In 1977, the UNESCO Courier published a slender essay by Karel Vasak, a Czech-born, French jurist and director of UNESCO’s Division of Human Rights and Peace. Entitled ‘A 30-year struggle’, Vasak’s essay characterised human rights in international law in terms of ‘three generations’. The first generation, he wrote, concerns civil and political rights, specifically, those enshrined in the International Covenant on Civil and Political Rights, such as freedom of expression and the right to vote. The second generation, concerns economic, social and cultural rights, specifically, those enshrined in the International Covenant on Economic, Social and Cultural Rights, such as rights to housing and to form a trade union. The third generation, which Vasak characterised as one that ‘the international community is now embarking on’, refers to what he called ‘solidarity rights’, which include the right to development, the right of self-determination, minority rights, the right to a healthy environment, the right to peace, and the right to ownership of the common heritage of mankind.

Vasak’s metaphorical generations have come to assume an intellectual prominence far greater than the journal in which they first appeared. Classifications that comprehend

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2 Ibid.
human rights in terms of these three generations are now legion in international legal scholarship. Institutions specialise in them, judges invoke them, scholars and practitioners rely on them, and students learn them when they learn about international human rights. Less common are explanations of what actually is meant when we speak of human rights in generational terms. Do ‘generations’ refer to temporal differences concerning the emergence of different human rights in international law? Do they refer to distinctive properties that some rights share with others or analytical differences among rights? Or do they refer to the possibility that the protection of certain kinds of rights is conceptually prior to the protection of other kinds of rights?

This essay argues that understanding human rights in international law in terms of generations is historically inaccurate, analytically unhelpful, and conceptually misguided. The chronologies suggested by generational conceptions of human rights don’t correspond to the history of human rights in international law. The analytical categories into which generational conceptions sort human rights don’t capture their legal nature and character. And generational conceptions of human rights, by highlighting differences that allegedly exist among different types of human rights, fail to appreciate what is common to all human rights in international law.

Different human rights seek to protect different kinds of interests, and the nature of these interests will require different means of protection. Whether chronological or analytical, a generational conception that stylises these differences misses the fact that, despite the diverse sets of interests they seek to protect, human rights in international law share a common purpose, which is to mitigate injustices produced by the ways in which international law brings legal order to global politics. In this sense, civil and political
rights, and social, economic and cultural rights, as well those thought of as third-generation rights comprise but one generation: a single population of entitlements, speaking to the structure and operation of international law.

GENERATIONS AS CHRONOLOGICAL CATEGORIES

Vasak’s metaphor of generations fails to capture the nature of human rights in at least one respect: classes of human rights, unlike generations in life, don’t replace each other sequentially over time.³ Carl Wellman puts it bluntly: ‘[g]enerations succeed one another, not only in that the members of one generation are born before those of the next generation, but also in that parents tend to die before their children.'⁴ Nonetheless, some see merit in Vasak’s metaphor because it highlights important chronological facts about human rights. In another essay published a few years after his contribution to the UNESCO Courier, Vasak himself intimated that a generational conception of human rights captures how human rights came into existence in different ‘waves’ throughout history. The first wave, which accompanied the French revolution, gave rise to the generation of civil and political rights. With the second wave, after the Russian revolution of 1917, economic, social and cultural rights gained universal recognition. The third wave accompanied ‘the emancipation of colonised and dominated peoples’ in the middle of the 20th century.⁵


Others draw chronological insight into the relationship between first- and second-generation rights from the work on citizenship by T.H. Marshall. Writing in 1949, Marshall conceived of citizenship as consisting of three elements—civil, political and social—each of which emerged and gave shape to the concept sequentially during and after the industrial revolution in England. Civil rights, such as the right to own property and to enter into contracts, the right to sue and be sued, and rights associated with access to the judiciary, conferred legal personality on individuals and were primarily the work of courts. Political rights, such as the right to vote and hold office, were primarily the work of legislatures. And social rights, which range from ‘the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilized being according to the standards prevailing in society’, were primarily the responsibility of the administrative state and educational systems.\(^6\) In Marshall’s words, ‘it is possible, without doing too much violence to historical accuracy, to assign the formative period in the life of each to a different century—civil rights to the eighteenth, political to the nineteenth and social to the twentieth’.\(^7\)

However accurate such chronological accounts of human rights may be, they say little that is meaningful about human rights in international law, which are of a much more recent vintage than, say, rights that surfaced in British common law during the industrial revolution. Before the turn of the 20th century, positive international law referred to human rights at best obliquely. Samuel Moyn argues that international human rights


emerged ‘seemingly from nowhere’ and acquired political and legal salience only recently, in the 1970s.\(^8\) Others take a longer view, tracing the ancestry of the field to diverse historical events and epochs, including the British movement to abolish the transatlantic slave trade,\(^9\) the European renaissance and reformation,\(^10\) and the cultural and literary milieu of the enlightenment.\(^11\) Accounting for international human rights in terms of generations, however, is not the same as determining their origins or antecedents. A generational account typically assumes their formal legal existence and, at least from a chronological perspective, classifies them in terms of when they came to exist. Relying on events or periods prior to the 20th century to identify a chronology of international human rights confuses the origins or antecedents with their legal existence.\(^12\)

The lack of fit between the periods to which generations of human rights are often assigned and their comparatively youthful existence in positive international law do not foreclose the possibility of a chronological account of their international legal status. Human rights in international law are often portrayed by international legal scholars as possessing a unique chronology of their own, one that commences in the aftermath of the Second World War and which continues through the latter half of the 20th century to the present day.\(^13\) Vasak alluded to such a conception when he characterised the international


\(^12\) Daniel Whelan makes the additional point that ‘[t]he problem with the generations approach is that it permanently categorizes rights, not only by fixing the categories in history but also by finding within each generation incompatible philosophical sources of inspiration.’ DJ Whelan, *Indivisible Human Rights: A History* (University of Pennsylvania Press, 2011) 210.

community, in 1979, as ‘embarking on a third generation of human rights’ in what has been ‘a 30-year struggle’. On this conception, first-generation civil and political rights initially received recognition, second-generation social and economic rights subsequently received recognition, and third-generation solidarity rights are in the process of receiving recognition, in international law.

If we relax the positivistic premise that human rights received formal legal expression only in 1948, with the adoption of the Universal Declaration of Human Rights (UDHR), and engage with developments earlier in the 20th century, any chronology that might exist in the resulting expanded time frame belies the one suggested by Vasak. Philip Alston notes that human rights first emerged in international law when international labour rights, which Marshall conceived of as a subset of social rights, made their first appearance after World War I, with the creation of the International Labour Organization (ILO) and the raft of treaties that emerged shortly thereafter protecting the rights of workers. Asbjørn Eide locates the emergence of labour rights in international law even further back in time, to conferences convened by the Swiss authorities in 1905 and 1906, which adopted conventions based on the work of the International Association for the Legal Protection of Workers in 1900, building on a set of recommendations generated by a conference convened in Germany in 1890. According to Eide, the main contribution that the 1948 UDHR made to international human rights law was to extend the field beyond social and economic rights to include civil and political rights. From this vantage point, whether the chronology commences at the end of the 19th century or the beginning

14 Vasak (1977) 29.
of the 20th century, social and economic rights are first-generation rights, and civil and political rights are their relatively youthful second-generational relatives.\footnote{Ibid 17 (the Universal Declaration’s ‘great contribution is that it extended the human rights platform to embrace the whole field—civil, political, economic, social and cultural, and made the different rights interrelated and mutually reinforcing’).}

