Rehabilitating Territoriality in Human Rights

Austen L. Parrish
Indiana University Maurer School of Law, austparr@indiana.edu

Follow this and additional works at: http://www.repository.law.indiana.edu/facpub
Part of the Human Rights Law Commons, and the Transnational Law Commons

Recommended Citation
http://www.repository.law.indiana.edu/facpub/881
REHABILITATING TERRITORIALITY
IN HUMAN RIGHTS

Austen L. Parrish*

ABSTRACT

For many years, territorial principles anchored an international system organized around nation-states. Recently, however, the human rights movement has sought to change the state-centric focus of international law and overcome the limitations of a system where the territorial state is the primary actor. The field of human rights has promoted a new legal orthodoxy that places the person at the center of the international legal system. Within this orthodoxy, non-state actors play a prominent role, unilateral domestic lawsuits are promoted, and territorial borders give way when necessary for humanitarian intervention. In contrast, territorial conceptions of international law are viewed as outdated and ill-equipped to deal with a globalized world. Prevailing wisdom in the human rights community, at least among academic scholars, now suggests that non-territorial models of governance are better in protecting and enforcing human rights.

This Article challenges that wisdom. Globalization and territorial governance can be consistent in the field of human rights. The Article advances two principle arguments. First, concepts of territorial sovereignty and the multilateralism upon which international law operates achieve an underappreciated balance between state and individual rights that often serves as a foundational prerequisite for human rights to flourish. The rejection of territoriality may undermine the hard-fought gains the human rights movement has achieved. Second, in the long run, strong territorial states will remain critical to a world system that promotes human dignity. A disaggregated state,

* Professor of Law and Vice Dean, Southwestern Law School. The author is grateful to Ronald Aronovsky, Kristen Boon, Bryant G. Garth and Christopher Whytock for their helpful comments on earlier drafts. The Article also benefited from comments received, and discussions had, at conferences held at the University of Montreal and Southwestern Law School, as well as at the 2009 Annual Meeting of The Society for Historians of American Foreign Relations. The International Section on Human Rights selected the Article for presentation at the 2011 Association of American Law Schools (AALS) Annual Meeting. Special thanks to Michael Bauer and Maria Daatio for their research assistance.
where globalized, American-style interest group politics control, is unlikely to be favorable to human rights over time. The Article concludes that territorial approaches to global governance have greater promise than many assume to jump-starting greater respect for, and enforcement of, human rights. The human rights community would benefit from re-embracing traditional multilateral legal solutions as the primary way of achieving meaningful reform.

Table of Contents

Introduction................................................................. 1100
I. The Modern Human Rights Movement.......................... 1108
   A. Territorial Beginnings....................................... 1108
   B. Discarding Territoriality................................... 1111
      1. The Rise of Non-State Actors......................... 1111
      2. Domestic Courts and Universal Jurisdiction........ 1114
      3. Humanitarian Intervention........................... 1117
   C. Reasons for Discarding Territoriality................ 1119
II. Limitations of Non-Territorial Models.................... 1124
   A. Legitimacy.................................................. 1124
   B. Longevity and Stability................................... 1127
   C. Competing Voices and Uncomfortable Pluralism......... 1129
III. Rehabilitating Territorial Models......................... 1134
   A. Distinguishing Conventional Analyses.................. 1134
   B. Favoring Multilateral Solutions....................... 1136
Conclusion......................................................................... 1140

Introduction

For centuries, territoriality served as a cornerstone of an international system organized around Westphalian concepts of state sovereignty, formal equality and nonintervention. As classically understood, only nation-states defined by their territorial borders could formally participate in and were the subjects of international law.1 The human rights movement, however, recently has sought to change this state-centric focus and overcome the limitations of a system where the state is the primary actor.2 Although human rights law is compatible with the territorial nation-state,3 the modern human rights movement


