Consent and Self-Determination in Human Rights Lawmaking

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Abstract

A range of actors have advocated and implemented changes in how international human rights law is made and interpreted to reduce a State’s control over the content of its human rights obligations. Such efforts are premised on the view that State consent is an impediment to development of human rights. This article argues, however, that State consent is essential to the protection of the human right of self-determination, a right which guarantees people collective control over their political, economic, social and cultural development. Thus, efforts to expand international human rights without State consent themselves infringe upon a human right.

Because consent is essential to protecting the right to self-determination, efforts to limit State consent must be undertaken consistently with the traditional methodology for adjudicating rights competitions: proportionality analysis. Proportionality requires that limitations upon self-determination be based upon a human rights rationale that is proportionate to the restriction in question. Advocates for diminishing the role of State consent in human rights lawmaking have not conducted this analysis.

Proportionality analysis reveals that many current efforts in practice and scholarship to restrict the consent principle are difficult to reconcile with self-determination. This Article concludes by defending changes to current practice necessary to ensure self-determination is considered when evaluating changes to international human rights lawmaking and interpretation.
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By Vijay M. Padmanabhan*

“The international human rights program is more than a piecemeal addition to the traditional corpus of international law…By shifting the fulcrum of the system from the protection of sovereigns to the protection of people, it works qualitative changes in virtually every component.”¹ Michael Reisman’s prophetic words from 1990 foreshadowed a continuing struggle within international law generally and human rights law specifically to adapt international law concepts developed during an age of States’ rights to a system ever-more organized around the protection of human rights.

One area where this struggle has been ongoing has been with respect to the mechanisms by which international human rights obligations are created. It is axiomatic to describe the international legal system as voluntary: a State is bound only by those international legal obligations to which it consents.² This statement is an oversimplification of even traditional doctrine, which has recognized a limited set of circumstances in which customary norms bind unaware or objecting States.³ But State consent is the primary and typical route by which international legal obligations are created.

A primarily voluntary legal system has traditionally been justified as an attribute of State sovereignty; consent ensures that State autonomy is limited only if the State agrees.⁴ But a voluntary legal system has drawbacks if the goal is protection of human rights as opposed to States’ rights. An international human rights regulatory system developed through consent is riddled with geographic gaps, is normatively thin, and evolves slowly given the

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² 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.”)

³ See infra notes 29-33 & accompanying text (describing difficulty in reconciling peremptory norms and the obligations of newly created States with consent principle).

encumbrances of consent-based lawyering.\textsuperscript{5} It also gives States, which are sometimes hijacked by self-serving elites, complete control over the development of human rights obligations, opening the door to abuse.\textsuperscript{6} Scholars, international institutions, and human rights activists have been critical of these drawbacks of the traditional, sovereignty-driven lawmaking mechanism to the protection of human rights.\textsuperscript{7}

To ameliorate these concerns some human rights actors have advocated for the diminishment of the consent principle. The International Court of Justice has promulgated a rule easing the formation of custom in the face of contrary practice.\textsuperscript{8} Scholars and activists also advocate for an ever-growing list of \textit{jus cogens} norms from which persistent objection is not permitted.\textsuperscript{9}

In treaty law, institutions involved in interpreting human rights treaties employ a teleological or evolutionary approach to interpretation that can result in locating obligations not agreed to by the parties.\textsuperscript{10} The Human Rights Committee (HRC), a treaty monitoring body (TMB) created by the International Covenant on Civil and Political Rights (ICCPR), has claimed the right to sever invalid reservations and hold States responsible for the original treaty provision, without subsequent opportunity for the State to exit the treaty.\textsuperscript{11}

All of these efforts have been premised on the belief that reducing the domain for State consent is a normative positive for a system oriented around protection of human rights, a belief left largely unchallenged in existing scholarship.\textsuperscript{12} But this analysis suffers from an important flaw: it treats consent as itself a static, States’ rights driven concept. In fact, the human rights revolution requires re-conceptualizing consent as well.

In a system oriented around the protection of human rights, the consent principle protects the collective right to self-determination provided that there

\textsuperscript{5} \textit{See infra} Part I (B) (providing human rights criticisms of the consent principle).

\textsuperscript{6} \textit{Id.}

\textsuperscript{7} \textit{Id.}

\textsuperscript{8} \textit{See} Military and Paramilitary Activities in and against Nicaragua (Nicar. V. U.S.) [hereinafter Nicaragua Case], Merits, 1986 ICJ Rep. 14, ¶ 186 (June 27) (announcing that contrary practice would be treated as confirming the existence of custom if defended consistently with a putative rule).

\textsuperscript{9} \textit{See} Dinah Shelton, \textit{Normative Hierarchy in International Law}, 100 Am. J. Int’l L. 29, 292 (2006) (describing efforts to expand the category of \textit{jus cogens} norms with little or no evidence of general acceptance by the international community as such).

\textsuperscript{10} \textit{Infra} notes 89-104 & accompanying text (describing uses of this approach by human rights adjudicatory bodies).


\textsuperscript{12} \textit{See infra} Part I (D) (describing prevailing responses against diminishment of the consent principle).
is a representative fit between the State and its people. The right to self-
determination grants all peoples a continuing right to use their respective States to self-direct development free from external intervention.\(^\text{13}\) This right reflects the intrinsic value that communities who share a common life place on self-government as a vehicle to make decisions about how to develop as a society.\(^\text{14}\) Consent protects self-determination because it gives the people of the State the right to decide which international human rights obligations to accept, which in turn conditions the manner in which society develops.\(^\text{15}\)

The representation caveat is not a minor one, however. States may fail to represent their people either because there are multiple peoples within a State who do not seek a common life together or because there is a government of self-dealing elites acting without internal legitimacy. Self-determination theory has not developed an agreed standard of representation to weed out States that are vehicles for self-determination of their people, and those that are not.\(^\text{16}\) Nevertheless, the fact that some number of States do not represent their people creates a human rights imperative for broadening the pool of potential lawmakers that would not exist in a world in which States lived up to the self-representation ideal.

But even if the world is not filled with representative States, there is value in considering the consequences for human rights lawmaking of a relationship between consent and self-determination. Under any representation standard a significant subset of States would be deemed agents of their people such that their acts are manifestations of self-determination. Moreover, a goal of international human rights law is the creation of more representative States; given this goal, it is important to understand the consequences for consent and human rights lawmaking if achieved.

The link between consent and self-determination suggest two important modifications to efforts to recalibrate the consent principle to improve the protection of human rights. First, consent gives the world’s peoples control

\(^{13}\) Self-determination is a treaty-based right located in both Covenants. See International Covenant on Civil and Political Rights art. 1(1), adopted Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural 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.”) 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.

\(^{14}\) See infra notes 135-39 & accompanying text (describing philosophical underpinnings of self-determination).


\(^{16}\) See infra Part II (B) (analyzing challenge representation issue poses to self-determination).
over the locus and pace of rights development. Efforts to modify consent must be cognizant both of the risk that consent is abused to prevent international regulation of human rights and that efforts to resolve this problem could impinge upon self-determination. This latter recognition is not always present in existing reform efforts.

Second, self-determination, like most human rights, is subject to limitation by competing human rights, providing a stronger philosophical foundation for sometimes departing from the consent principle. But because self-determination is a human right, limitations must be justified by a proper human rights consideration and be proportionate to that reason. Such analysis has not always accompanied efforts to modify the consent principle.

These general observations raised concerns about existing efforts to modify the consent principle. First, non-norm specific efforts to constrict the consent principle are deserving of heightened skepticism because they do not identify a specific human rights reason proportionate to the restriction on self-determination. While per se efforts to diminish consent may be justified if the representative link between the State and its people is generally absent, most such efforts to date have merely sought to transfer decision making authority from dissenting States to consenting States about the content of international law. Reform efforts which do not attempt to broaden the list of human rights legislators beyond States, do not address the representation conundrum.

Second, placement of norms into the peremptory category represents the most severe restriction on self-determination, meaning it must be supported by the weightiest of justifications. To date the only such accepted justification is general consensus by the international community that the norm falls outside the bounds of local decision making. Efforts to expand this category have paid insufficient attention to the reasons why such a drastic restriction on self-determination is required.

Third, self-determination justifies provision of a margin of appreciation to State interpretations of treaties. But soft law treaty interpretations are the most meager of restraints on self-determination. The unique status of human rights treaty bodies and courts may justify promulgation of treaty interpretations that depart from the consent principle for the limited purpose of enunciating developing community norms.

This Article proceeds in three parts. Part I lays out the contours of the complex relationship between human rights law and State consent. Part II argues that this relationship has been analyzed improperly because of a failure to value consent as a manifestation of self-determination where the State is representative of its people. Part III analyzes the consequences that flow from this relationship.

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**PART I: THE HUMAN RIGHTS CONSENT PROBLEM**
This Part undertakes four tasks. First, it describes the traditional State sovereignty driven account of consent in international lawmaking. Second, it explains why and how this account of the consent principle has been challenged by the emergence of human rights as a central guiding principle of the international system. Third, this Part describes efforts to ameliorate these concerns. Fourth, it offers the prevailing scholarly responses, which do not challenge the premise that the consent principle offers a normative challenge to the protection of human rights.

(A) The Consent Principle

There is no more axiomatic rule in international law than the 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.\(^{17}\) This rule emanates from a natural law conception of States in international law: States, like men, are free, independent and equal entities in the state of nature.\(^{18}\) As such, States possess rights by virtue of being States, the bundle of which constitute international legal sovereignty.\(^{19}\) Sovereignty includes recognition that States as autonomous entities have the right to decide whether to surrender a portion of its natural freedom and enter into international obligations.\(^{20}\) The consent principle operationalizes this right by using consent as a formal marker of the State’s agreement to limit its autonomy pursuant to a commitment to the international community.\(^{21}\)

In practice, this account of international law is insufficiently nuanced. Treaties and customary law respect State consent in different ways, and customary law in particular has nonconsensual elements.

\(^{17}\) *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.”)


\(^{19}\) *STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY* 14 (1999) (explaining international legal sovereignty is derived from Vattel’s concept of equal States living together in the state of nature). State sovereignty remains the formal guiding principle of the international legal system. *See* U.N. CHARTER art. 2(1) (“The Organization is based on the principle of the sovereign equality of all its Members.”); *id.* art. 2(7) (“Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state….”)


\(^{21}\) Consent is manifested through formal mechanisms, such as signature of the treaty or exchange of instruments of ratification. Vienna Convention on the Law of Treaties art. 11, *adopted* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].
States create treaty obligations through their affirmative consent.22 States use reservations to modify the content of the treaty obligation to match their consent.23 Reservations to multilateral human rights treaties are permissible so long as they do not violate the object and purpose of the treaty.24 Where a reservation is invalid, the reserving State is not bound by the provision without the reservation because it never consented to such an obligation.25 Rather, it is either not party to the treaty in its entirety, or simply not party to the provision with the disputed ratification.

Traditional customary norms are located through uniform, extensive and widespread state practice done with a sense of legal obligation (opinio juris). Those States engaging in practice that leads to custom affirmatively consent to the norm by opting to act consistently with the rule.26 Customary law does not merely obligate those States participating in the norm creation, however, as all non-persistently objecting States are bound. But not all States contribute practice relevant to the creation of each customary norm. Sometimes States don’t confront the issue that is the subject of the custom. In other situations the State may not have come into being until after the norm was formed. States in those situations are nevertheless bound by the customs absent persistent objection, thus creating an obligation without affirmative consent.

Instead, the doctrine of tacit consent presumes consent from a failure to dissent from the norm.27 States can dissent from the formation of custom 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

22 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 than its treaty relations a State cannot be bound without its consent.”)

23 VCLT, supra note 21, art. 1(d) (defining “reservation”).

24 Id., art. 19(c); Genocide Convention Case, supra note 22, at 24 (“The object and purpose of the Convention…limit…the freedom of making reservations…..”).

25 States generally self-police whether their reservations meet this requirement. A reservation to a multilateral human rights treaty 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. VCLT, supra note 21, at 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. Id. art 20(4)(b).

26 See 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).

27 See id. at 22 (explaining tacit consent theory).
persistently objecting to the rule at the time it is created.\textsuperscript{28}

Nevertheless, there are at least two aspects of customary law practice depart from the consent principle. First, \textit{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.”\textsuperscript{29} 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 achieving elevated status.\textsuperscript{30}

But general acceptance does not mean each and every State has consented. Once a norm achieves \textit{jus cogens} status, dissenting States lose the right to remain outside the norm through persistent objection. As a consequence, it is possible that a \textit{jus cogens} norm will bind a State that affirmatively indicated a desire not to be bound by the norm. For example, once the apartheid norm became peremptory it bound South Africa and Rhodesia, even if they were persistent objectors to such a norm in the past.

