority*, *supra* note 18, at 1012.

25. *Id.*

26. Tasioulas, *The Legitimacy of International Law*, *supra* note 21, at 98; see also Allen Buchanan, *The Legitimacy of International Law*, in *THE PHILOSOPHY OF INTERNATIONAL LAW* 79, 84 (Samantha Besson & John Tasioulas eds., 2010) ("The . . . very robust requirement of a content-independent *moral obligation* to comply with rules is not needed The weaker combination of a . . . substantial content-independent reason not to interfere, along with substantial content-independent *moral reasons* to comply . . . does the job.").

27. For an influential description and discussion of this concept, see JOSEPH RAZ, *PRACTICAL REASON AND NORMS* 35–48 (1975).

puts it, exclusionary reasons should not simply be “weighed along with other reasons that apply[,]” because they “have the normative effect of excluding at least some countervailing reasons.”²⁸ As an example, if I promise to return a book on Friday, that promise constitutes an exclusionary reason: I may have other good reasons to keep the book until Saturday (perhaps I’m not finished), but those do not factor into my decision—the promise I made excludes these reasons. An exclusionary reason is simply a particularly strong or important reason that both speaks in favor (or against) some action but also insulates other reasons by making them irrelevant.

Tasioulas’s weaker formulation has the benefit of flexibility: a legitimate legal institution does not create moral obligations but rather provides strong moral reasons to obey. On this weaker account, international human rights or other legal institutions stand a better chance of being legitimate. While that may not count as a reason for selecting Tasioulas’s conception over others, my concern is to showcase problems for the legitimacy of international human rights law and potential solutions. Since those problems will presumably multiply on stronger conceptions of legitimacy, I will use his weaker notion of exclusionary reasons. If there are problems for international human rights on this weaker account of legitimacy, they should apply with greater force to stronger accounts.

Putting it all together, we can grasp some necessary conditions for legitimate institutions on Raz’s service conception: if a legal institution is legitimate, then the fact that it commands *X* constitutes an exclusionary moral reason for those under the domain of that institution to *X*.²⁹ In other words, a legitimate institution provides a unique type of reason for obeying its commands. A legitimate legal institution provides a *moral* reason to obey, rather than merely a pragmatic reason. And it provides a moral reason to obey simply in virtue of commanding that obedience, not because of the specific content of the command (though that can become relevant). Finally, the reason to obey is of a peculiar force: as an exclusionary reason, it not only speaks in favor of obedience but also insulates other reasons from consideration.

28. See Tasioulas, *supra* note 21, at 98.

29. Specifying what counts as the “domain” of that institution, and why the exclusionary reason only extends that far, would of course be necessary in a full explication of this idea. But I will leave those problems aside.

C. Two Conditions of a Legitimate Institution

Thus far, Raz has provided the necessary condition of a legitimate legal system: if a legal institution is legitimate, its commands have a certain moral force. But how can a legal institution reach this exalted state? How can a state's commands constitute exclusionary moral reasons? Raz provides two conditions. First, it must be the case that a person "would better conform to reasons that apply to him anyway . . . if he intends to be guided by the authority's directives than if he does not."³⁰ By following the institution's commands, I will better conform with those reasons that apply to me anyway than I would without the legal institution. There are a multitude of reasons that apply to me that command or suggest various actions—my current set of reasons, for example, commands that I not steal my neighbor's car. Those reasons apply to me categorically because they do not depend on whether I want to steal it. And on this first condition, a law against stealing is legitimate if I (and others) will better conform with those reasons by following the law than I would by ignoring it and attempting to follow my own moral reasoning. In other words, by following the law, I will better conform with justice than if I relied on my own judgment. A legitimate legal institution provides a comparative advantage in bringing about just behavior.

Second, the reasons satisfying the first condition must be in an area where "it is better to conform to reason than to decide for oneself, unaided by authority[.]"³¹ This "independence condition" limits the first condition.³² The independence condition requires that the decisions being made by a legal institution are ones where it is *more important to be right* than to choose for yourself. Think, for example, of the decision of whom to marry. One may very well get that decision wrong, objectively, from the standpoint of practical reason (assuming there are wrong answers). But it is more important to make that decision oneself, rather than have the law make it for you—even if the law would ensure you got that choice right. The service conception does not amount to a full-blown deference to the law. Instead, in those areas where it is more important to act correctly than to act free of legal requirement, a

30. Raz, *The Problem of Authority*, *supra* note 18, at 1014.

31. *Id.*

32. *Id.*

law is legitimate if it better promotes just actions than individual decision-making would. Raz gives the example of pharmaceutical regulations: I can best avoid harming myself by complying with the regulations about the use of pharmaceuticals, and it is more important to act correctly in this regard (to avoid serious harm) than it is to choose without legal constraints. As such, I should listen to the experts and follow the rules.³³ These rules are legitimate because they better promote correct action in an area where it is less important to act free from legal directives than it is to act correctly.