In fact, from this perspective, the emergence of what we understand to be third-generation rights occurred before civil and political rights received formal expression in international law. With the 1648 Treaty of Westphalia guaranteeing religious freedom for minority communities, minority rights received international recognition at the very moment that international law began to conceive of states as sovereign legal actors. While it recognised the sovereign right of princes to determine the religion of their own states, the Treaty of Westphalia also guaranteed the right of Lutherans and Calvinists in specified regions to vested in members of minority communities the right to practise their faith in public and private realms.\footnote{Article 28 of the Treaty, for example, stipulated that “those of the Confession of Augsburg, and particularly the Inhabitants of Oppenheim, shall be put in possession again of their Churches, and Ecclesiastical Estates, as they were in the Year 1624. as also that all others of the said Confession of Augsburg, who shall demand it, shall have the free Exercise of their Religion, as well in publick Churches at the appointed Hours, as in private in their own Houses, or in others chosen for this purpose by their Ministers, or by those of their Neighbours, preaching the Word of God.” Treaty of Westphalia, 1 Parry 271 (1648). For more discussion of Westphalia and minorities see D Philpott, ‘Religious Freedom and the Undoing of the Westphalian State’ 25 Michigan Journal International Law (2004) 981; A Osiander, ‘Sovereignty, International Relations, and the Westphalian Myth’ 55 International Organization (2001) 251; S Beaulac, ‘The Westphalian Legal Orthodoxy – Myth or Reality?’ 2 Journal of the History of International Law (2000) 148; S Krasner & D Froats, ‘ Minority Rights and the Westphalian Model’, in D Lake & D Rothchild (eds), The International Spread of Ethnic Conflict: Fear, Diffusion, and Escalation (Princeton UP, 1998) 227. Janne Nijman describes the history of minorities and majorities in international law in more ancient terms, as having ‘clear roots in periods before 1648, in 4th-6th-century Asia Minor’. J Nijman, ‘Majorities and Minorities’, in B Fassbinder & A Peters (eds), The Oxford Handbook of the History of International Law (Oxford UP, 2012) 95, 100, 102-03.}

Minority rights also rose to international legal prominence after World War I with the adoption of a host of multilateral and bilateral treaties, monitored by the League of Nations, which provided protection to populations adversely affected by the war and the subsequent redrawing of territorial boundaries in Europe. Although minority rights were
not thought of in universal terms during this period, they shared common features. The relevant legal instruments contained stipulations regarding the acquisition of nationality of the newly created or enlarged state, the right to equal treatment, rights against non-discrimination, and the protection of ethnic, religious or linguistic identity, including the rights of minorities to use their mother tongue officially, to have their own schools, and to practise their religion.19

Indigenous rights, too, don’t track the common chronological account of the three generations of human rights in international law. Soon after its inception in 1919, the ILO sought to extend its supervisory authority to working conditions in colonies and dependent territories. The ILO undertook studies in 1921 on the working conditions in these jurisdictions, establishing in 1926 a Committee of Experts on Native Labour to formulate labour standards for what it termed ‘indigenous’ workers in these regions, and enshrining these standards in seven Conventions that came into force between 1930 and 1955. These Conventions set out relatively weak labour standards for the protection of workers in colonies and dependent territories. They included obligations to phase out the use of forced labour, regulations governing the recruitment of workers that sought to minimise the impact of the demand for labour on the political and social organisation of the population, requirements that employers enter into written contracts with employees and bear certain costs associated with relocation and transportation of workers, obligations to phase out—‘progressively and as soon as possible’—penal sanctions for breach of contract, provisions specifying the maximum length or term of employment

contracts, and regulations governing the use of migrant workers.\textsuperscript{20} Despite their weaknesses, indigenous civil and social rights nonetheless found formal expression in international law well before the adoption of the Universal Declaration and the entrenchment of so-called first- and second-generation rights in 1948.

In Vasak’s defence, social rights and minority rights typically were not cast in universal terms in international law before the adoption of the International Covenant on Civil and Political Rights. They vested in some people and not in others and were tailored to the contingent circumstances of the communities that they purported to protect. And characterisations of indigenous rights as instruments that protect interests associated with the right to self-determination—a right that is said to vest in all of us by virtue of our common humanity\textsuperscript{21}—surfaced even more recently. If human rights, understood as universal entitlements, first surfaced in international law with the adoption of the 1948 Universal Declaration, then minority and indigenous rights plausibly could be characterised chronologically as third-generation rights, arguably emerging in universal terms in 1976 and 1991, respectively.\textsuperscript{22} But if the chronology commences in 1948, then civil and political rights appear in international law at the same time as the appearance of

\textsuperscript{20} See respectively Convention concerning Forced Labour of 1930 (No. 29); Convention concerning the Recruiting of Indigenous Workers of 1936 (No. 50); Convention concerning the Contracts of Employment (Indigenous Workers) of 1939 (No. 64); Convention concerning Penal Sanctions (Indigenous Workers) of 1939 (No. 65); Convention concerning Contracts of Employment of 1947 (No. 86); Convention concerning the Migration for Employment of 1949 (revised as No. 97). Penal sanctions for breach of contract were finally abolished in 1955: see Convention concerning the Abolition of Penal Sanctions for Breaches of Contract of Employment by Indigenous Workers of 1955 (No. 104). Forced labour was abolished in 1957: see Convention concerning the Abolition of Forced Labour of 1957 (No. 105).

\textsuperscript{21} For an account of international indigenous rights in these terms see SJ Anaya, \textit{Indigenous Peoples in International Law}, 2nd ed. (Oxford UP, 2004).

social, economic and cultural rights. The 1948 UDHR enshrines both sets of rights, rendering suspect the claim that first-generation rights chronologically preceded second-generation rights in international legal history.

If instead we tighten the positivistic premise that human rights first appear in international law when they receive formal legal expression, and commence the chronology in 1976, when the International Covenant on Civil and Political Rights and the International Covenant on Social, Economic and Cultural Rights entered into force, then a chronological account of the three classes of rights is even more historically inaccurate. Under this tighter premise, both first- and second-generations of human rights came into international legal existence simultaneously, as did minority rights understood as universal entitlements. And the right of self-determination—a so-called third-generation right—was formally recognised as a human right by the International Court of Justice—one year before the coming into force of the two Covenants. If we are to ascribe a chronology to these events, it is a much more complex one than what is offered by generational accounts of human rights.

GENERATIONS AS ANALYTICAL CATEGORIES

Another way of understanding human rights in generational terms is to treat Vasak’s three generations as analytical instead of chronological categories. Approached analytically, a human right belongs to a particular generation of rights because of distinctive properties that it possesses. Vasak himself alluded to this approach by distinguishing the three generations of rights in terms of the obligations they generate and

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23 See also Alston (1982) 317.
24 Western Sahara (Advisory Opinion), ICJ Reports (1975) 1.
on whom their obligations fall. Civil and political rights, he wrote, are ‘negative rights, in
the sense that their respect requires that the state do nothing to interfere with individual
liberties’. Social, economic and cultural rights, in contrast, require ‘positive action by
the state to be implemented’. Third-generation rights, for Vasak, are distinctive not
because of the nature of the obligations they impose but because of the actors who bear
these obligations. Unlike first- and second-generation rights, which impose obligations
only on states, third-generation rights, because they ‘reflect a certain conception of
community life, . . . can only be implemented by the combined efforts of everyone:
individuals, states and other bodies, as well as public and private institutions’. Critiques of
accounts that characterise civil and political rights as negative rights and
social and economic rights as positive rights are well known, and there is no need to
rehearse their arguments in detail here. It suffices to say that, contrary to Vasak, who
insisted on a sharp divide between positive and negative rights, all rights—whether civil,
political, social, or economic—give rise to both positive and negative state obligations
calibrated to protect certain interests and not others. The right to property, for example,
classically conceived of as a negative civil right that requires the state to refrain from
interfering with its exercise, requires extensive state action—legislative, judicial and

