The Human Rights Consent Principle

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Abstract

One of the most pressing issues facing international human rights law today is when and how to respect the decision of States to consent or decline to international human rights norms. Should human rights treaty monitoring bodies, created to monitor State compliance with treaties, read their respective treaties to create obligations the parties did not contemplate? Is there a core of human rights norms that bind all States irrespective of State dissent? While the answer to these questions has traditionally been no, for the most part, in recent years practice and scholarship have shifted toward yes. The prerogatives of State sovereignty are under assault throughout human rights law, and the consent principle is no exception. Where scholars and activists have identified benefits to human rights law from dispensing with State consent, they advocate doing so.

This Article argues that the consent principle serves an important human rights purpose: it is integral to protection of the collective right to self-determination. The human right to self-determination grants all peoples a continuing and permanent right to use their respective States to self-direct political, economic, social and cultural development. The decision of States to accept or reject international human rights obligations is an exercise of self-determination. Failing to respect that choice reduces the ability of peoples to control the development of their societies. This is a cost to nonconsensual lawmaking that is not currently accounted for in international human rights lawmaking.

Identifying this cost has two significant consequences for human rights lawmaking. First, international human rights law generally prescribes balancing as a methodology for reconciling between competing rights. Respect for self-determination is a human rights benefit not currently being balanced against the benefits to individual rights identified in nonconsensual lawmaking. Introducing collective rights to the calculus has the potential to alter the decision whether to undertake or respect nonconsensual lawmaking.

Second, the human rights value of the consent principle is predicated on the State representing its people’s interests. In practice however, different States live up to this ideal to varying extents. The human rights
value of the consent principle is at its zenith where the State decision to accept or reject an international obligation reflects popular will. It is at its ebb where the State’s decisions are shielded from meaningful public participation. This understanding of the consent principle, derived from the grant of self-determination rights to people not States, is a sharp break with the premise of sovereign equality that has traditionally driven the consent principle.

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In 1996 the United Nations Population Fund (UNFPA) convened a roundtable with representatives from human rights treaty monitoring bodies (TMB), the United Nations (U.N.), non-governmental organizations (NGO), and academics with the goal of recognizing a women’s right to an abortion as a human right.1 While no international human rights treaty expressly protects abortion rights, the roundtable participants sought to use the link between maternal mortality and abortion to argue that existing treaty provisions protect abortion rights.2 To that end the roundtable identified human rights treaty provisions that could be reinterpreted to include such rights.3 They made this recommendation despite evidence in the negotiating histories of these treaties that the parties did not intend to recognize abortion rights.4

The Executive Director of UNFPA Nafis Sadik explained to the roundtable the logic behind this approach. She argued that women’s sexual and reproductive rights are universal, meaning that States cannot use conflicting cultural, traditional and social norms to deny such rights.5 Nevertheless, she asserted that States perpetuate structural and systemic discrimination against women, including denying access to reproductive care.6 One way to overcome

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1 U.N. POPULATION FUND ET AL., ROUND TABLE OF HUMAN RIGHTS TREATY BOARDS ON HUMAN RIGHTS APPROACHES TO WOMEN’S HEALTH, WITH A FOCUS ON SEXUAL AND REPRODUCTIVE HEALTH AND RIGHTS (1996).

2 Id. at 21-29. See also Nancy Northrup, Introduction, 18 COLUM. J. GENDER & L. 391, 396-97 (2008-09) (explaining human rights lawyers sought to reinterpret existing rights); 149 CONG. RECORD E2536 (2003) (extension of remarks of Rep. Christopher Smith) (quoting Center for Reproductive Rights (CCR) stating “Because unsafe abortion is responsible for 78,000 deaths each year...criminalization of abortion clearly harms women’s health.”)

3 See International Covenant on Civil and Political Rights art. 6, adopted Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] (“Every human being has the inherent right to life.”); id. art. 7 (“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”); id. art. 17 (“No one shall be subjected to arbitrary or unlawful interference with his privacy.”); Convention for the Elimination of Discrimination Against Women art. 12(1), adopted Dec. 18, 1979, 1249 U.N.T.S. 13 (“States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.”)

4 See infra notes 41-42 & accompanying text.

5 See U.N. POPULATION FUND, supra note 1, at 7 (summarizing Sadik’s comments).

the hostility of States toward women is to reinterpret existing treaty provisions to protect reproductive rights. Such an approach avoids the need to seek consent from States for a new treaty, and the potential damage to women’s rights that could result from the likely failure of such a process.\(^7\)

Human rights treaty monitoring bodies operationalized the roundtable’s recommendations in their interpretations of their respective treaties. The Committee for the Elimination of Discrimination against Women (Women’s Committee) interpreted the Convention for the Elimination of Discrimination against Women (CEDAW) to require States to eliminate criminal laws punishing women for undergoing abortions when possible.\(^8\) The Human Rights Committee (HRC) interpreted the International Covenant on Civil and Political Rights (ICCPR) to require medical exceptions to laws criminalizing abortion.\(^9\) Neither of these requirements was agreed to by the parties negotiating the treaty.

Not surprisingly, anti-abortion groups and scholars, and States which restrict abortion rights have reacted negatively to these interpretations. Anti-abortion activists criticize the use of human rights law to create abortion rights as a circumvention of democracy because it seeks to override local opposition to such rights.\(^10\) They point to the continued prevalence of votes by democratically-elected legislatures against abortion rights as evidence of popular opposition to recognizing a human right to abortion.\(^11\) Overriding public will in such a manner, they contend, threatens the sovereign right of States to decide for themselves what policy to undertake with respect to abortion.\(^12\)

The willingness of treaty bodies to legislate international abortion rights is

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\(^7\) CCR, an abortion rights organization, has stated that it doubts an international instrument protecting a woman’s right to choose abortion could be adopted “in the near term.” 149 CONG. RECORD E2538 (2003) (extension of remarks of Rep. Christopher Smith) (introducing CCR statement into record).


\(^10\) See DOUGLAS A. SYLVA & SUSAN YOSHIMURA, RIGHTS BY STEALTH: THE ROLE OF U.N. HUMAN RIGHTS TREATY BODIES IN THE CAMPAIGN FOR AN INTERNATIONAL RIGHT TO AN ABORTION 42-44 (2009) (describing efforts by treaty bodies to use expansive interpretations of treaty provisions to override democratic opposition to legalizing abortion in Poland, Ireland, Namibia, and Nicaragua).

\(^11\) See id. (describing vote of Nicaraguan legislature in favor of restricting abortion rights).

demonstrative of the declining role for State consent in international human rights lawmaking. Traditional international law doctrine holds that States are bound only by those legal obligations to which they consent; this requirement is labeled here as the “consent principle.” This traditional principle is under severe strain in human rights lawmaking. TMB, created to keep track of State compliance with human rights treaties, today legislate new obligations for State parties without their agreement in the guise of treaty interpretation. At the same time, human rights actors locate an ever wider array of customary norms that they argue bind all States, even those objecting through practice or words.

Many human rights scholars defend this development. These scholars see human rights benefits in overriding the consent constraint in some circumstances. Some scholars favor permitting TMB to update the meaning of human rights treaties to ensure their continued relevance over time and to expand protections for individuals. Other scholars defend the existence of a core of customary human rights protections from which an individual State or small group of States cannot dissent. From the perspective of these scholars, these benefits supersede concerns about protecting State sovereignty.

Those who defend the consent principle largely make arguments in favor of preserving traditional State sovereignty. Some States, led by the United States defend traditional sovereign prerogative as constitutive of international law and therefore not subject to bartering for human rights benefits. Some scholars see the consent principle as protection from predation by hegemonic actors abusing the mandate of human rights law to impose their values on others. For other scholars the consent principle recognizes the unique role of States in enforcing human rights law, which makes consent valuable in securing the State buy-in needed for compliance.

This traditional State sovereignty driven account of the consent principle ensures its continued erosion in the face of an ever expanding remit for human rights. Throughout international law there is a growing impatience with the

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13 See The Case of the S.S. Lotus (Fra. v. Tur.), 1927 P.C.I.J. 10 (“The rules of law binding on States… emanate from their own free will…Restrictions upon the independence of States cannot therefore be presumed.”)

14 See Laurence R. Helfer, Nonconsensual International Lawmaking, 2008 U. Ill. L. Rev. 71, 87-90 (describing work of treaty bodies as nonconsensual lawmaking).

15 Infra Part II.

16 Id.


18 See Helfer, supra note 14, at 121 (explaining why nonconsensual human rights lawmaking is particularly susceptible to noncompliance).
idea that State consent is a *sine qua non* of international law.\textsuperscript{19} This shifting attitude toward State consent is part of a broader unraveling of sovereign prerogative. The Rome Statute establishes international jurisdiction over crimes where the State is unable or unwilling to prosecute the crimes.\textsuperscript{20} The Responsibility to Protect (R2P) permits even military intervention in a State that is unable or unwilling to protect its people from grave human rights violations.\textsuperscript{21} Given these developments a clear trend away from State’s rights is evident.

Nor is the central role of States in enforcing human rights law likely to preserve respect for the consent principle. Human rights law is the most utopian disciple of international law, and therefore the most willing to tolerate a degree of non-compliance in exchange for normative clarity.\textsuperscript{22} Thus arguments about compliance are unlikely to promote adherence to the consent principle.

Instead, this article argues that there are human rights attributes to the consent principle that present independent grounds for valuing State consent. The consent principle is integral to the realization of the collective human right to self-determination.\textsuperscript{23} The right to self-determination found in both the ICCPR and International Covenant on Economic, Social and Cultural Rights (ICESCR) grants all peoples a continuing right to use their respective States to self-direct development free from external intervention.\textsuperscript{24} Part of self-

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\textsuperscript{20} Rome Statute, art. 5, 12 (granting ICC jurisdiction over international crimes).


\textsuperscript{22} See Andrew T. Guzman, *Against Consent*, 52 VA. J. INT’L L. 747, 752-53 (arguing that compliance rate is not so important to human rights law as long as the behavior of some States is modified by the existence of a rule)

\textsuperscript{23} This article treats self-determination as a treaty-based right located in both Covenants and evaluates the meaning of this treaty provision. Given that most States of the world are parties to either the ICCPR or ICESCR, the self-determination right described herein applies to most States. While there are strong arguments that the conception of self-determination described here is also customary, this Article does not take on the task of proving that this is so.

\textsuperscript{24} See ICCPR, *supra* note 3, art. 1(1); International Covenant on Economic, Social and Cultural
determination is deciding whether to undertake international human rights obligations that by definition condition development choices. The consent principle grants international protection to those choices, which is essential to their remaining “free.”

There are not, however, human rights benefits associated with two attributes of the sovereignty-driven consent principle. First, the traditional consent principle is treated as absolute because it is constitutive of international law. The human rights value of consent is agnostic on the question of whether State consent is required for the creation of international law. But from a human rights perspective there is no reason for the principle to be treated as absolute. Human rights law recognizes that there are competing human rights values in many situations and prescribes balancing to mediate between rights. Thus, recognizing the human rights value in State consent does not preclude nonconsensual lawmaking.

Second, the traditional consent principle treats the consent of all States as equal consistent with sovereign equality. But the human rights value of consent is not predicated on sovereign equality. Rather, the human rights value of consent is linked to whether a State is available to its people for self-directed development. The consent of States that do not meet this requirement of self-determination lacks human rights value. Self-determination theory has no agreed standards of representation which States must meet, however. While at the margins there may be States that meet or violate any test of representation, to differentiate between States in the middle is difficult at present.

Nevertheless, the human rights consent principle has the potential to reinvigorate the role of State consent in human rights lawmaking. Bringing the consent principle into the human rights corpus provides a rubric for including the costs to self-determination in nonconsensual lawmaking. Human rights actors are naturally biased toward human rights and identifying a human rights cost in departing from the consent principle is the best route for encouraging caution in nonconsensual lawmaking. Such an argument also strengthens the hands of States in preserving room for local decision making as a function of protecting the collective right to self-determination.

In the treaty context the human rights consent principle argues that TMB promote human rights by granting people space to exercise self-determination over contested rights questions, just as they promote human rights by advancing nonconsensual rights interpretations that favor the individual. In

Rights art. 1(1), adopted Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICESCR] (“All people have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”) Part III develops the meaning of these treaty provisions using the text of the treaty, its negotiating history, and subsequent practice.

25 The onus remains on those advancing nonconsensual lawmaking to identify an alternative legitimating basis for the norm other than State consent.
customary law, while there may be a core of human rights norms not subject to State dissent, the size of such a core is negatively correlated with the scope of the self-determination right.

This Article proceeds in four parts. Part I describes the erosion of the traditional State sovereignty based consent principle in international human rights lawmaking. Part II argues that the prevailing understanding of the consent principle in sovereignty terms ensures its continued decline.

Part III re-conceptualizes the consent principle in human rights terms, arguing that it is an integral part of the collective right to self-determination. Part IV addresses the consequences for human rights lawmaking that flow from recognizing a human rights value to State consent.