D. Tying the Strands of the Service Conception

Pulling it all together, Raz's service conception is as follows: A legal institution is legitimate if the fact that it commands X provides a content-independent, exclusionary moral reason to X. And a legal institution can reach this point by providing citizens with a comparative advantage in following reason in situations where it is more important that they act correctly than that they choose for themselves.

Raz's service conception has its flaws. On his view, legitimacy basically amounts to paternalism—the government is legitimate if it can help us choose the right when we might otherwise choose poorly.³⁴ Even with his independence condition, which limits the reach of this paternalism, it is not clear why acting in accordance with reason should play the central role in an account of legitimacy to the exclusion of other concerns. Especially in today's democratic climate, consent of the governed (or other procedural concerns) would appear to matter at least as much as the comparative expertise or usefulness of the state in promoting moral behavior. And the service conception appears to further divide the positive and normative accounts of legitimacy. Empirical research on positive legitimacy, for example, usually focuses on the level of trust in government, beliefs about corruption, the extent of political participation, and the like.³⁵ Whether a legal institution is likely

33. *Id.* at 1014–15.

34. Though Raz's notion of paternalism is still decidedly liberal, given its emphasis on autonomy. *See, e.g.,* RAZ, *THE MORALITY OF FREEDOM*, *supra* note 22.

35. *See, e.g.,* Bruce Gilley, *The Meaning and Measure of State Legitimacy: Results for 72 Countries*, 45 *EUROPEAN J. POL. RSCH.* 499, 505 (2006) (listing indicators of legitimacy).

to better equip a citizen to behave justly probably never enters the minds of those who assess their governments as legitimate or illegitimate.

But the service conception does capture something important – on Raz’s view, substance matters. It is true that if a legal institution is legitimate, the substance of the commands does not figure into whether those commands provide exclusionary reasons for obedience. But it is also true that for a legal institution to be legitimate, it must give citizens a better chance at acting justly than they would have on their own. In other words, for a legal institution to be legitimate, we must know whether it really promotes justice, whether it generally helps individuals act in accordance with reason. In contemporary jargon, Raz’s view places a premium on the concerns of “substantive justice” – whether a legal institution gets the law correct as a matter of content, not just as a matter of form.³⁶ This much is certainly entailed by the definition of legitimacy as Raz understands it: if a legal institution’s commands provide moral reasons to obey, then that legal institution must generally promote just actions (even if we do not analyze the content of each individual command, one-by-one). Otherwise, we would not only lack reasons to obey the commands of the law, but we would have moral reasons not to.

But for my purposes, the key value of Raz’s conception is its descriptive power. Whatever its flaws, Raz is certainly correct that comparative advantage and the reach of the law (“independence”) are important factors in showing that a legal system is legitimate. And more importantly, his two conditions of legitimacy line up well with the criticisms of the international human rights regime.

II. LEGITIMACY AND THE INTERNATIONAL HUMAN RIGHTS REGIME

On the service conception, a legal regime is legitimate if its commands generate exclusionary reasons to obey. And to reach that status, a legal system must provide a comparative advantage in acting justly in areas where it is more important to act correctly than to act independently. While Raz’s view lends itself

36. Perhaps so much that procedural justice plays too little role, at least with respect to legitimacy. On this issue of the weighing of substantive versus procedural justice see Zofia Stemplowska & Adam Swift, *Dethroning Democratic Legitimacy*, in 4 OXFORD STUD. IN POL. PHIL. 3 (David Sobel, Peter Vallentyne & Steven Wall eds., 2018).

straightforwardly to analyses of domestic legal systems, some alterations must be made at the international level. First, comparative advantage. At the international level, the issue is not simply whether *individuals* would have a comparative advantage in acting justly when following the laws (though that could be relevant). Rather, it seems more natural to say that international law has a comparative advantage when it allows *states* to act in accordance with reasons that apply to them than they would have otherwise. So, for example, in areas where collective action may be mutually beneficial, yet difficult to obtain, international law can solve this by providing a uniform standard of behavior. Without this distinction, then an analysis of legitimacy at the international stage would simply be duplicative: if *some* law would provide a comparative advantage, then the international legal system would be legitimate (without asking whether a national or international law would be best).

The same issue arises for the independence condition. On the domestic level, it entailed that a system is legitimate only when it provides a comparative advantage for individuals in those areas where it is more important that they act correctly than independently. Yet at the international level, human rights laws (overwhelmingly) govern states, not individuals. As a result, Raz's conception should be altered to account for this. We can alter his independence condition such that for international laws to be legitimate, they must address an area where it is more important for *states* to act correctly than to act independently.

As I will argue below, these two conditions—adjusted for international law—align quite well with common criticisms of international human rights law.

A. Comparative Advantage

First, comparative advantage. At the international level, this means that the international human rights regime must provide a comparative advantage in securing human rights than a purely national regime or no regime at all.³⁷

One consistent problem for the international human rights regime on this score is the paucity of enforcement mechanisms.

37. This of course assumes that (1) states can have reasons, (2) human rights norms can provide such reasons, and (3) those reasons are sufficient to dictate a certain course of action.