26 Ibid.
27 Ibid. Although critical of generational approaches, Whelan offers this analytical version: ‘First-
generation rights view the state as the primary violator of rights. Second-generation rights seek to combat
the power of the market. Third-generation rights are anti-colonial, and in a sense are linked to second-
28 For a sampling, see S Fredman, Human Rights Transformed: Positive Rights and Positive Duties (Oxford
UP, 2008); A Sen, The Idea of Justice (Harvard UP, 2009); C Fabre, Social Rights and the Constitution:
Government and the Decent Life (Oxford UP, 2004); S Holmes & CR Sunstein, The Cost of Rights: Why
Liberty Depends on Taxes (WW Norton, 1999); H Shue, Basic Rights: Subsistence, Affluence, and U.S.
Foreign Policy, 2nd ed. (Princeton UP, 1996); C Scott & P Macklem, ‘Constitutional Ropes of Sand or
Justiciable Guarantees? Social Rights in a New South African Constitution’ 141 University of Pennsylvania
administrative—for its protection. Zoning legislation, criminal law, the common law of
property and tort, and environmental agencies and police forces serve to protect the value
of one’s property from the actions of others. ‘The protection of property’, in Neil
Komesar’s words, ‘needs both protection from and the protection of the government’.29

Social and economic rights, too, can be cast in either positive or negative terms,
depending on how one characterises the state obligations to which they give rise. State
abolition of social assistance, for example, implicates a negative right to minimal
subsistence in so far as a state subject to such a right cannot deny a person the minimal
subsistence to which she is entitled. But it also implicates a positive right to minimal
subsistence in so far as the right obligates the state to secure minimal subsistence to each
individual. Similarly, a right to shelter contemplates a negative obligation on government
not to demolish one’s housing as well as, under some formulations, an obligation to
provide housing to those in need.

So-called third-generation rights also possess negative and positive dimensions. The
right to development, as we will see, imposes internal obligations on states that are both
negative and positive in nature. A state’s negative obligations require it to not act in ways
that interfere with the exercise of the right to development. A state’s positive obligations
require it to enable its population to participate in and benefit from economic, social,
cultural and political development. It imposes additional external obligations on
international legal actors that are also negative and positive in nature. Its negative
dimensions require states and international institutions to fashion rules and policies

29 N Komesar, Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy
(University of Chicago Press, 1994) 245.
governing the global economy in ways that do not exacerbate global poverty. Its positive
dimensions require states and international institutions to provide assistance to
developing states in the form of development aid and debt relief.

Given that all rights—regardless of which generation they are said to belong to—give
rise to positive and negative state obligations, the key task is not to determine whether a
right is positive or negative. It is instead to identify, in specific contexts, the particular
configuration of state obligations—positive and negative—to which a human right gives
rise. This configuration is itself dependent on the nature of the interests that the right is
deemed to protect, and the extent to which it contains positive obligations will depend, in
part, on how much value those specifying its terms place on state intervention or market
ordering.

Vasak himself alluded to a conception of human rights that classifies them in terms of
the interests they seek to protect by grandly suggesting that the three generations of
human rights correspond, respectively, to the three ideals of the French revolution:
liberty, equality and fraternity.\(^\text{30}\) In his view, liberty corresponds to first-generation rights
because they protect fundamental freedoms such as freedom of expression and religion.
Equality corresponds to second-generation rights because they are aimed at the
amelioration of social and economic inequalities.\(^\text{31}\) Fraternity—or what Vasak also

noncomparative standards of well-being’ and in this respect they ‘differ from various other human rights
that import equality as a value directly into human rights doctrine’).
referred to as solidarity—underpins third-generation rights in the sense that it promotes
the social solidarity necessary for individuals to develop their full human potential.\textsuperscript{32}

Vasak argued that third-generation rights were necessary to address two deficiencies
associated with first- and second-generation rights. The first is that a culture of rights
promotes a culture of individualism, resulting in the social isolation of individuals, which
solidarity rights seek to overcome. Second, writing in 1984, Vasak presciently foresaw
that processes of economic globalisation render it increasingly difficult for states, acting
independently, to address problems that second-generation rights were designed to
address. Vasak saw third-generation rights as instruments that enable a global
coordinated response to the social isolation produced by a culture of individualism
because they require cooperative action at the international level.\textsuperscript{33}

Equating the three generations of rights with the three ideals of liberty, equality and
fraternity, however, merely underscores the fact that different rights protect different
interests and that these interests can be grouped into larger normative categories that
speak to different dimensions of the human condition. Conveying this fact by way of a
metaphor of generations risks mystifying this simple, albeit important, insight. More
importantly, it obscures what is common to all human rights in international law, despite
the diverse sets of interests that they seek to protect.

\textsuperscript{32} Wellman (2000) 642. René Cassin, a French delegate instrumental in the drafting of the 1948 Universal
Declaration of Human Rights, wrote that his draft of Article 1 of the Universal Declaration, which states
that ‘all human beings are born free and equal in dignity and rights’ and that ‘they are endowed with reason
and conscience and should act towards one another in a spirit of brotherhood’, was meant to allude ‘to the
three fundamental principles of liberty, equality, and fraternity’. Quoted in J Morsink, The Universal
Declaration of Human Rights (University of Pennsylvania Press, 1999), at 38.

Another way of understanding generations in analytical terms is to treat them as highlighting a conceptual sequencing of types of human rights. Civil and political rights can be thought of as conceptually prior to, and therefore belonging to a generation ‘older than’, social and economic rights. This is because civil and political rights establish the legal and political standing of those entitled to exercise and enjoy social and economic rights. And the protection of both sets of rights is necessary to the effective enjoyment of a third generation of human rights, such as the right of self-determination. If one is not vested with civil, political, social and economic rights, then one cannot be said to be capable of freely determining one’s political status and freely pursuing one’s economic, social and cultural development.

With generations as proxies for conceptual sequences, however, it is not clear in which direction the sequences run. Social and economic rights can just as easily be comprehended as conceptually prior to civil and political rights for the simple reason that the vesting of civil and political rights is practically meaningless if an individual is incapable of satisfying his or her most basic needs in life. The right to vote means little to someone who is starving. Or, as Jeremy Waldron more elegantly put it, ‘if one is really concerned to secure civil or political liberty for a person, that commitment should be accompanied by a further concern about the conditions of the person’s life that make it possible for him to enjoy and exercise that liberty’. 34

Others locate third-generation rights at the start of the sequence. Advocates of so-called third-generation rights often argue that these rights are necessary for the full

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realisation of first- and second-generation rights. Jamil Baroody, who represented Saudi Arabia when the United Nations turned its attention to the international legality of colonialism in the 1950s, for example, was successful in his efforts to amend a draft 1952 UN resolution on self-determination to proclaim that ‘[t]he right of peoples and nations to self-determination is a prerequisite to the enjoyment of all fundamental human rights’.35 Similarly, the Indonesian delegate at the time, Nazir Pamontjak, characterised the right of self-determination as ‘a conditio sine qua non of individual human rights’.36

Henry Shue has offered what is perhaps the most sophisticated account of human rights in terms of their sequential importance. In his book, Basic Rights, Shue predicated US foreign policy on a commitment to rights that he referred to as economic subsistence rights—a small set of rights that has priority over other human rights.37 Building on Rawls’s notion of ‘primary goods’, Shue specified a set of what he called ‘basic rights’, which, in his view, have the highest priority among human rights in terms of the need for their realisation. Basic rights, for Shue, were not intrinsically more valuable than other rights. Their status lay in the functional need for their realisation in order to secure other, ‘non-basic’, rights. ‘When a right is genuinely basic’, he wrote, ‘any attempt to enjoy any other right by sacrificing the basic right would be quite literally self-defeating, cutting the ground from beneath itself’ 38

Shue’s basic rights included rights associated with physical security, including rights that protect individuals from physical harm, such as the right not to be tortured and rights

38 Ibid 19.
not to be assaulted. They also included those rights that Shue identified as economic subsistence rights around which he sought to reorientate US foreign policy. Subsistence rights include many of the rights associated with the International Covenant on Social, Economic and Cultural Rights, including the rights to food, shelter and health care. Basic rights, for Shue, additionally included a few rights that are associated with liberty, including freedom of physical movement and rights associated with political participation. Together, this set of basic rights, in Shue’s words, is ‘the morality of the depths. They specify the line beneath which no one is to be allowed to sink.’