3 See infra Part III.B; see also Richard J. Goldstone & Erin P. Kelly, Progress and Problems in the Multilateral Human Rights Regime, in MULTILATERALISM UNDER CHALLENGE? POWER,
has attempted to create a new legal orthodoxy that places the person at the center of the international legal system.\(^4\) Territorial conceptions of international law are now commonly viewed as antiquated.\(^5\) And increasingly, commentators argue that “the traditional doctrine, whereby

\[^4\text{See, e.g., Emmanuelle Jouannet,}\ Universalism and Imperialism: The True-False Paradox of International Law?, 18 EUR. J. INT’L L. 379, 386 (2007) (describing human rights as emblematic of “the new legal humanism” that “compete[s] with the classical understanding of international law as based upon territorial sovereignty”); Anne Peters,\ Humanity as the A and Ω of Sovereignty, 20 EUR. J. INT’L L. 513, 513 (2009) (arguing that sovereignty is being ousted as the first principle of international law and that territorial sovereignty is not “merely limited by human rights, but should be seen to exist only in function of humanity”); W. Michael Reisman, Editorial Comment,\ Sovereignty and Human Rights in Contemporary International Law, 84 AM. J. INT’L L. 866, 872 (1990) (describing how human rights “shift[ed] the fulcrum of the system from the protection of sovereigns to the protection of people”). For additional recent articles that discuss this trend, see William Magnuson,\ The Responsibility to Protect and the Decline of Sovereignty: Free Speech Protection Under International Law, 43 VAND. J. TRANSNAT’L L. 255, 256, 260-74 (2010) (arguing that international law should not be beholden to “the now-eroded concept of state sovereignty” and urging an expansion of the responsibility to protect); and Timothy William Waters, “The Momentous Gravity of the State of Things Now Obtaining”: Annoying Westphalian Objections to the Idea of Global Governance, 16 IND. J. GLOBAL LEGAL STUD. 25, 26 (2009) (noting how at conferences it is common to hear predictions that “the state as we know it [will] not be around in fifty years” and that “there already are or soon will be other, more decisive actors”). \textit{Cf.} A. Claire Cutler,\ Critical Reflections on the Westphalian Assumptions of International Law and Organization: A Crisis of Legitimacy, 27 REV. INT’L STUD. 133, 133 (2001) (“[T]he fields of international law and organization are experiencing a legitimacy crisis relating to fundamental reconfigurations of global power and authority.”).\]

\[^5\text{See, e.g., Sarah H. Cleveland,}\ Embedded International Law and the Constitution Abroad, 110 COLUM. L. REV. 225, 247 (2010) (describing territorial theories as antiquated); Anne-Marie Slaughter & David T. Zaring, Extraterritoriality and Discovery,\ in CURRENT LEGAL ISSUES IN INTERNATIONAL COMMERCIAL LITIGATION 72, 73 (1997) (arguing that “tidy circles demarcating national jurisdiction” based on territory have become “either impossible or meaningless”); Catherine E. Sweetser,\ Humanity as the A and Ω of Sovereignty: Four Replies to Anne Peters, 20 EUR. J. INT’L L. 549, 550 (2009) (“There is a growing consensus that the traditional notion of sovereignty, which gave states inviolable territorial boundaries except for diplomatic protection claims and self-defence, is now outdated.”);\ \textit{cf.} DAVID CHANDLER, FROM KOSOVO TO KABUL AND BEYOND: HUMAN RIGHTS AND INTERNATIONAL INTERVENTION 128-29 (new ed. 2006) (describing scholarship that believes “international law is just an ‘anachronism’ or historical hangover” and that “Westphalian sovereignty is ‘a tyrant’s charter’”). This rejection has paralleled attacks on territorial concepts in other areas of the law too. \textit{See, e.g., Paul Schiff Berman,}\ From International Law to Law and Globalization, 43 COLUM. J. TRANSNAT’L L. 485, 487 (2005) (arguing that “we need to move beyond the limiting framework of international law” and criticizing territorial conceptions of law); Hannah L. Buxbaum, Territory, Territoriality, and the Resolution of Jurisdictional Conflict, 57 AM. J. COMP. L. 631 (2009) (discussing how territorial underpinnings of legislative jurisdiction are challenged in an age of globalization); Ralf Michaels, Territory Jurisdiction After Territoriality,\ in GLOBALISATION AND JURISDICTION 105 (Piet Jan Slot & Mielle Bulterman eds., 2004) (exploring globalization’s challenges to territorial jurisdiction).\]
international law imposes duties and responsibilities and confers rights only upon states, not individuals, is untenable.  