Or, to put it more bluntly, the worst human rights abusers often get little more than a finger wag from international human rights institutions. Taken abstractly, the enforcement ability of any legal institution can have key benefits or drawbacks for its legitimacy. Consistent enforcement of a law increases the likelihood that the law will achieve its ends.³⁸ Imagine for example a law that provided high taxes on smoking to force smokers to internalize the external costs of their behavior. Without enforcement, this internalization would never happen. Though on the flip side, consistent enforcement can also mean that unjust laws are effectively implemented—oppressive laws are enforced along with just ones. Consistent enforcement can thus be both a help and a hindrance, and much depends on the content of the law in question. But in the abstract, the ability to enforce laws consistently—or the ability to induce compliance with the law—is important on the service conception. If legitimacy requires that a legal institution can better promote just behavior than acting unilaterally, then the ability of the law to induce compliance could very well be crucial.

On this score, international law generally and human rights law in particular face serious challenges. For starters, international courts generally lack jurisdiction over nation-states without their consent. And even if states give consent, enforcement can still prove difficult if not purely symbolic. Under the U.N. Charter, the Security Council has the power to institute forcible and non-forcible measures “as may be necessary to maintain or restore international peace and security.”³⁹ And all members of the United Nations must “undertake to make available” to the Security Council the necessary resources to achieve this purpose.⁴⁰ But this power is limited in scope and has never been used. While the United Nations has found ways—primarily through the Security Council—to promote international peacekeeping and protection of human rights, its success is far from clear. To take some of the most egregious failures, in response to the humanitarian crisis in Bosnia and Herzegovina in the early 1990s, the Security Council issued

38. Assuming, of course, that enforcement can attain some end. If the aims of law are purely symbolic, enforcement would not achieve any distinctly legal end. But a number of purposes can be assisted by enforcement, for example deterrence, retribution, etc.

39. U.N. Charter arts. 41–42.

40. *Id.* at art. 43, ¶ 1. Additionally, all U.N. members are obliged by the Charter to “accept and carry out the decisions of the Security Council.” *Id.* at art. 25.

resolution 819 which demanded “that all parties and others concerned treat Srebrenica and its surroundings as a safe area which should be free from any armed attack or any other hostile act[.]”⁴¹ To enforce this “safe area,” the Security Council called upon the Secretary-General to increase the presence of U.N. peacekeeping troops in the area.⁴² Despite this resolution and the presence of U.N. peacekeeping forces, thousands were massacred. And in the case of Rwanda, the Security Council simply “refused to recognize that genocide was being perpetrated against the Tutsi in Rwanda and failed in its responsibilities to reinforce the U.N. peacekeeping mission [there] in order to protect as many innocent civilians as possible.”⁴³ To be sure, in each case, the Security Council initiated international criminal tribunals to bring (at least some of) the perpetrators of these acts to justice. Yet the Security Council also failed to prevent these atrocities when it was aware of them, taking only meager steps to avoid them.

I do not wish to overstate this point. In the famous words of Louis Henkin, “almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.”⁴⁴ The level of compliance and the capabilities of enforcement vary by the area of international law: for example, treaties with specifically tailored dispute-resolution mechanisms can be very effective in inducing compliance.⁴⁵ And the issue is whether international law better induces compliance with justice than its absence (or an alternative) would. Yet when gaps in enforcement come about in the realm of human rights law – those that result in some of the most egregiously unjust outcomes – these benefits diminish. And given the moral catastrophes in the last century, this

41. S.C. Res. 819, ¶ 1 (Apr. 16, 1993).

42. *Id.* at ¶ 4.

43. *Rwandan Genocide: Security Council Told Failure of Political Will Led to ‘Cascade of Human Tragedy,’* U.N. NEWS (Apr. 16, 2014), <https://news.un.org/en/story/2014/04/466342-rwandan-genocide-security-council-told-failure-political-will-led-cascade-human> (quoting Colin Keating, former Permanent Representative of New Zealand, which held the presidency of the Security Council during the Rwandan Genocide).

44. LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 47 (2d ed. 1979).

45. Investor-state dispute settlement is one area that seems to be fairly successful, such as in the North American Free Trade Agreement and (presumably) its successor, the United States–Mexico–Canada agreement. *See, e.g.,* United States–Mexico–Canada Agreement ch. 31, Dec. 10, 2019, OFF. U.S. TRADE REPRESENTATIVE, <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between>.

lack of enforcement becomes all the more troubling. Or, to put it more squarely in Raz's terms, a system which fails to provide mechanisms for avoiding the worst outcomes may very well lack a comparative advantage in bringing about just behavior.