For present purposes, what is noteworthy is that Shue’s conception of basic rights as analytically prior to other human rights in terms of their realisation is that they include both social and economic rights and civil and political rights. Although he was no doubt familiar with generational accounts of human rights, and even sought to problematise efforts to distinguish negative rights from positive rights, he didn’t describe the relationship between basic and non-basic rights in generational terms. But Shue does comprehend human rights in sequential terms, with basic rights commencing the sequence. Given that, for Shue, basic rights include some civil and political rights as well as some social and economic rights, this way of sequencing further undermines any analytical priority that a generational account might impose on the different types of human rights in international law.

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40 Ibid 22-29.
41 Ibid 67-82.
42 Ibid 18.
43 Ibid 35-40.
Understanding classes of rights as conceptual sequences not only must confront the uncomfortable fact that they can be logically sequenced in a number of different ways. It must also confront a foundational commitment in international human rights law to the concept of indivisibility. References to the concept of indivisibility are almost as legion as references to human rights as generations. The seeds of the concept were planted in debates in the 1950s surrounding the inclusion of a right of self-determination in the two Covenants, as illustrated by Baroody’s understanding of self-determination as a ‘prerequisite’ of all human rights. The concept first explicitly surfaced in the Proclamation of Tehran, issued at an international conference in 1968. The UN General Assembly subsequently endorsed the idea that human rights in international law are indivisible, a position that has since been affirmed by the UN’s Office of the Commissioner for Human Rights. In recent years, the UN has gone so far as to declare that the indivisibility, interdependency and interrelatedness of human rights is ‘beyond dispute’.

In international legal discourse on human rights, indivisibility is typically joined with the concepts of interdependency and interrelatedness. Although precise definitions vary, Daniel Whelan defines interdependency as meaning ‘the enjoyment of any right or group of rights requires enjoyment of others’ interrelatedness as ‘mutual relationship or connectedness’, and indivisibility as akin to inseparability. Together, they convey the idea—signified by the term ‘indivisibility’ re-enlisted here by Whelan as an umbrella

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44 Whelan (2011) 2.
46 Proclamation of Tehran, International Conference on Human Rights, 22 April-13 May 1968, UN Doc. A/CONF.32/41..
48 Whelan (2011) 1.
term—that all human rights are equal in terms of their status and importance, and that the content of each intrinsically relates to and mutually reinforces all other human rights on the international legal register. In contemporary discourse, the concept of indivisibility participates in what Whelan has characterised as ‘a rhetoric of restoration of the spirit of the fundamental unity (or some might say, organic unity) of the rights contained in the 1948 Universal Declaration of Human Rights’.

If, as the UN claims, it is ‘beyond dispute’ that human rights are indivisible, then dividing them into generations to capture analytical priorities that some allegedly enjoy over others misconstrues their nature. As an umbrella concept, indivisibility suggests that the realisation of each right is necessary to the realisation of all others, not that the realisation of some is a precondition of the realisation of others. And, views held at the UN notwithstanding, the indivisibility of human rights is in dispute, as the work of Shue and others illustrates. But what this dispute reveals is not that human rights can be classified by generations to capture the idea that civil and political rights are necessary preconditions of social and economic rights, and that social and economic rights are necessary preconditions of third-generation rights. It reveals instead that relationships between and among rights are far more complex than the portrayals offered by generational accounts. The implementation of some rights might be necessary for the effective enjoyment of other rights. Rights relating to physical security, for example, are necessary to exercise effectively freedom of assembly. Other rights might have bilateral relationships. For Shue, the relationship between security and subsistence rights is of this nature. Some rights might bear a strong connection to other rights whereas others might

49 Ibid 2.
50 Ibid 211 (‘If we subscribe to the idea that (something about) human rights is truly indivisible, the generations approach confronts us with significant contradictions’).
manifest a weaker connection.\footnote{See Nickel (2008) (distinguishing between weak and strong ‘supporting relations’ among human rights).} The right to access to health care is closely connected to the right to security of the person, for example, whereas the right to education is loosely connected to the right to a fair trial.\footnote{The latter example is Nickel’s. Nickel (2008) 998.} The complexity of relations among rights that protect different sets of interests makes generational conceptions of human rights ill-suited to the task of classification. Moreover, it risks glossing over commonalities that, as the remainder of this chapter seeks to explain, all human rights in international law share.

**CIVIL AND POLITICAL RIGHTS AS MONITORS OF SOVEREIGNTY’S EXERCISE**

Different human rights seek to protect different kinds of interests, and the nature of these interests will generate different means of protection. Whether chronological or analytical, a generational conception that stylises these differences misses the fact that, despite the diverse sets of interests they seek to protect, human rights in international law share a common purpose, which is to mitigate injustices produced by the ways in which international law brings legal order to global politics. This account finds its clearest expression in the role that civil and political rights play in international law. Civil and political rights in international law do not align neatly with the class of rights identified as civil by Marshall. For Marshall, they included the right to own property and to enter into contracts, the right to sue and be sued, and rights associated with access to the judiciary. Civil and political rights in international law are generally thought to include rights that protect life, liberty and security of the person, that prohibit various forms of inequalities, including discrimination on grounds such as race, gender, national origin,
colour, sexual orientation, ethnicity, religion, and disability, and that protect privacy, freedom of thought and conscience, speech and expression, religion, the press, assembly and movement. They also include rights that relate more to the legal and political standing of individuals, such as those rights that secure procedural fairness in legal proceedings, including the right to a fair trial, due process rights, the right to seek redress or a legal remedy, as well as rights of participation in civil society and politics such as freedom of association, the right to assemble, the right to petition, and the right to vote and run for political office.

The role that civil and political rights play in international law is to mitigate the harm that states can cause to rights-bearers in the exercise of sovereign power that international law vests in states. What these interests are, and what their corresponding rights require of states in the exercise of sovereign power, are matters of deep contestation that arise in the context of particular disputes that frame them in continually new and unpredictable ways. Questions about the content of civil and political rights form a large part of the ongoing interpretive enterprise that is international human rights law. While their content is constantly open to contestation, the function of civil and political rights in international law is to address the fact that international law authorises states to exercise sovereign power in ways that threaten the interests that such rights seek to protect.

This conception of international human rights is a marked departure from traditional accounts of their nature and purpose, which conceive of human rights as moral entitlements that all human beings possess by virtue of our common humanity. What constitutes a human right, according to this approach, is not determined by a positive legal instrument or institution. Human rights are prior to and independent of positive
international human rights law. Just because a legal order declares something to be a human right does not make it so. Conversely, the fact that a human right does not receive international legal protection does not mean that it is not a human right. The existence or non-existence of a human right rests on abstract features of what it means to be human and the obligations to which these features give rise. The mission of the field is to secure international legal protection of universal features of what it means to be a human being.