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.\textsuperscript{31} 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.\textsuperscript{32} Similar criticism has been rendered against attributing tacit consent to States who were unaware entirely of the formation of a custom until after it was formed.\textsuperscript{33}

These two areas of practice demonstrate inconsistencies with respect to the role of State consent even in traditional international legal theory and practice. Doctrine has long recognized circumstances in which particular States have been bound to customs without their affirmative consent or anything more than

\textsuperscript{28} See id. at 27 (affirming validity of persistent objector rule).
\textsuperscript{29} VCLT, \textit{supra} note 21 at art. 53.
\textsuperscript{31} See ANTHONY D’AMATO, \textsc{International Law: Process and Prospect} 13-25 (1987) (describing customary norms as inherited obligations required to participate in the international order); THOMAS M. FRANCK, \textsc{Fairness in International Law and Institutions} 44-45 (1996) (describing these rules as associative obligations of participation in the international system).
\textsuperscript{33} See Jonathan Charney, \textit{Universal International Law}, 87 Am. J. INT’L L. 529, 537 (1993) (criticizing practice of giving weight to State silence when “many states do not know law is being made and therefore have not formed an opinion”).
an illusory opportunity to dissent. Instead, a more accurate rendition of the consent principle is that it establishes State consent is the primary and typical route by which international legal obligations are created. But it also recognizes a limited set of circumstances in which customary norms are obligatory for unaware or even dissenting States.

(B) Human Rights Criticism of the Consent Principle

The emergence of international human rights law has led some scholars to challenge the premise that States’ rights ought to be the heart of the international legal system. Instead they argue that humans, not States, ought to be the central animating figures of international law. The State is not a true person of course, and its anthropomorphic characterization misses why States matter: they are primarily discretionary associations that exist to advance the interests of their people. As such State sovereignty is valuable only for the instrumental benefits it provides for the protection of human rights.

Anne Peters moves from “ought” to “is,” making the strong descriptive claim that today human rights have replaced State sovereignty as the foundation of the international legal system. She argues that the recognition of the so-called “responsibility to protect,” which provides that States lose their protection from intervention when they are unwilling or unable to protect their population from gross violations of human rights, reveals the ascendancy of human rights. Thus, according to Peters while States retain control over the lawmaking process, State sovereignty has “legal value only to the extent that it respects human rights, interests, and needs.”

If in fact the protection of human rights has replaced or ought to replace State sovereignty as the foundation of international law, then the consent principle must be reexamined. While a primarily voluntary legal system

34 See, e.g., FERNANDO TESÓN, A PHILOSOPHY OF INTERNATIONAL LAW 39 (1998) (describing shift in focus of the international legal system based upon an acceptance than internal legitimacy of States to people should be the foundation of respect for State sovereignty); ALLEN BUCHANAN, JUSTICE, LEGITIMACY AND SELF-DETERMINATION, MORAL FOUNDATIONS FOR INTERNATIONAL LAW 289-327 (2004) (arguing that a justice-based account of legitimacy oriented around protection of human rights should replace State sovereignty as the legitimating principle for international law).

35 See TESÓN, supra note 34, at 40 (arguing that sovereignty is valuable for its instrumental benefits in protecting human rights and has moral weight only with respect to States that are internally legitimate).

36 See Anne Peters, Humanity as the A and Ω of Sovereignty, 20 EUR. J. INT’L L. 513, 514 (2009) (arguing that the contest between State sovereignty and human rights as the “Grundnorm” for international law has been resolved in favor of human rights).


38 Peters, supra note 36, at 514.

39 Id.
protects States’ rights, it results in a human rights regulatory scheme with attributes that are worrisome from the perspective of protecting human rights.

First, the consent principle results in international human rights regulation akin to a thin slice of Swiss cheese. It contains holes in coverage because a State or group of States may decline to consent to an otherwise widely agreed to treaty norm, or may block application of a custom to it through persistent objection. The regulations that do exist are “normatively thin,” in order to foster the consensus between widely divergent cultures and self-interested governments needed to create an international obligation. And there are generally no adjudicatory institutions with the capacity to interpret vague norms in a manner that creates greater clarity about the content of the norm.

Consider, for example, the mandate found in the International Covenant on Civil and Political Rights [hereinafter ICCPR] that States criminally prohibit hate speech that amounts to incitement of discrimination, hostility or violence. Some States like China are not parties to the ICCPR at all; others, like the United States, have taken a reservation to the treaty that restricts the application of the provision within its territory. Thus, there are geographic spaces where this provision does not apply.

Moreover, the terms like “national, racial, or religious” hatred are subject to divergent interpretations, especially given cultural differences. This vagueness gives States wide interpretative latitude over the content of human rights norms. While such vagueness is frequently characteristic of law generally, municipal legal systems include adjudicatory institutions whose job it is to fill gaps in statutory and constitutional language. By contrast, the ICCPR creates no adjudicatory institution with a mandate to provide a binding interpretation of what these terms mean for the Parties. The result is a

42 See ICCPR, supra note 13, art. 20(2) ("Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.").
43 The U.S. reservation excludes any obligation to pass criminal laws inconsistent with the First Amendment to U.S. Constitution.
45 Carozza, supra note 41, at 60-63.
46 See Harlan G. Cohen, International Law’s Erie Moment (forthcoming 2013) (contrasting acceptance that municipal courts will engage in gap filling with concerns about international adjudicatory institutions engaging in similar activities).
47 As discussed later, the ICCPR creates a Human Rights Committee to monitor State compliance, which has at times asserted a right to play this role, although such a role was not
relatively “thin” legal rule, with no easy mechanism for thickening it.

A relatively thin, gap riddled international human rights regulatory scheme is a function of human rights lawmaking privileging States’ rights. Geographic gaps in coverage respect the right of the sovereign in that territory to opt out of international regulation. The thinness of the norms reflects the desire of States to preserve sovereign flexibility in application of the norms.

But such a system has normative problems from the perspective of the protection of human rights. The current system is potentially in tension with the promise of universal human rights, a core objective of the human rights movement. It is a philosophical challenge to international human rights for these rights to mean different things in different places. This challenge is deepened to the extent a thin international regulatory system reflects the efforts of self-dealing elites to deny their people rights that they deserve by virtue of being human.

This philosophical challenge is also a practical one because the consent principle sometimes abets States in abusing people free from the constraints of international law. The United States, for example, used the existence of legal gaps in the legal framework governing conflicts with non-State actors to arguably torture detainees in its conflict with al Qaida. Preventing such atrocities from occurring is the core objective of the human rights movement.

Second, the consent principle slows the pace of development of human rights norms. The traditional international lawmaking mechanism has an inherent “status quo” bias because of the hurdles that exist with respect to formally granted in the treaty.

48 See Universal Declaration of Human Rights art. 2 (“Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”)


creating new law or altering existing law. This bias is particularly stark with respect to human rights.

Securing consensus between groups of States on new human rights treaty obligations is a cumbersome process due to deep cultural differences that exist with respect to the practices that are the subject of human rights norms. Once treaties exist, changing their terms generally requires unanimous consent, which empowers laggard States to delay changes unless their particular concerns are addressed. While the Vienna Convention on the Law of Treaties allows regular practice between treaty parties to modify the meaning of a treaty without new negotiations, there is limited inter-State practice on human rights questions given that most human rights activity takes place within the State.

The process of locating new customary norms is even slower. Demonstrating that there is a pattern of uniform, widespread and extensive State practice with respect to a human rights norm will take significant time, both to actually develop and to be documented by the actor seeking to establish a custom. The pace may be further retarded by the search for evidence of opinio juris separate and apart from the consistent practice.

This slow pace of legal development is a function of a system oriented toward protecting States’ rights. States make a momentous choice when opting to surrender a portion of their domestic sovereignty to international regulation, especially where the issue at question is the relationship between the government and its people. They must be afforded proper time to make this decision, and if the result is a slow pace of evolution for international human rights, so be it.

But again, this analysis changes if protection of human rights is the relevant touchstone. Human rights terms, perhaps more than other kinds of treaty terms, acquire different meanings over time. For example, the meaning of “cruel,


54 See VCLT, supra note 21, art. 31(3) (attributing weight in treaty interpretation to subsequent practice between treaty parties).

55 See Simma, supra note 44, at 187-188 (describing lack of practice). Most practice, such that it is, consists of statements made at bodies like the Human Rights Council and the Third Committee.


inhuman and degrading,” by definition is not static, as practices once widely
accepted are later viewed as barbaric and inconsistent with human rights. The
relevance of human rights obligations over time depends upon those
obligations evolving.59 To the extent that the consent principle stands in the
way of this evolution, then changes to the consent principle must be
considered.

(C) Loosening the Consent Principle

Given the limitations of the consent rule imposes upon the protection of
international human rights, it is not surprising that many scholars, human rights
advocates, and human rights institutions have sought to loosen its strictures.
This Part describes those efforts.

i. Customary Law

Two important developments related to customary law seek to reduce the
ability of individual States or small groups of States to dissent from customs
favored by other States.

First, the ICJ has promulgated a rule easing the formation of custom. 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 prohibition on
torture.60 The failure to recognize the formation of custom in those
circumstances protects the inherent right of sovereigns to choose how to treat
their citizens within their territory. If States opt not to recognize a human rights
custom, then they should not be bound.

But such an outcome produces the potential negatives for the protection of
human rights discussed in the previous section. Customary law provides a
unique opportunity to bind most States to any particular norm, given that some
number of States will choose not to join any human rights treaty. Thus, the
harder it is to create customary law, the more likely it is that there will be
geographic gaps in human rights protection. Moreover, the traditional rule
enshrines a slow pace for legal development given the indefinite and perhaps
infinite time it will take for the world’s States to arrive at widespread,
extensive and uniform practice with respect to any human rights question.

59 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”).

60 See Bellinger & Padmanabhan, supra note 52, at 212-13 (describing difficulties inherent in
locating human rights custom).
In the *Nicaragua Case* the International Court of Justice (ICJ) promulgated a rule to ease formulation of custom that has proven important in the area of human rights.\(^{61}\) 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.\(^{62}\) There are so many examples of States violating Article 2(4) that under traditional doctrine the existence of custom is difficult to establish. But the ICJ 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.\(^ {63}\)

This change makes it more difficult for States to dissent from a putative human rights custom. Rather than their action alone registering contrary practice, their explanations of their actions are also evaluated. On the surface this change may not appear dramatic; if a State does not consent to the existence of a rule, why would it attempt to defend its action consistent with the putative rule? In reality States have political or economic reasons for describing their conduct in a manner that is more pleasing to the international community that has nothing to do with accepting the existence of a legal obligation.\(^{64}\) Requiring States to disavow those contrary policy objectives in order to dissent from creation of a customary norm imposes potentially significant additional costs on dissent.

Consider the sometimes proclaimed customary duty to prosecute those involved in international crimes, such as genocide, crimes against humanity and serious war crimes. Scholars have described this duty as customary.\(^{65}\)

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61 The powers of the ICJ are limited to deciding disputes between States, and it has no formal authority to alter rules on the formation of custom. Statute of the International Court of Justice [hereinafter “ICJ Statute”] art. 59 (“The decision of the Court has no binding force except between the parties and in respect of that particular case.”) But the ICJ approach in the *Nicaragua Case* has been widely adopted by States and scholars as the method for evaluating contrary practice in the context of human rights and humanitarian norms. See, e.g., Jean-Marie Henckaerts, *Customary International Humanitarian Law: a response to US comments*, 89 INT’L REV. RED CROSS 473, 478-480 (2007) (arguing application of *Nicaragua* rule is essential to prevent “violators to dictate the law or stand in the way of rules emerging”).

62 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.”)

63 *Nicaragua Case*, supra note 8, at ¶ 186. The court found that the content of Article 2(4) was indeed customary law.

64 See Bellinger & Haynes, supra note 57, at 445 (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).

despite the regularity with which States have granted amnesties to those who allegedly committed such crimes. They make this claim by using the Nicaragua rule to convert the contrary practice of States into a form of consent to the rule. These scholars argue that if a State granting amnesty invokes exigent circumstances—like national reconciliation or fragility of the democratic transition—to explain amnesties, they are implicitly accepting that they need to explain deviations from the rule. Why else would they feel the need to offer an explanation for choosing amnesties over prosecutions?