For international human rights law more specifically, the formal mechanisms to enforce compliance are very thin. Under the ICCPR, states are required to provide remedies for violations of the Convention,⁴⁶ but it is up to the states to select and implement those remedies when they deem it necessary. The only means to "enforce" this obligation—apart from international shaming or diplomatic pressure—comes from the Human Rights Committee, which can ask for explanations of "the remedy, if any, that may have been taken" by a state.⁴⁷ The Committee cannot enforce any remedies on its own. Moreover, both the European Court of Human Rights⁴⁸ as well as the Human Rights Committee⁴⁹ will generally not hear a case unless domestic remedies have been exhausted, requiring any potential claimant to first face the gauntlet of domestic litigation. For violations of human rights, the state itself is the primary means of enforcement, not international bodies. But since international human rights law primarily restrains the behavior of states, the states themselves get to adjudicate the rightfulness of their own behavior. With consistent human rights violators, this is little promise of achieving a just outcome.

It may be, moreover, that the international human rights apparatus is not only thin on enforcement capabilities but positively harmful to the cause of human rights. The United States has recently made claims like this. In 2018, the United States completely withdrew from the U.N. Human Rights Council alleging it was a "hypocritical and self-serving organization that

46. See International Covenant on Civil and Political Rights art. 2, ¶ 3, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

47. Optional Protocol to the International Covenant on Civil and Political Rights art. 4, ¶ 2, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 302 (entered into force Mar. 23, 1976); see also *Yaker v. France*, Communication No. 2747/2016, Human Rights Committee, ¶¶ 10–11 (Dec. 7, 2018), https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f123%2fD%2f2747%2f2016&Lang=en (illustrating the practice of deferring to states with respect to selecting and implementing a remedy).

48. Convention for the Protection of Human Rights and Fundamental Freedoms art. 35(1), *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953).

49. ICCPR art. 41, ¶ 1(c).

makes a mockery of human rights,” and that its behavior “damages the cause of human rights”⁵⁰ and threatens the “council’s legitimacy.”⁵¹ The complaint centered on allegations that the Human Rights Council provides a platform for anti-Israel bias while shielding the worst human rights abusers from scrutiny.⁵² As U.S. Ambassador Nikki Haley pointed out, “It’s hard to accept that [the Human Rights Council] has never considered a resolution on Venezuela, and yet it adopted five biased resolutions in March against a single country, Israel.”⁵³

Part of the problem is that some of the worst human rights abusers are also some of the most powerful states, and the international system gives a disproportionate power to some of these actors. Great power politics still dominates the international arena.⁵⁴ Powerful states can use their economic and political might to secure more favorable terms in treaties or bully other countries into shying away from open criticism of corrupt behavior. Recently, for example, China has attempted to “throttle” the economy of Lithuania for its decision to use “Taiwan” to describe the Taiwanese embassy, instead of the Chinese sanctioned term “Taipei

50. Colin Dwyer, *U.S. Announces Its Withdrawal from U.N. Human Rights Council*, NPR (June 19, 2018), <https://www.npr.org/2018/06/19/621435225/u-s-announces-its-withdrawal-from-u-n-s-human-rights-council> (quoting U.S. Ambassador to the United Nations Nikki Haley).

51. Merrit Kennedy, *Trump Administration Warns That U.S. May Pull Out of U.N. Human Rights Council*, NPR (June 6, 2017), <https://www.npr.org/sections/thetwo-way/2017/06/06/531752892/trump-administration-warns-that-u-s-may-pull-out-of-u-n-human-rights-council> (quoting U.S. Ambassador to the United Nations Nikki Haley).

52. See Meetings Coverage, Security Council, Rising Nationalism Threatens Multilateralism’s 70-Year ‘Proven Track Record’ of Saving Lives, Preventing Wars, Secretary-General Tells Security Council, U.N. Meeting Coverage SC/13570 (Nov. 9, 2018), <https://www.un.org/press/en/2018/sc13570.doc.htm> (“[M]ultilateralism is not good in and of itself but is a means to an end.’ That principle fails when it does not support the goals of peace, security and human rights, or when United Nations bodies such as the Human Rights Council give abusive regimes a pass. Those activities do not deserve the support of the United States”); see also UN: Deny Rights Council Seats to Major Violators, HUM. RTS. WATCH (Oct. 8, 2020), <https://www.hrw.org/news/2020/10/08/un-deny-rights-council-seats-major-violators>.

53. Kennedy, *supra* note 51 (quoting U.S. Ambassador to the United Nations Nikki Haley).

54. See Christopher Layne, *Coming Storms: The Return of Great-Power War*, FOREIGN AFFS. (Nov./Dec. 2020), <https://www.foreignaffairs.com/articles/united-states/2020-10-13/coming-storms>.