Immanuel Kant wrote of a single, innate ‘right belonging to every man by virtue of his humanity’ from which all other rights flow.\(^53\) Kant’s conception of rights sweeps in much more of moral life than contemporary human rights law, but many contemporary moral accounts of human rights draw from the principle of universality on which it rests. James Griffin, for example, conceives of human rights as protections of ‘personhood’, and argues that they ‘must be universal, because they are possessed by human agents simply in virtue of their normative agency’.\(^54\) John Tasioulas defines human rights as ‘moral entitlements possessed by all simply in virtue of their humanity’.\(^55\) Similarly, John Simmonds argues that ‘human rights are rights possessed by all human beings (at all times and in all places), simply in virtue of their humanity’.\(^56\) In a somewhat different—

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\(^{56}\) AJ Simmonds, Justification and Legitimacy: Essays on Rights and Obligation (Cambridge UP, 2001), at 185 (emphasis omitted). See also J Donnelly, Universal Human Rights in Theory and Practice, 2nd ed. (Cornell UP, 2003) 18 (‘Human rights are, literally, the rights that one has simply because one is a human being’); A Gewirth, Human Rights (University of Chicago Press, 1982).
but equally universal – vein, human rights, according to Martha Nussbaum, protect ‘central human capabilities’ that are fundamental to what it means to be truly human.57

On moral accounts such as these, human rights protect essential characteristics or features that all of us share despite the innumerable historical, geographical, cultural, communal, and other contingencies that shape our lives and our relations with others in unique ways. They give rise to specifiable duties that we all owe each other in ethical recognition of what it means to be human. Rights and obligations can also arise from the bonds of history, community, religion, culture or nation. But if such rights relate simply to contingent features of human existence, they don’t constitute human rights and don’t merit a place on the international legal register. And if we owe each other duties for reasons other than our common humanity—say, because of friendship, kinship, or citizenship—then these duties don’t correspond to human rights and should not be identified as such by international legal instruments.

But whether civil and political rights, and the interests that underlie them, relate to essential features of what it means to be human and therefore exemplify moral conceptions of human rights has little to do with their function in international law, which is to mitigate some of the adverse consequences of the structure and operation of the international legal order. It may be that some of those responsible for their entrance onto the international legal stage viewed civil and political rights in universal terms.58 It may be that others viewed civil and political rights in less than universal terms, perhaps as key


58 Johannnes Morsink, the author of an authoritative history of the drafting of the Universal Declaration, is of this view. See Morsink (1999) 295 (‘The drafters believed that people start life already possessing certain moral rights, the right to life being one of them’).
elements of a superior form of political community, and saw their international legality as an effective means of popularising its merits.\(^{59}\) Others may have sought their elevation to the status of international human rights as an effective means of combatting the spread of communism.\(^{60}\) The politics behind their international legal production, in other words, may or may not have been consistent with moral accounts of why human rights merit international protection. But moral conceptions of the purpose of civil and political rights have little to do with a legal conception of their role in international law, which relates to the structure and operation of the international legal order and not the demands of abstract morality.

This is not to say that the content of civil and political rights is completely divorced from moral considerations. The terms of human rights instruments often rely on concepts and principles charged with normative significance (dignity, for example) in their specification of the rights and obligations that they enshrine. The international legal validity of these rights and obligations is not in doubt. Their legal effect, however, rests on how we understand their nature and scope, which invariably requires interpreting the moral concepts and principles to which they refer, and which in turn leads those responsible for their interpretation to venture—explicitly or implicitly—into the realm of moral theory.

Article 10(1) of the International Covenant on Civil and Political Rights, for example, provides that ‘all persons deprived of their liberty shall be treated with humanity and with

\(^{59}\) For a contemporary defence of human rights in these terms see Headley (2008).

\(^{60}\) For the view that the founding of the International Labour Organization and the international labour rights that it spawned were partly aimed at addressing the ‘Bolshevist threat’ see F Maupain, ‘New Foundation or New Façade? The ILO and the 2008 Declaration on Social Justice for a Fair Globalization’ 20 European Journal of International Law (2009) 823, 832.
respect for the inherent dignity of the human person’. Some insight into the meaning of Article 10(1) can be gleaned from the fact that it goes on to specify that accused persons shall, except in exceptional circumstances, be segregated from convicted persons, and accused juvenile persons shall be separated from adults, and that penitentiary systems should strive to reform and rehabilitate prisoners. The text of Article 10 thus suggests that ‘liberty’ and ‘dignity’ are values that ought to inform the design of prison systems and correctional institutions—values that are often said to be universal features of what it means to be human.

These terms invite moral inquiry in cases where the meaning of Article 10 is not clear. For example, is a person deprived of her liberty when involuntarily committed to a psychiatric hospital? Are the requirements of humane treatment and respect for the inherent dignity the same for all states or do they vary depending on the material resources available to states? Suggesting that liberty means more than freedom from arbitrary arrest and punishment, the Human Rights Committee has stated that Article 10(1) extends beyond the criminal justice system to involuntary detention ‘elsewhere’, including hospitals, psychiatric hospitals and detention camps. It has also stated that ‘treating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamentally and universally applicable rule’. As a result, the minimum requirements of Article 10(1) do not vary depending on the ‘material resources available’ in any given state. What the Committee’s views illustrate is that the scope and content of

61 ICCPR Article 1.
62 UNHRC, CCPR General Comment No. 21: Article 10 (Humane Treatment of Persons Deprived of Their Liberty) (adopted 10 April 1992) para. 2.
Article 10(1) cannot be determined solely by reference to the form and manner in which it holds itself out to be a legal rule. They turn, in part at least, on the meaning of the values that Article 10(1) enshrines, which makes separating questions of law from questions of morality a delicate task.

One of the effects of Article 10 may well be to protect universal features of what it means to be human, depending on one’s understanding of liberty and dignity. Article 10’s presence on the international legal register may also represent a major moral victory, depending on one’s morality. It certainly was a significant political victory for those responsible for its international legal existence, because they succeeded in codifying its constituent norms in the form of an international human right. But its legal role—the reason it is a human right in international law—isn’t to protect universal features of our common humanity. Nor is it reducible to the intent of those responsible for its international legal existence. Its legal role is to render illegal actions otherwise authorised by international law that have the potential to harm interests that underlie it. As is the case with all civil and political rights—indeed, all human rights—in international law, Article 10 is not so much a legal expression of the demands of abstract morality or the politics of its production as it is an instrument that aims to do justice in the actual international legal order in which we live.

SOCIAL AND ECONOMIC RIGHTS AS MONITORS OF SOVEREIGNTY’S EXERCISE

With the adoption of the International Covenant on Economic, Social, and Cultural Rights in 1976, the pantheon of international human rights law opened its august doors to
a broad set of social and economic rights that guarantee individuals access to a set of
basic social resources—such as food, housing, an adequate standard of living, and health
care—binding on states party to the Covenant’s terms. It conceives of these rights as
imposing obligations on states to take measures to secure their protection. Many states
appeared quickly to follow suit. The constitutions of states drafted or amended after 1976
overwhelmingly contain at least some of the set of social rights enshrined in the
International Covenant. Social rights are now so ubiquitous that they are a defining
feature of the contemporary constitutional order.

It is tempting to understand the relationship between these international and
comparative developments in causal terms. But if part of the project of constitutional
design is to protect a political community from its worst fears, then different states are
likely to entrench social rights for different reasons. Whereas drafters of the Constitution
of South Africa strove to ensure a parting of ways with the injustices of apartheid, for
example, central and eastern European states drafted constitutions as projects of
economic, social and political transition from communism to market economies. Social
and economic rights in South Africa arguably seek to break with the past whereas social
and economic rights in Central and Eastern European constitutions seek to maintain a

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64 International Covenant on Economic, Social, and Cultural Rights (adopted 16 December 1966, entered
into force 3 January 1976) 993 UNTS 3, Articles 11 (food, housing, adequate standard of living), 12
(health), 13 (education).
65 Ibid Article 2. See also Committee on Economic, Social and Cultural Rights, General Comment No. 3:
The Nature of States Parties’ Obligations (Fifth Session, 1990), UN Doc. E/1991/23, annex III.
66 C Jung, R Hirschl & E Rosevear, ‘Economic and Social Rights in National Constitutions’, 62 American
Journal of Comparative Law (2014) (‘Nearly all new democracies, and several established ones, have
included some form of ESRs in their constitutions, committing their governments, at least formally, to the
realization of minimum standards of social welfare’).
(‘Constitutions should . . . work against a nation’s most threatening tendencies’).
68 See generally S Leibenberg, Socio-Economic Rights: Adjudication under a Transformative Constitution
(Juta & Co, 2010).
link to the past. Although international human rights instruments may have provided a common lexicon for their domestic entrenchment, the presence of social and economic rights in any given domestic constitutional order is more likely to the function of its unique constitutional past and projected future than to lofty developments in international human rights law.