But in reality there may be many reasons for these explanations that have nothing to do with accepting a duty to prosecute. States which use amnesties 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. Thus their statement, while an acknowledgment that Western States might view a duty to prosecute as customary, may not be a statement of agreement to that effect. Alternatively, States simply may have been offering reasons why they opted for one policy over another, with no intention of accepting any legal obligation. Requiring States to forego those policy or economic benefits to dissent from the duty to prosecute imposes a significant new restriction on the consent principle.

Second, some scholars and human rights activists have pushed to increase the number of peremptory norms that by definition bind even dissenting States. 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 through timely, persistent, and open objection to the rule. As described in Part I.A, the consent principle recognizes a limited exception to this rule in the case of peremptory norms, identified as such by their recognition and acceptance by the international community of States. The existence of this exception reflects

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68 Bruno Simma argues that the Nicaragua rule is justifiable when evaluating practice that is inconsistent with an existing rule of custom, but far less sensible when examining practice to determine whether there is custom in the first place. Simma, supra note 44, at 220. The diminishment of the consent principle only arises in the latter circumstance. States have traditionally enjoyed the ability to dissent from the formation of custom through contrary practice, a right made more difficult by this rule. By contrast, once a rule is formed States have no right to dissent through contrary practice, as such conduct would be a violation of the rule until sufficient practice has accumulated to defeat the conclusion that the rule still exists.

69 VCLT, supra note 21 at art. 53.
willingness, even in the sovereignty-driven account of consent, to recognize that a small number of peremptory norms will trump the sovereign right of individual States to control the content of their international legal obligations.

But some potential benefits accrue for the protection of international human rights from increasing number of peremptory norms. *Jus cogens* norms solve the problem of geographic gaps in coverage because they are by definition applicable globally, not providing States the opportunity to dissent through persistent objection.\(^{70}\) Not surprisingly then, human rights advocates and scholars have created a cottage industry in proclaiming human rights norms *jus cogens*.\(^{71}\)

Some notable human rights scholars contend that all human rights are *jus cogens*.\(^{72}\) Other scholars, taking a slightly more restrained view, have argued that a wide range of human rights norms are *jus cogens*, including the duty to assassinate political leaders in certain circumstances;\(^{73}\) the right to development;\(^{74}\) and the right to free trade.\(^{75}\)

In making these pronouncements scholars and activists must wrestle with the difficulty of establishing that a particular norm or body of norms is generally accepted and recognized as peremptory by the international community of States as a whole. Scholars and activists often have asserted that norms fall into this category presentation of much—or any—evidence that there is general support in the international community for treating the norms

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\(^{70}\) Jonathan Charney made a more direct effort at restricting the right of persistent objection, arguing that persistent objection be permitted only during the period before a custom is formed. If that objection was insufficient to prevent the formation of custom, even those States which had been in persistent and open objection to the norm should be bound, he contended. Jonathan I. Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 1 Austl. Y.B. Int’l L. 1, 22. Professor Charney’s argument has not been widely adopted, however. See Int’l Law Ass’n, *supra* note 26, at 27 (confirming existence of persistent objector rule despite scholarly criticism).


as such.  

As an example consider again the customary duty to prosecute. Some scholars argue that this duty is not only customary but jus cogens and thereby not subject to persistent objection. But they do so without providing evidence that there is general acceptance in the international community that this duty is non-derogable. M. Cherif Bassiouni, for example, asserts the duty to prosecute is “inderogable” and “mandatory” based upon the conclusions of the international community that the crimes that are the subject of the duty are peremptory limitations on State power. Bassiouni makes no effort catalog evidence that the duty to prosecute itself is viewed as peremptory by States.

Scholars do so because this position closes geographic gaps in coverage for the norm. While many States have engaged in practice inconsistent with the norm historically, in recent years African States have openly 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. 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, amnesties issued by African States are simply illegal under international law, because persistent objection is not recognized. The result is a significant diminishment of the consent principle.

ii. Treaty Law

Unlike customary law, treaty law has traditionally epitomized the consent principle; States only have those treaty obligations to which they have consented. But TMB and human rights courts have used techniques in interpreting their treaties that depart from the consent principle.

Human rights treaties have created a range of institutions to monitor treaty compliance and/or adjudicate disputes arising under treaties. Most U.N. sponsored international human rights treaties have TMB, which are empowered to monitor State compliance with the treaties. In the course of their duties,

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76 See Shelton, supra note 9, at 292 (criticizing practice of writers and international tribunals to assert norms are peremptory “without presenting any evidence”).

77 See M. Cherif Bassiouni, Searching for Peace and Justice: The Need for Accountability, 59 Law & Contemp. Prosbs. 9,17 ( Autumn 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, 2608-09 (1991) (describing as “untenable” a position which permits derogations from the duty to prosecute).


79 There are currently eight human rights treaty monitoring bodies with a ninth, covering
TMB issue concluding observations regarding State performance with the treaty; general comments regarding interpretation of the treaty; and, in some cases, views on disputes regarding compliance with the treaty raised by private actors and States.\(^80\) As a formal matter TMB have not been given lawmaking authority.\(^81\) But as a practical matter, their treaty interpretations are very influential in shaping State understandings with regard to their obligations under the treaty.

As experts on their treaties, TMB interpretations carry sufficient “authority signals” with the audience such that they exercise significant compliance pull.\(^82\) The International Law Association found that most States, while rejecting any formal lawmaking authority for TMB, 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.\(^83\) Even in the rare instances where a State puts forward an alternative interpretation, the TMB interpretation is as a baseline for a dialogue with the State on the nature of the obligation in question.\(^84\)

Some regional human rights instruments have created human rights courts with jurisdiction to hear disputes arising under the treaty.\(^85\) Unlike TMB, the pronouncements of these courts are binding with respect to the parties to the case.\(^86\) The decisions of these courts are not formally binding on other parties to the treaty. But the likelihood that subsequent cases will be brought against

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\(^81\) The ICCPR parties, for example, intended the HRC to play a supporting role in assisting the Parties in implementing the treaty, not a court-like legal development role. MANFRED NOWAK, U.N. CONVENANT 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”).

\(^82\) See W. Michael Reisman, A Hard Look at Soft Law, 82 AM. SOC’Y INT’L L. PROC. 373, 373 (1988) (providing criteria by which to judge whether soft law is law).


\(^84\) 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), [http://www.state.gov/g/drl/rls/55504.htm](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.


\(^86\) See ECHR, supra note 85, art. 46(1); American Convention, supra note 85, art. 68(1).
the State parties resulting in a similar outcome creates an even stronger impetus for compliance by all parties than TMB interpretations.87

The traditional approach to treaty interpretation uses the expectations of the State parties to the treaty as the touchstone for interpretation.88 Such a rule protects State sovereignty by leaving in the hands of States alone the creation and modification of treaty obligations. It is incumbent upon non-State institutions engaged in treaty interpretation to display fealty to State expectations so as to avoid infringing on State autonomy.

But such an interpretative technique is dissonant with a system oriented around the protection of human rights, as discussed in Part I(B). Securing consensus on treaty terms requires negotiating terms that are open-ended and vague, with wide latitude in implementation. Such latitude imbues human rights law with a normative thinness. It also results in human rights obligations being interpreted differently across States, which is in some tension with the promise of universal human rights. Fealty to the expectations of the State parties will also retard the evolution of human rights treaty terms, given the paucity of inter-State practice available to alter the original meaning of the terms.

To ameliorate these concerns, human rights bodies engaged in treaty interpretation often use a teleological or even evolutionary approach to interpretation.89 Such an approach is based upon the rule in the VCLT requiring treaties to be interpreted consistently with their object and purpose—here protecting human rights.90 These bodies argue that this purpose requires them to employ plausible interpretations of treaty text that are most favorable to human rights, as opposed to an interpretation that prioritizes fealty to State intent.91

Two examples illustrate this approach. First, the Women’s Committee has

87 See Laurence R. Helfer & Erik Voeten, International Courts as Agents of Legal Change, 67 Int’l Org. (forthcoming 2013) (arguing that gay rights decisions by the ECtHR have influenced policies of States that are not parties to the decision).

88 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 21, art 31(3).

89 See Simma, International Human Rights and General International Law, supra note 44, at 187 (quoting ECtHR judges on the need for evolutionary interpretation of the European Convention on Human Rights). See also Mechlem, supra note 79, at 908 (describing criticisms of treaty monitoring bodies for departing from traditional treaty interpretation techniques).

90 VCLT, supra note 21, art. 31(1) (requiring treaties be interpreted in light of their “object and purpose”).

used an evolutionary approach to treaty interpretation to locate at least a partial right to an abortion within the Convention for the Elimination of Discrimination Against Women [hereinafter “CEDAW”].

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 that the States negotiating this article did not intend 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 Committee rejected the argument that article 12 has implications for abortion. There was also no subsequent practice or agreement between the Parties modifying article 12.

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 it 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.

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92 The HRC has also engaged in an evolutionary approach to treaty interpretation on the abortion question. In has interpreted Articles 7 and 17 of the ICCPR to require States to provide at least a medical exception to abortion laws. K.L.N.H. v. Peru ¶ 6.3-6.4. It has done so despite strong evidence that these provisions were not intended to cover abortion rights. There was an intense debate about abortion in the context of article 6. See Nowak, supra note 81, at 153-55 (describing debate regarding whether Art. 6 “life” begins at conception). The absence of such a debate in the context of articles 7 & 17, as well as the decision of States with total abortion bans to join those provisions without reservation, suggests strongly that these provisions were not intended to have abortion implications.


96 See id. 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).

97 Such subsequent agreements are exceedingly rare in human rights law, given that most practice is intra-State rather than inter-State. Simma, supra note 44, at 188. Subsequent practice must be inter-State to modify the treaty in order to comply with the consent principle, as it must reflect a shared, agreed to change in interpretation of the treaty provisions.
Such a requirement led the Women’s Committee to interpret Article 12 to require States to repeal “laws that criminalize medical procedures only needed by women.” 98 Specifically, it stated that “legislation criminalizing abortion should be amended, in order to withdraw punitive measures imposed on women who undergo abortion,” when possible. 99

Another example of an evolutionary or teleological approach to treaty interpretation is found within the decisions of the European Court of Human Rights (ECtHR) on the right of non-refoulement, or right not to be transferred to face torture or cruel, inhuman or degrading treatment. 100 The European Convention on Human Rights (“ECHR”) does not contain an express non-refoulement provision. Article 3 of the ECHR prohibits torture, but does not make mention of transfers. European States parties have argued that they did not intend to create a non-refoulement obligation when negotiation Article 3, 101 nor is there evidence that the subject was raised during the negotiations of the provision.

Nevertheless, the ECtHR has used an evolutionary approach to interpretation to locate within Article 3 non-refoulement protection. The Court explains that the object and purpose of the treaty, which is to protect human rights, and “to promote the values and ideals of a democratic society,” requires expanding Article 3. 102 The Court found the Article 3 non-refoulement right to be absolute, rejecting potential security exceptions. 103 It recently expanded the protection to include the right not to be transferred to face trial where evidence at that trial may have been obtained using torture. 104

This approach to treaty interpretation difficult to reconcile with an international legal system oriented around State sovereignty. 105

99 Id. ¶ 31(c).
100 The HRC has similarly used an evolutionary interpretative approach to locate a non-refoulement right within Article 7 of the ICCPR. Human Rights Comm., General Comment no. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant ¶ 12, U.N. Doc. CCPR/C/21 (Oct. 3, 1992). It has done so despite evidence that the Parties never intended for the prohibition on cruel, inhuman and degrading treatment to include a non-refoulement provision. 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) (describing problems with this jurisprudence).
104 Othman v. United Kingdom
105 Some scholars have made the argument that States in effect consent to human rights institutions engaging in gap filling, at least where those institutions are given authority to make
institutions are attempting to use either their power to issue binding decisions or the power of the bully pulpit to pressure States to recognize new international obligations. But a robust lawmaking role for TMB and human rights courts potentially addresses some concerns about a voluntary human rights system described in Part I(B). These decisions add a detailed heft to previously thin provisions, thereby combating normative thinness. They also allow potentially static treaty provisions to evolve with changing social expectations, which is unlikely to occur if one were to wait for States to “update” treaty terms through subsequent agreement or practice. It also introduces non-State actors into the lawmaking process, thereby breaking the potentially troublesome monopoly of States in lawmaking.