Representative Office.”⁵⁵ More formally, the United States, Russia, France, the United Kingdom, and China all have permanent positions on the Security Council,⁵⁶ as well as effective vetoes over any non-procedural matters.⁵⁷ The dissenting vote of any permanent member will kill a Security Council resolution. And the U.N. General Assembly – in some ways the most democratic organ of the United Nations – cannot pass or enforce laws; it can only make recommendations or issue resolutions with no legal force.⁵⁸ While these functions are important, the structure of the U.N. Charter allows a single powerful state to hold back the full weight of international law, as Russia did in 2015 when it vetoed a resolution to establish an international tribunal to prosecute those responsible for shooting down Malaysia Airlines Flight 17.⁵⁹

B. The Independence Condition

A number of criticisms can also take shape under the independence condition of legitimacy. At its broadest, a criticism of international human rights under this prong would look like the following: human rights, whatever their value, should not be the subject of international law because, at least at the international level, it is more important that states act for themselves. Yet one can endorse this overall view from a variety of vantage points. For example, those who worry about the international legal regime as supplanting state sovereignty can be thought of as criticizing international law for addressing areas where it does not belong. Yet that very same person may be committed to the cause of human rights, simply at the national level. The United States, for example, often seems to represent some weak version of this view. As noted above, despite its commitment to human rights at home and abroad,⁶⁰ it has refused to ratify some human rights treaties, and it

55. *What China's Bullying of Lithuania Reveals About Europe*, ECONOMIST, Jan. 22, 2022, Edition, <https://www.economist.com/europe/2022/01/22/what-chinas-bullying-of-lithuania-reveals-about-europe>.

56. See U.N. Charter art. 23, ¶ 1.

57. See *id.* at art. 27, ¶ 3.

58. See U.N. Charter arts. 9–17.

59. See U.N. SCOR, 70th Sess., 7498th mtg. at 3, U.N. Doc. S/PV. 7498 (July 29, 2015).

60. See Press Release, Antony J. Blinken, Secretary of State, *Putting Human Rights at the Center of U.S. Foreign Policy* (Feb. 24, 2021), <https://www.state.gov/putting-human-rights-at-the-center-of-u-s-foreign-policy/>.

has been skeptical of the value of international tribunals to enforce international law. Human rights matter, but so does state sovereignty.

Indeed, at some level, most parties to human rights instruments must recognize the merit of this view: after all, human rights provisions are typically left to states for enforcement and protection. In the International Covenant on Civil and Political Rights, for example, the body overseeing implementation of the treaty (the Human Rights Committee) only has the power to make recommendations and ask states to comply with their commitments in the case of a violation—they lack any enforcement power. And while the Security Council theoretically could enforce human rights treaties, it is reluctant to do so. Some have argued that this feature was crucial for the human rights regime to get off the ground, for governments were hesitant to accept human rights as part of international law unless there was an “expectation that the United Nations would respect the domestic jurisdiction of states by refraining from intervention in their internal affairs.”⁶¹ States, at least, value their own sovereignty. And whatever the merit of achieving human rights, they say it must be tempered by the fact that international law should stretch only so far. The international human rights regime, that is, must respect an independence condition.

Additionally, some have argued that international human rights standards are oppressive or otherwise unjust to the extent that they impose one set of values on the world, when those values are not universally accepted or do not have the transcendent status of being objective. As discussed at the beginning of this Note, some of this criticism appeared right at the beginning of the universal human rights movement. As depicted, for example, in the statement of the Executive Board of the American Anthropological Association, the argument was that human rights embody only one set of values—those in the United States and Western Europe—and that, more generally, “standards and values are relative to the culture from which they derive”⁶² This criticism can really take two different shapes: (1) human rights standards are not universally accepted and thus they should not be enforced on the

61. CHARLES R. BEITZ, *THE IDEA OF HUMAN RIGHTS* 21 (2009).

62. The Exec. Bd., Am. Anthropological Ass’n, *Statement on Human Rights*, 49 AM. ANTHROPOLOGIST 539, 542 (1947).

world; or (2) no values, including human rights, are transcendent or objective—all depend on the culture from which they derive—and hence they should only be enforced at the level of the nation, where such standards originate.

These two criticisms are important because their relevancy has been overlooked and they are connected. Both go to the heart of a persistent problem for international human rights—justification. At the outset of the human rights project, the lack of a justification for *why* there are human rights (or *why these* rights) was touted by some as a virtue. Jacques Maritain, a strong intellectual influence on the international human rights movement as well as a member of UNESCO's committee on the Theoretical Bases of Human Rights, once quipped that "we agree about the rights *but on condition that no one asks us why.*"⁶³ The goal of human rights is "a practical goal," he reiterated, seeking "agreement between minds . . . not on the basis of common speculative ideas, but on common practical ideas . . ."⁶⁴ In other words, by *not* attempting to provide a comprehensive justification for human rights, Maritain and others hoped to achieve unanimity in the cause of human rights. Even today, some scholars tout this lack of theory as a virtue of the human rights project, allowing it to move beyond speculative disputes and generate multicultural agreement.⁶⁵

While this reticence may have proven useful, it carries serious baggage. For one thing, it has led to a number of criticisms that international human rights are "inherently vacuous," and "a kind of puffery or white magic."⁶⁶ The claim that there are human rights simply appears, without any type of support. Alasdair MacIntyre put belief in human rights alongside "belief in witches and in unicorns," because "[i]n the United Nations declaration on human rights . . . what has since become the normal U.N. practice of not giving good reasons for *any* assertions whatsoever is followed with great rigor."⁶⁷

As for legitimacy, this lack of justification (or, really, much attempt at justification) gives credence to the concerns about

63. Jacques Maritain, *Introduction*, in HUMAN RIGHTS: COMMENTS AND INTERPRETATIONS 9, 9 (UNESCO ed., Greenwood Press, Publishers 1973) (1949).