Moreover, social and economic rights in constitutional orders have a more secure footing in terms of legitimacy than their international legal counterparts. Constitutional rights need not wear the mantle of universality to acquire legitimacy in domestic legal orders. They acquire a measure of legitimacy domestically to the extent that they represent instruments that secure whatever particular vision of social justice for which citizens strive as a defining feature of their political community. Different political communities opt for different visions of social justice and their constitutions accordingly vary in terms of their commitments to social and economic rights. In Hart’s terms, social and economic rights in domestic constitutions are ‘special rights’ that ‘arise out of special transactions between individuals or out of some special relationship in which they stand to each other’. In contrast, the dominant account of human rights in international law is a moral one, where the legitimacy of a human right rests on its capacity to protect an essential and universal feature of our common humanity.

As a result, social and economic rights fit awkwardly into moral conceptions of human rights. Their allegedly universal status of social and economic rights is

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70 HLA Hart, ‘Are There any Natural Rights?’ 64(2) Philosophical Review (1955) 175, 183.
compromised by the fact that some protect only some individuals and not others, and make more sense in some national economies than others. Social and economic rights give rise to duties not easily assimilated by universal accounts, in that they often require states to legislate for their protection and don’t rest on a pre-institutional conception of what it means to be human. To the extent that they are comprehended in universal terms, the positive obligations to which they give rise, typically end at state boundaries whereas moral accounts tend to assume that obligations that attach to human rights are universal in nature. And social and economic rights, generally speaking, are understood as generating positive obligations on states to secure access to such resources for their own citizens, and many moral accounts falter when providing an explanation as to why this should be so as a matter of international as opposed to domestic law.

These features of social and economic rights, as we have seen, also serve as reasons why, for some, social rights belong to a different generation from civil and political rights. But if one stops attempting to force the round peg of social and economic rights into the square hole of universalism in an attempt to garner a modicum of legitimacy for their presence on the international stage, the salience of their differences from civil and political rights dissolves. In other words, if one sees shortcomings associated with the lack of fit between social and economic rights and universalism as not revealing deficiencies about framing social and economic rights as human rights but instead revealing deficiencies about framing human rights as universal rights, then what comes into stark relief is what these two classes of rights share. Social and economic rights, like civil and political rights, mitigate the harm that states can cause to the interests that
underlie them in the exercise of sovereign power that international law vests in the collectivities it recognises as states.

To be sure, the interests protected by social and economic rights are different from those protected by civil and political rights. Social and economic rights purport to provide individuals with access to resources. Civil and political rights speak to the legal and political standing of individuals and their dignity, autonomy and equality. As a result, civil, political, social and economic rights manifest distinctive features. And the interests to which these features relate can be grouped into larger normative categories that speak to different dimensions of the human condition. But, as stated, conveying this fact by way of a metaphor of generations risks mystifying this simple, albeit important, insight. More importantly, it fails to appreciate what is common to both classes of rights, which is that their function in international law is to address the fact that international law authorises states to exercise sovereign power in ways that threaten interests that underlie both sets of rights.

In recent years, political accounts of human rights have garnered attention in international political theory. Unlike most moral approaches, which focus on universal features of our common humanity, political conceptions define the nature of human rights in terms of their function in global political discourse. Human rights, according to political conceptions, don’t necessarily correlate to the requirements of moral theory. They represent reasons that social, political and legal actors rely on in international
arenas to advocate interfering in the internal affairs of a state and to provide assistance to states to promote their protection.71

Charles Beitz, for example, argues that justifications of human rights, as well as questions relating to their content and the obligations they impose on others, presuppose a concept of human rights that specifies the properties that make human rights what they are. Such a concept will not justify their protection nor determine their content or their ensuing obligations, but it will provide some purchase and help to frame debate on these questions. Beitz offers a concept of human rights derived from the practice of human rights in global politics. Global human rights practice, for Beitz, is a social practice, and participants invoke or rely on human rights as reasons for certain kinds of actions in certain circumstances.

What this practice reveals is that human rights protect urgent individual interests against certain predictable dangers associated with the exercise of sovereign power. States have a primary obligation to protect urgent interests of individuals over whom they exercise sovereign power, but external actors, such as other states and international institutions, have secondary obligations to secure protection when a state fails to live up to its responsibility.72 ‘To say something is a human right’, in Beitz’s view, ‘is to say that


72 Beitz (2009) 102-17. Rawls also defines the functional role of international human rights in terms of justifying interference in the internal affairs of a state. See Rawls (1999) 79 (human rights restrict ‘the justifying reasons for war and its conduct’ and specify ‘limits of a regime’s internal autonomy’). But as Beitz points out, Rawls does not also see human rights as justifying external assistance in their realisation. Beitz, in contrast, includes external assistance in his definition of the functional role of human rights, which leads him to define the right to an adequate standard of living as mandating global wealth redistribution.
social institutions that fail to protect the right are defective—they fall short of meeting conditions that anyone would reasonably expect them to satisfy—and that international efforts to aid or promote reform are legitimate and in some cases may be morally required'.

Social and economic rights, however, fit awkwardly into such political conceptions of human rights. This is not to discount the role that politics plays in their elevation to the status of international legal norms. Their presence in international law as human rights is, itself, the product of successful international political projects. Social and economic rights enshrined in the UDHR and subsequently rendered binding in the International Covenant on Economic, Social and Cultural Rights are political achievements, not legal markers of moral theory working itself pure on the international stage. In the words of Kerry Rittich, ‘[s]ocial rights are . . . artefacts of political struggles, the product of a time- and place-specific consensus about the requirements of social peace and economic progress’.

And practices associated with international social and economic rights, such as the monitoring of state compliance performed by the UN Committee on Economic, Social and Cultural Rights and regional bodies such as the European Committee of Social Rights, confirm political conceptions of social and economic rights as reasons for the international community to interfere in the internal affairs of a state.

But the practices of legal and political actors in international economic institutions such as the International Monetary Fund and the World Bank also suggest an increasingly


marginal role for social and economic rights as instruments that aim to secure access to basic goods. Current practice in these and related institutions manifests what Rittich refers to as ‘a new regulatory consensus’ in international economic circles on the need to ‘increase the extent to which economic and social status tracks market measures, market incentives and market success’.75 To the extent that this consensus contemplates a role for social and economic rights, it is one that merely secures access to social resources for only the least well-off in society and on a temporary basis.76

If, as political accounts claim, we are to draw out the normative dimensions of human rights from the practice of international political and legal actors, then this consensus suggests a very limited normative role for social and economic rights in international legal arenas. And to comprehend social and economic rights in this way vests with normative significance the very regulatory consensus that social and economic rights ought to monitor, and drains them of their capacity to critique existing practices. The normative role that social and economic rights play in international law is more than what practice reveals to be their discursive function in international economic and political arenas.77 Their normative significance, like that of civil and political rights, lies in the fact that they monitor the exercise of sovereign power that international law otherwise vests with legal validity.