The rejection of territoriality has appeared in several forms. International law scholars have sought to universalize human rights and diffuse the power of the nation-state so that enforcement and promotion of human rights are no longer as tied to territorial sovereignty. The rights of the individual are "seen to be 'above' the sovereignty of nation-states and are thus important markers of the extra-territoriality that globalization usters in." The human rights movement has also sought to harness the power of institutions and organizations formed both above and below national governments. Invoking universal jurisdiction, advocates have turned to domestic courts to remedy and regulate human rights abuses worldwide. In turn, many have discounted traditional multilateral solutions, believing that the future of human rights enforcement lies primarily in domestic, not international, systems. In the field of humanitarian intervention, scholars have

---

6 Rafael Domingo, The Crisis of International Law, 42 VAND. J. TRANSNAT'L L. 1543, 1550 (2009); see also KAL. RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG? THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW 8 (2009) (describing the "widespread belief today that territoriality is under siege" and noting that "[s]ome see the relentless rise of a borderless, globalized world that is dismantling traditional sovereignty"); Domingo, supra, at 1544, 1551 (noting that "we are witnessing a slow death" of the territorial state, that the "state is suffering an irremediable and prolonged agony," and that there exists a "crisis of territoriality" as concepts of sovereignty, territoriality and the nation-state "have become obsolete"); Alfred Van Staden & Hans Vollaard, The Erosion of State Sovereignty: Towards a Post-Territorial World?, in STATE, SOVEREIGNTY, AND INTERNATIONAL GOVERNANCE 165, 165 (Gerard Kreijen et al. eds., 2002) ("The classical concept of State sovereignty, i.e. the notion of territorially rooted political authority, which is exclusive and undivided, has increasingly become subject to criticism from different political quarters.").

7 Cf. Boaventura de Sousa Santos & César A. Rodríguez-Garavito, Law, Politics, and the Subaltern in Counter-Hegemonic Globalization, in LAW AND GLOBALIZATION FROM BELOW: TOWARDS A COSMOPOLITAN LEGALITY 1, 5 (Boaventura de Sousa Santos & César A. Rodríguez-Garavito eds., 2005) (describing how "a copious literature on 'global governance' has developed which inquires into the transformation of law in the face of eroding state power and the decentralization of economic activities across borders" and an "approach [that] focuses on non-state-centered forms of regulation allegedly capable of best governing the global economy").


11 See, e.g., Richard B. Lillich, The Role of Domestic Courts in Enforcing International Human Rights Law, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 228, 228 (Hurst Hannum ed., 2d ed. 1992) (explaining that human rights protection and enforcement begins primarily with domestic courts); Anne-Marie Slaughter & William Burke-White, The Future of International Law is Domestic (or, the European Way of Law), 47 HARV. INT'L L.J. 327, 350 (2006) (arguing that international law must harness the power of national institutions to achieve
urged military action to protect human rights even when doing so is prohibited under classical conceptions of international law. This does not mean that, as a practical matter, territorial states have become marginalized in global politics—far from it. But the fascination with non-territorial models of governance is now pervasive and the models are described in romantic terms.\(^\text{12}\)