64. *Id.* at 10.

65. See, e.g., BEITZ, *supra* note 61, at 102–06.

66. RAYMOND GEUSS, HISTORY AND ILLUSION IN POLITICS 144 (2001).

67. ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 69 (2d ed. 1984).

enforcing human rights around the world. To be clear: in my view, the claim that there are no objective moral standards—and hence that *nothing* resembling human rights can be the subject of law—has little philosophical support. Indeed, it seems self-defeating. But the claim that human rights are not universally accepted has more merit. The reason is that even if all nations sign on the international human rights treaties, those treaties themselves are incredibly vague. This problem is compounded since, usually, there is no authoritative interpretation of the treaties (unlike in most domestic legal systems). The International Covenant on Civil and Political Rights, for example, speaks of the “inherent right to life” which “shall be protected by law” and that “[n]o one shall be arbitrarily deprived of his life.”⁶⁸ At the highest level, this does not provoke much disagreement. But what about in the details? The U.N. Human Rights Committee, for example, has stated that the right to life also protects the right to abortion, and not simply in instances where the life of a mother is jeopardized. Instead, the right to life prohibits restrictions on abortion that “discriminate against [women] or arbitrarily interfere with their privacy.”⁶⁹ Regardless of one’s position on abortion, the notion that these protections stem from the right to life seems tenuous at best, and it can hardly be expected that distinct cultures would find this legal point equally persuasive. Yet when the human rights regime lacks a justificatory framework, it is unclear how such issues could be resolved apart from pure fiat. And even if these issues can be resolved, there is still the delicate issue of how to balance—if balancing is at all possible—different rights against one another.⁷⁰ As Allen Buchanan has explained, “even the most uncontroversial human-rights norms are not self-specifying, nor do they come with their relative weights stamped on their foreheads.”⁷¹ In other words, a justification for

68. ICCPR art. 6, ¶ 1.

69. Human Rights Comm., General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life, at ¶ 8, U.N. Doc. CCPR/C/GC/36 (Oct. 30, 2018).

70. See Allen Buchanan, *Human Rights and the Legitimacy of the International Order*, 14 LEGAL THEORY 39, 41 (2008) (“There can be serious disagreements, rooted in different cultural views, about the specific content of even the most basic human rights, about how they ought to be balanced against one another in cases of conflict of rights, and about what conditions, if any, would have to be satisfied if they were to be permissibly abrogated to avoid a moral catastrophe.”).

71. *Id.*

human rights could provide a framework for answering these important questions about the *nature* and *meaning* of human rights.

In the absence of such a framework, worries about the reach of human rights seem quite troubling. On the independence condition, we must know that the law can appropriately touch on these issues. And for defenders of state sovereignty or those who worry about the indeterminateness of human rights treaties, the lack of a justificatory theory of human rights simply compounds this problem. To address these issues we must know more than simply that human rights protections are part of international law – we must also know *why*.

III. SKETCHING A SOLUTION – THE NEED FOR A ROBUST JUSTIFICATION OF HUMAN RIGHTS

Thus far, I have argued that we can helpfully frame common criticisms of the international human rights regime through the lens of legitimacy. Utilizing Raz's service conception, we can see how criticisms about the reach of international law – from the position of state sovereignty or enforcing non-universal/underdetermined values – can be understood through the independence condition. And using comparative advantage can help illustrate the meaning of recent and longstanding criticisms about weak enforcement of human rights and even outright harm to the cause of human rights at the level of international institutions.

How can one go about addressing these concerns now that they can be seen as extensions of one normative concept? There is, I will argue, one tool within international law that could allow one to address many of these concerns simultaneously. While it will not answer all worries about legitimacy – especially enforcement – it does take a step forward. That conceptual tool is *jus cogens*, specifically, the method by which *jus cogens* are understood to be international law in virtue of their intrinsic content.

Jus cogens (or peremptory norms) are non-derogable, general principles of international law.⁷² They are, in some sense, super-principles or axioms of international law. To count as a peremptory norm, a principle must be “accepted and recognized by the international community of States as a whole as a norm from which

72. Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331.

no derogation is permitted[.]”⁷³ Not only must the principle itself be accepted by the international community as a whole, but so must its peremptory or non-derogable character.⁷⁴ Though, at least according to some, this does not require that *every* state accept the jus cogens: “It would be enough if a very large majority did so[.]”⁷⁵ As a non-derogable principle, any treaty provision that conflicts with a peremptory norm is void.⁷⁶ The power of these peremptory norms is also cross-temporal. If a treaty is signed prior to the emergence of a peremptory norm, once it emerges, if the treaty conflicts with it, the treaty becomes “void and terminates” all the same.⁷⁷ Given their role in limiting the possibilities of treaty-making, jus cogens can also influence treaty interpretation: they provide a “climate of interpretation of the intention of the parties,” because the intentions of the states cannot violate these norms and remain valid.⁷⁸ Jus cogens also limit the actions of states and the development of customary international law. As Alexander Orakhelashvili has argued, this is because “*jus cogens* applies to treaties precisely because the fundamental illegality attached to certain acts is so grave that it is not capable of being legitimized[.]”⁷⁹ As a result, if jus cogens did not apply outside of treaty-making, their role in limiting treaty-making would make no sense. Given their peremptory character—such that not even consent by treaty can legitimate their violation—all state actions or international laws are limited by jus cogens. The only way to modify a peremptory

73. *Id.*

74. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §102 Repts.’ Note 6 (AM. L. INST. 1987).