Like civil and political rights, then, international social and economic rights act as instruments that mitigate the harm that states can cause to the bearers of such rights in

75 Ibid 131, 133.
76 Ibid.
77 Compare C O’Cinneade, ‘Bringing Socio-economic Rights Back within the Mainstream’ 13(1) Revista Europea de Derechos Fundamentales (2009) 259 (noting that both the European Committee of Social Rights and the European Court of Human Rights does not consider that the existing state of state practice shapes the content of the socio-economic rights set out in the European Social Charter and the European Convention on Human Rights, respectively).
the exercise of sovereign power that international law vests in the collectivities it recognises as states. International social and economic rights have both internal and external dimensions. Internally, they reiterate some of the reasons why the international legal order values sovereignty as a good that it distributes among the variety of legal actors that it recognises as states. Legally organising political communities by vesting them with sovereign power enables them to establish durable institutional arrangements—markets, administrative agencies, wealth and income redistribution mechanisms, social services, schools, and the like—to distribute basic social goods to their members. International social and economic rights call on states to exercise their sovereign power in ways that don’t violate the social and economic rights of their citizens.

Externally, international social and economic rights monitor the establishment and operation of international institutions, such as the World Trade Organisation and the World Bank, and international instruments, such as multilateral and bilateral trade and investment agreements, which determine the international legality of domestic and transnational economic activities. In these contexts, social and economic rights attend to the specific risks produced by processes of economic globalisation and which threaten access to goods that satisfy a person’s basic needs, such as food and shelter. Understood in external terms, international social and economic rights are instruments for monitoring these risks. The external obligations to which they give rise, oblige states, acting on the international stage, to minimise the chances of these risks becoming realities. They call on states as international actors to design international legal arrangements in ways that promote interests associated with the social and economic rights of all.
SOVEREIGNTY AND ITS DISTRIBUTION

According to Beitz, the purpose of ‘modern human rights doctrine’ is to ‘address pathologies of a global political structure that concentrates power at dispersed locations not subject to higher-level control’. Beitz’s insight captures the first contribution made by the concept of sovereignty to the structure of international law that this essay is seeking to highlight. The concentration of power to which Beitz is referring is sovereignty, and the fact that sovereignty is ‘not subject to higher-level control’ creates a risk that sovereigns will exercise their power in ways that adversely affect individuals and groups subject to their jurisdiction. Human rights operate to address the pathologies that would flow if sovereigns were relatively free to exercise their sovereign power in ways they saw fit. Where Beitz’s political account differs from the account advanced here is in relation to the normative question of why human rights ought to perform this function. Beitz answers this question in terms external to international law, by specifying conditions, extrapolated from practice, that a human rights claim must meet in order to possess normative legitimacy. The account offered here answers this question in terms internal to international law, by conceiving of the normative purchase of human rights in terms of their capacity to mitigate adverse consequences that arise from the structure and operation of international law itself.

There is an additional important difference between these two accounts. Perhaps because of their focus on practice, political accounts understate the systemic and dynamic role that sovereignty performs in international law. International law brings legal order to

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78 Beitz (2009) 129.
global politics not simply by legally authorising the exercise of sovereign power by the collectivities it recognises as states. By authorising the exercise of sovereign power by all sovereign states in the world, international law also produces a systemic distribution of sovereign power. By specifying rules that enable the re-allocation of sovereignty, international law produces a dynamic distribution of sovereign power. The systemic and dynamic nature of the distribution of sovereignty in international law produces pathologies relatively distinct from those associated with international law’s authorisation of the exercise of sovereign power. Human rights in international law not only speak to adverse consequences of the exercise of sovereign power. They also speak to adverse consequences of the distribution of sovereign power.

International law performs its distribution of sovereign power by a set of rules and principles that relate to the acquisition and maintenance of state sovereignty. Claims of sovereign power possess legal validity in international law only under certain conditions and in certain circumstances. International law provides that a state whose government represents the whole of its population within its territory, consistent with principles of equality, nondiscrimination, and self-determination, is entitled to maintain its territorial integrity under international law and to have its territorial integrity respected by other states.79 But international legal rules also determine which collectivities are entitled to

79 See, e.g., UN General Assembly, Declaration on the Occasion of the Fiftieth Anniversary of the United Nations, GA Res. 50/6, 24 October 1995 (the right of self-determination ‘shall not be construed as authorising or encouraging any action that would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind’). This formulation originally and most famously appeared in the Friendly Relations Declaration of 1970. See Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, GA Res. 2625, UN GAOR, 25th Sess., Supp. No. 28, UN Doc. A/8028 (1970).
exercise sovereign authority and over which territory and people such authority operates. The field entitles a collectivity to form a state and wield sovereign power if it constitutes a ‘people’ and has experienced severe and ongoing injustices such as colonial rule or alien subjugation, domination or exploitation. Finally, international law also confers legal validity on a claim to sovereignty by a collectivity if it manifests certain properties that international law stipulates as conditions of acquiring statehood.

These avenues of obtaining and maintaining sovereign statehood are the means by which the international legal order distinguishes between legal and illegal claims to sovereign power. International law brings legal order to international political reality by sorting the countless claims of sovereign power that have defined global politics for centuries according to a binary opposition between legal and illegal claims. By legally validating some claims of sovereign power and refusing to validate others, in other words, international law organises international political reality into a legal order in which certain collectivities possess legal authority to rule people and territory. In doing so, international law effectively performs an ongoing distribution of sovereignty among certain collectivities throughout the world.

International law thus brings legal order to international political reality by processing the countless claims of sovereign power that have punctuated global politics for centuries by sorting them by a binary opposition between legal and illegal claims of sovereignty. This has the effect of legally including certain political communities, and legally

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80 According to some formulations, international law also entitles a people to form a state and assume sovereign power if it is denied any meaningful exercise of its right to self-determination within the state of which it forms a part. See, e.g., Reference re Secession of Quebec, [1998] 2 SCR 217.
81 Article 1 of the Montevideo Convention on Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934), 165 LNTS 19, for example, lists the following criteria of statehood: a permanent population, a defined territory, a system of government, and a capacity to enter into relations with other states.
excluding others, in a dynamic and systemic international distribution of sovereign authority. Its dynamic nature arises from the presence of rules and principles that authorise reallocations of sovereignty occasioned by the demise of existing states and the creation of new states by right or recognition. These rules and principles render the distribution of sovereignty capable of recalibration and realignment in light of new political developments deemed to possess international legal significance. Its systemic nature is a function of the fact that its distributional reach envelops all states in its structure and operation, treating all as formal equals in terms of the legal nature and scope of their sovereign power.

The dynamic and systemic dimensions of the distribution of sovereign authority in international law enable us to ask questions about the ways it organises international political reality into a legal order, how and under what conditions it vests certain political projects with international legal significance, and the distributive outcomes that it produces. What are the rules and principles that determine which communities are entitled to participate in the distribution of sovereignty that international law performs? What values are promoted, and what values are compromised, by an international legal order that conceptualises the power to rule people and territory as a legal entitlement that vests in certain geographically concentrated communities in the various regions of the world? To what extent can we speak of a just or unjust distribution of sovereign power? What varieties of inequalities are produced—and what varieties of inequalities are addressed—by an international legal architecture built on the foundation of sovereign equality?
The dynamism that new political developments, deemed to possess international legal
significance, impart to the distribution of sovereignty is the backdrop to the role that
minority rights play in international law. This is partly a function of the fact that
international treaties episodically modify the distribution of sovereign power by
transferring sovereignty over territory and people from one sovereign actor to another. In
so doing, they create majorities and minorities. Minorities exist in relation to majorities,
and majorities exist because international law distributes sovereign power over territory
and people to certain collectivities and not to others.\textsuperscript{82} Comprehending national minority
rights claims in terms of the role they can play in monitoring the justice of the
distribution of sovereign power, reveals that their normative status lies in the fact that
they serve as instruments to mitigate injustices associated with the kinds of recalibrations
of sovereign power that international law treats as possessing international legal force.
Claims based on religious and cultural difference challenge the exercise of sovereign
power more than its sources. Instead of seeking commonalities among minorities from
the vast diversity of their religious, cultural, linguistic and national identities, this
approach distinguishes among the myriad claims for minority protection vying for
international legal recognition—by specifying their legal relevance in terms that relate to
different features of the structure and operation of international law.