**PART I: THE DECLINING ROLE FOR STATE CONSENT IN INTERNATIONAL HUMAN RIGHTS LAWMAKING**

This Part describes the decline of the consent principle in international human rights lawmaking, a comprehensive description of which is missing in existing scholarship. It provides the traditional State sovereignty driven account of the consent principle in international lawmaking. It then describes how the consent principle is eroding.

(A) The Traditional Consent Principle

There is no more axiomatic rule in international law than the traditional consent principle propounded by the Permanent Court of International Justice in the *Lotus Case*: a State is bound only by those international legal obligations to which it consents.26 In practice, this simple statement of the law is insufficiently nuanced. Treaties and customary law generally comply with the consent principle in different ways.

Treaties protect the consent principle through the rule that States are bound only by those treaty obligations to which they affirmatively consent.27 Consent is manifested through formal mechanisms, such as signature of the treaty or exchange of instruments of ratification.28

States are permitted to use reservations, which are unilateral statements excluding or modifying the effect of treaty provisions as applied to the State, to

26 *Supra* note 13.

27 *See* Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 16, 21 (May 28) (hereinafter Genocide Convention Case) (“It is well established that its treaty relations a State cannot be bound without its consent.”)

circumscribe the international obligations they wish to undertake.\footnote{Id. art. 1(d) (defining “reservation”).} Reservations to multilateral human rights treaties are permissible so long as they do not violate the object and purpose of the treaty.\footnote{Id., art. 19(c); Genocide Convention Case, supra note 24, at 24 (“The object and purpose of the Convention…limit…the freedom of making reservations…..”).}

States generally self-police whether their reservations meet this requirement. Treaty ratification accompanied by a reservation is valid as long as at least one other party to the treaty doesn’t object to the reservation; if all State parties object, exceedingly unlikely with a multilateral human rights treaty, the reserving State is not a party to the treaty.\footnote{Id. art. 20(4)(c) & (5).} Any particular State that objects to a reservation is free to decide that the treaty is not in force between it and the reserving State.\footnote{Id. art 20(4)(b). In human rights treaties with state-to-state complaint mechanisms, those mechanisms may not be in effect between a reserving State and an objecting State.} But under no circumstances is the reserving State bound by the provision without the reservation because it never consented to such an obligation.

Customary law, unlike treaty law, does not always require the affirmative consent of a State to bind it. Traditional customary norms are located through uniform, extensive and widespread state practice done with a sense of legal obligation (\textit{opinio juris}). Those States engaging in practice that leads to custom are consenting to creation of that custom, as they are opting to act consistently with the rule.\footnote{See \textbf{INTERNATIONAL LAW ASSOCIATION, FINAL REPORT OF THE COMMITTEE: STATEMENT OF PRINCIPLES APPLICABLE TO THE FORMATION OF GENERAL CUSTOMARY INTERNATIONAL LAW} 39 (2000) (explaining that those States who practice initiates the formation of custom consent to be bound by the rule).} But not all States contribute practice relevant to the creation of each customary norm. This lack of contribution may be because a State doesn’t confront the issue that is the subject of the custom. In other situations it is because the State was not in existence at the time the norm formed. Such States do not affirmatively consent to being bound by a customary norm.

Instead, the consent principle is protected through providing States the opportunity to dissent from customary norms. The right of dissent is preserved in two ways. First, groups of States can prevent the formation of putative customary norms through contrary practice. Contrary practice defeats the conclusion that a norm is custom if it is sufficient to disprove uniform, widespread and extensive practice. Second, traditional custom permits an outlier State—whose action in contradiction to the rule is insufficient to prevent the formation of custom—to block application of a customary rule to itself by openly and persistently objecting to the rule at the time it is created.\footnote{See id. at 27 (affirming validity of persistent objector rule).}
Where States opt not to exercise their right to dissent, their non-objection is treated as tacit consent to the norm’s formation.35

Numerous scholars have spent time extensively chronicling the inconsistencies with which the right of dissent has been applied in customary law.36 There are two aspects of customary law practice depart from the consent principle. First, *jus cogens* or peremptory norms are in some instances nonconsensual. The VCLT defines a peremptory norm as “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”37 Given that the test for a norm achieving peremptory status is general acceptance by the international community, there is by definition an element of consent in its creation.38 But once a norm achieves *jus cogens* status States lose the right to remain outside the norm through persistent objection. As a consequence, it is possible that a *jus cogens* norm will bind a State that affirmatively indicated a desire not to be bound by the norm.39

Second, newly formed States cannot dissent from customary norms because they did not object at the time the custom was created. Traditional doctrine presumes that States tacitly consent to these norms when assuming statehood because acceptance of customary law is an inherent part of being a State.40 Under this explanation, putative States have the right to opt out of customary norms by not becoming States. This choice appears illusory, however, and therefore a thin reed on which to rest the conclusion that custom as applied to new States is voluntary.41

These two areas of practice notwithstanding, the consent principle is protected in traditional doctrine through an affirmative consent requirement with treaties, and through provision of an opportunity to dissent with custom.42

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35 See id. at 22 (explaining tacit consent theory).
37 VCLT, supra note 28 at art. 53.
39 For example, once the apartheid norm became peremptory it bound South Africa and Rhodesia despite their persistent objection.
41 See, e.g., Kelly supra note 36, at 513 (describing inconsistencies in customary practice).
42 Allen Buchanan argues that these inconsistencies in application of the consent principle in
(B) Treaties: Diminishment of Affirmative Consent

TMB have placed the traditional affirmative consent treaty rule under strain. TMB are a unique creation of human rights treaties designed to monitor State compliance with a treaty, and sometimes hear individual complaints regarding violations. TMB have claimed a mandate to interpret treaty provisions as a function of their monitoring and adjudication duties.

TMB depart from the consent principle when they interpret the treaty to impose obligations upon States parties to which the parties do not consent. The consent principle certainly permits States to delegate lawmaker role to international institutions. But States have not as a general matter consented to TMB lawmaking. The ICCPR parties, for example, intended the HRC to

customary lawmaking demonstrate that the principle is not as important to international law as traditional doctrine suggests. ALLEN BUCHANAN, JUSTICE, LEGITIMACY AND SELF-DETERMINATION, MORAL FOUNDATIONS FOR INTERNATIONAL LAW 310 (2004). While that is one potential conclusion to reach, another is that these exceptions reflect a failure of traditional doctrine to identify just how important the consent principle is to protection of human rights. This Article contends that there is an important human rights value for State consent that has been underappreciated in existing scholarship and practice, including with respect to the exceptions identified here. Infra Parts III & IV.


44 To the extent this mandate is nonconsensual, TMB also bear the onus of identifying a principle legitimating their exercising lawmaking authority.


46 Cf. Oona Hathaway, International Delegation and State Sovereignty, 71 LAW & CONTEMP. PROBS. 115, 136 (2008) (noting that while States may not intend for any specific decision by an international body, they may intend for that body to make decisions that will evolve obligations over time).

47 European States consented to the ECHR undertaking a lawmaking role by delegating to it authority to issue binding, enforceable legal interpretations of the ECHR. See European Convention for the Protection of Human Rights and Fundamental Freedoms art. 46(1), C.E.T.S. 5 (“The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.”) The structure of the ECHR—with “extremely wide and sometimes indefinite legal concepts,” and a court granted authority to issue binding interpretations—suggests intent by the parties for the ECHR to play a significant lawmaking role. Bruno Simma, Consent: Strains in the Treaty System, in THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY DOCTRINE AND THEORY 485, 497 (R. MacDonald & Douglas M. Johnston, eds., 1983). The ECHR may exceed this mandate at times, however. British officials have repeatedly worried
play a supporting role in assisting the Parties in implementing the treaty, not a
court-like legal development role.  

TMB nevertheless legislate because they begin from the premise that
human rights treaty terms are open-ended in nature, and must evolve in
meaning to meet changing social understandings of human rights. The TMB
update the treaty in light of such evolving understandings, even if the result is a
set of obligations different from what the parties intended. This approach is in
contrast to an approach to interpretation driven by fealty to the parties’
interpretation of the treaty as demanded by the consent principle.

The work of the Women’s Committee and the HRC interpreting their
respective treaties to protect at least a partial right to an abortion is a
paradigmatic example. CEDAW article 12 provides that “States Parties shall
take all appropriate measures to eliminate discrimination against women in the
field of health care in order to ensure, on a basis of equality of men and
women, access to health care services, including those related to family
planning.”

There is strong evidence demonstrating that the States negotiating this
article did not intend its provisions to prevent laws criminalizing abortion at the
time of negotiation. States specifically rejected including the phrase “family
planning services” within article 12, because they feared that phrase would
bring abortion into the article’s ambit, thereby hurting ratification rates.
Moreover, States with restrictive abortion laws ratified the treaty without
reservation to article 12, which is unlikely if they thought the provisions
implicated abortion. Other States have in their dialogue with the Women’s

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48 MANFRED NOWAK, U.N. CONVENTION ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 669 (2d ed., 2005) (explaining the decision to name the HRC a “committee” instead of a “court” or “tribunal”).


50 Such an approach is not the same as an originalist approach to treaty interpretation. The Vienna Convention on the Law of Treaties, which employs a consent-based approach to treaty interpretation, requires treaties be interpreted as the parties would agree today. To that end, while the negotiating history of the treaty is relevant to interpretation, so too are subsequent agreements and inter-State practice of treaty parties. VCLT, supra note 25, art 31(3).

51 CEDAW, supra note 3, art. 12.


53 SYLVA & YOSHIHARA, supra note 10, at 31-32.
Committee rejected the argument that article 12 has implications for abortion.\textsuperscript{54} There was also no subsequent practice or agreement between the Parties modifying this understanding of article 12.\textsuperscript{55}

Despite the evidence that States did not intend to cover abortion within Article 12 and the absence of subsequent practice modifying the treaty, the Women’s Committee has nevertheless interpreted the term “discrimination” to confer abortion rights. In its General Recommendation 24, the Women’s Committee explained “eliminating discrimination against women” in health services mandates an end to legal barriers to health procedures needed only by women, such as abortion. Such a requirement led the Women’s Committee to demand States repeal “laws that criminalize medical procedures only needed by women.”\textsuperscript{56} This interpretation led to the recommendation that “legislation criminalizing abortion should be amended, in order to withdraw punitive measures imposed on women who undergo abortion,” when possible.\textsuperscript{57}

ICCPR article 7 prohibits torture and cruel, inhuman and degrading treatment. Article 17 protects the right to privacy. During the negotiations of the ICCPR, there was extensive debate surrounding whether the protection of the right to life in article 6 prohibited abortion.\textsuperscript{58} By contrast, there was no similar discussion whether articles 7 and 17 guaranteed abortion rights. The absence of any such debate in the context of these rights, suggests States did not believe that these articles implicated abortion. States with laws prohibiting abortion also ratified the treaty without reservation to articles 7 or 17, suggesting they too did not think abortion was implicated in these provisions. There is also no evidence of subsequent practice or agreement modifying the meaning of the ICCPR.

Nevertheless, the HRC has interpreted these terms to require States to provide a medical exception to prohibitions on abortion. In \textit{K.L.N.H. v. Peru} the HRC considered whether a Peruvian law denying a woman carrying an anencephalic fetus from obtaining an abortion violated the ICCPR.\textsuperscript{59} The HRC interpreted the terms “cruel, inhuman and degrading treatment” to include the severe emotional distress the mother endured as a consequence of being forced to bear a child sure to die immediately after birth.\textsuperscript{60} The HRC also interpreted

\textsuperscript{54} See SYLVA \& YOSHIIHARA, supra note 10 at 42-44 (describing efforts by treaty bodies to use expansive interpretations of treaty provisions to override democratic opposition to legalizing abortion in Poland, Ireland, Namibia, and Nicaragua).

\textsuperscript{55} Such subsequent agreements are exceedingly rare in human rights law, given that most practice is intra-State rather than inter-State. Simma, supra note 49, at 188.

\textsuperscript{56} CEDAW General Recommendation 24, supra note 8, at ¶ 14.

\textsuperscript{57} Id. ¶ 31(c).

\textsuperscript{58} See NOWAK, supra note 48, at 153-55 (describing debate regarding whether “life” begins at conception).

\textsuperscript{59} Views, supra note 9.

\textsuperscript{60} Id. ¶ 6.3.
the term “privacy” to include the right to make private medical decisions regarding termination of a pregnancy involving a fatally-defective fetus.61

Thus, both the Women’s Committee and the HRC depart from the consent principle when interpreting their respective treaties as providing abortion rights. There are State parties to both treaties which did not consent to restrict the ability to criminalize abortion when entering into either treaty. Requiring such States to modify laws restricting abortion is a clear break with the consent principle. Abortion rights are not an isolated example in this regard. TMB have used evolutionary interpretative techniques to locate nonconsensual obligations in areas as diverse as jurisdictional scope62 and non-refoulement.63

TMB also depart from the consent principle when they sever reservations from treaty ratifications and bind States to the original treaty provision without the reservation. The HRC announced in General Comment 24 that it would assume the role of judge with respect to reservations because other States lack interest or motivation in policing the reservations of other States.64 Where such reservations are inconsistent with the object and purpose of the treaty, which is prohibited under international law, the HRC severs the reservations and holds the State to the original treaty provision.65 This rule means that States are being bound to an obligation—the original treaty provision—to which they did not consent.66

61 Id. ¶ 6.4. This rationale opens the door to future recommendations that States protect broader abortion rights using the privacy rationale employed by the U.S. Supreme Court in Roe v. Wade.