75. U.N. Conference on the Law of Treaties, Summary Records of the Plenary Meetings and of the Meeting of the Committee of the Whole, U.N. Doc. A/CONF.39/11, at 472 (May 21, 1968) (statement of Mr. Yasseen, Chairman of the Drafting Committee for the Vienna Convention on the Law of Treaties).

76. Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331.

77. *Id.* at art. 64.

78. C. WILFRED JENKS, THE PROSPECTS OF INTERNATIONAL ADJUDICATION 458 (1964).

79. ALEXANDER ORAKHELASHVILI, PEREMPTORY NORMS IN INTERNATIONAL LAW 205–206 (2006). *But see* DANIEL COSTELLOE, LEGAL CONSEQUENCES OF PEREMPTORY NORMS IN INTERNATIONAL LAW 284 (2017) (“While it is not conceptually impossible for a peremptory norm of general international law to be in conflict with a rule of customary international law, such a scenario remains a mere theoretical possibility. It is difficult to see how it could ever materialize in practice. Certainly it is, at present, not possible to point to any examples.”).

norm is through the creation of “a subsequent norm of general international law having the same character.”⁸⁰

While there is no official list of all peremptory norms, some principles are routinely mentioned. For example, the International Law Commission recently issued a non-exhaustive list of norms that the Commission has previously referred to as having the status of *jus cogens*: (1) the prohibition of aggression, (2) the prohibition of genocide, (3) the prohibition of crimes against humanity, (4) the basic rules of international humanitarian law, (5) the prohibition of racial discrimination and apartheid, (6) the prohibition of slavery, (7) the prohibition of torture, and (8) the right to self-determination.⁸¹ All of these peremptory norms are also the subject of international treaties or customary international law,⁸² but what gives them the status of *jus cogens* goes beyond that. They are not only legal requirements; they are also non-derogable legal requirements.

Calls for explicitly recognizing such norms came quickly following the shift in international law after World War II. International lawyer and judge Hersch Lauterpacht, for example, argued that such norms are essential to public international law in his 1953 report to the International Law Commission:

It would thus appear that the test whether the object of the treaty is illegal and whether the treaty is void for that reason is not inconsistency with customary international law pure and simple, but inconsistency with such overriding principles of international law which may be regarded as constituting principles of international public policy (*ordre international public*). These principles need not necessarily have crystallized in a clearly accepted rule of law such as prohibition of piracy or

80. Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331.

81. Int'l Law Comm'n, Rep. on the Work of Its Seventy-First Session, U.N. Doc. A/74/10, at 208 (2019). Note that the ILC did not declare these were peremptory norms, only that it had, in the past, referred to them as such. See generally Sean D. Murphy, *Peremptory Norms of General International Law (Jus Cogens) and Other Topics: The Seventy-First Session of the International Law Commission*, 114 AM. J. INT'L L. 68 (2020) (describing the drafting process and minutes of the ILC's seventy-first session).

82. See, e.g., U.N. Charter art. 2, ¶ 4 (prohibition of aggression); Convention on the Prevention and Punishment of the Crime of Genocide art. 1, Dec. 9, 1948, 78 U.N.T.S. 277 (genocide); Rome Statute of the International Criminal Court art. 7, ¶ 1, July 17, 1998, 2187 U.N.T.S. 3 (crimes against humanity); the Geneva Conventions of 1949 (international humanitarian law); International Convention on the Elimination of All Forms of Racial Discrimination art. 2, ¶ 1, Mar. 3, 1966, 660 U.N.T.S. 1 (racial discrimination); ICCPR art. 8 (slavery); *id.* at art. 7 (torture); U.N. Charter art. 2, ¶ 1 (sovereign equality).

aggressive war. They may be expressive of rules of international morality so cogent that an international tribunal would consider them as forming part of those principles of law generally recognized by civilized nations⁸³

For Lauterpacht, *jus cogens* function to limit the operations of international law—to provide non-derogable boundaries to the actions of states. And they gain this status as non-derogable limits because of their expression of international morality, such that they are already, essentially, law. This point is key. The legal *force* of peremptory norms depends primarily on their intrinsic *content*—that is what gives them the power to act as peremptory norms. Unlike treaties or customary law, a peremptory norm’s status as a legal requirement does not derive solely from its source. For treaties, it is the intent to be bound that creates a legal obligation, and with customary law, it is the consistent practice along with *opinio juris*. But peremptory norms—while they must be recognized as such—derive their legal force in large part from the content of the principles themselves.⁸⁴ *Jus cogens*, therefore, act as a check on the substance of public international law: such laws must conform with basic principles of morality that are so essential as to be part and parcel of the law itself in civilized nations. Importantly, the value of *jus cogens* in this regard depends on its legal-moral character. As Lauterpacht and others have argued, *jus cogens* are moral principles of the greatest importance, and for precisely this reason, they have legal consequences. As such, rather than thinking of international law as a legal system *subject to* moral evaluation, peremptory norms urge us to consider international law as a legal system *because of* moral evaluations.