One TMB interpretation with particular effect on the consent principle is the HRC’s jurisprudence on reservations. A persistent source of irritation in human rights treaty practice among some scholars and activists is the use of reservations by treaty parties to alter their obligations arising under treaties.

binding interpretations of the treaty. 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) (arguing that the open-ended nature of human rights terms combined with creation of an adjudicatory institution invites judge-driven lawmaking). While the creation of these institutions implies consent to some judge-made law, it is not clear that parties to treaties like the ECHR intended for human rights courts to depart from the general rule that the intent of the parties should be the touchstone for interpretation. The United Kingdom, for example, has expressed its view that the ECtHR’s non-refoulement jurisprudence exceeds the Court’s mandate. See John F. Burns, Britain Releases and Curbs Extremist, N.Y. TIMES, Feb. 14, 2012, at A6 (describing hostile reaction of Conservative MPs to ECtHR decision rejecting deportation of a radical Muslim cleric).

Andrew Guzman and Tim Meyer’s research suggests there may be a division between parties to human rights treaties as to the extent to which they favor courts assuming a lawmaking function. They contend that States that wish for greater international regulation of human rights agree to create international institutions to adjudicate disputes arising under treaties without including States opposed to greater regulation. They do so out of the expectation that these institutions will create jurisprudence that will overtime pressure non-participating States to accept greater levels of international supervision. Andrew Guzman & Timothy Meyer, International Soft Law, 2 J. LEGAL ANALYSIS 171, 202 (2010). This theory suggests that some State parties to a human rights treaty are indeed consenting to evolutionary treaty interpretation in order to gap fill, while other parties are not. The constriction of the consent principle occurs with respect to non-consenting States.

Thomas Fuller and Abraham Sofaer have argued that when States comply with TMB pronouncements they implicitly consent to their lawmaking role. 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). It is generally the case that States retain control over whether to comply with treaty obligations, whether through non-compliance or treaty-exit, meaning such obligations are not purely nonconsensual. But pressuring States to accept new human rights obligations through the stain on reputation of being labeled a lawbreaker constrains the consent principle to varying extents depending upon the intensity of coercion behind the effort. Coercion is greater with human rights courts, who issue binding judgments, than with TMB.

See, e.g., Kenneth Roth, The Charade of U.S. Ratification of International Human Rights Treaties, 1 Ctri. Int’l’l L. 347, 351-352 (2000) (accusing the U.S. of abusing the use of reservations to avoid providing its people the protections of the ICCPR); William A. Schabas, Reservations to the
Reservations permit States to join multilateral human rights treaties while undertaking only those obligations they wish to undertake. While reservations help increase the number of parties to a human rights treaty, they also incur several burdens of the consent principle identified in Part I.B.

Reservations contribute to the “thin slice of Swiss cheese” nature of human rights regulation. States or groups of States use reservations to exclude applicability of particular treaty provisions from their territory and jurisdiction, thereby creating geographic holes in treaty application. States also use reservations to modify the content of treaty provisions in order to maximize flexibility for State compliance. Doing so “thins” out the norms, as it allows a wide-range of compliant conduct. In so doing, reservations undermine the general premise of “universal” human rights, turning them instead into much more an à la carte menu to be chosen from by individual States.

As described in Part I.A, States are limited in the reservations they may employ, however, as they must be consistent with the “object and purpose” of the treaty. But in reality, this rule fails to provide a meaningful restraint on reservations to multilateral human rights treaties for two reasons.

First, States rarely police the reservations of other States to human rights treaties because they are of limited interest to other States. This reality has led to a proliferation of reservations.

Second, if a reservation is invalid, the presumed remedies are either allowing the State to remain part to the treaty without the provision to which the reservation attached, or invalidating the ratification entirely. The former leaves the State in more or less the same position as if its invalid reservation were valid, while the latter leaves the people of the State without the protection of the treaty.

Frustrated with the impact of reservations, the HRC announced in General Comment 24 that where reservations are inconsistent with the object and purpose of the treaty, it would sever the reservation and hold the State to the original treaty provision without the reservation.

To understand what this means in practice, consider the experience of Trinidad & Tobago with respect to its reservations to the Optional Protocol (OP) to the ICCPR. The OP grants the HRC jurisdiction to hear complaints regarding alleged State violations of the ICCPR. Trinidad & Tobago joined the

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108 See Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 ICJ Rep. 15, 24 (May 28) (viewing increasing the number of adherents to the Genocide Convention as one of its purposes).

109 Id. at 29.

OP with a reservation denying the HRC jurisdiction over petitions by death row prisoners. 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. The result is that the HRC exercised jurisdiction over petitions by death row prisoners despite Trinidad & Tobago’s desire to avoid such an outcome.

From a traditional sovereignty perspective, this outcome is worrisome as it results in a State being bound to an obligation to which it did not consent. Often States would have the option of exit from the treaty if their reservation were severed. But the HRC has separately concluded that States cannot withdraw from the ICCPR once becoming party. If these two rules were both in effect, then States whose reservations were severed would be bound non-consensually.

But if the protection of human rights is the measuring stick, then HRC approach makes much more sense. It reduces the ability of States to employ invalid reservations—which harm core human rights equities—while preserving the protections of the treaty more generally.

(D) Counter-Reaction

Scholars and States opposed to diminishing the role of consent in human

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113 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). Ryan Goodman makes the admittedly counterintuitive argument that a rebuttable presumption in favor of severance actually better protects consent given the costs of requiring States to re-ratify treaties with invalid reservations. Ryan Goodman, Human Rights Treaties, Invalid Reservations and State Consent, 96 AM. J. INT’L L. 531, 537 (1996) Ryan Goodman, Human Rights Treaties, Invalid Reservations and State Consent, 96 AM. J. INT’L L. 531, 536 (1996). But Goodman’s proposal differs from the HRC approach in two ways that would minimize encroachment on the consent principle. First, his touchstone for the rebuttable presumption is whether the State intended the reservation to be an essential condition of ratification. Id. Such an inquiry would attempt to be true to State intent in the case its reservation was invalid. Second, Goodman assumes States can exit from a treaty if the presumption is applied incorrectly. Id. at 556. While the opportunity to exit is not a perfect protection for consent, it is certainly greater than what the HRC approach permits, given that it views exit from the ICCPR as barred by the treaty.

114 See U.N. Human Rights Comm., General Comment No. 26, The Continuity of Obligations, ¶ 5, U.N. Doc. CCPR/C/21/Rev.1/Add.8/Rev.1 (1997) “(The Committee is therefore firmly of the view that international law does not permit a State which has ratified or acceded or succeeded to the Covenant to denounce it or withdraw from it.)
rights lawmaking challenge the paradigm shift identified as central to this effort. Some States and scholars reject the premise that international law has shifted or ought to shift from State sovereignty as its touchstone to the protection of human rights.

During its 2006 presentation regarding U.S. compliance with the ICCPR, a U.S. official informed the HRC that “it was not for the Committee to change his country’s obligations flowing from the Covenant, or to issue authoritative guidance in that respect.”115 Consistent with this statement, the United States rejects recommendations from TMB that create unintended obligations for the United States because lawmaking is outside the mandate of TMB. Other States, including France117 and the Netherlands,118 have criticized TMB in similar terms.

A small number of pro-sovereignty American scholars justify this position as essential to the preservation of American exceptionalism.119 These scholars are skeptical of efforts to place human rights above sovereignty, viewing so-called human rights concerns as liberal positions favored by academics, NGOs, and government officials that have been rejected by the American voter. Failing to prioritize the right of the United States to decide which human rights obligations it wishes to undertake, strips legislative and judicial power away from Congress and the federal courts, which these scholars view as normatively problematic.120

117 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.”)
John Bolton, for example, takes direct aim at the so-called duty to prosecute described in Part I(C). Bolton challenges the proposition that a duty to prosecute is positive for human rights, viewing this effort at geographic gap filling as an effort to impose the “value preferences” of academics and activists on unsuspecting States.\(^{121}\) He instead favors leaving the decision to undertake such an international duty in State hands. Bolton explains that such decisions go to the heart of “national autonomy” properly protected by State sovereignty, and fears that efforts to undermine that autonomy are part of efforts to bring the United States and other States to heel of the “globalist” agenda.\(^{122}\)

Other critics are skeptical that there is such a thing as universal human rights around which to orient the international system. These critics fear that such rights are the culturally contingent preferences of the internationally powerful that they seek to impose on the weak.\(^{123}\) Scholars making this argument note the existence of cultural differences with respect to human rights questions. If in fact these differences reflect the absence of true universal human rights, then State sovereignty is a potential bulwark against imposing the values of particular States or social groups on dissenting cultures.

This criticism is most trenchant when made by developing world critics who view consent as a protection for weaker States from the moral imperialism of Western Europe and the United States.\(^{124}\) 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.\(^{125}\)

Makau Mutua, for example, describes a “savages-victims-saviors” metaphor at the core of human rights law, in which Western actors demonize States with non-western cultural foundations as savages for victimizing their own population. This metaphor, he contends, permits human rights law and its advocates to portray themselves as saviors, much as missionaries or colonialists about looking to the writings of “legal academics, human rights activists, and international institutions” in interpreting human rights norms; Julian G. Ku, The Delegation of Federal Power to International Organizations: New Problems with Old Solutions, 85 MINN. L. REV. 71, 72-73 (2000) (describing constitutional concerns of international delegation).

\(^{121}\) Bolton, supra note 119, at 213.

\(^{122}\) See id. at 212-13 (describing elaborate “globalist” conspiracy to undermine sovereign prerogative).

\(^{123}\) See, e.g., MUTUA, supra note 50, at 10 (describing Western authors of the universal human rights movement); Paul S. Berman, Global Legal Pluralism, 80 S. CAL. L. REV. 1155, 1190 (2005) (“[T]he presumed universal may also be the hegemonic.”); Weil, supra note 71, at 441 (describing nonconsensual formation of customary norms as transferring lawmaking authority to a “de facto oligarchy” of the international community)


\(^{125}\) See MUTUA, supra note 50, at 10 (arguing that resisting the current Eurocentric human rights model is essential to the future of human rights as a global movement).
once did. The result is a “Eurocentric ideal” of human rights that lacks legitimacy in the developing world. Consistent with this view, Mutua extols consent as a sacrosanct protection from Western domination.

In addition to this lively debate about the merits of shifting the focus of international law from State sovereignty to protection of human rights, there is also a debate about the impact diminishing the consent principle will have on compliance with human rights. International human rights law largely depends on voluntary compliance because of the general absence of coercive enforcement mechanisms. While in other areas of international law, States may use their full range of diplomatic and economic tools to enforce international commitments, violation by one State of its human rights commitments is of little interest to other States. Thus, States are largely left to self-comply with human rights obligations.

Given the dependence on self-compliance, one concern raised with diminishing the role of consent in lawmaking is that it will increase the risks of noncompliance. If the goal of human rights law is to change State behavior, then it may be pointless to create rules that States have no intention of following. By contrast, Andrew Guzman argues that even human rights norms with spotty compliance rates serve an important purpose. 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.

These debates suggest that the scholarship has viewed consent as a static attribute of State sovereignty. Scholars disagree about whether international

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126 See id., at 10-12 (developing metaphor).
127 Id. at 12.
128 See id. at 108 (“[T]he most fundamental of all human rights is self-determination and…no other right overrides it.”)
130 See Goodman & Jinks, supra note 19, at 629 (noting that externalities from human rights violations, such as massive refugee flows, are sporadic and localized).
131 There are different theories offered as to why this might be so. See Jack L. Goldsmith & Eric A. Posner, The Limits of International Law 10-14 (2005) (offering an explanation from a rationalist perspective); Laurence R. Helfer, Nonconsensual International Lawmaking, 2008 U. Ill. L. Rev. 71, 119-121 (doing same from realist, liberal and expressive perspectives).
132 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).
133 See id. at __ (using norms of genocide and crimes against humanity as examples).
law ought to privilege State’s rights or compliance rates. But there is no normative defense of State consent that accepts the premise that international law should be oriented more toward protection of human rights, than States’ rights. 134 Part II provides such a defense.

PART II: MOORING CONSENT TO HUMAN RIGHTS

Part I described the contours of the human rights consent problem. The consent principle, rooted in protection of States’ rights, raises concerns from the perspective of the protection of human rights. These burdens have led to arguments in favor of diminishing the consent principle. While there have been scholarly critics of this effort, they have failed to mount a normative challenge to the premise that a system oriented toward the protection of human rights ought to reduce the scope of the consent principle.