62 The HRC has interpreted the ICCPR to extend to conduct by State officials outside the territory of the State despite voluminous evidence that the Parties rejected such a wide scope. See Michael J. Dennis, Application of Human Rights Treaties Extraterritorially to Detention of Combatants and Security Internees: Fuzzy Thinking All Around?, 12 ILSA J. INT’L & COMP. L. 459, 463-64 (2006) (providing ICCPR Art. 2(1) negotiating history on this point). Manfred Nowak explains that the HRC “sought to correct the wording” of Article 2 consistent with “the object and purpose of the Covenant.” NOWAK, supra note 45, at 43-44.

63 The European Court of Human Rights (ECtHR) has interpreted the European Convention on Human Rights provision prohibiting torture to include an implicit obligation not to transfer individuals to a State where there is a substantial risk of post-transfer mistreatment despite the absence of evidence that treaty parties intended to create such a right. The HRC has done much the same. For a discussion of this jurisprudence, see Vijay M. Padmanabhan, To Transfer or Not to Transfer: Identifying and Protecting Relevant Human Rights Interests in Non-Refoulement, 80 FORDHAM L. REV. 73, 107-112 (2011).


65 General Comment No.24, supra note 51, at ¶ 18.

66 See Curtis A. Bradley & Jack L. Goldsmith, Treaties, Human Rights & Condition Consent, 149 PA. L. REV. 399, 436-37 (2000) (arguing severability is inconsistent with State consent). But see Goodman, supra note 64, at 533 (arguing that severability regime better protects State consent because States prefer to remain within the treaty without the reservation rather than being forced to
The experience of Trinidad & Tobago with respect to its reservations to the Optional Protocol (OP) to the ICCPR is instructive in this regard. The OP grants the HRC jurisdiction to hear complaints regarding alleged State violations of the ICCPR. Trinidad & Tobago joined the OP with a reservation denying the HRC jurisdiction over petitions by death row prisoners.\(^{67}\) When a death row prisoner brought a claim to the HRC alleging a violation of the ICCPR, the HRC heard the claim despite the reservation. It did so because it believed the reservation violated the object and purpose of the treaty, and was invalid and severed.\(^{68}\) The result is that the HRC gained jurisdiction over petitions by death row prisoners despite the obvious lack of consent by Trinidad and Tobago to such an outcome.

Before leaving treaty practice, two quick points must be made. First, this article takes a functional approach to defining “law.”\(^{69}\) Michael Reisman argues the distinction between human rights law and non-law turns less on formal distinctions and more on three functional factors: content, authority signals, and intent for legal effectiveness.\(^{70}\) This functional test demonstrates the output of TMB constitute “law.”\(^{71}\) TMB make demands of State parties that are law-like. They then take the same steps to enforce those demands as they do with “hard” obligations they monitor. Specifically, they trigger the same iterative dialogue between themselves and States that they use to enforce


\(^{69}\) Some TMB output is law as a formal matter as well. State parties to the ECHR have imbued the decisions of the European Court of Human Rights (ECtHR) with legal status by making its decisions legally binding upon the parties. See European Convention for the Protection of Human Rights and Fundamental Freedoms art. 46(1), C.E.T.S. 5 (“The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.”) The HRC and the Committee Against Torture both claim the authority to issue binding interpretations of their respective treaties when adjudicating communications. See Human Rights Committee, *General Comment No. 33 on the Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights*, U.N. Doc. CCPR/C/GC/33 ¶13-16 (2008) (arguing that communications issued in response to disputes arising under the ICCPR are “authoritative” and must be implemented by the parties); Convention Against Torture, *General Comment No. 2, Implementation of article 2 by States Parties*, ¶ 4, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008) (same for Convention Against Torture). Most States have not recognized such a power. See INT’L LAW ASSN., INTERNATIONAL HUMAN RIGHTS LAW AND PRACTICE ¶ 16 (2004) (describing results of their study on this point).


\(^{71}\) This kind of law is sometimes called “soft law,” or law which is not formally binding.
hard treaty obligations.

TMB also benefit from strong authority signals because their relative expertise in administering their respective treaties gives their pronouncements gravitas. The International Law Association found that most States, while formally rejecting the premise that TMB have lawmaking authority, in practice use the interpretation provided by TMB as the applicable legal standard, whether in reporting on compliance to the TMB or in interpreting the treaty in their national courts. Even in the rare instances where a State puts forward an alternative interpretation, the TMB interpretation serves as a baseline for a dialogue with the State on the nature of the obligation in question.

Second, this compliance does not imply functional consent to TMB norm creation. It is important not to conflate consent in compliance with consent in norm creation. The consent principle protects the right of States to decide whether to incur the compliance pressure of the international community that is attached to international legal obligations. TMB run afoul of the consent principle when they apply law-like pressure on States without their consent. The fact that imposed reputational costs for noncompliance coerces compliance does not mean that the State agreed to be the subject of international pressure.

(C) Custom: Diminishment of Opportunity to Dissent

The opportunity to dissent from customary norms preserves the consent principle in customary law. Two developments in human rights customary law have diminished this right of dissent.

First, under traditional doctrine all instances of contrary State practice are accounted for in determining whether widespread, uniform practice fueled by opinio juris exists to create customary law. This rule has made it difficult for human rights custom to form because large amounts of contradictory State practice exist even with respect to the most sacred human rights, such as the

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72 Id. at 631-657.

73 For example, while the United States disagrees with the HRC’s interpretation of the ICCPR as covering extraterritorial conduct, it nevertheless provides information to it on such conduct. See U.S. DEP’T OF STATE, SECOND AND THIRD PERIODIC REPORT OF THE UNITED STATES OF AMERICA TO THE UN COMMITTEE ON HUMAN RIGHTS CONCERNING THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, annex 1 (Oct. 21, 2005), at http://www.state.gov/g/drl/rls/55504.htm (providing information on activities outside the territorial United States “as a courtesy matter”). Doing so spawned an iterative dialogue between the United States and the HRC on U.S. extraterritorial activities that mirrored the dialogue on activities taking place in the United States.

74 But see Thomas Fuller & Abraham D. Sofaer, Sovereignty, in PROBLEMATIC SOVEREIGNTY 24, 39 (Stephen D. Krasner, ed. 2001) (arguing that decision to comply constitutes consent to the obligation).

prohibition on torture. The desire for descriptive accuracy in traditional custom comes at the cost of normativity, a trade-off particularly pernicious to the formation of human rights law.

In the Nicaragua Case the International Court of Justice (ICJ) promulgated a rule to ease formulation of human rights custom. The Court evaluated whether the prohibition on the use of force and intervention in the internal affairs of other States, found in Article 2(4) of the U.N. Charter, is customary law. There are so many examples of States violating Article 2(4) that under traditional doctrine the existence of custom prohibiting the use of force against the territorial integrity or political independence of another State is difficult to establish. Instead, the Court announced that inconsistent State practice should be treated as a violation of the custom, as opposed to evidence that no custom exists, if the State justifies its conduct consistently with the custom. This approach allows the pious words of States to replace practice as the touchstone for custom.

But from a consent principle perspective, this shift reduces the ability of a State or small group of States to block the creation of custom through acts inconsistent with a putative customary norm. To understand why, consider the claimed customary duty to prosecute those involved in international crimes, such as genocide, crimes against humanity and serious war crimes. Some scholars have described this duty as customary, with others even going so far as to describe the duty as jus cogens. This claim is difficult to sustain under the traditional test for the existence of a customary norm because States have

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78 U.N. CHARTER Art. 2(4) (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”)

79 Military and Paramilitary Activities in and against Nicaragua (Nicar. V. U.S.) [hereinafter Nicaragua Case], Merits, 1986 ICJ Rep. 14, ¶ 186 (June 27). The court found that the content of Article 2(4) was indeed customary law.


81 See M. Cherif Bassiouni, Searching for Peace and Justice: The Need for Accountability, 9 LAW & CONTEMP. PROBS. 9,17 (1996) (arguing that jus cogens nature of crimes against humanity, genocide, war crimes and torture creates a jus cogens duty to prosecute); Diane F. Orentlicher, Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime, 100 YALE L. J. 2537, 2609 (1991) (arguing duty to prosecute peremptory norms is itself peremptory).
regularly granted amnesties to those allegedly involved in serious violations. 82

Scholars have invoked the Nicaragua rule, however, to argue that this inconsistent practice should be viewed as violation of an existing customary rule rather than evidence that custom does not exist. They claim that States that decide to grant amnesties do not announce any disagreement with the existence of a duty to prosecute, but instead invoke exigent circumstances—like national reconciliation or fragility of the democratic transition—to justify a deviation from the rule.83 This analysis essentially mandates public rejection of a putative custom for contrary practice to count against the custom’s existence.

Nothing formally prevents States from disavowing the existence of a customary norm when engaging in conduct inconsistent with the norm. Indeed, such a statement might be a powerful defense of their conduct. As a consequence, if States like the Latin American States fail to do so, it may indicate their tacit agreement that such a duty exists. But there are many other reasons, having nothing to do with a sense of legal obligation, as to why a State acting inconsistently with a putative custom will not disavow it.84 For example, the Latin American States who used amnesties in the 1980s may have felt constrained not to openly reject the existence of a duty to prosecute because they feared that departures from a pro-human rights stance would disrupt Western aid upon which the States were dependent. Or they may simply have believed that there was no norm of any sort against which to speak. Limiting the effect of contrary practice on norm formation makes dissent less viable.

Second, the persistent objection rule in customary law protects the consent principle by giving States the right to opt out of customs with which they disagree with timely, persistent, and open objection to the rule. The protection of persistent objection is in decline, however, because of the proliferation of alleged jus cogens, to which no persistent objection is permitted.

Human rights advocates and scholars have created a cottage industry in proclaiming human rights norms jus cogens,85 without presentation of much—

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84 See John B. Bellinger III & William J. Haynes, A US government response to the International Committee of the Red Cross study Customary International Humanitarian Law, 89 INT’L REV. RED CROSS 443, 445 (2007) (explaining that States will verbally support resolutions at international organizations for reasons that have nothing to do with judgment on the existence of a legal norm).

85 Prosper Weil predicted this inevitable outcome in 1983, stating, “virtually nothing… prevent[s]an irresistible tide of rules of general international law from swelling, one after another,
or any—evidence that there is general support in the international community for treating the norms as such.86 This practice has emerged out of a desire to bind non-consenting States to a rule that human rights advocates and scholars believe should be binding for all.87

This practice is widespread. Some notable human rights scholars contend that all human rights are *jus cogens*.88 Other scholars, taking a slightly more restrained view, have argued that a wide range of norms are *jus cogens*, including the duty not to cause trans-border environmental harms, the right to life of animals, and the right to development.89 If accepted as true, this wide ranging corpus of peremptory norms drastically shrinks the scope of the right of dissent that protects the consent principle.

To understand why, consider again the customary duty to prosecute. As just explained, some scholars argue that this duty is *jus cogens* and thereby not subject to persistent objection.90 While many States have engaged in quiet practice inconsistent with the norm historically, in recent years African States have challenged the legal status of the duty to prosecute. These States argue that such a duty impedes peace, and have pushed to reconsider the role of amnesties in transitional societies.91 Amnesties issued by such States would count against the existence of custom even under the *Nicaragua* ruling, because the contrary practice is accompanied by verbal rejection of the rule. But if characterized as *jus cogens*, the actions of the African States are just illegal under international law, because persistent objection to the rule is not recognized. Such an outcome eliminates the ability of African States to dissent from a duty to prosecute, thereby vitiating the consent principle.

The pronouncements of the ICJ, while not formally law creating except between the parties to the dispute, carry sufficient weight to be treated functionally as law. The approach of the *Nicaragua* court to locating custom has been widely adopted by scholars and States as the method for evaluating

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87 Id. at 304.