But should human rights groups discard territoriality? How robust a role should territoriality play in international law and global governance? Should human rights advocates cultivate linkages and leverage power within territorial states or maintain greater independence from them? Now is an opportune time to examine these questions and rethink the relationship between international human rights and more traditional, territorial conceptions of international law. In a wide range of contexts, scholars have renewed their attention to territoriality as a concept in law worth examining.\(^\text{13}\) Extraterritorial regulation has remained a controversial topic,\(^\text{14}\) the extraterritorial reach of the United

---


\(^{13}\) John Fabian Witt, Book Review, 28 LAW & HIST. REV. 569, 569 (2010) (reviewing KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG? THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW (2009)) (“The territorial state is the foundation for virtually all law in the modern world. . . . And yet precisely because it is so ubiquitous, it often evades the radar of contemporary scholarship. We have massive literature on any number of arcane areas, but too little good work on the territorial state that lies at the base of it all.”); see also John Gerard Ruggie, *Territoriality and Beyond: Problematizing Modernity in International Relations*, 47 INT’L Org. 139, 174 (1993) (famously noting how the concept of territoriality has been studied so little). For some recent good analysis, see RAUSTIALA, supra note 6; RESTRUCTURING TERRITORIALITY; EUROPE AND THE UNITED STATES COMPARED (Christopher K. Ansell & Giuseppe Di Palma eds., 2004); and TERRITORIALITY AND CONFLICT IN AN ERA OF GLOBALIZATION (Miles Kahler & Barbara F. Walter eds., 2006). *Cf.* LEGAL BORDERLANDS: LAW AND THE CONSTRUCTION OF AMERICAN BORDERS (Mary L. Dudziak & Leti Volpp eds., 2006) (examining the role of law in the construction of U.S. borders and the impact that globalization has had on American studies scholarship).

States Constitution has once again come to the fore in academic debates, and issues of extraterritoriality are commonly the subject of panels at academic conferences. In short, territoriality has taken a prominent place in legal scholarship.

Reexamining the role of territoriality in human rights is also timely for another reason. While the human rights movement has grown, its limitations have dwarfed its successes. Although in the 1980s and 1990s certain developments momentarily suggested that global universalism was taking hold, overall the human rights movement has been impotent at crucial moments. A vast array of human rights abuses continue unabated, nations and non-state actors remain largely.


18 For some, the 1998 Pinochet arrest in Chile signaled that global civil society could hold dictators accountable for their crimes against humanity. And the United States’ use of human rights to justify interventions in Kosovo, Rwanda, and later, in part, Iraq were urged by some as a triumph. See Andrea Bianchi, Immunity Versus Human Rights: The Pinochet Case, 10 EUR. J. INT’L L. 237, 260 (1999) (arguing that the traditional principles and values underlying international law are under challenge by the notion that fundamental human rights must be respected); cf. William J. Aceves, Liberalism and International Legal Scholarship: The Pinochet Case and the Move Toward a Universal System of Transnational Law Litigation, 41 HARV. INT’L L.J. 129 (2000) (describing changes in the international system).

19 DEBRA L. DE LAET, THE GLOBAL STRUGGLE FOR HUMAN RIGHTS: UNIVERSAL PRINCIPLES IN WORLD POLITICS 5 (2006) (explaining that a “gap between rhetoric and reality” has meant that “[t]orture, political repression, genocide, abject poverty, discrimination, and inequality have been a standard feature of life for many human beings throughout this century,
immune from serious reforms and, even if viewed as a temporary setback, for almost a decade the United States appeared ambivalent to international human rights. Compared to neo-liberalism, which has continued to dominate in the commercial arena, human rights has been marginalized as a model for global governance. For supporters of the human rights movement, the lack of success is troubling and demands examination.