This Part makes such a challenge, arguing that the consent principle is essential to the exercise of the collective human right of self-determination. It has two objectives. First, it describes the contours of the human right of self-determination, including an explanation of the values protected by that right. Second, it links the consent principle to self-determination with an important caveat: that link is dependent upon the State in fact representing its people.

(A) Human Right of Self-Determination

The collective human right to self-determination emerges from an understanding of the intrinsic value of self-government to actualization of human potential. Members of a community share experiences and cooperate together such that over time they create a common life. That life has value to its members separate and apart from the instrumental benefits they receive from the community. 135 This insight is at the heart of “culture,” which people value intrinsically because it provides a sense of belonging to a community with shared attributes and a framework through which to enjoy individual

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134 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); Goldsmith, supra note 120, at 333 (describing democratic legitimacy concerns in relying on academics and human rights activists to determine the content of law); Oona Hathaway, International Delegation and State Sovereignty, 71 Law & Contemp. Probs. 115, 146 (2008 (noting that an overly expansive understanding of core human rights norms can threaten self-determination and autonomy); Helfer, supra note 131, at 78 (noting challenge to democracy posed by international delegation increases with nonconsensual lawmaking).

135 See Michael Walzer, Just and Unjust Wars 51-63 (1977) (describing the collective aspect of human rights);
rights.\textsuperscript{136} Self-governing communities place inherent value on exercising control over their own political, economic, social and cultural development.\textsuperscript{137} Avishai Margalit and Joseph Raz provide a framework for understanding this value.\textsuperscript{138} They explain that membership in communities is an aspect of human personality, and therefore well-being requires the opportunity to express membership. A primary method for doing so is participation in the public life of the community, including through political activity. Self-government is requisite for this process to occur.

One of the critical protections required for self-government is protection from external intervention into local decision making. External decisions or interventions can unduly influence or even override local decisions, thereby undermining the promise of self-government.\textsuperscript{139}

International law actualizes this philosophical insight through the collective right to self-determination. Consistent with its privileging of the State as its primary unit of measurement,\textsuperscript{140} international law recognizes the people of a State as a community that enjoys the right of self-government.\textsuperscript{141} The people of the State are its ultimate sovereigns who provide the government its powers through consent to be governed.\textsuperscript{142} They must be free to direct their development free from external intervention in order to realize the promise of self-government.

This concept first bloomed as a principle in response to colonialism and foreign occupation, which are problematic from a rights perspective primarily because they deprive communities of their opportunity to self-govern.\textsuperscript{143} The

\textsuperscript{136} See Allen Buchanan, Secession 79 (1991) (rejecting argument that people value culture primarily for instrumental or individual reasons).

\textsuperscript{137} See Michela Pomerance, Self-Determination in Law and Practice 2 (1982) (describing the origin of self-determination as recognition of the nation as “a community of organization, of life and of tradition”).


\textsuperscript{139} See Will Kymlicka, Multicultural Citizenship 35-36 (1995) (distinguishing external and internal elements of collective rights).

\textsuperscript{140} The State is the unit recognized in international law as responsible for representation of its peoples’ interests on the international plane. It was for this reason that colonized peoples were presumed to be able to exercise self-determination only by forming their own State, free from the oppression of their colonial masters. See Antonio Cassese, Self-Determination of Peoples 71-89 (1995) (describing practice related to external self-determination).


\textsuperscript{143} During the pre-World War II period, a small number of influential political leaders advocated
U.N. Charter includes self-determination as a principle guiding the United Nations. This principle was invoked as the basis upon which newly decolonized territories could seek statehood if approved by its people 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 and as a basis for resolution of sovereignty over Kashmir.

Self-determination evolved into a collective 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 peoples 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.” This right is the first human right found in the Covenants because negotiators agreed that self-determination is a prerequisite for enjoyment of individual rights.

The text of the Covenants, their negotiating history, and subsequent practice together demonstrate that the human right to self-determination 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

for self-determination as a concept to guide international affairs. See Antonio Cassese, supra note 140, at 14-19 (describing Lenin’s view that ethnic or national groups enjoy the right to choose their own sovereigns); Michla Pomerance, The United States and Self-Determination: Perspectives on the Wilsonian Conception, 70 Am. J. Int’l L. 1, 2 (1976) (describing Woodrow Wilson’s argument that every people have 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. Thomas M. Franck, The Emerging Right to Democratic Governance, 86 Am. J. Int’l L. 46, 53 (1992). But self-determination had relatively little purchase before World War II. 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).

144 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.).

145 167 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.

146 See ICCPR, supra note 13, art. 1(1); ICESCR, supra note 13, art. 1(1).

147 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 81, 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).

148 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. Such peoples are in contrast to ethnic, linguistic and religious minorities who were granted separate protection by Article 27 of the
direct development free from external intervention. The remained of this sub-
Part will examine these three points.

First, the Covenants are clear that the human right to self-determination
extends to peoples as a whole in all countries and territories.\textsuperscript{149} For example the
American people as a whole enjoy the right to self-determination. This
recognition is consistent with the decision of the Covenants and the Universal
Declaration of Human Rights (UDHR)\textsuperscript{150} to enshrine the people of the State, as
opposed to its current rulers, as sovereign.\textsuperscript{151}

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 to portions
of a population,\textsuperscript{152} or to colonized peoples.\textsuperscript{153}

States have generally interpreted Article 1 to apply to the population of
States as a whole. An exception is India, which when ratifying the ICCPR and
ICESCR 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.”\textsuperscript{154} The fact that India felt

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\textsuperscript{149} Louise Doswald-Beck, \textit{The Legal Validity of Military Intervention by Invitation of the
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\textsuperscript{150} See Universal Declaration of Human Rights art. 21(3) (“The will of the people shall be the
basis of the authority of government.”)
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\textsuperscript{151} See Reisman, supra note 1, at 866-68 (describing transformation of the understanding of the
sovereign in international law). 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. Buchanan, supra note 34 at 102 (explaining that States previously
were seen as “private property of dynastic families”); Reisman, supra note 1, at 866 (describing older
conception of sovereignty inuring in a powerful individual who ruled the State based on divine or
historic authority).
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rests with the people”). While popular sovereignty certainly began as a Western concept, Reisman,
supra note 1, at 867, its inclusion in the Covenants and the UDHR demonstrates its current
international bona fides. See Buchanan, supra note 34, at 101 (describing this view as “widely held
among politicians and ordinary people).

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\textsuperscript{152} States 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
(1955).
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\textsuperscript{153} 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. Casse, supra
note 140 at 49.
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\textsuperscript{154} United Nations Treaty Collections,
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compelled to make such a declaration suggests it sensed that the phrase “all peoples” is generally interpreted to include the people as a whole of sovereign States.\(^{155}\) Moreover, this declaration spawned the first-ever objections by France, West Germany, and the Netherlands to ICESCR reservations, indicating their deep disagreement with India’s interpretation of the provision.\(^{156}\)

The HRC has also been clear that it interprets the right of self-determination to extend to the people as a whole of a sovereign State. It rejects reservations to Article 1(1) that restrict the scope of protection as inconsistent with the object and purpose of the treaty.\(^{157}\) The HRC admonished Azerbaijan when it asserted that Article 1(1) extended protection only to “former colonies.” The HRC indicated it “regretted” this position, noting its view that the ICCPR guarantees the right of self-determination for “all peoples, not merely colonized peoples.”\(^{158}\)

Anne Peters has argued that rather than viewing self-determination as a collective right owned by peoples, it is better conceived of as an individual right.\(^{159}\) While she acknowledges that the “technical” rights-holder with self-determination is “peoples,” she dismisses the argument that the right is

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\(^{155}\) See \textit{Cassese, supra} note 140, at 60 (characterizing Indian declaration as a reservation).

\(^{156}\) U.N. Treaty Collection, \textit{supra} note 154 (listing objections to declarations and reservations).


\(^{159}\) Such a view is consistent with scholars who claim there is no room in liberal human rights theory generally for collective rights. \textit{See, e.g., Tesón, supra} note 34, at 133. Tesón, for example, argues that collective rights which cannot be reduced to a collection of individual rights are social policies masquerading as rights. Such a deception is undertaken for rhetorical purposes, he argues, as it strengthens the rhetorical appeal of the social policy. \textit{See id. at} 136-37 (opposing granting social policies the rhetorical weight accorded to individual rights).

While it is beyond the scope of this Article to defend collective rights generally, such criticism fails to account for the presence of collective rights in most international and domestic rights instruments. \textit{See Buchanan, supra} note 34, at 77 (describing aspects of freedom of association and federalism as by definition collective rights). It also attributes a false clarity to a dichotomy between individual and collective rights. Individual rights can often be justified in collective terms and vice-versa. \textit{See id. at} 77-79. Insisting that collective rights be described in individual terms, as Peters does with self-determination, obscures an important attribute of the right.
intended to be held by a collective for two reasons. First, Peters argues that the concept of “peoples” is itself arbitrary, given the difficulty in distinguishing between peoples and minorities. To attribute legal significance to such an arbitrary grouping makes little sense, according to Peters. Second, she explains that the placement of self-determination as the first right within the Covenants that are otherwise filled with individual rights suggests it is designed to protect individual, not collective rights. Thus, Peters claims that self-determination really protects an individual’s right to determine his or her fate in and through the community, as opposed to a collective right.

Peters’ approach is inconsistent with the negotiating history and State practice surrounding the provision as just described. Indeed, the HRC has repeatedly concluded that it cannot hear claims through its communications procedures for violations of Article 1(1) because it protects collective, not individual rights. To cast self-determination as an individual right, is to rewrite the Covenants.

Moreover, the collective privileged by the Covenants, the people as a whole of a sovereign State, is not arbitrary, at least given the history of international law prioritizing the State as the relevant unit of measurement. Self-determination theory is premised on the idea that the people of the State are sovereign within the State, thus making the people of the State an appropriate collective to exercise the right. While as Peters suggests the concept of “peoples” becomes more complicated in multi-ethnic States, this problem at the margins does not undermine the validity of the people as a whole of the State as a collective rights-holding entity.

More fundamentally, Peters’ approach ignores the normative value attached to belonging to a self-governing community with capacity to direct development as it sees fit separate and apart from the instrumental individual benefits such a community might confer. The individual human experience values culture and community as intrinsically valuable and in the process develops a sense of shared interests separate and apart from individual interests. Thus, to describe self-determination in individual terms is to miss a significant portion of what the right describes.

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160 Peters, supra note 36, at 541.
161 Id.
162 ADD CITE
163 See Buchanan, supra note 34, at 79 (arguing against reducing collective rights solely to the instrumental benefits they confer to individuals).

164 But even under Peters’ approach, consent is relevant to the protection of self-determination. Under Peters’ analysis individuals possess the right to participate in the public life of the State “to determine their fate in and through the community.” Peters, supra note 36, at 541. Diminishing the consent principle in human rights lawmaking constricts an individual’s right to determine one’s fate through the community because it reduces extent to which the community controls matters important to the human experience. The individual’s right to determine his or her fate through the community is
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 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.

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 diluted by a decrease in community powers. This cost to individual rights is not currently considered a factor in evaluating proposals that diminish consent.

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165 See U.N. General Assembly, supra note 152, §8 (providing original draft text).
166 See Cassese, supra note 140, at 54 (quoting Chairman of the Third Committee Working Group).
168 Id. ¶ 4.
170 U.N. General Assembly, supra note 152, at ¶ 12. 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. See id. at ¶ 13 (noting worries that it would prompt “burning of foreign books and confiscation of foreign investments”).
nations.”  

The HRC hewed to this broad 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.

There are good reasons to believe that States view this three-part understanding of self-determination as customary. Most States of the world have accepted the collective right to self-determination as a treaty obligation by joining either or both of the Covenants. Moreover, the three-part formulation described here is repeated in numerous international agreements and resolutions of international organizations.

This Article does not, however, undertake the potentially painstaking task

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171 Id.

172 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 140, at 55.


174 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”).

175 Nicaragua Case, supra note 63, at ¶ 205 (condemning interference in the choice of political, economic, social and cultural systems).

176 Self-determination is often described as a jus cogens norm. See, e.g., James Crawford, The Creation of States in International Law 101 (2d. 2006) (including self-determination within the list of peremptory norms). However, it appears that only the application of self-determination to colonized peoples achieves this lofty status. See, e.g., Héctor Gros Espiell, The Right to Self-Determination: Implementation of UN Resolutions, U.N. Doc. E/CN.4/Sub.2/405/Rev.1, ¶ 70 (1980) (arguing self-determination is peremptory in its anti-colonial form).