\textsuperscript{82} Compare Hans Kelsen: ‘[T]he concept of a majority assumes by definition the existence of a minority,
and thus the right of the majority presupposes the right of the minority to exist. From this arises perhaps not
the necessity, but certainly the possibility, of protecting the minority from the majority. This protection of
minorities is the essential function of the so-called basic rights and rights of freedom, or human and civil
rights guaranteed by all modern constitutions of parliamentary democracies.’ H Kelsen, ‘On the Essence
(University of California Press, 2000) 84, 100. See also P Macklem, ‘Minority Rights in International Law’
The dynamic nature of the distribution of sovereign power is also partly a function of the fact that international law includes certain collectivities and excludes others from its distribution. International law excluded indigenous peoples, for example, from the outset from its distribution of sovereign power and included them within the sovereign power of states established on the territories they had inhabited since time immemorial. This process of exclusion and inclusion is an ongoing one. International law continues to exclude and include indigenous peoples in its distribution of sovereign authority by refusing to recognise that they possess a right of self-determination entitling them to acquire sovereign statehood. Instead, indigenous peoples have rights of internal self-determination, which entitle them to extensive protection associated with their identities, cultures, territories, and forms of governance. Indigenous rights in international law thus speak to some of the adverse consequences of international law’s exclusion of indigenous peoples from the distribution of sovereign power.83

The dynamic nature of the distribution is also due to the fact that the criteria for inclusion and exclusion can change. Take international law’s relationship with colonialism. For centuries, international law authorised the colonisation of peoples by sovereign states. It did so by comprehending the territory of a sovereign state as including the territory of any and all colonies under its imperial control.84 A state’s sovereignty thus extended to its colonial territories and colonised peoples. Any attempt by a colonial population to free itself of its colonial status was comprehended as a threat to the territorial integrity of its colonising master and an international illegality. This distribution of sovereign power became more dynamic when international law reversed

84 Case Concerning Right of Passage over Indian Territory (Portugal v. India), ICJ Reports (1960) 6.
itself in the middle of the previous century and came to comprehend colonialism as an international illegality. Colonised peoples acquired sovereign independence from their colonial masters and thus now participate in the distribution of sovereignty by virtue of their right of self-determination. By specifying that colonised peoples have a right to external self-determination and sovereign independence, self-determination rights the wrong, so to speak, of the fact that colonialism possessed international legal validity. It deems this particular feature of international law to be unjust and seeks to mitigate its adverse effects.

Moreover, the dynamism of the distribution of sovereignty is also a function of the fact that states acquire sovereignty at different times. One important consequence of the dramatic international legalisation of decolonisation was that ex-colonies only acquired the incidents of sovereignty when they acquired sovereignty itself. Before they achieved sovereign recognition, control over natural resources vested in their colonial masters, as did all other incidents of international sovereign power. Before colonies participated in the distribution of sovereignty, in other words, international law vested the legal power to exploit their natural resources in colonial powers, and when colonies became subjects in the distribution, international law vested them with power only over those resources that remained at the date that they achieved sovereign statehood.\(^8\) This temporal dimension to the acquisition of sovereignty in international law has the effect of privileging states with a history of colonising others over states with a history of being colonised, thereby contributing to the disparity of resources that exists between developed and developing states.

The systemic nature of the distribution of sovereignty is a function of the fact that its
distributional reach envelops all states in its structure and operation, treating all as formal
equals in terms of the legal nature and scope of their sovereign power. A sovereign state
is one of many participating in a distribution of sovereignty by an international legal
order committed to the principle of the formal equality of sovereign states. International
law treats states as juridically equal legal actors, in possession of the same rights in
international law, and equal in their formal capacity to exercise these rights.86 This
commitment is also a critical feature of how international law organises global politics
into an international legal order. The principle of formal equality of sovereign states, in
Benedict Kingsbury’s words, ‘has attained an almost ontological position in the structure
of the international legal system’.87 The normative value of this principle should not be
overstated, but nor should it be understated. It enables economically, politically and
militarily weak states to exercise the same formal legal authority as powerful states,
revealing the international legal order’s capacity to check, in particular institutional
settings, the very real power imbalances that exist among states.

One of the consequences of international law’s foundational commitment to formal
equality of states, however, is that substantive equality of states plays a marginal role in
the normative architecture of the international legal order. International law domesticates
questions of substantive equality, treating its potential normative significance as a
domestic question of distributive justice among citizens, subject to the vagaries of

86 See, e.g., Charter of the United Nations, Article 2(1): ‘The Organization is based on the principle of the
sovereign equality of all its Members’; Montevideo Convention on the Rights and Duties of States (adopted
26 December 1933, entered into force 26 December 1934) 165 LNTS 19, Article 4: ‘States are juridically
equal, enjoy the same rights, and have equal capacity in their exercise. The rights of each one do not
depend upon the power which it possesses to assure its exercise, but on the simple fact of its existence as a
person under international law.’
domestic political contestation. However valuable international law’s commitment to the formal equality of states, its banishment of substantive equality to the domestic realm further implicates the structure of the international legal order in the natural, geographical and social contingencies that contribute to global poverty. Deploying sovereignty to organise global politics into an international legal order has the effect of extending legal validity to certain natural, geographical and social contingencies into which we are born. The capacity of a sovereign state to address poverty in its midst is in no small measure a function of its location, boundaries, and resources—variables whose limits and possibilities are determined by the nature and extent of that state’s sovereign powers.

The right to development speaks to how the structure and operation of international law participates in the production of global poverty. Despite textual ambiguities in the various instruments in which it finds expression, the right vests in individuals and communities who have yet to benefit from development. It imposes internal obligations on the states in which they live to address conditions that contribute to their plight. Internal obligations are both negative and positive in nature. A state’s negative obligations require it not to act in ways that interfere with the exercise of the right to development. A state’s positive obligations require it to enable its population to participate in and benefit from economic, social, cultural and political development.

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The right to development also imposes external obligations on international legal actors, including developed states and international organisations, to assist developing states in poverty reduction. The external obligations associated with the right to development are also negative and positive in nature. Its negative dimensions require states and international institutions to fashion rules and policies governing the global economy in ways that do not exacerbate global poverty. Its positive dimensions require states and international institutions to provide assistance to developing states in the form of development aid and debt relief.

International law thus sorts claims of economic and political power made throughout the world by validating some such claims as endowed with sovereign authority and rejecting others as international illegalities. The consequences of legally organising global economic and political realities in these ways are manifold. Our international legal order vests sovereign legal authority in some collectivities and not in others. It has validated the sovereign power of some collectivities for centuries; it has recognised the sovereignty of other collectivities only recently. It extended international legal validity to colonialism by extending a state’s sovereignty to its colonial territories and colonised peoples. It episodically recalibrates the distribution of sovereign power that it performs, transferring peoples and territories from some sovereign legal actors to others.

Not only does it legalise an international distribution of sovereign power, it validates countless ways in which sovereignty can be and is exercised. It confers on states broad powers to exercise sovereign power in ways that can both benefit and harm their populations. By geographically dividing the globe into a finite set of sovereign states, and legally recognising sovereignty as including exclusive rights to a state’s territory and
resources, international law also determines what belongs to whom, and thus validates a
global distribution of wealth and resources. And by empowering sovereign states to
establish international instruments and institutions that legalise certain economic and
social relations at the expense of others, it provides international legal validity to myriad
processes of economic and social globalisation that dramatically affect the nature and
levels of poverty and inequality throughout the world. It is to these consequences that
human rights in international law—regardless of any chronological or analytical
differences they might otherwise possess—seek to attend.