Against this backdrop, this Article challenges the notion that an international legal system based on territoriality is outdated or antithetical to progress in human rights. I aim to make two contributions. First, I question the wisdom of forcefully rejecting territoriality and traditional, positivistic, sovereignty-based conceptions of international law. I suggest that the concept of territorial sovereignty, and the multilateralism upon which territorial-based international law operates, achieves an underappreciated balance between state and individual rights that often serves as a foundational prerequisite for human rights to flourish. The rejection of territoriality in the long-term may threaten to undermine the hard-fought gains the human rights movement has achieved. Second, I suggest that the victories realized in

---

20 DELAET, supra note 19, at 4-5; see also Harold Hongju Koh, Restoring America’s Human Rights Reputation, 40 CORNELL INT’L L.J. 635, 645 (2007) (lamenting the “striking ineffectiveness of U.S. human rights policy” in curbing abuses in four categories of countries: (1) in the face of genocide in Darfur, Sudan; (2) as committed by our major allies, especially those in the War on Terror; (3) in the so-called ‘Axis of Evil’ countries—North Korea, Iran, and Iraq—as well as in Afghanistan, notwithstanding our costly military interventions in two of those countries; and (4) in such traditional geopolitical rivals as China, Russia, and Cuba”). See generally AMNESTY INT’L, AMNESTY INTERNATIONAL REPORT 2010: THE STATE OF THE WORLD’S HUMAN RIGHTS, at xv (2010) (describing challenges to human rights recognition and criticizing how powerful states such as China, India, Indonesia, Russia, Turkey, and the United States have “stood aside from, if not deliberately undermined, international justice efforts”).


22 I use a minimalist definition of multilateralism. See John Gerard Ruggie, Multilateralism: The Anatomy of an Institution, in MULTILATERALISM MATTERS: THE THEORY AND PRAXIS OF AN INSTITUTIONAL FORM 3, 8 (John Gerard Ruggie ed., 1993) (“At its core, multilateralism refers to coordinating relations among three or more states in accordance with certain principles.”).
the human rights field are not attributable to the purported universal, transcendental nature of human rights, but largely to the support from powerful states, and organizations and groups within those states. This is the very sort of power that the human rights movement at times condemns, but which is essential to its continued viability. While a weaker territorial nation-state may in the short-term seem desirable, in the long-term strong states are critical to a world system that promotes and respects human dignity. In contrast, the new transnational leaders of globalization—corporations, the media, interest-groups, religious organizations, as well as environmental, philanthropic and other non-governmental actors—are less accountable for the policies they promote. Although in the short-term the human rights movement may achieve temporary gains through garnering a greater voice on the international stage for sub-state actors that are supportive of the human rights agenda, over the long haul those voices are likely to be drowned out by competing voices. Stated differently, a disaggregated state where globalized American-style interest group politics control, on balance and over time, is unlikely to be favorable to human rights.

Before proceeding, a point to underscore: While I attempt to reexamine the strategic decisions made in the human rights movement to distance itself from territorial-based international law, my purpose is not to undermine that movement. Often those critiquing human rights come from a perspective hostile to the human rights agenda. At least in American academia, the debates commonly mimic the predictable domestic clashes between liberal and conservative groups in the so-called culture wars. And if not this, then the criticism is of international law generally, with assertions that it overly threatens

---

23 This Article is not focused on critiquing the substance behind the liberal human rights agenda or debating whether a Western approach to human rights is normatively desirable (or at least not undesirable). Criticism of the agenda or of its practice has been the subject of tremendous debate. Rather, this Article explores what strategies are best to achieve the liberal human rights agenda assuming that agenda is normatively desirable.


In contrast, I am largely supportive of the goals and values the international human rights movement promotes. I instead wish to push back softly on the now received wisdom over the means to achieve those goals. Liberal internationalists and human rights scholars alike should pause before advocating that we dismantle the traditional territorial frameworks of international law. A territorial approach may well have greater promise than many assume and rehabilitating territoriality in law may be a path to jump-starting greater respect for, and enforcement of, human rights.