89 Shelton, supra note 79, at 303-04.

90 Supra note 74.

contrary practice in the context of human rights and humanitarian norms.\textsuperscript{92}

The pronouncements of scholars and NGOs that an ever wider array of norms is peremptory, however, require closer consideration. Unlike TMB or the ICJ, scholars and NGOs emit far weaker authority signals as a font for legal obligations.\textsuperscript{93} As a consequence, States will feel more freedom to reject legal pronouncements coming from NGOs and scholars. The result is that proclaimed \textit{jus cogens} norms are sometimes more aspirational than a realistic expectation of State action because States do not internalize these norms as standards by which to conform their behavior and judge that of other States.\textsuperscript{94}

Nevertheless, these pronouncements are sufficiently law-like to be treated as impediments to the consent principle. Scholars and NGOs make these pronouncements in terms of law-like commands, seeking to remove a contested question from the political domain. They then apply the same methodology they use for pushing States to comply with hard legal obligations: an iterative dialogue with States designed to push them to comply with the putative norm.\textsuperscript{95} While this dialogue is perhaps less powerful where the norm emanates from an NGO or scholar, it nevertheless imposes transaction costs on State dissent because the dissenting State must cope with the reputational costs of being labeled a lawbreaker. These transaction costs may be significant, especially given the international voice of many human rights NGOs.\textsuperscript{96} Such costs diminish the viability of dissent and its protection of the consent principle.

\textbf{PART II: SOVEREIGNTY-BASED CONSENT PRINCIPLE}

Part I demonstrated that the consent principle is in decline in international human rights lawmaking. This Part argues that the scholarly debate around this development has been treated as another chapter in the conflict between State


\textsuperscript{93} See Reisman, supra note 70, at 373 (arguing authority signals are a factor in determining whether putative legal pronouncements are indeed law).

\textsuperscript{94} See Anthea Roberts, \textit{Traditional and Modern Approaches to Customary International Law}, 95 Am. J. Int’l L. 757, 769 (2001) (describing criticisms of modern custom); Tomuschat, supra note 36, at 362 (worrying human rights customs amount to nothing more than a “pious wish”).


\textsuperscript{96} For example, human rights NGOs regularly denounce States as violating international law for failing to prosecute those who allegedly committed crimes against humanity. See, e.g., Kenneth Roth, \textit{International Injustice: The Tragedy of Sierra Leone}, WALL ST. J. (Europe), Aug 2, 2000 (criticizing Sierra Leone amnesty as a violation of international law). These condemnations increase the cost for States to dissent from a putative custom or peremptory obligation to prosecute.
sovereignty and human rights law. Framing the debate in this manner has the result of the continued decline of the consent principle in human rights lawmaking.97

(A) Treaty Law

TMB serve a unique and important function in the enforcement of international human rights law. International human rights law largely depends on voluntary compliance because of the general absence of coercive enforcement mechanisms.98 While in other areas of international law, States may use their full range of diplomatic and economic tools to enforce treaty commitments, violation by one State of its human rights commitments is of little interest to other States.99 Thus, States are largely left to self-comply with human rights obligations, risking massive noncompliance. TMB are designed to ameliorate this problem by serving as an external monitor on State compliance.

In exercising this responsibility TMB must apply their treaties to a range of factual circumstances. Doing so, while abiding by the consent principle, is difficult for two reasons. First, human rights treaties include terms like “cruel, inhuman and degrading” that are “extremely wide and sometimes indefinite.”100 Cultural differences likely mean different States disagreed on how the terms applied to a particular scenario at the time the treaty was concluded.101 Applying this term to a particular set of facts is likely to result in an interpretation that is nonconsensual with respect to some group of States.

Second, even if there were shared meanings at the time of drafting, human

97 Scholars do sometimes note in passing that departing from the consent principle is problematic from a democracy or self-determination perspective, but rarely linger upon this point. See Michael Ignatieff, Whose Universal Values? The Crisis in Human Rights 21, 22-23 (1999) (arguing that allowing human rights to override State consent automatically undermines the human right of self-determination); Jack Goldsmith, Should International Human Rights Law Trump US Domestic Law?, 1 Chi. J. Int’l L. 327, 333 (2000) (describing democratic legitimacy concerns in relying on academics and human rights activists to determine the content of law); Hathaway, supra note 46, at 146 (noting that an overly expansive understanding of core human rights norms can threaten self-determination and autonomy); Helfer, supra note 14, at 78 (noting challenge to democracy posed by international delegation increases with nonconsensual lawmaking).


99 See Goodman & Jinks, supra note 19, at 629 (noting that externalities from human rights violations, such as massive refugee flows, are sporadic and localized).

100 See Simma, supra note 45, at 187 (quoting ECtHR judge describing the ECHR).

101 See id. at 188 (arguing that cultural diversity among treaty parties makes a shared meaning for treaty terms hard to find).
rights terms acquire different meanings over time. The continued relevance of human rights treaties depends upon employing the current, socially relevant understanding of what is “cruel.” But unlike with other treaties where the parties engage in regular international practice which may modify the meaning of the treaty, there is limited traditional inter-State practice on human rights questions. Most practice, such that it is, consists of statements made at bodies like the Human Rights Council and the Third Committee. Thus, the likely result of keeping treaty terms time relevant is an interpretation of the treaty that differs from the understanding of at least some States.

When making these interpretations, TMB expand rules in direction of recognizing more robust individual rights. TMB invoke the rule in the VCLT that treaties be interpreted consistently with their object and purpose—here protecting human rights. TMB have interpreted this purpose as requiring them to employ plausible interpretations of the text that are most favorable to individuals, as opposed to the State. This explains in the abortion context, for example, the decision of CEDAW and the HRC to interpret open ended terms in their respective treaties to recognize abortion rights.

Despite the likely conflict with the consent principle, TMB have not shied away from offering detailed, contemporary interpretations of treaty provisions, offering specific prescriptions because they believe doing so is beneficial to human rights. TMB reject the existence of gaps in treaty regimes, fearing such gaps will be exploited by States for the purpose of abusing rights. TMB attach meat to the bones of otherwise bare human rights provisions, including updating out of date understandings of open-ended terms. They then use those detailed interpretations to push States towards compliance with the TMB understanding of the treaty terms. For an institution committed to promoting human rights, such benefits outweigh concerns about State sovereignty.

Those defending application of the consent principle raise State sovereignty related concerns with this approach. Some States, led by the United States, take the traditional position that State consent is constitutive of international law, and therefore sacrosanct. During its 2006 presentation regarding U.S. compliance with the ICCPR, a U.S. official informed the HRC that “it was not

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103 See id. at 61 (arguing ECHR needs to evolve to keep pace with “social and legal advances made within the domestic legal structures of member States”).
104 See Simma, supra note 45, at 187-188 (describing lack of practice).
105 VCLT, supra note 25, art. 31(1) (requiring treaties be interpreted in light of their “object and purpose”).
107 FN on decline on non-liquet doctrine and to Michael Glennon on gaps in the law
for the Committee to change his country’s obligations flowing from the Covenant, or to issue authoritative guidance in that respect.”

Consistent with this statement, the United States rejects recommendations from TMB that create unintended obligations for the parties because they are outside their respective mandates.

Other States, including France and the Netherlands, have criticized TMB in similar terms.

Scholars worry that sovereign prerogative granting States full law enforcement power within their territory renders the human rights benefits anticipated by TMB ephemeral. There is a real risk that States will simply opt not to enforce TMB legal commands to which they did not consent for two reasons. First, because the consent principle is the traditional bedrock principle of treaty law, interpretations that hew to that principle are more convincing and persuasive. TMB legal interpretations that do not adhere to the traditional process by which legal rules are created may not be followed. Second, States are likely to have accounted for sovereignty costs of compliance when joining a human rights treaty. If the TMB employ nonconsensual interpretations that raise compliance costs, the parties are likely to either not comply with the new rules, or even exit from the treaty.

Such sovereignty-driven concerns about TMB legislation fly in the face of the steady erosion of sovereign prerogative when challenged by human rights norms.

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110 See U.N. Hum. Rts. Com. [CCPR], Observations of States parties under Article 40, Paragraph, of the Covenant, ¶14, U.N. Doc. A/51/40, Annex VI (1995) (“France points out that the Committee, like any other treaty body or similar body established by agreement, owes its existence exclusively to the treaty and has no powers other than those conferred on it by the States parties.”)


112 See Mechlem, supra note 43, at 924 (describing positive effects of using VCLT methodology in fashioning concluding observations).

113 See Thomas M. Franck, The Power of Legitimacy Among Nations 92 (1990) (arguing that following the traditional mechanisms for law making itself exercises a compliance pull through ritual validation).

114 See Helfer, supra note 14, at 121 (describing risks to compliance associated with nonconsensual human rights lawmaking).
concerns. Today international law accepts that the traditional rules protecting State sovereignty are subject to abrogation because of human rights concerns. The responsibility to protect, or R2P, provides that States lose their protection from intervention, including potentially military intervention, when they are unwilling or unable to protect their population from gross violations of human rights. In international criminal law States lose their exclusive jurisdiction over crimes committed within their territory when they are unwilling or unable to prosecute those who commit serious international crimes. The kind of international intervention contemplated in these areas is more intrusive to State sovereignty than departures from the consent principle in treaty law.

Practical arguments subordinating growth of human rights to the reality of State enforcement fail to recognize the utopian nature of human rights commands. Many human rights scholars and activists privilege normativity over conformity with actual State behavior. This viewpoint means many human rights actors prefer rules that are beacons on the hill, even where those rules do not achieve perfect compliance. To wit, Andrew Guzman has recently argued that spotty compliance should not deter human rights law from advancing ambitious rules. Guzman notes that even if some or many States ignore human rights rules, an improvement in the behavior of a small number of States justifies the existence of the rule. As a consequence Guzman, and thinkers like him, are not moved by the compliance argument.

The empirical claim that States are less likely to comply with norms to which they did not consent is also contested. As described in Part I, the International Law Association study on the output of treaty monitoring bodies finds that States treat the legal pronouncements of TMB as they do binding forms of human rights law: as a starting point for an iterative dialogue with relevant stakeholders on the principle in question. That of course does not mean that they comply with the commands of the TMB; there is voluminous scholarship demonstrating States don’t comply even with human rights obligations they formally undertake. But TMB trigger an iterative dialogue on the practice in question that is the goal of TMB whether the norm is

116 Rome Statute art. 5.
117 See MARTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 60 (2d ed., 2005) (defining such arguments as “utopian”).
118 See Guzman, supra note 22, at 752-53 (arguing that compliance rate is not so important to human rights law as long as the behavior of some States is modified by the existence of a rule).
119 See id. at ___ (using norms of genocide and crimes against humanity as examples).
consensual or nonconsensual.

The State sovereignty based defense of the consent principle is unlikely to arrest its continued decline in human rights lawmaking. TMB are institutionally motivated to advance the cause of human rights, and see benefits from progressive gap filling. State sovereignty is simply not a persuasive constraint. Meanwhile, States are placed under increasing pressure to comply with TMB legal pronouncements. Invocation of State sovereignty as an excuse from performance sounds increasingly anachronistic, undermining the ability of States to resist TMB promulgated rules.

(B) Customary Law

Scholars who support a diminished right of State dissent from customary norms start from the premise that there is a core set of human rights norms that attach to all people by virtue of their birth, as opposed to from the consent of their State. At minimum such a core includes norms widely acknowledged as peremptory, like the prohibition on genocide, torture, or other crimes against humanity. Such a core is viewed as a positive for human rights by many scholars. Oona Hathaway, for example, expresses horror at the prospect of a world in which States are free to excuse engaging in serious international crimes on grounds that they did not consent to the norm in question.

Scholars taking this position at least partially reverse the traditional trope that States are constitutive of international law. Instead, these scholars see international law as conferring the attributes of sovereignty to States. If international law confers the prerogatives of sovereignty, then it can also condition sovereign prerogatives on respect for human rights. In this respect States are asked to take the proverbial “bitter with the sweet.” The sweet of sovereignty mandates the bitter of providing human rights protections. As a consequence State sovereignty does not stand in the way of establishment of a human rights core guaranteed to all men.

The ICJ’s rule on dissenting practice in the Nicaragua Case protects this core of norms. Putatively core norms, like the prohibition on torture, are

121 See, e.g., BUCHANAN, supra note 42, at 102-103 (describing popular sovereignty as bounded by international law and the Natural Duty of Justice); Jonathan Charney, Universal International Law, 87 Am. J. Int’l L. 529, __ (1993) (arguing international law must include norms not subject to dissent); Hathaway, supra note 46, at 147-48 (arguing sovereignty mandates acceptance of a “fundamental core of human rights”); Henkin, supra note 81, at 44 (arguing “an occasional State cannot veto law that reflects the contemporary international political-moral intuition”); Anne Peters, Humanity as the A and Ω of Sovereignty, 20 Eur. J. Int’l L. 513, 514 (2009) (contending sovereignty only has legal value to the extent that it respects human rights).

122 Hathaway, supra note 46.

123 See, e.g. id. at 146-47 (describing State sovereignty as “social and legal construct—a creation of the modern international legal system”).

124 Peters, supra note __, at 514.
honored in the breach. The traditional rule for custom formation would undermine the contention that customary law prohibits torture under all circumstances because the contrary practice would undermine the requirement of uniform, consistent State practice. By reducing the role of actual practice in the formation of custom, norms like the torture prohibition can obtain and retain customary status primarily on the basis of pious words.