177 See, e.g., 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.”); 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.”); 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.”).
of proving it is so. Instead, it notes that most States of the world have agreed through ratification of the Covenants and their practice thereunder that the people as a whole of a State have the collective continuing right to self-direct development free from external intervention.

(B) The Link Between Self-Determination and Consent

The right to self-determination found in the Covenants provides an opportunity to reimagine consent rooted in the protection of human rights. This Part argues that the act of consent to human rights obligations is itself a manifestation of self-determination provided that there is a representative fit between the State and its people.

The link between self-determination and consent to human rights obligations stems from the relationship between political, economic, social and cultural development and human rights. Part of directing development is deciding which international human rights obligations to accept because these obligations set the conditions within which development will occur. 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 influences the distribution of political power; development of the rule of law and domestic legal structures; and the economic well-being of victims and victims’ families.

Once the people of the State make the decision whether to undertake a human rights obligation, they then use their State to communicate that decision to other States and international actors. Thus the act of consent is itself a manifestation of self-determination, as it represents the people’s decision on whether and how to condition development with international commitments. Self-determination mandates that other States and the international community

178 One of the core difficulties in assessing the existence of custom is determining what would constitute State practice on the question. While it may be easy to locate examples where States have not respected the collective right to self-determination through intervention, how is one to measure the myriad of situations where States opt not to interfere in the development decisions of the people of another State? Are they doing so as a policy choice, or out of a sense of legal obligation? These questions suggest that a separate project is needed to assess the customary status of this norm.

179 See Crawford, supra note 15, at 121 (claiming a heightened interest for popular participation on human rights questions given their impact on the internal life of the State). Human rights obligations, which regulate the internal functioning of the State, are more likely to affect political, economic, social and cultural development than other kinds of international obligations. But some other kinds of international obligations will affect development as well. For example, the decision whether to join the World Trade Organization will have significant influence on a State’s path of economic development.

180 See id. at 123 (explaining that international law has traditionally viewed the established government of a State as the voice for all its people).
respect this decision in order to permit the people to develop its society “freely.”

This analysis presupposes that the State does in fact speak on behalf of its people when consenting to or dissenting from a human rights norm. But as with any group right, there is the risk that the individuals exercising that right on behalf of the group act in ways that benefit themselves at the expense of the group.\(^\text{181}\) In practice the extent to which a State represents its people varies significantly from State to State.\(^\text{182}\) Historian Samuel Moyn argues that it was disillusionment with the extent to which States satisfied the promise of self-determination that in part spawned the desire for greater international regulation of human rights.\(^\text{183}\)

There are at least two ways in which a State providing consent or dissent to human rights obligations may not in fact be exercising self-determination.\(^\text{184}\) First, the government of the State may not be representative of its people, either because of the way it came to power or because of how it has behaved once it was in power. Second, the people of the State may not form a single community engaged in pursuit of a common life. This form of illegitimacy is particularly likely to occur in a multi-ethnic State where the people of the State perceive themselves as separate peoples and incapable of selecting representatives jointly to advance their collective will.

Self-determination theory has a rudimentary answer to the latter question of fit between the State as an institution and the people within it. States containing multiple peoples are expected to exercise their right of self-determination collectively through a single State.\(^\text{185}\) Only in situations “where a definable group is denied meaningful access to government” to pursue their respective development is the State an inadequate entity for the exercise of self-determination.\(^\text{186}\) States that deny peoples within their populations the same opportunities to participate in government as other groups lack sufficient representative fit to deem their acts of consent or dissent an exercise in self-

\(^{181}\) See Buchanan, supra note 34, at 78 (“[G]roup rights encourage hierarchy and create the possibility of opposition between the interests of those who control the exercise of the right and the interests of other members of the group.”)

\(^{182}\) See, e.g., Trimble, supra note 151, at 1966 (“[T]he idea that the governments of Burma, Nigeria, or Somalia speak for their people is patently false.”); Mutua, supra note 50, at 90 (noting that African States act inconsistently with the rights of their people in order “to maintain their privileges and retain power.”)


\(^{184}\) This analysis is based upon a distinction developed by Fernando Tesón. See Tesón, supra note 34, at 57 (distinguishing between vertical and horizontal illegitimacy in States).

\(^{185}\) James Crawford, The Creation of States in International Law 115 (2nd ed., 2006).

\(^{186}\) Reference re Secession of Quebec, ¶ 138 [1998] 2 S.C.R. 217 (Can.).
determination.

Human rights theory is less developed on the question of the fit needed between a government and its people in order for the State to be viewed as an arena for realization of self-determination. Nor is such an answer likely forthcoming at least from a State consent-driven lawmaking process. No State’s government will consent to a standard of representation for self-determination that it itself would not meet.

Western States 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. 187 Australia informed 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. 188 Similar statements have been made to the U.N. Third Committee by Germany, 189 the United Kingdom, 190 and the United States. 191 The HRC, while not directly interpreting Article 1(1) of the ICCPR in this way, has argued that the “substantively related” Article 25(a), which guarantees every citizen the right to participate in the public life of the State, mandates citizens be permitted to participate in government through freedom of expression, assembly and association. 192

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.” 193 Crawford argues that democracy requires the State to

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187 Antonio Cassese identifies ICCPR rights that he believes are required to ensure participation in the public life of the State: freedom of expression; peaceful assembly; free association; and the right to vote. CASSESE, supra note 140, at 53.
190 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”).
191 See CASSESE, supra note 140, at 303 n.47 (quoting American official stating “Freedom of choice is indispensable to the exercise of the right of self-determination.”)
193 Franck, supra note 143, at 59.
protect a range of rights, including freedom of expression and assembly.\textsuperscript{194}

There are several reasons, however, to be dubious of this standard of representation. First, China undertook its self-determination obligation in the ICESCR, but has not become party to the ICCPR. Reading Article 1(1) of the ICESCR to mandate protection of certain civil and political rights would appear inconsistent with the decision to divide the corpus of human rights into civil and political and economic, social and cultural covenants.

Second, many States that have ratified the ICCPR have forms of government that do not protect political participation rights. Their choice to join the treaty without reservation to Article 1(1) is strong evidence that these States did not believe that they were accepting an obligation to set up a liberal democratic form of government.\textsuperscript{195}

Third, 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.\textsuperscript{196}

Consistent with these concerns, many non-Western States reject the idea that self-determination mandates a liberal democratic form of government. 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.”\textsuperscript{197}

States that are non-representative from a Western perspective argue that their peoples chose to create a political

\textsuperscript{194} Crawford, \textit{supra} note 15 at 116.

\textsuperscript{195} See BRAD R. ROTH, GOVERNMENTAL ILLEGITIMACY IN INTERNATIONAL LAW 332 (1999) (arguing against conclusion that human right to self-determination mandates Western liberal democracy).

\textsuperscript{196} 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. See Assaf Meydani & Shlomo Mizrahi, \textit{The Politics and Strategies of Defending Human Rights: The Israeli Case}, 39 Isr. L. Rev. 39, 46 (2006) (arguing power of special interests usually places politicians against the position of human rights organizations). 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 predicts that the preferences of the economically disadvantaged are likely to be sufficiently heterogeneous that it impedes their ability to use the political system collectively. See Varun Gauri, \textit{Social Rights and Economics: Claims to Health Care and Education in Developing Countries}, in \textit{HUMAN RIGHTS AND DEVELOPMENT: TOWARD MUTUAL REINFORCEMENT} 65 (Philip Alston & M. Robinson eds., 2005) (describing difficulties in aggregating poor through democratic procedures). 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. Cite to ICESCR Statement from 1992.

system that, while different from liberal democracy, is nevertheless an acceptable exercise of self-determination.\textsuperscript{198}

Other scholars take a broader approach to the question of representative fit. Michael Walzer argues that it is difficult for those outside of a State to judge the fit between a government and its people because they do not have the same experiences as those within the State. This reality, Walzer argues, mandates a presumption in international law that the State is representative of its people.\textsuperscript{199} Walzer believes that this presumption can be rebutted only where the lack of fit is “radically apparent.”\textsuperscript{200} Such situations occur for Walzer in multi-ethnic States where particular ethnic groups are in revolt, as well as in States that commit genocide, ethnic cleansing, or that enslave their own population.

Brad Roth makes a similar argument. Roth notes that the people of a State may opt for an illiberal form of government out of a preference for unity, stability, decisive leadership and better long-term planning free from the pressures of electoral politics.\textsuperscript{201} This reality, Roth contends, makes it difficult for the international community to reject States as illegitimate representatives of their own people based on a failure to provide civil and political rights. He believes it is appropriate to do so only where there has been a repudiation of the ruling apparatus by its people that it makes it clear that the State is not representing its people.\textsuperscript{202} Such circumstances may arise with racist regimes, foreign occupation, or perhaps internal revolt.

It is beyond the scope of this Article to answer the question of what fit self-determination ought to require between a State and its people. But in the absence of such a standard, two points are worth noting.

First, concerns about the representation of States create a powerful reason to expand the pool of human rights’ legislators beyond States. Doing so would be inconsistent with a traditional approach to States’ rights, which viewed States alone as empowered to restrict their autonomy with international obligations. But if consent is valuable for self-determination purposes, and States are not fulfilling the goal of serving as vehicles for self-determination, then alternate routes for public participation in the creation of human rights law must be considered.

Second, it is still worth examining what flows from a consent/self-determination link. There is good reason to believe that under any

\textsuperscript{198} See U.N. Doc. A/4240 (describing argument that the people of Zaire opted for “Mobutisme,” or a system without political parties organized under teachings of former President Mobutu); U.N. Doc A/4640 (describing argument by Sudan that its people opted for government under Shariah law that cannot by definition provide all the civil and political rights found in the ICCPR).

\textsuperscript{199} Walzer, supra note 141, at 212.

\textsuperscript{200} Id. at 214.

\textsuperscript{201} ROTh, supra note 195, at 27-28.

\textsuperscript{202} Id. at 416.
representational standard a significant subset of States would be deemed agents of their people such that their acts are manifestations of self-determination. Under even the most restrictive representation tests currently offered—those offered by Franck and Crawford—many States, albeit mostly developed States, meet the self-determination standard.

Moreover, one goal of international human rights law is the creation of more representative States. Better protection of human rights, such as protection of the rights required to participate in the public life of the State, or an end to discrimination against minority groups, will result in States that are closer to the representative ideal. As a matter of theory, it is important to understand the consequences for consent and human rights lawmaking of States genuinely serving as representatives of their people.

Thus, the remainder of this Article explores the effects for consent and for human rights lawmaking that stem from the link between consent and self-determination.

**PART III: CONSEQUENCES**

Part II establishes a human rights dimension to consent not accounted for in the traditional State sovereignty based account of the concept. Consent is essential to the protection of the collective right to self-determination provided that there is a representative fit between the State and its people. This link means that efforts to reorient the international system toward the protection of human rights must continue to value consent.

This Part has two objectives. First, it reimagines the consent principle as one rooted in human rights law and explores the consequences for human rights lawmaking. Second, it considers how this analysis is modified by persistent questions about representation.

**(A) Consent Principle Modified**

The link between consent and self-determination has two important consequences for assessing efforts to reform the role of consent in human rights lawmaking.

First, an international human rights system that respects self-determination will possess areas of international regulation, determined largely by global consensus, but will also leave space for people to determine locally how to allocate contested rights and resources free from international regulation. Such a system recognizes that “universal” human rights are universal in the context of human culture, which inevitably leads to differences in application of rights by different peoples.203 This model protects the pluralism and diversity that

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203 See Carozza, supra note 41, at 71-72 (arguing that universal human rights needs to be
characterize the international community, while at the same time leaving room for international regulation of rights.

Consent protects this goal by granting the world’s peoples control over the locus of human rights regulation and the pace of human rights development. Such control is a normative positive: a valuable part of the human experience is the ability to participate in a community with control over its development, including whether to join international human rights obligations. In exercising this control, the people may opt for rather amorphous and indefinite obligations to allow discretion in implementation given a thin level of international agreement on human rights questions. Peoples also will opt out of particular human rights obligations entirely because of disagreements about how rights and resources should be allocated.204

A matter of concern well-worn in scholarship is that the consent principle may be abused to prevent international regulation of human rights. Abuse occurs when there is a break down in self-determination or the matter is one not properly within the scope of self-determination. Self-dealing elites can wrestle control of the decision whether to undertake human rights obligations away from their people. In the process they may decline international regulation in order to preserve space to abuse their people. In other cases a single State or small number of States may use the consent process may block the development of norms that the rest of the international community view as a trump to self-determination. Limitations on the consent principle are necessary to protect against these risks.