The Article unfolds in three parts. In Part I, I trace the recent history of human rights and the reluctance to embrace territoriality as a desirable feature of international law. I use three examples to show how international law scholars in conjunction with the human rights movement have challenged and weakened a state-centric, territorial model of international law. In Part II, I sketch out some of the limitations of non-territorial approaches to global governance. While non-territorial approaches have an understandable appeal, I explain why they are problematic for effective human rights enforcement over the long term and for the promotion of democratic self-governance. Finally, in Part III, I describe how and why territorial models of global governance can continue to serve us well, and how globalization and territorial governance are not inconsistent in the field of human rights. In so doing, I push back on cosmopolitan conceptions and legal pluralism. I encourage the human rights community to more readily promote traditional multilateral legal solutions.


27 See, e.g., Michael Stokes Paulsen, The Constitutional Power to Interpret International Law, 118 YALE L.J. 1762, 1804 (2009) (“The force of international law is thus largely an illusion. . . . It is international relations or international politics dressed up as law . . . [and merely] a rhetorical, political trope . . . .”); see also JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005) (arguing that international law is often rhetorical and only obeyed when convenient to powerful states); ERIC A. POSNER, THE PERILS OF GLOBAL LEGALISM (2009) [hereinafter POSNER, THE PERILS OF GLOBAL LEGALISM] (criticizing international law).

I. THE MODERN HUMAN RIGHTS MOVEMENT

The narrative begins at the end of the Second World War with an international system founded on territorial state-centric principles. It ends in the present, where the traditional territorial limits of international law have been displaced in part by extraterritoriality—an approach the human rights movement has championed.

A. Territorial Beginnings

The international order immediately after the Second World War was built as a way to ensure (or so it was hoped) international peace and stability. At the time, international law focused on state-to-state relations and the rights and obligations of territorial states. Only the territorial state could enter into treaties. Customary international law bound only states. Only states had standing before most international institutions. In this state-centric way, the international system aimed

---


29 Centralized statehood, constructed in what is known as the Westphalian mold, was the framework for all political privileges in international law. See generally HANS J. MORGENTHAU, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE 294 (Kenneth W. Thompson ed., 6th ed. 1985) ("The Treaty of Westphalia... made the territorial state the cornerstone of the modern state system."); Leo Gross, The Peace of Westphalia, 1648-1948, 42 AM. J. INT’L L. 20 (1948); John H. Herz, Rise and Demise of the Territorial State, 9 WORLD POL. 473, 480 (1957) ("From territoriality resulted the concepts and institutions which characterized the interrelations of sovereign units, the modern state system.... Only to the extent that it reflected their territoriality and took into account their sovereignty could international law develop in modern times.").


31 ANTONIO CASSESE, INTERNATIONAL LAW 156-58 (2d ed. 2005).


The classical sources of international law depend on the interaction of States in the form of treaties and customary law. Diplomatic relations are conducted between States. Official arenas, like international organizations and international courts, are largely reserved to States. ... Central concepts of international law, like sovereignty, territorial integrity, non-intervention, self-defense or permanent sovereignty over natural resources all rely on the exclusive or dominant role of the State.
to protect the sanctity of Westphalian territoriality and, by doing so, limit conflict and war.\textsuperscript{33}

This focus on the territorial state gave rise to three related and self-reinforcing tenets: territorial integrity, sovereign equality and nonintervention.\textsuperscript{34} To protect territorial integrity, international law rules developed to restrain aggression that might impair a state's sovereignty.\textsuperscript{35} Territorial sovereignty became the "idea that there is a final and absolute political authority in the political community . . . and no final and absolute authority exists elsewhere."\textsuperscript{36} Power ended at the border.\textsuperscript{37} Law only applied in state borders to peoples within the state,\textsuperscript{38} as did constitutional protections.\textsuperscript{39} These ideas were not new;
they had been core concepts of international law for centuries, at least since the modern State replaced the Holy Roman Empire. But they took on renewed force in the immediate post-war period.