Human rights scholars and advocates press to place an ever larger number of norms within this core because they believe doing so is a net positive for human rights. An oft repeated mantra of the human rights community and supporting scholars is that States are abusing the consent principle to avoid providing human rights that are beneficial to their people.125 Placing new norms in the basket not subject to State consent avoids this trap. And this human rights benefit is achieved merely at the cost of State sovereignty, which is viewed as subordinate to cause of protecting human rights.

This effort is unconstrained by any real test for determining which norms are subject to the consent principle and which norms are not. There are as many theories with respect to this question as there are scholars who defend the proposition that a core exists.126 Scholars disagree about whether the source of a human rights core is natural law or some contemporary, shared human intuition;127 whether this core is limited to civil and political rights or includes economic, social and cultural rights, such as the right to development; and how such a core evolves over time.128 Without an agreed test constraining growth of the core, the allure of assisting the cause of human right through bypassing the consent principle leads to an inexorable decline in the number of human rights norms for which consent is needed before becoming obligatory.129

Scholars who defend the role of the consent principle in customary law raise State sovereignty related concerns with dispensing with it. Some scholars see State consent as necessarily constitutive of international law given the

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126 See, e.g., BUCHANAN, supra note 42, at 102-103 (invoking the Natural Duty of Justice as the source of the core); Hathaway, supra note 63, at 147 (claiming the core consists of “limits on government action shared by nearly every culture and religion, at least in aspiration, if not always in reality”); Henkin, supra note 81, at 44 (arguing “an occasional State cannot veto law that reflects the contemporary international political-moral intuition”); Peters, supra note 104, at 524-26 (describing responsibility to protect the population from human rights violations as a predicate of sovereign responsibility).

127 Compare BUCHANAN, supra note 42, at 102-103 (invoking the Natural Duty of Justice as the source of the core), to Henkin, supra note 81, at 44 (arguing “an occasional State cannot veto law that reflects the contemporary international political-moral intuition”).

128 See Hathaway, supra note 46, at 146 (describing criticisms of position); Peters, supra note 104, at 527-33 (same).

129 Weil, supra note 85, at 427.
cultural differences that exist across the globe. These scholars are skeptical of the premise that nonconsensual customary norms represent universal values, seeing them instead as the views of particular States or social groups who wish to impose those views on dissenters. Scholars advancing this view have emerged from both the developing world and right-wing American scholarly traditions.

Developing world critics claim that human rights law as currently constituted consists primarily of the values of the hegemon—Western Europe and the United States. The West uses the premise of universal human rights to impose its values on developing societies in an extension of the colonial project. The consent principle ensures that the developing world’s values are included within the human rights corpus, essential if human rights are to be truly global.

Right-wing American scholars portray left-wing academics, NGOs, and government officials as the actors driving an effort to use human rights law to erode American sovereignty and with it, American exceptionalism. Sometimes named the “New Sovereignists,” this camp rejects the premise that human rights are universal, instead seeing them as left wing ideals that have been rejected by the American voter. They also worry that the amorphous process by which these norms are declared universal takes legislative and judicial power away from Congress and the federal courts. As a consequence, those in this camp view the consent principle as a sacrosanct protection of American sovereignty.

Other scholars worry that the human rights benefits of an expanding nonconsensual human rights core are ephemeral because they fail to account

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130 See Hathaway, supra note 46, at ___ (acknowledging this risk); Buchanan, supra note 42, at 310-11 (describing predation concern); Weil, supra note 85, at 411 (concerned that a “de facto oligarchy” of the powerful would impose views on others); Paul S. Berman, Global Legal Pluralism, 80 S. Cal. L. Rev. 1155, 1190 (2005) (“[T]he presumed universal may also be the hegemonic.”)

131 See, e.g., Mutua, supra note 17, at 10-12 (arguing the West uses a “savages-victims-saviors” metaphor to impose its values on the developing world); M.O. Chibundu, Making Customary International Law, 39 Va. J. Int’l L. 1069, 1139-40 (1999) (noting that human rights cases in U.S. court are like “a current affairs topics primer of the trouble spots of the non-Western world”).

132 See Mutua, supra note 17 (arguing that resisting the current Eurocentric human rights model is essential to the future of human rights as a global movement).


134 Peter Spiro

for the role of States in enforcing human rights law. State sovereignty includes not only the right to decide whether to undertake international obligations, but also sole authority to enforce those obligations within the State’s territory. As a consequence, there is a real risk that States will simply opt not to comply with human rights norms over which they have no control.  

Such a risk is enhanced for two reasons. First, the opportunity to dissent has always been part of the customary law creation process. Use of the traditional lawmaking mechanism itself exercises compliance pull that is an important part of State obedience to human rights law. So-called customary norms that are widely violated and to which there is persistent objection will not exercise such pull because they depart from the traditional law creation mechanism.  

Second, such customs lack a connection with traditional State practice that has served as a predictor of future compliance. Without this connection to practice, there is a risk that the norms are simply “matters of taste,” which will be ignored, as opposed to legal norms. Thus, for these scholars the reality of State control over compliance argues in favor of adhering to the traditional, sovereignty-based consent principle. 

Such sovereignty-driven concerns fail to resonate in the face of growing consensus that human rights are a limit on sovereign prerogatives. The concern that a human rights core reflects the preferences of the powerful imposed upon the weak earns at least a pause from scholars who support the existence of customary norms from which States cannot dissent. It is critical to the legitimacy of the human rights project that the values therein be perceived as universal, and not merely the preferences of a powerful group. Advocates of placing particular norms within the human rights core do so generally out of a good faith belief that they attach to all people as a virtue of birth. To the extent that premise is untrue, the motive to proceed non-consensually is lessened.

But the conclusion that critical scholars draw—State consent must constrain human rights development because of cultural differences—is a dead

136 See Roberts, supra note 90, at 769-70 (describing risk that utopian modern custom spawns non-compliance).
137 See FRANCK, supra note 108, at 184 (describing Hart’s theory that rules exert a greater sense of obligation where the follow the rules regarding creation of law).
139 See Kelly, supra note 36, at 451 (worrying that custom becomes nothing more than a “matter of taste”).
140 BUCHANAN, supra note 42, at 310-11 (describing predation concern); Hathaway, supra note 46, at 146 (noting that an overly expansive understanding of core human rights norms can threaten self-determination and autonomy).
141 IGNATIEFF, supra note 97, at __ (arguing liberal human rights activists must be concerned about moral imperialism).
letter in contemporary human rights theory. As explained in Part I, customary law long ago crossed the Rubicon with respect to the existence of nonconsensual norms. Scholars who are supportive of a human rights core not subject to dissent note that this fact means that the debate is not really about whether there should be nonconsensual norms because there always have been; rather, it is about which norms should be nonconsensual.\textsuperscript{142} The argument that cultural relativism requires rolling-back this development is a non-starter given the commitment of the human rights community to the existence of a core.

Practical arguments subordinating the growth of the human rights core to the reality of State enforcement is out of touch with the utopian nature of human rights law. There is an intense normative challenge to the premise that State sovereignty should influence the nature of the human rights core.\textsuperscript{143} Peremptory norms that make up the heart of the nonconsensual core are the classic sign-post norms, important because they exist as much as anything else. If any States alter their willingness to commit genocide, crimes against humanity or torture as a consequence of non-consensual customary lawmaking, then from a human rights perspective the outcome is a net positive.\textsuperscript{144}

Thus, continuing to view the consent principle as a sovereignty-based restriction on the growth of human rights law guarantees the inexorable decline of State consent. Reinvigorating this principle depends upon re-conceptualizing its role in international human rights.

\textbf{PART III: CONSENT AND SELF-DETERMINATION}

Part II described the debate surrounding the role of the consent principle as one pitting State sovereignty against human rights. As long as the consent principle is understood in this manner, its continued erosion is likely. This Part re-conceptualizes the consent principle as a human rights value because it is essential to promoting the collective right to self-determination. Re-conceptualizing the consent principle as part of protecting human rights instead of a constraint on such rights has the potential to reinvigorate its role in human rights lawmaking.

\textbf{(A) The Human Right to Self-Determination}

Self-determination starts from the premise that the people of a State are ultimately sovereign within that State. This concept originated in the American

\textsuperscript{142} Charney, \textit{supra} note \_, at \_: Hathaway, \textit{supra} note 46, at \_.


\textsuperscript{144} Guzman, \textit{supra} note 22.
and French revolutions, both of which articulated a vision of popular sovereignty in which the people provide the government its powers through consent to be governed.  

In the 20th Century Lenin wrote that the principle of self-determination granted ethnic or national groups the right to choose their own sovereigns, especially in the aftermath of war or colonial occupation. Woodrow Wilson similarly argued that self-determination grants every people the right to choose the sovereignty under which they live. Wilson’s ideals influenced the Versailles Treaty ending World War I, especially in setting the German-Danish border and freeing the Slavs in Czechoslovakia from Austro-Hungarian rule, but were severely compromised in other areas. Still, self-determination had relatively little purchase before World War II.

A radical shift occurred with the U.N. Charter after World War II, which included self-determination as a principle guiding the United Nations. This principle led to the rapid emergence of external self-determination as a central feature of the post-war order. It recognizes the right of newly decolonized territories to determine their international status through plebiscite. This principle was used to support the decolonization of Africa and Asia; the struggle against racist regimes in South Africa and Rhodesia; and today is invoked to support creation of an independent Palestinian State.

This principle evolved into a human right in both Covenants that together serve as an international bill of rights. Both the ICCPR and ICESCR begin with an identical right: “All people have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”

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149 See Report of the Committee of International Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Question, Official Journal of the League of Nations, October 1920 (rejecting the existence of a right of self-determination that gave national groups the right to separate themselves from their existing State without consent).
150 See U.N. CHARTER art. 1(2) (describing development of “friendly relations based on respect for the principle of...self-determination of peoples” as a purpose of the U.N.).
151 167 States are parties to the ICCPR and 160 States are parties to the ICESCR, meaning that a commitment found in these treaties are legal obligations for the vast majority of States.
152 See ICCPR, supra note 3, art. 1(1); ICESCR, supra note 24, art. 1(1).
human right found in the Covenants because negotiators ultimately agreed that self-determination is a prerequisite for enjoyment of individual rights.  

The text of this provision, its negotiating history, and subsequent practice together demonstrate that this provision at minimum guarantees: (1) the people as a whole in all countries and territories of the world (2) a continuing and permanent right to (3) use the State to direct development free from external intervention.

First, the Covenants are clear that the human right to self-determination extends to peoples as a whole in all countries and territories not just colonized or dominated peoples. Thus, for example, Article 1 recognizes that the American people as a whole enjoy the right to self-determination.

The use of the word “all” in the text of the Covenant provisions provides textual support for this interpretation. The negotiating history indicates it was used after the rejection of many phrases designed to limit the term in different ways. The Soviet Union led the effort to limit the right of self-determination to people living under colonial rule or foreign occupation, but was rebuffed by the other negotiating States. States also rejected qualifiers like “large compact national groups,” “ethnic, religious or linguistic minorities,” and “racial units inhabiting well defined territories” because it was believed that people should be understood in a “general” sense.

Subsequent practice generally confirms this interpretation. When ratifying the ICCPR and ICESCR, India entered a declaration stating that it interprets Article 1 as extending only to “peoples under foreign domination,” and not “to sovereign independent nations or to a section of a people or a nation.” The fact that India felt compelled to make such a declaration suggests it sensed that the phrase “all peoples” is interpreted to include the people as a whole of sovereign States. Moreover, this declaration spawned the first-ever

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153 China, Lebanon, Poland, and Yugoslavia, among other States gave precedence to self-determination. M.J. Bossuyt, The Guide to the “Travaux Preparatoires” of the International Covenant on Civil and Political Rights 20-21 (1987). See also Nowak, supra note 45, at 13 (describing firm rejection by negotiating parties of the view that self-determination is not a human right). This view prevailed over Western concerns that self-determination was insufficiently clear to be defined as a human right. Bossuyt, supra, at 20 (chronicling the negative comments of Australia, Belgium, France, Great Britain and Sweden).

154 See CasseSE, supra note 146, at 49 (summarizing negotiating history).

155 See U.N. General Assembly, U.N. Doc. No. A/2929 §9 (1955) (listing proposals limiting the scope of peoples covered by the Covenants that was rejected by the negotiating parties)

156 http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-%3C%2Fchapter%3E4%3C%2Flang%3Een#EndDec (last visited July 25, 2012) (“India declares that the words ‘the right of self-determination’ appearing in [this article] apply only to the peoples under foreign domination and that these words do not apply to sovereign independent States or to a section of a people or nation--which is the essence of national integrity.”)

157 See CASSESE, supra note 146, at 60 (characterizing Indian declaration as a reservation).
objections by France, West Germany, and the Netherlands to reservations entered to the ICESCR, indicating their deep disagreement with India’s interpretation of the provision. The HRC also expressed its disagreement with the Indian declaration, when it wrote that Article 1(1) is not subject to reservation because any reservation would be inconsistent with the object and purpose of the treaty. Thus most States that have commented on Article 1, as well as the HRC, believe it extends protections to people as a whole of sovereign States.