The key point here is the justificatory move. For *jus cogens*, they are accepted as law in part because of their intrinsic content—the substance of the principles makes them legally binding. This says a great deal about the basic nature of the international legal system. Namely, at root, some of its laws depend less on agreement and more on content. In virtue of the *content* of a norm, we can assess

83. H. Lauterpacht (Special Rapporteur), *First Report on the Law of Treaties*, 155, U.N. Doc. A/CN.4/63, art. 15, ¶ 4, (Mar. 4, 1953).

84. See THOMAS WEATHERALL, *JUS COGENS: INTERNATIONAL LAW AND SOCIAL CONTRACT* xxxviii (2015) (“The inviolable status of a peremptory norm is a feature of the subject matter of the rule, rather than the legislative process through which it was codified, and is therefore intrinsic to the norm itself.”).

its *legal character*. I suggest a similar theoretical move for human rights norms. If international human rights norms are to have the exalted status we claim they do, then one way of grounding that status is by making a link between their intrinsic content and international law generally, as in jus cogens. And if international human rights can be justified in a similar way to jus cogens, then this can address Raz's independence condition. In other words, if, as a result of their content, human rights norms were binding, then it follows that state sovereignty is not sufficient to limit the reach of international law in this area. The reason is that human rights norms simply *are* legal norms in virtue of their content and recognition of that content. If what counts as "law" can depend on its intrinsic content—as international law allows, via jus cogens—and if human rights meet that standard by virtue of their content, it follows that the reach of international law must be able to extend into the realm of the state on human rights issues. Now, there may be reasons to respect state sovereignty, even given the status of human rights norms as jus cogens: but this provides a way of dealing with state sovereignty. Though for some, this will seem like a high cost: state sovereignty is now relegated as a backdrop to human rights norms, and those human rights norms are very expansive. Notice, though, that if human rights were to be taken as jus cogens, then a more persuasive account of their content and justification is required. That is, for human rights to meet the concerns about universality and acceptance that the independence condition seems to require, there must be a compelling theory of their content (which will, in turn, hopefully, generate the type of recognition required).

There will, of course, be challenges in this approach. One is to explain how it is that human rights have a legal status in virtue of their content, yet some human rights are derogable while others are not. Moreover, if they have legal status simply in virtue of their content, how is it that they can ever be limited with respect to other important values? Might it be the case that this type of human rights regime suggests a kind of universalism?

These are legitimate worries, but the issue here is providing the correct justificatory framework, not ignoring it. The demands of legitimacy require that we address why human rights can play the exalted role they have (at least theoretically) in international law. And simply pointing to human rights treaties without any theory

of their justification does not give us an answer. Instead, as the independence condition makes clear, we need reasons to believe that international law should address these issues, and without such a case, it is not clear that the international human rights system is legitimate. Ideally, a justification of human rights would include not only a grounding for human rights as intrinsically moral but a subtle system of reason-giving whereby human rights norms interact in ways that track the current human rights regime—as limited in some respects and as balanced by other significant concerns of international law.

But what then of enforcement? Do peremptory norms play any part in solving that troubling aspect of public international law? While peremptory norms themselves do not do any enforcing, their importance lies in their ability to justify the demands of human rights. Given the nature of human rights, voluntary compliance with international treaties is essential. In other words, human rights must be capable of generating compliance largely without the means of enforcement available to nation-states. One way to induce that compliance is by recognizing human rights as not simply a method for improving commercial relations and minimizing conflict (though these are, of course, very important). Rather, human rights—at their foundation—have the status *as law* precisely because of their conformity with the most essential aspects of justice. That is, human rights are law because they are peremptory norms. Moreover, given that the service conception entails that a legitimate legal institution creates exclusionary moral reasons for obedience, human rights—as *jus cogens*—provide the content to precisely make those kinds of moral demands.

CONCLUSION

Making a full justification for these claims requires going beyond the aims of this Note. Such a justification requires, most fundamentally, addressing the nature of human rights and how it is that various cultures can be justified in accepting them. It may be that there are a variety of justificatory routes and that not one is definitive. But to make a case for human rights as *jus cogens* (or something similar to them) requires addressing something that has been neglected. Yet the upshot is important. If human rights can be established as legal norms by virtue of their content, then they have the requisite moral force to answer important demands of

legitimacy. And a legitimate international rights system not only satisfies an important criterion of justice, but it may also help promote the international human rights system and better equip us at ensuring voluntary buy-in from countries around the world. Given the importance of the human rights project, the upsides are enormous.