Less well established is that effort to ameliorate these problems can diminish the consent principle in a manner harmful to the protection of international human rights. International gap filling may deprive people of the right to determine collectively at the local level how their society ought to develop. The risk of such international encroachment on self-determination is magnified by the perception that gaps in international regulation are normatively problematic and should be combated. In reality gaps may be either the beneficial product of self-determination or the pernicious effect of problems in the consent process.

Thus, efforts to modify the consent principle to best protect international human rights must be cognizant of both the risk that consent improperly interpreted in light of cultural differences on rights questions).

204 Such a model is consonant with Paolo Carozza’s argument in favor of embracing subsidiarity as a structural principle in international human rights law. See id., at 67-68 (describing benefits of subsidiarity as applied to international human rights law). Subsidiarity argues that the most local level of government capable of achieving a particular goal should be employed, with more distant groupings obligated to provide assistance as needed. Self-determination roots the structural principle of subsidiarity within international human rights with the insight that it is the people of States that ought to determine how to allocate authority between international and local regulation.
thwarts international regulation and the risk that diminishing consent deprives people of the opportunity to exercise self-determination.

Similar analysis may be applied to criticisms of the slow pace of legal development that is a consequence of the consent process. The slow pace of change has been criticized for being inconsistent with human rights regulation, given the need to keep pace with rapidly changing social definitions of rights. The link between consent and self-determination modifies this simple analysis. The consent process gives the world’s peoples control over the pace of human rights development. States will proceed as quickly or as slowly as social consensus permits in creating new obligations.

Human rights scholars and advocates have offered good reasons not to be sanguine that the pace of change produced by the consent process is optimal for the protection of human rights. Self-dealing elites, who obtain control of the consent process, can abuse the slow pace of change created by the consent process to delay obligations favored by their people. This delay allows them to persist in pernicious practices that harm their people. In other cases, the people of a small number of laggard States may use the consent process to block a rapidly developing norm that much of the international community believes trumps self-determination. It is necessary, therefore, to introduce modifications to the consent principle to ameliorate these concerns.

But efforts to address this concern by modifying the consent principle can undermine self-determination, and thereby harm human rights, a point rarely made in the literature. Efforts to speed up change by partially diverting decision making authority for international obligations away from States or constricting the right of dissent has the potential to subvert the development of social consensus behind international human rights necessary for those rights to reflect self-determination. The risk of such an outcome is magnified by the view that the slow pace of change is per se bad for the protection of human rights, as opposed to being seen as a sometimes beneficial byproduct of the exercise of self-determination.

Therefore, efforts to modify the consent principle to modulate the pace of legal development must be aware both of the risk that consent improperly slows human rights development and that effort to diminish consent can prevent the development of social consensus behind human rights obligations necessary to satisfy self-determination.

Second, valuing consent as a manifestation of self-determination means it is not an absolute requirement, but rather subject to limitation. Human rights law recognizes that rights like self-determination are limited or even trumped by other competing rights. But limitations on self-determination must be justified by a proper human rights consideration and be proportionate to that reason.

The consent principle described in Part I(A) views State consent as constitutive of international legal obligations. Free and independent States have
no international obligations unless they choose to accept them. In its pure form such an argument brooks no exceptions. If the only source for the creation of international legal norms is consent, then consent cannot be bypassed. In practice, even the traditional consent rule recognizes a limited set of circumstances in the area of customary law where norms bind unaware or even dissenting States. But this practice is tied up in theoretical knots because of the difficulty in squaring it with States’ rights.205

By contrast, a consent principle rooted in self-determination values consent because it is essential to giving the people of the State the ability to self-direct development free from external intervention. While this right is important, human rights law recognizes that rights are not absolute and are to be balanced against competing rights.206 Thus, the consent principle as a human rights value permits constraints on consent of varying intensity.

But such restrictions must be proportionate to the aims sought. While limitations to self-determination are consistent with human rights theory, such limitations are justified through a proportionality inquiry.207 Such an inquiry is required to determine whether there is an appropriate justification for restricting self-determination, and whether that justification supports the restriction in question. This proportionality analysis is often not undertaken in the literature and practice seeking to diminish the consent principle.

205 See, e.g., ANTONIO CASSESE, INTERNATIONAL LAW IN A DIVIDED WORLD 178-79 (1986) (arguing that State sovereignty mandates that States be permitted to persistently object even to jus cogens norms).

206 Peremptory norms are the one exception, as they void competing norms located in treaties, are not subject to derogation or limitation, and may be modified only by another norm of the same character. VCLT, supra note 21, art. 53.

207 Provisions mandating balancing between competing interests are expressly included in multilateral human rights instruments. See, e.g., ECHR, supra note __, art. 9 (balancing freedom of thought, conscience and religion against the needs of a democratic society to protect “public safety,” “public order, health or morals,” and “the rights and freedoms of others”); ICCPR, supra note 13, art. 18 (allowing State restriction of freedom of thought, conscience and religion where prescribed by law and “necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others”); ICESCR, supra note __, art. 2 (“Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”) They are also located in newer national constitutions. See S. AFR. CONST., 1996 § 27 (requiring a State to take measures to provide health care services, food, water and social security “within its available resources”); INDIA CONST. art. 41 (limiting right to work, education and public assistance to India’s “economic capacity and development”).

Even in the United States, where rights provisions do not include any express balancing requirements, balancing tests have been employed. See, e.g., Stone v. Powell, 428 U.S. 465, 490–91 (1976) (limiting application of the Exclusionary Rule to Fourth Amendment violations where the costs of application were disproportionate to the benefit).
(B) The Human Rights Consent Principle

The key contribution in thinking about consent as a manifestation of self-determination is that it serves as a marker in human rights lawmaking for the need to balance efforts to secure greater international regulation of human rights with the imperative of preserving space for local decision making. Consistent with human rights theory, self-determination may be limited only on the basis of a proportionality inquiry that determines both the reasons behind a limitation and whether the cost is in proportion to the reason proffered. This Part applies these observations to the efforts underway to diminish the consent principle described in Part I(C).

First, an effort to diminish the scope of the consent principle without reference to the norm in question is inconsistent with valuing consent as a manifestation of self-determination. The more severe the restrictions, the greater are the concerns from the perspective of protecting human rights.

Two of the legal developments described in Part I(C) fall into this category. The decision of the ICJ in the Nicaragua Case to alter the treatment of contrary practice in the determination of custom is a norm-irrelevant rule. It seeks to reduce the ability of States to dissent from the formation of custom through contrary practice irrespective of the content of the custom. Similarly, the approach of the HRC to reservations diminishes the ability of States to control the content of their human rights obligations through reservations irrespective of the content of those obligations. The HRC’s approach to reservations would bind States to any provision of the ICCPR to which they attached an invalid reservation without the protection of that reservation.

Such efforts are in tension with the protection of the collective right to self-determination. A cleaver-approach to diminishing the consent principle is justified only if consent is a priori negative from a human rights perspective.\footnote{If there was an accepted standard of representation for self-determination, it is conceivable that the contrary practice or reservations of a State could be evaluated based upon representation. It would take more searching justifications to ignore the contrary practice or reservations of a highly representative State; by contrast, such restrictions would be more permissible with less representative States. But in the absence of such a standard there is no basis for making such distinctions.} While such an approach is justified based upon the view that geographic gaps in coverage and slow-pace of development are per se problematic from a human rights perspective, the link between consent and self-determination upends that analysis. These features of the existing human rights lawmaking system are sometimes positive byproducts of the effort to develop norms based upon popular agreement. Thus, changes to the human rights lawmaking rules that make it per se harder to dissent should be viewed skeptically.

As such restrictions on consent grow in severity they become increasingly problematic. In this respect there is more reason to be concerned about the HRC’s approach to reservations. As discussed above, the HRC has interpreted...
the ICCPR not to permit parties to exit the treaty. Thus, in totality the HRC approach to reservations would permit it to sever invalid reservations and hold the State to the original obligation without granting the State the opportunity to exit from the treaty. Such an approach would result in truly nonconsensual obligations, which represent the greatest restriction of self-determination.\footnote{209 See Helfer, supra note 131, at 77 (viewing the HRC approach to severance of reservations as an example of nonconsensual lawmaking).}

By contrast, the Nicaragua rule does continue to give dissenting States an opportunity to avoid obligation by an unwanted custom, either through being clear that dissenting practice repudiates the existence of custom, or through persistent objection. While as discussed earlier this shift does represent a diminishment of the consent principle, it is less serious than the HRC’s reservations rule because it leaves States an opportunity to avoid legal obligation.

Of course, this analysis presumes a link between consent and self-determination, which will not exist if States are not representative of their people. But these approaches to restricting the scope of the consent principle are not well targeted to this concern. They merely transfer legislative authority from non-representative States to other States, be it States engaged in practice in support of a putative custom or other treaty-party States. It is unclear why these States would be any more representative of the interests of the people of a non-representative State than the non-representative State itself. This fact suggests that efforts to diminish the consent principle because of concerns about representation need to think more creatively about the potential for non-State lawmakers who might better represent the unrepresented.

Second, placing norms within the category of \textit{jus cogens} completely trumps the self-determination rights of dissenting peoples, as they are bound to such norms irrespective of contrary practice or persistent objection. Such a drastic restriction on self-determination is justified in the VCLT because of the general acceptance of the international community that the conduct prohibited by the norm is outside permissible bounds of State conduct.\footnote{210 VCLT, supra note 21, art. 53. \textit{See also} Hathaway, supra note 135, at 147 (accepting restrictions on the right of an individual State to reject “limits on government action shared by nearly every culture and religion, at least in aspiration, if not always in reality”); Henkin, supra note 72, at 44 (arguing “an occasional State cannot veto law that reflects the contemporary international political-moral intuition”).} Efforts to create new peremptory norms lacking in that level of international support must identify a proportionate human rights basis for a severe restriction on self-determination.

\textit{Jus cogens} norms represent the most significant restriction on self-determination; such norms trump the right of self-determination of any dissenting State completely.\footnote{211 This restriction is greater than the restriction created by the HRC’s reservation rule because the State whose reservation is found to be invalid could have avoided the obligation by not joining} The justification for this restriction is that the
international community as a whole supports raising the norm to the level where it obligates all States, including isolated dissenters. While the VCLT definition of peremptory norms was developed consistent with a sovereignty-driven understanding of consent, scholars have justified this category of norms in terms consistent with the protection of human rights.

Louis Henkin argued, for example, that the human rights revolution has created international “constitutional law,” that much like domestic constitutional law trumps contrary municipal law.212 Such constitutional norms for Henkin are located in “contemporary international political-moral intuition,” presumably evidenced by general systemic consent to their peremptory status.213

Oona Hathaway makes a similar argument premised on the conditional nature of State sovereignty. Hathaway contends that State sovereignty is an international construct, and as such may be conditioned on “certain elemental requirements,” including the protection of international human rights.214 These elemental requirements, she explains, are located through “universal or close to universal agreement.”215

But, as described in Part I(C) there are scholars and activists who have advocated for recognizing still more peremptory norms, even in the absence of universal or near universal agreement. These efforts have often falsely claimed that there is universal or near universal agreement on the norm, or just avoided providing a basis for the conclusion the norm is peremptory. But the relationship between consent and self-determination means that these efforts incur a significant human rights cost. Thus, attempts to identify new peremptory norms on a basis other than universal or near universal support must identify an equally compelling reason to support such a drastic restriction on self-determination. At least three potential justifications are worth considering.

First, a range of human rights actors have pushed to expand peremptory norm status to norms in the penumbra of a peremptory norm. Scholars have argued that the duty to prosecute serious violations of international law is peremptory because the crimes being prosecuted are themselves peremptory. TMB and human rights courts have determined that non-refoulement protection is absolute because the prohibition on torture is \( jus cogens \).216 If in fact

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212 Henkin, supra note 72, at 43-44.
213 Id. at 44.
214 Hathaway, supra note 134, at 146.
215 Id. at 147.
peremptory obligations cannot be satisfied without secondary obligations that are also peremptory, then perhaps the universal or near universal agreement on the primary norm is sufficient to support *jus cogens* status for the secondary norm.