In addition to the people of a sovereign nation as a whole, Article 1 also includes within its ambit significant national or ethnic groups within a multinational State. For example, the HRC has asked about and the United Kingdom has reported on its treatment of Northern Ireland under the rubric of Article 1, which suggests that the Irish are a people within the United Kingdom. As a general matter, such peoples are expected to exercise their right of self-determination through their States together with the other peoples of the State, as opposed to seceding to create their own state.

Second, the right to self-determination enjoyed by all peoples is continuing and permanent and not extinguished by statehood. The original draft text of the ICCPR prepared by the Human Rights Commission stated that “All

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158 U.N. Treaty Collection, supra note 142 (listing objections to declarations and reservations).
161 Such peoples are in contrast to ethnic, linguistic and religious minorities who were granted separate protection by Article 27 of the ICCPR, and were apparently excluded from Article 1 protection. See Casseuse, supra note 146, at 61 (making textual argument). The difference between minorities and sub-national peoples is slippery and not well developed in the ICCPR negotiating history or practice. Nowak, supra note __, at 20-22.
164 See Reference re Secession of Quebec, ¶ 138 [1998] 2 S.C.R. 217 (Can.) (holding that secession is implied only for former colonies, situations of foreign occupation, and “where a definable group is denied meaningful access to government” to pursue their development).
peoples…shall have the right of self-determination.” The “shall” was dropped during the U.N. negotiations of the provisions. The chairman of the U.N. Committee assigned to negotiate the text explained to the larger group of States that this change was designed to emphasize that the right was permanent, and not extinguished with statehood.  

Reporting on Article 1 by State parties to the ICCPR and ICESCR confirm that States understand the Article 1 requirement as continuing. The HRC in General Comment 12 wrote that while States were always including Article 1 within their reports on compliance with the treaty, they were too often limiting that information to election laws. Instead, the HRC asked States to provide information on the “constitutional and political processes which in practice allow the exercise of this right.” Consistent with this request, even established States long since removed from colonialism report on measures they have taken to comply with article 1. Their decision to do so is strong evidence that States agree the right continues permanently.

Third, this continuous right enjoyed by all peoples entitles them to use the political institutions of the State to direct development without external intervention. Such a right emerges from the face of the text granting peoples the right to, “freely determine their political status and freely pursue their economic, social and cultural development.”

The negotiating history of the provision indicates that States wanted to enshrine a “very comprehensive conception of the right of self-determination.” To that end, the world’s peoples are free to “establish its own political institutions, develop its own economic resources, and direct its own social and cultural evolution, without the interference of other peoples or nations.” This broad conception of self-determination even provoked concerns that it would lead to discrimination against foreigners within the State, although Parties were confident other provisions in the Covenants prevented such an outcome.

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166 See CASSESE, supra note 146, at 54 (quoting Chairman of the Third Committee Working Group).
168 Id. ¶ 4.
171 Id.
172 See id. at ¶ 13 (noting worries that it would prompt “burning of foreign books and confiscation of foreign investments”).

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The HRC hewed to this interpretation in General Comment 12. There the HRC admonished, “States must refrain from interfering in the internal affairs of other States and thereby adversely affecting the exercise of the right to self-determination.” This link between self-determination and non-intervention has been repeated in resolutions of the General Assembly and by the ICJ.

The Covenants’ three-part formulation of the right to self-determination has been repeated in other international documents, including the 1970 General Assembly Resolution on International Law Principles, the Conference on Security and Co-operation in Europe’s (CSCE) Helsinki Accords, and the Banjul Charter.

Thus, most States have agreed that international law grants all peoples a continuing and permanent right to use their respective States to self-direct their development free from external intervention.


173 Antonio Cassese employs a similar interpretation of this term in his treatise on self-determination. Cassese explains that Article 1(1) protects a State’s political institutions from outside interference, in particular reinforcing the customary prohibitions on interference with the political independence and territorial integrity of another State. Cassese, supra note 146, at 55.


175 See Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, GA Res. 2131 (XX), ¶ 5, U.N. Doc. __ (1965) (“Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State.”) See also Jean Salmon, Internal Aspects of the Right to Self-Determination, in Modern Law of Self-Determination 253, 258 (Christian Tomuschat, ed., 1993) (describing self-determination and non-intervention as “two sides of the same coin”).

176 Nicaragua Case, supra note 79, at ¶ 205 (condemning interference in the choice of political, economic, social and cultural systems).

177 See Declaration on Principles of International Law, Friendly Relations and Co-operations among States in accordance with the Charter of the United Nations, U.N. G.A. Res. 2625 (XXV), U.N. Doc. __ (1970) (“[A]ll peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development.”)

178 See Conf. on Security & Coop. in Europe [CSCE], Final Act, Helsinki, Aug. 1, 1975 (“By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development.”)

179 Organization of the African Union [OAU], African Charter on Human and People’s Rights, at ¶ 20, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (“[A]ll peoples shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.”)

180 Antonio Cassese marshals evidence for the proposition that this treaty norm has grown into a rule of customary international law, but ultimately concludes it is difficult to reach that conclusion, in significant part because of the developing world concerns that such a norm would invite intervention into the domestic affairs of States. Cassese, supra note 146, at 102-103 & 302-312. This Article takes no position on whether this aspect of self-determination is customary, noting instead that most nations of the world have assumed self-determination as a treaty obligation through the Covenants, and that the Covenants’ formulation of the right is widely repeated by the international community.
(B) Self-Determination and Consent

The right to self-determination found in the Covenants provides a new human rights based understanding of the consent principle. Self-determination posits that the world’s peoples have the right to establish their own political institutions, develop its own resources, and oversee its social and cultural evolution. This right grants the people responsibility for the society in which they live and work.\textsuperscript{181} The people exercise this right through the State.

Both Covenants and the Universal Declaration of Human Rights (UDHR)\textsuperscript{182} recognize that it is the people of the State, as opposed to its current rulers, who are sovereign within the State.\textsuperscript{183} Because people are sovereign within the State, they are to use the State to advance their collective interests.\textsuperscript{184}

The importance that international law theory attaches to the State as the vehicle for achieving self-determination is reflected in the fact that most serious scholarly and practical consideration of self-determination has centered around the impact it has on the State. Colonized peoples exercise self-determination by deciding whether to form their own State free from the oppression of their colonial masters.\textsuperscript{185} Subsequent practice and scholarship has attempted to apply this principle to multi-ethnic States. Scholarship has considered both how such States can be structured to allow different groups to develop under the umbrella of one State, and when that becomes sufficiently impossible to justify secession.\textsuperscript{186}

By definition, part of that remit includes deciding which international

\textsuperscript{181} F\textsc{ranck}, supra note 34, at 123.

\textsuperscript{182} See Universal Declaration of Human Rights art. 21(3) (“The will of the people shall be the basis of the authority of government.”)


\textsuperscript{184} B\textsc{uchanan}, supra note 42, at 102 (noting that under the prevailing conception of the State there is no such thing as a State’s interest separate from its citizens’ interests). Popular sovereignty marks a sharp shift from the earlier view that the State’s territory and its people belong to the State’s rulers, permitting those rulers full discretion with respect to disposition of both. Id. at 102 (explaining that States previously were seen as “private property of dynastic families”); Reisman, supra note 166, at 866 (describing older conception of sovereignty involving in a powerful individual who ruled the State based on divine or historic authority).

\textsuperscript{185} See C\textsc{assese}, supra note 146, at 71-89 (describing practice related to external self-determination).

\textsuperscript{186} See id. at 108-11 & 118-20 (describing practice on questions of secession).
obligations to accept because these obligations alter the path of future
development. Human rights obligations in particular are likely to influence a
people’s development because they regulate the relationship between the
people and the State. 187 For example, the decision whether or not to permit
women to choose abortions potentially impacts issues as diverse as the role of
religion within society; women’s health; and women in the workplace.
Similarly, the decision of a transitional society on whether to prosecute those
who committed serious international crimes could influence distribution of
political power; the rule of law and development of domestic legal structures;
and the economic well-being of victims and victims’ families.

Once the people of the State have made this decision, it falls to the State to
communicate it to other States and international actors. 188 Thus the act of
consent is itself a manifestation of self-determination. The consent principle
protects this act of self-determination by giving it international protection. The
other States of the world must respect the choices of a State as to whether to
undertake a human rights obligation because failure to do so would impinge
upon a people’s right to decide how to develop its society. The right to do so
“freely” is the heart of the self-determination right protected by the Covenant.

The link between self-determination and the consent principle reflects the
value self-determination places on preserving local control, a lesson from the
colonial experience. Self-determination grants peoples the right to make
choices that will shape their civil society, and therefore their day to day lives.
Inherent in such a right is the likelihood that the choices made will differ
between societies. The consent principle is the method by which the
international community tolerates such differences. 189

The human rights value to the consent principle does not attach to every jot
and tittle of the traditional State sovereignty driven core, however. Rather,
linking the human rights import of consent to self-determination suggests that
two aspects of the traditional consent principle are not requisite to protecting
human rights.

First, consent in its sovereignty-driven guise is constitutive of international
law, and therefore by definition absolute. As discussed in Part I, the

187 See James Crawford, Democracy and International Law, 64 Brit. Y.B. Int’l L 113, 121
(1993) (claiming a heightened interest for popular participation on human rights questions given their
impact on the internal life of the State).

188 See Crawford, supra note 187, at 123 (explaining that international law has traditionally
viewed the established government of a State as the voice for all its people). As will be discussed in
Part IV, however, this rule must be modified in light of self-determination.

189 See Larry May, Crimes Against Humanity: A Normative Account 11-12 (2005)
(describing “tolerance” as the value underlying appeals to state sovereignty); Reisman, supra note
166, at 872 (arguing international law protects sovereignty today to preserve the ability of people to
exercise self-determination). See also Paul S. Berman, Global Legal Pluralism 141-151 (2012)
(listing benefits to international law of respect for pluralism).
autonomous nature of States within the international legal system includes the right to be free from external intervention.\footnote{Henkin, International Law: Politics, Values, and Functions, supra note __, at 26-29. See also Amb. Richard N. Haass, Director, State Dept. Policy Planning Staff, Sovereignty: Existing Rights, Evolving Responsibilities at Georgetown University (Jan. 14, 2003) (describing the attributes of sovereignty in a post-Westphalian world).} This right means that States are bound only by those obligations to which they consent, and are otherwise free to act as they wish.\footnote{Supra notes __ (describing ICJ decisions to this effect).} Under this conception of the consent principle it must be absolute, as without State consent international law lacks a legitimating principle.\footnote{This is true in theory. In practice sovereignty has always been malleable. See Stephen D. Krasner, Sovereignty: Organized Hypocrisy 125-26 (1999) (describing sovereignty as an “organized hypocrisy” where powerful States have always impinged upon the rights of weaker States where it suits them); Thomas Fuller & Abraham D. Sofaer, Sovereignty, in Problematic Sovereignty 24, 30 (Stephen D. Krasner, ed. 2001) (arguing sovereignty has always been aspirational and limited by competing principles); Eli Lauterpacht, Sovereignty—Myth or Reality? 73 INT’L AFFAIRS 137, 140 (1997) (describing absolute sovereignty as “unrealistic and largely meaningless”).}

By contrast, the human rights consent principle makes no claim about the constitutive nature of State consent. It is agnostic on this point. Instead, from a human rights perspective, self-determination is a relevant human rights value competing with other human rights values. International human rights law generally conceives of human rights as limited by other human rights, with rights competitions resolved through balancing.\footnote{See Padmanabhan, supra note 63, at 112-13 (describing the use of balancing tests to deal with competing human rights).} Thus, the consent principle in its human rights guise is not a trump that means States will never be subjected to human rights obligations without their consent.

Second, consent in its state-sovereignty driven guise is a protection of States, and consistent with sovereign equality, is applied in theory equally to all States.\footnote{See Crawford, supra note 187, at ___ (providing traditional assumption that any established government speaks for its people).} By contrast, the right of self-determination attaches to peoples. Self-determination theory does posit that the world’s peoples use their respective States to self-direct development.\footnote{Historian Samuel Moyn argues that human rights activists grew disillusioned with States as the vehicle through which people realize rights because of the failure of post-colonial States in Asia and Africa to represent their people. See Samuel Moyn, The Last Utopia 208 (2010) (expanding on}
significantly from State to State. As a consequence, a human rights based consent principle will not attach the same degree of value to the consent of each State. Rather, this value is positively correlated with the degree to which a State represents its people. The more representative a State is of its people, the greater the impingement on self-determination when its consent is overridden. By contrast, States that are run by corrupt ruling elite indifferent to their people are not embodiments of popular will, and therefore their consent is less valuable in human rights terms.

Defining the standard of representation that States must meet to satisfy self-determination is difficult, however. The approach of Western States and supporting scholars is to argue that self-determination mandates States provide their citizens with the civil and political rights needed to participate in the public life of the State.

Treaty terms, like Article 1(1) of the ICCPR, are to be read consistently with other terms within the treaty. Antonio Cassese uses this canon of interpretation to argue that self-determination requires granting individuals within the State the ability to exercise those rights in the ICCPR necessary for participation in the public life of the State. He identifies freedom of expression, peaceful assembly, free association, and the right to vote as the particular rights needed to ensure that the State permits the expression of popular will.

The HRC appears to interpret the ICCPR in similar terms. In General Comment 25 the HRC explains that while article 25(a), which guarantees every citizen the right to participate in the public life of the State, is distinct from

his book-long thesis that human rights law emerged into its current form from 1970s disillusionment with previous utopian theories). Such failures, he contends, contributed to a shift away from States and toward international law as the favored guarantor of individual rights.

196 See, e.g., Trimble, supra note __, at 1966 (“The idea that the governments of Burma, Nigeria, or Somalia speak for their people is patently false.”); MUTUA, supra note 17, at 90 (noting that African States act inconsistently with the rights of their people in order “to maintain their privileges and retain power.”)

197 See Reisman, supra note __, at 874 (arguing that sovereignty is today improperly invoked when used to defend the prerogatives of a ruling clique as opposed to popular will).

198 See ICCPR, supra note __, art. 25(a) (“Every citizen shall have the right and the opportunity…to take part in the conduct of public affairs, directly or through freely chosen representatives.”)

199 Id. art. 19(2) (“Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”)

200 Id. art. 21 (“The right of peaceful assembly shall be recognized.”)

201 Id. art. 22 (“Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.”)

202 Id. art. 25(b) (“Every citizen shall have the right and the opportunity to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.”)
article 1 because it protects individual as opposed to collective rights, is nevertheless related substantively.\textsuperscript{203} The HRC then argues that the ICCPR mandates citizens be permitted to participate in government through freedom of expression, assembly and association.\textsuperscript{204} It also requires the State to permit citizens to exercise power through holding office and electing officials, without discrimination on the basis of any subjective or unreasonable criteria.\textsuperscript{205}

Western States have also put forth this interpretation of self-determination, both in their dialogue with the HRC and in comments made at the United Nations. For example, Australia stated to the HRC that it “interpreted self-determination as the matrix of civil, political and other rights required for meaningful participation of citizens” in the public life of the State.\textsuperscript{206} Cassese chronicles very similar statements made to the U.N. Third Committee by Germany,\textsuperscript{207} the United Kingdom,\textsuperscript{208} and the United States.\textsuperscript{209}

Scholars have seized on this practice to argue that self-determination implies a right to democracy. Thomas Franck and James Crawford both locate a right to democracy based in part on the right to self-determination. Franck defines this right as “free, fair and open participation in the democratic process of governance.”\textsuperscript{210} Crawford argues that democracy requires the State to protect a range of rights, including freedom of expression and assembly.\textsuperscript{211}

From this perspective, States that provide robust participation rights represent their people when they opt into or out of human rights obligations. Respecting such decisions is part and parcel of self-determination. By contrast, States that deny such rights are likely representing the views of its leadership as opposed to its people. The consent principle is not imbibed with human rights


\textsuperscript{204} Id. ¶ 8. See also CASSESE, supra note 146, at 53 (listing requirements for compliance with Article 1(1)).

\textsuperscript{205} Id. ¶ 4, 6.


\textsuperscript{208} See BYIL 1984, 432 CITE needed (contending self-determination requires “rights to freedom of thought and expression, the right to take part in the conduct of public affairs, either directly or through freely chosen representatives, and the right to vote and be elected at genuine periodic elections”).

\textsuperscript{209} See CASSESE, supra note 146, at 303 n.47 (quoting American official stating “Freedom of choice is indispensable to the exercise of the right of self-determination.”)

\textsuperscript{210} Franck, supra note __, at 59.

\textsuperscript{211} Crawford, supra note 146 at 116.
value under such circumstances because State consent is not itself a manifestation of self-determination.

There are reasons, however, to be dubious of this standard of representation. To start, there are States like China that have undertaken a commitment to self-determination in the ICESCR, but have chosen not to ratify the ICCPR. A significant problem with reading Article 1(1) as mandating protection of certain civil and political rights is it would impose such an obligation upon States like China non-consensually, itself a potential violation of the right of the Chinese people to decide how to direct their development.

Moreover, Article 1(1)’s presence in the ICESCR begs the question why the standard for representation requires only provision of certain civil and political rights, and not any economic, social and cultural rights. There are reasons to doubt that economically disadvantaged peoples will be able to take advantage of electoral democracy to self-direct development. Even where civil and political rights are protected, public choice theory predicts that special interests will take collective action pressuring the government to protect their interests at the expense of the public at large. Economically disadvantaged peoples will have a difficult time combating such special interests because of lack of funds, even if they are numerically superior. Social choice theory adds that the preferences of the economically disadvantaged are likely to be sufficiently heterogeneous that it impedes their ability to use the political system collectively. This fact raises concerns that provision of political rights will in no way ensure that disadvantaged peoples in fact can exercise control over their development.

The preference for civil and political rights in defining self-determination feeds concerns of developing States and supportive scholars that Western states engage in moral imperialism when arguing that self-determination mandates liberal Western democracy. They make this argument by focusing on the freedom self-determination gives peoples to select the kind of political institutions they wish. The General Assembly has affirmed that it is the “concern solely of peoples to determine methods and to establish institutions regarding the electoral process, as well as to determine the ways for its implementation according to their constitutional and national legislation.”

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214 Cite to ICESCR Statement from 1992.

215 See, e.g., Respect for the principles of national sovereignty and non-interference in the internal affairs of States in their electoral processes, G.A. Res. 45/151, U.N. Doc. A/RES/45/151
States that are non-representative from a Western perspective argue that their peoples chose to create a political system that, while different from liberal democracy, is nevertheless an acceptable exercise of self-determination.\footnote{216}

Makau Mutua encapsulates this argument in his book \textit{HUMAN RIGHTS}. Mutua argues that the West uses human rights to promote Western liberal democracy as the only acceptable form of government.\footnote{217} Mutua claims that this form of government is premised on a Western conception of the relationship between the State and its people that is inapposite to African societies.\footnote{218} Instead, he argues that human rights must draw from alternative rights traditions in order to create a more global understanding of the State.\footnote{219}

It is beyond the scope of this Article to resolve whether a State must approximate the Western liberal model in order to satisfy the requirements of self-determination. Answering this representation question is its own project, and must be left unanswered here. It may be that at the margins these questions are relatively easy. The idea that Denmark represents the will of the Danish people, while North Korea does not do the same is likely to hold regardless of the representation theory employed. But in the middle a detailed theory is needed. For example, does the Russian Federation represent the interests of its many peoples?

Instead, this Article simply notes sovereign equality is inconsistent with assigning a human rights value to State consent. Under any theory of representation, the extent to which States are vehicles for self-determination will vary, with some States more representative of popular will than others. The closer States fall to the ideal representative State, however defined, the greater the human rights value attached to respecting the consent principle. By contrast, the less representative a State, the lower the human rights value protected by respecting the consent principle.

\textbf{PART IV: CONSEQUENCES FOR HUMAN RIGHTS LAWMAKING}

Part III recast the consent principle, traditionally understood in State sovereignty terms, as a protection for the collective human right of self-
determination. Human rights considerations do not mandate an absolute consent principle, and imply a departure from sovereign equality, with the consent of all States not treated equally. This Part contends that understanding the consent principle in human rights terms has the potential to reinvigorate its role in human rights lawmaking.

(A) Treaty Law

As discussed in Part II, scholars have debated whether State sovereignty should constrain TMB from legislating new treaty norms. TMB and supportive scholars have identified human rights benefits to gap-filling treaties in a manner that expands individual rights, and view such benefits as more important than traditional concerns about State sovereignty. Those defending the consent principle do so with the intent of protecting traditional sovereignty, or out of concern that other aspects of the State system will render the benefits of nonconsensual lawmaking ephemeral. But the steady trend in international law against State sovereignty suggests the consent principle will continue to atrophy if viewed in terms of States’ rights.

Re-conceptualizing State consent as integral to the collective right to self-determination provides a human rights based theory for caring about consent. The people of a State enjoy the collective right to self-direct development, including deciding whether and how to condition development through acceptance of treaty obligations. When a State consents to a treaty, the terms on which it does so reflect the decision of its people as to the extent to which to condition development with human rights obligations. Respecting those decisions is part and parcel of allowing a people the “freedom” to make development choices without external interference.

This approach recasts the decision facing the Women’s Committee and the HRC in interpreting the application of their respective treaties to abortion rights. These TMB are faced with the task of applying open-ended, indefinite terms like “discrimination,” “cruel, inhuman and degrading treatment,” and “privacy” to State laws criminalizing abortion. TMB currently view it as advantageous to human rights to gap-fill the meaning of these terms as applied to the abortion context in a manner that is timely and favorable to the individual, even if the result is an outcome that departs from the consent principle. This approach has resulted in interpretations of both CEDAW and the ICCPR that restrict criminalization of abortion, even though such an interpretation imposes obligations upon States like Poland, Ireland and Nicaragua that never intended to restrict their ability to regulate abortion.

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220 Supra notes __ & accompanying text.
221 Supra notes __ & accompanying text.
222 SYLVA & YOSHIBARA, supra note 10, at 42–44.
The suggestion that such an approach is contrary to human rights is never raised.

The approach taken in this Article adds a new human rights calculation to the mix. The right to self-determination means that the people in States like Poland, Ireland and Nicaragua have the collective right to use their respective States to freely direct their cultural and social evolution. Part of exercising that right is deciding whether and how to undertake human rights treaty obligations with potentially significant cultural or social implications. If the Polish or Irish or Nicaraguan people decide that they wish to develop a society in which the availability of abortion is restricted in order to promote a religious society or a so-called culture of life, then self-determination grants them the right to do so free from external intervention. TMB protect human rights by not gap-filling because doing so respects the peoples’ decisions to reject international restrictions on their ability to criminalize abortion. Such an argument alters what it means for TMB to satisfy their core mandate of promoting human rights.

The reservations debate discussed in Part I is similarly altered. Under the prevalent approach, TMB view reservations as restrictions that prevent the people of a State from enjoying the full protections afforded by a human rights treaty. TMB and supportive scholars argue that they advance the cause of human rights by severing reservations inconsistent with the object and purpose of the treaty and holding to the State to the provision as originally drafted. Such an approach maximizes the scope of protections the individual receives from the State. No concern is raised that this approach is inconsistent with the protection of human rights.

The human rights consent principle changes this calculus. Self-determination posits that the people of the State use the State to decide which international obligations it wishes to condition its economic, social and cultural development. Reservations to a human rights treaty are an important method of modulating international commitments to match local preferences. When a TMB severs an invalid reservation and holds a State to an obligation to which it did not consent, it takes away from the people of the reserving State the right to decide whether or not to condition their development with such an obligation. It is the core of self-determination that is infringed when TMB impose such obligations non-consensually.

Conceiving of self-determination as a countervailing human rights

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223 Goodman, supra note 64, at __.

224 Ryan Goodman has argued that the preference of States is sometimes to be bound by a human rights provision without an invalid reservation, as opposed to having the entire ratification invalidated. Goodman, supra note 64, at __. This Article is agnostic about this argument. The point here is that TMB should value the consent principle because doing is integral to protection of right to self-determination. If doing so supports severance, so be it.
consideration raises the collective right to self-determination into the human rights calculus where it has been previously missing. Human rights law has a prescribed method for accounting for competing rights: balancing. This paper argues that self-determination, in the guise of the consent principle, be included within such balancing, as heretofore has not been done.

TMB looking to interpret their respective treaties consistent with the object and purpose of protecting human rights will have new options. Currently, TMB have treated the rights of individual women as the only touchstone in interpreting terms like “discrimination,” “cruel, inhuman and degrading treatment,” and “privacy.” Such an approach led TMB to locate abortion rights within the treaties despite running afoul of the consent principle.

But the human rights consent principle modifies this interpretative process. TMB promote the collective right to self-determination if they decide that a treaty term like “discrimination” means different things in different places when applied to abortion. Such an approach grants the worlds’ peoples freedom to control the cultural and social consequences of permitting abortion through respect for the consent principle. Alternatively, it could conclude that preventing “discrimination” necessarily requires limits on criminalizing abortion, but at the acknowledged cost of the right to self-determination. This is the human rights tradeoff at issue in nonconsensual lawmaking of which no express account is currently taken.

Similarly, the human rights consent principle modifies the responses available to the State in the face of nonconsensual TMB legislation. In human rights terms the rhetoric of State sovereignty is undeniably passé. Thus, States seeking to resist the human rights pronouncements of TMB while still claiming fealty to human rights lack a rhetorical foundation for resistance. Self-determination provides that foundation. States make a human rights argument against compliance with nonconsensual TMB pronouncements because the collective right to self-determination protects their people’s right to self-direct development free from external intervention. Or the dialogue with the TMB regarding the norm may well change popular preferences with respect to the question, leading to State consent to an international obligation.