But this might not always be so. For example, the differences in the nature of the duty not to commit torture and to protect against torture by third parties could mean that the former justifies a total abrogation of the self-determination right but the latter requires exceptions to preserve room for local decision making. It is critical to parse the specific reasons for elevating a secondary norm to *jus cogens* status in the absence of general international agreement that it is so. Such an inquiry has to date often not been undertaken because of the failure to recognize the self-determination consequences of constricting consent.

Second, norms that define whether a State is sufficiently representative to constitute a vehicle for self-determination may be difficult to develop consensually. If consent is normatively valuable in human rights lawmaking because of self-determination, then it is important to have a standard by which to judge whether a particular State is in fact a representative fit of its people. A meaningful representation standard is exceedingly unlikely to be produced through consensual means, however, as States are not going to agree to standards of representation that would exclude their system of government.

The need for such standards might bolster the oft-criticized work of Thomas Franck and James Crawford claiming the existence of a developing customary right to democracy. The existence of large amounts of contrary practice makes such a claim difficult to sustain. But if consent is to be a foundational element of an international legal system centered upon the protection of human rights, the need for a meaningful set of representation standards might justify setting community standards that limit the kinds of governments recognized as legitimate under international law.

Generating such standards is difficult as a philosophical matter. There may be legitimate social and cultural reasons to opt for non-liberal forms of government. Michael Walzer argues that societies may arrive at authoritarian regimes because those regimes on some level share a “world view or life” with

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217 See Padmanabhan, *supra* note 100, at 107-112 (arguing that the duty not to torture and the duty to protect against torture by third parties are normatively different).


219 See *id.* at 309 & fn. 69 (questioning premise that right to democracy has risen to the level of a customary right).
the people. Walzer correctly points out that institutional choices are always constrained by history and circumstance, creating more of a spectrum of choice associated with political institutions than a binary designation of freely chosen or not. Constraining the array of institutional options available to people in constructing a State consistent with international law is a non-insignificant restriction on self-determination.

Third, a consent-based human rights system may need anti-majoritarian checks. In some constitutional systems, like the United States, rights are primarily oriented around restricting the ability of political majorities to trample upon minorities. In other systems, like the United Kingdom, the political process is largely called upon to protect rights. Nevertheless, the need to protect politically vulnerable minorities may be a sufficient justification for restricting the scope of self-determination. Thus, for example, Will Kymlicka distinguishes between external and internal aspects of collective rights. He defends the right of groups to create barriers to prevent outsiders from eroding group identity. But he disagrees with efforts to use group status to force dissenting members of the group from acting inconsistently with group norms. Protecting these dissenters may require protection generated above the group.

The difficulty of course is finding a way of identifying such norms other than State consent. The municipal constitutional law example is not analogous because those majority-restricting rights come from popular consent in creating the constitution (including courts with binding interpretative authority), and the continuing consent implicit in the decision to maintain the constitution. So-called minority rights such as gay rights, women’s rights, and rights of religious minorities also may go directly to the heart of the kind of society and culture a people wish to maintain. Removing such choices from the scope of self-determination would be a particularly intense burden on self-determination in need of a strong justification.

Thus, the link between consent and self-determination is an important brake on the growth of peremptory norms unless a proportionate human rights justification for constricting self-determination is identified.

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220 Walzer, supra note 141, at 224-25.
221 Id. at 224.
222 Here it is worth considering whether John Rawls’ concept of “decent hierarchical peoples” provides an alternative standard to liberal democracy that may be sufficiently representative to satisfy self-determination standards. Rawls theorizes that the Law of Peoples ought to respect societies that are not aggressive, and which are oriented around a shared conception of the common good, even if those societies are not liberal. JOHN RAWLS, THE LAW OF PEOPLES 64-67 (1999). Such a standard has the potential to allow for a wider array of institutional options while not protecting governments imposed on people through force.
223 KYMLICKA, supra note 139, at __.
224 This conclusion holds true even assuming some number of States is not representative of their people. Peremptory norms created without general international consensus are likely to override
Third, the task of interpreting treaties consistent with the object and purpose of protecting human rights requires consideration be provided to fealty to the parties’ interpretations. This fact provides a human rights justification for a margin of appreciation. But given the relatively meager infringement on the consent principle created by soft law treaty interpretations, TMB and human rights courts do not need overly weighty justifications for departing from the consent principle in their interpretations. The potential value of such interpretations in signaling the views of the larger community on the development of human rights norms is one such important justification.

As described in Part I(C) one striking attribute of human rights treaty interpretation is the proliferation of interpretations by TMB and human rights courts that employ an evolutionary or teleological approach to treaty interpretation. Human rights treaty terms are often amorphous and indefinite as a result of negotiated, cross-cultural compromise. When interpreting such terms, institutions will invoke the rule that the treaty must be interpreted in light of the object and purpose of the treaty, which is protecting human rights. Such interpretations give short shrift to the intent of States in joining a treaty, instead maximizing the scope of international human rights regulation.

Recognizing a connection between consent and self-determination modifies this analysis. Human rights does not always benefit from increasing the depth of international obligations because part of human rights is an ability to make rights and resource allocations at a local level. Thus, interpreting human rights treaties in a manner consistent with their object and purpose requires affording weight to maintaining fealty to the parties’ interpretations, assuming State consent is a manifestation of self-determination.

This connection argues in favor of employing a margin of appreciation with respect to State interpretations of human rights treaties. The margin of appreciation has been employed by the European Court of Human Rights to offer a measure of deference to State interpretations of human rights treaties. The margin requires the Court to afford significant weight to a State’s application of the European Convention because it is the State that has the closest connection to their people’s aspirations. Margins are wider in the absence of a European consensus on a practice and narrower where a practice runs afoul of how most other parties interpret the treaty.

While the Court has not expressly grounded this doctrine in self-determination, its approach to evaluating State treaty interpretations has the potential to reinforce self-determination. States are given a degree of freedom

the dissent of at least some representative States for whose people the self-determination consequences are serious.

to make their own choices about how to best comply with European Convention obligations because of the impact those obligations have on social development. But as in the context of peremptory norms, general consensus that a practice is inconsistent with human rights—here measured through the views of other treaty parties—provides a strong justification for limiting the scope of self-determination.

Not surprisingly, some scholars have resisted this doctrine on grounds that it is inconsistent with the protection of universal human rights.226 But a critical takeaway from this project is that this argument takes an unduly cramped view of human rights, in that it fails to account for self-determination. Granting communities the ability to make choices about how to organize society, far from a concession to power politics or outdated conceptions of sovereignty, permits people to exercise control over the contours of their community, a value intrinsic to the human experience.

There is, however, still room for soft law development consistent with self-determination. Limitations on self-determination are permissible where the restrictions are proportionate to the human rights justification provided. The extent to which soft law pronouncements constrain self-determination is limited.

For TMB, like the HRC, who are not empowered to issue binding interpretations of their respective treaties, they can at most impose reputational costs on States for their failure to abide by the interpretations. While these costs are impingements on the consent principle, States retain the option of non-compliance or treaty exit if they do not wish to comply. These opt-outs reduce the extent to which self-determination is hindered.

By contrast human rights courts, like the ECtHR, are empowered to issue binding treaty interpretations, and can mandate State compliance. While such an outcome would apparently entail significant self-determination consequences, there are at least two reasons those consequences are less onerous in reality. First, the decision of States to grant interpretative institutions authority to issue binding treaty interpretations is fairly viewed as delegation of limited lawmaking authority to these institutions, thereby obviating some self-determination concerns.227 Second, States generally also retain at least a limited exit right from the treaty, providing an opt out that also limits the self-determination infringement.

Moreover, there may be a human rights rationale that justifies this


227 Simma, supra note 105, at 497.
relatively limited intrusion on self-determination. Treaty interpretative bodies have a unique opportunity to articulate developing norms. Given the fragmentation of sources of human rights law, this bully pulpit is rare and important for identifying developing consensus. They also represent a non-State institution that broadens the pool of legislators. Because of concerns about the extent to which States represent their people, there is value in introducing non-State voices into the legislative process if those voices can provide an otherwise neglected perspective.

Consider for example the evolving jurisprudence of the ECtHR in the area of gay rights. In *Dudgeon v. United Kingdom* the Court struck down criminal sodomy laws as a violation of the right to privacy. In doing so, the Court relied significantly upon the fact that the great majority of States within the Council of Europe had decriminalized homosexual sodomy. On some level, this decision reflected a departure from the consent principle; States including the United Kingdom had ratified the ECHR without believing it imposed a restriction on long-standing laws criminalizing sodomy.

But this limitation is potentially justified by the Court’s unique ability to locate and publicize developing European consensus on sodomy laws, which might not have been clear to the United Kingdom or other European states retaining such laws. This function is essential to the development of community consensus around new human rights protections. It introduces a heretofore not present voice to the lawmaking process. And the degree of constriction is limited both because the United Kingdom agreed to join a treaty granting the Court the power to issue binding interpretations of the Convention, and because it retains the right to exit the ECHR.

Contrast from this example the approach of the Women’s Committee and the HRC on abortion discussed above. These institutions located abortion rights within their instruments despite clear evidence that the parties did not intend to include such obligations. But in doing so they did not identify any global consensus that laws criminalizing abortion violate a community norm; indeed, the continued prevalence of such laws suggests that no such consensus exists among ICCPR parties. In the absence of such consensus, treaty interpreting institutions departing from the consent principle must locate another human rights justification for the constriction on self-determination, as relatively meager as that constraint might be. As discussed in the context of peremptory

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228 It is a fair question whether these human rights bodies are any more representative of the people in States with non-representative governments than the governments themselves. If in fact a human rights rationale for imbuing these bodies with limited lawmaking authority is their ability to cure representation defects in States, then much greater attention needs to be paid to the selection and composition of these institutions.


230 *Id.*
norms, it is difficult to develop such a rationale.

CONCLUSION

A central goal of this Article is to demonstrate that an international legal system oriented toward the protection of human rights should still care about State consent. Too often existing debate cabins the reasons one should care about consent to concerns about old school sovereignty, cultural relativism, or rights implementation. But such a limited remit for consent is based upon a failure of imagination with respect to the role of the State in the protection of human rights.

The collective right to self-determination envisions the people of a State as its sovereign. The people use their State to make decisions about how to shape society for a community interested in a common life. The representative State, however defined, is a goal of the human rights movement because of the importance of self-government to the human experience.

As a matter of ideal theory then, the consent principle serves an important task in an international legal system oriented toward the protection of human rights. Consent gives the people of the State decision making authority over acceptance of international human rights standards; international supervision of commitments; and pace of rights development. Thus, State consent should continue to play an important role in international lawmaking because of its human rights function.

This is not to say, however, that the consent principle is not in need of reform. The traditional consent principle, born in the era of States’ rights, fails to provide adequate account of the desire of the international community to preserve space for norms from which dissent is impermissible. Moreover, the ideal of the representative State is frequently unmet; self-interested elite abuse the State structure to create thin international regulation of human rights and a slow pace of rights development that is used to mistreat people.

But critically, efforts to ameliorate this problem need to be targeted given the consequences for self-determination. Efforts to diminish the consent principle in order to make it harder for people to use their State to dissent from potential community norms must be evaluated on proportionality grounds. Is there a human rights basis that is sufficient to justify a particular intrusion on self-determination? Proportionality analysis has not been applied in a searching manner to either efforts to broaden the pool of peremptory norms or to soft law treaty interpretations and should be applied going forward.

Equally important is the need to think more creatively about how to restructure human rights lawmaking to account for concerns about representation within States. Part of this task is a reinvigorated scholarly debate about the requirements a State must meet to be considered a vehicle for self-
determination. Such a debate needs to move beyond the largely failed 1990s argument that international law includes a right to democracy, and instead consider what a representation standard ought to look like. Here particular heed must be given to the criticism that a standard mandating liberal, western democracy is insufficiently capacious to capture the variety of governmental forms that might be responsive to popular aspirations. Whether there are alternative representation standards that can be developed is an open question that this Article believes ought to receive more attention.

The remainder of this task is to think about ways to broaden the pool of human rights legislators to provide non-State actors a place at the legislative table while States retain their legislative preeminence. The proliferation of soft human rights law can be understood in these terms. But efforts at expanding the use of soft law need to consider both the rationale for potential impingement on self-determination and the seriousness of that violation.

Re-imagining consent in this manner is difficult. But as Michael Reisman argued in general terms more than twenty years ago, it is essential if we are to reconfigure the international legal system around the protection of human rights.