Understanding consent in human rights terms also opens the door to treating the consent of different States differently. The human rights consent principle is not premised on sovereign equality, but rather values State consent to the extent that the State represents its people. In theory then the extent to

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225 Or it could decide that the rights of unborn child mean that the term discrimination should be interpreted as definitively not prohibiting laws criminalizing abortion.

226 See Koh, supra note __, at 2646 (describing how iterative dialogue between States and transnational actors produces a change within the State of its normative preferences). This Article would slightly restate Koh’s premise, arguing that the dialogue could change the people’s normative preferences as expressed through their State.
which the State is representative of its people conditions the weight attributed to the consent principle when balancing between competing rights.

The abortion example again clarifies the point. The stronger the link between the Polish or Irish or Nicaraguan State and its people, the greater the human rights benefit in protecting the consent principle. The more the State decision represents an act of collective self-determination, the more weight it holds when compared to competing rights, such as a woman’s right to privacy regarding health decisions.\footnote{Human rights law is well versed in balancing unlike values, like public order and individual liberty. See Padmanabhan, supra note 63, at ___ (detailing the complex values human rights balancing tests compare).} Poland, Ireland or Nicaragua is also in a much stronger position to resist non-consensual TMB rules on self-determination grounds, if in fact the State is viewed as broadly representative of its people. States that are perceived as the voices of their people will invoke self-determination in a much more powerful way than States that are not. As a consequence, the human rights consent principle will raise representation questions into the iterative dialogue surrounding treaty interpretation.\footnote{Some States have taken the position that is inconsistent with self-determination for external actors to judge whether the political structures adopted by any State are representative of popular will. See G.A. Res. 45/150, ¶ 4, U.N. Doc. A/RES/45/150 (Dec. 18, 1990) (“Recognizes that the efforts of the international community to enhance the effectiveness of the principle of periodic and genuine elections should not call into question each State's sovereign right freely to choose and develop its political, social, economic and cultural systems, whether or not they conform to the preferences of other States.”) Such an argument treats States as the entities that have self-determination rights. While it would be inconsistent with self-determination to second guess the choices made by “peoples” through their respective States, it is consistent with self-determination to have rules in place to ensure that States are in fact responsive to popular will. See CasseSE, supra note 146, at 311 (arguing that a right to internal self-determination for all the people of a State is “of scant legal value” without an external enforcement mechanism). Once such rules are in place, whether individual States meet those rules becomes the subject of international dialogue much like any human rights question.}

But as discussed in Part III, there is no agreed international standard on the rights that a State must protect in order to meet the requirements of self-determination.\footnote{Supra Part III.B.} At the margins accounting for the representative nature of the State in treaty interpretation is not hard. It is hard to conceive of a test of representation that wouldn’t view the Irish State as representative of its people, and therefore attach a human rights value to respecting its consent. It is similarly hard to conceive of a test that wouldn’t reach the opposite conclusion on North Korea. But in the middle this question cannot be answered without an agreed standard by which to judge representation. And in the absence of such a standard, differentiating the value attached to consent based on the State in question will be a difficult endeavor.

\footnote{Supra Part III.B.}
(B) Customary Law

As discussed in Part II, there has been a robust debate in international law about whether there is a core of human rights norms not subject to State dissent, and if so, which norms fall within that core. Scholars in favor of a diminishing consent principle see human rights benefits in a core of human rights norms not subject to dissent by a single State or small group of States that outweighs the resulting concerns about State sovereignty.\textsuperscript{230} Those defending the consent principle do so because they believe that State sovereignty is a bulwark against moral imperialism or out of concern that other aspects of State sovereignty will render the benefits of nonconsensual lawmaker ephemeral.\textsuperscript{231} But the steady atrophy of sovereign prerogatives in international law suggests that continuing to view the consent principle as a constraint on human rights will further erode its places in lawmaking.

Re-conceptualizing State consent as integral to the collective right to self-determination provides a human rights based theory for caring about consent. The people of a State enjoy the collective right to self-direct development, including deciding whether to condition development with a customary obligation. When a State chooses to engage in practice contrary to a developing custom or to object to an already formed custom, this decision reflects its people’s choice. Respecting those decisions is part and parcel of allowing a people the “freedom” to make development choices without external interference.

This understanding of the consent principle recasts the debate surrounding the customary duty to prosecute those accused of serious international crimes described in Part I. Under current thinking there is a human rights core applicable to all States, irrespective of the dissent by a single State or small group of States, because such a core is beneficial to human rights. To those scholars who place the duty to prosecute within the core, numerous examples of contrary practice by Latin American and African States are dismissed on grounds that the States implicitly affirmed the validity of the underlying rule when claiming exigent circumstances mandated granting amnesty. Those scholars who go still further and describe this duty as \textit{jus cogens} view even the open opposition of African States to the existence of a duty, for example, as irrelevant given that dissent from peremptory norms is impermissible. This approach has been undertaken without any human rights cost identified in placing certain decisions outside the hands of each State.\textsuperscript{232}

The approach taken in this Article adds a new human rights calculation to

\textsuperscript{230} Supra notes \_ \_ & accompanying text.

\textsuperscript{231} Supra notes \_ \_ & accompanying text.

\textsuperscript{232} There has been extensive debate about whether the best policy for human rights is to always prosecute those who have committed gross violations of human rights, not about whether human rights suffer from taking this decision out of the hands of the State.
the mix. The right to self-determination means that the people in African and Latin American States have the right to use their respective States to develop their societies, including choosing the political institutions they wish to employ. Part of exercising that right is deciding how to handle a history in which serious international crimes were committed. If the people within these societies wish to prioritize peace building and reconciliation over prosecution of those who committed past wrongs, then self-determination grants them the right to do so free from external intervention. It is beneficial to human rights to grant these societies space to make their own choices with respect to structuring transitional justice.

This analysis does not change depending on the putative core norm selected. Under current thinking the non-refoulement norm, which prohibits transfer of an individual to a State where there is substantial risk of post-transfer mistreatment, has been described as a customary or even *jus cogens* norm. Those scholars who defend such a categorization view the norm as an essential protection of the prohibition on torture, which is itself described as *jus cogens* and of central importance to human rights. Because of this benefit, scholars will excuse numerous instances of violation of the norm, as well as its partial rejection by States like the United Kingdom and Canada as irrelevant to the norm’s customary status. Such an approach maximizes the size of the non-derogable human rights core. The concern that this approach ignored State dissent is dismissed as a state sovereignty concern subordinated to the protection of human rights.

The human rights consent principle changes this calculus. Self-determination posits that the people of the State use the State to decide which international obligations it wishes to condition its social and cultural evolution. Deciding when and how to honor the non-refoulement norm can have significant security consequences for the people of the State, particularly when the person whose removal is blocked is a danger to society. Imposing the norm non-consensually takes away from the people of that State the right to decide on a policy with respect to removal of unwanted aliens. It is the core of self-determination that is infringed when such decisions are taken away from people.

Still, as developed in Part III.B, the human rights consent principle is different from the traditional sovereignty-based version in two important respects, both of which protect space for limitations on State consent.

The first important shift within this approach is that it brings the self-determination concern expressly within the human rights rubric used to address rights competitions. There is both human rights value in the existence of a core and in the existence of space for the world’s people to exercise self-

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233 See Padmanabhan, *supra* note 63, at __ (listing scholars making this point).
determination. These two values are in inherent tension, as adding norms to the human rights core comes at the expense of depriving the world’s peoples of local control over the questions governed by the norm.

It is this tension for which current law fails to account. Scholars often view diminishing the opportunity to dissent as cost free and benefit rich from a human rights perspective. This perspective is what is driving the decline of the consent principle. But the human rights consent principle modifies this rationale. There is a human rights cost attached to taking areas of policymaking away from States because it shrinks the scope of the right to self-determination. Appreciating that chipping away at the consent principle is itself involves human rights costs has the potential to bolster the role of consent in human rights lawmaking because human rights law takes human rights tradeoffs more seriously.

The second shift is that the human rights consent principle is not premised on sovereign equality, but rather values State consent to the extent that the State represents its people. In theory the extent to which the State is representative of its people conditions the weight attributed to the consent principle when balancing between competing rights.

The duty to prosecute example again clarifies the point. The stronger the link between African States and their respective peoples, the greater the human rights benefit in protecting the consent principle. Such enhanced weight should be accounted for in determining how to weigh the dissent individual African States have made to the duty to prosecute. Failing to credit the persistent objection or contrary practice of South Africa is a greater impingement on self-determination than doing the same with Equatorial Guinea, if in fact South Africa is more representative of its people than Equatorial Guinea. Such an approach would clarify whether the opposition to the duty to prosecute reflects genuine disagreement between cultures or an effort by entrenched elites to undermine creation of a norm that may threaten their own future after relinquishing power.234

234 Some States have taken the position that is inconsistent with self-determination for external actors to judge whether the political structures adopted by any State are sufficiently representative of popular will. See G.A. Res. 45/150, ¶ 4, U.N. Doc. A/RES/45/150 (Dec. 18, 1990) (“Recognizes that the efforts of the international community to enhance the effectiveness of the principle of periodic and genuine elections should not call into question each State’s sovereign right freely to choose and develop its political, social, economic and cultural systems, whether or not they conform to the preferences of other States.”) Such an argument treats States as the entities that have self-determination rights. While it would be inconsistent with self-determination to second guess the choices made by “peoples” through their respective States, it is consistent with self-determination to have rules in place to ensure that States are in fact responsive to popular will. See CASSESE, supra note 146, at 311 (arguing that a right to internal self-determination for all the people of a State is “of scant legal value” without an external enforcement mechanism). Once such rules are in place, whether individual States meet those rules becomes the subject of international dialogue much like any human rights question.
But as discussed in Part III, there is no agreed international standard on the rights that a State must protect in order to meet the requirements of self-determination.\footnote{Supra Part III.B.} At the margins accounting for the representative nature of the State in treaty interpretation is not hard. It is hard to conceive of a test of representation that would assign much human rights value to protecting the opposition of the Obiang government in Equatorial Guinea to a duty to prosecute. It is similarly hard to conceive of a test that wouldn’t attach significant weight to the practice of post-apartheid South Africa in eschewing prosecutions of those involved with apartheid and aggressively defending the lawfulness of the truth commission approach it used. But in the middle this question cannot be answered without an agreed standard by which to judge representation. In the absence of such a standard, differentiating the value attached to consent based on the State in question will be a difficult endeavor.

**Conclusion**

The key contribution of this Article is that it identifies an important cost to human rights in the continued erosion of the consent principle. To human rights actors too often the only relevant right identified is an individual right to be free from State action or to demand something from the State. When thought of in this manner, the traditional State sovereignty based consent principle has little allure to the human rights movement, as it represents the State’s attempt to limit the rights it provides its people.

But the collective right to self-determination, comfortably enshrined in the pantheon of human rights as the first right found in both Covenants, conceptualizes consent in different terms. Self-determination grants the world’s peoples the right to use their respective States to make choices that determine the kind of society in which they live. When human rights law takes away these choices through nonconsensual lawmaking, it restricts the scope of self-determination. Restriction of the right of self-determination is the under-appreciated cost of imposing human rights obligations on disagreeable States.

Bringing self-determination within a human rights rubric has the potential to ensure the collective right to self-determination is respected in the human rights lawmaking process. Self-determination faces two difficult biases in the balancing process. First, self-determination protects a degree of cultural difference that is uncomfortable set against the otherwise universalist impulses of the human rights movement. Second, it promotes collective rights, which run against the individualist nature of most other human rights. But even if this bias cannot be overcome in the balancing process, forcing those engaged in lawmaking to acknowledge the cost to self-determination in overriding State...
consent and to explain why such a cost is worth bearing will spur a dialogue on respect for self-determination in lawmaking that is presently absent.

This Article also raises the importance of distinguishing between “peoples” and “States” in the context of self-determination. While the sovereignty-based consent principle exalts States, self-determination rests its rights in “people.” While the world’s peoples in theory use their States to self-direct development, a quick glance around the world demonstrates that in practice this premise is realized to different degrees in different States. Valuing State consent differently between States, while anathema to traditional sovereignty, is consistent with imbuing consent with human rights value based on its connection to self-determination.

The full import of this conclusion cannot be implemented in lawmaking today because of lack of agreement on the relationship between the State and its people mandated by self-determination. The absence of any meaningful standard undermines the promise of self-determination, as despotic States claim its privileges illegitimately. Introducing self-determination as a relevant concern in lawmaking will raise the dormant representation question more often, potentially producing more practice in the area.

But developing content for the link self-determination posits between State and its people is unlikely because of the limits of the international lawmaking process. No State will agree to a standard of representation that results in the conclusion that it is not an embodiment of self-determination. At the same time, imposing a standard non-consensually risks undermining the very premise of self-determination, which is that the world’s peoples have the right to select political institutions that meet their respective needs. Resolving this puzzle is an important piece of developing a human rights consent principle that must be tackled in future scholarship.