Human rights initially sat comfortably within the territorial approach of positivistic international law. Leaders in the human rights movement sought to harness the power of the territorial state to protect against genocide and other atrocities that had occurred with Nazi Germany. And human rights were vindicated through a state-based system of international norms created through multilateral treaties. The United States led efforts to establish the United Nations and its state-centric approach as a way to "promot[e] and encourag[e] respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion." In the 1940s and 1950s, territorality was also seen as an essential way to protect against human rights being used strategically in the Cold War. Fledgling democracies in turn began supporting international human rights as a way to legitimize and support new democratic regimes.

---


41 Acharya, supra note 34, at 99-105 (describing how the United Nations and its Charter "universalized the norms of equality of states, territorial integrity and nonintervention").

42 Aceves, supra note 18, at 130 ("This emphasis on the nation-state and the 'international' is clearly—and surprisingly—found in the field of human rights."); see also Louis B. Sohn, The New International Law: Protection of the Rights of Individuals Rather Than States, 32 Am. U. L. Rev. 1 (1982) (describing changes to the international legal system after World War II).


45 See Dezalay & Garth, supra note 25, at 61-72 (describing how the human rights movement in the United States was closely allied with the Cold War and the foreign policy establishment); see also Curtis A. Bradley, The United States and Human Rights Treaties: Race Relations, the Cold War, and Constitutionalism, 9 Chinese J. Int'l L. 321, 326 (2010) (noting concerns that "international human rights law would develop in ways antithetical to U.S. conceptions of rights and that it would be used by the Soviet bloc in its ideological campaign against the United States").

B. Discarding Territoriality

While territoriality was initially viewed as a way to guarantee human rights, it later became seen as a barrier. Traditional multilateral law based on territoriality was challenged as the number of non-state actors dramatically expanded, domestic courts began playing an increasingly important role in global governance under an expanded understanding of universal jurisdiction, and the sanctity of territorial borders were ignored in the name of humanitarian intervention. As the Cold War wound down, the international legal framework began to change, and the human rights agenda transformed with it.

1. The Rise of Non-State Actors

The first challenge came in the form of a change to the number and scope of actors acting transnationally and autonomously from the nation-state. As information, capital and people began to move across national boundaries with less restriction, non-state actors began to expect to participate in international affairs. Over the past three decades, the number of human rights-related nongovernmental organizations exploded. A “plentitude of national and international

---

47 I refer here mostly to territorial theories related to adjudicatory and enforcement jurisdiction. In many ways, prescriptive jurisdiction remains the domain of the state, at least formally.


49 Jacobson, supra note 12, at 155 (“In the first decade of the twentieth century there were fewer than 200 INGOs; by middle of the 1990s, there were more than 20,000.” (citation omitted)); see also Kerstin Martens, Examining the (Non-)Status of NGOs in International Law, 10 IND. J. GLOBAL LEGAL STUD. 1, 4-6 (2003) (describing the “enormous growth” and noting that “NGOs have become increasingly transnational” with “[t]he human rights sector currently record[ing] the greatest number of NGOs”); Peter J. Spiro, Accounting for NGOs, 3 CHI. J. INT’L
institutions, organizations, and campaigns designed to oppose and overcome particular human rights problems" developed. Transnational networks became seen as a key way to mobilize support for human rights by gathering and disseminating information about human rights abuses, educating the public, defining human rights norms and lobbying governments.

Several hundred nongovernmental organizations currently exist for the purpose of human rights advocacy. A growing number of those are organized across and without regard to national boundaries. Beginning as early as the 1970s, increased attention began to be paid to transnational relations as distinct from interstate relations. While the international human rights movement did not fully exist before the 1970s, by the late 1970s a movement had fully formed. By the late 1990s, over one hundred nongovernmental organizations (NGOs) had "general consultative status with the United Nations, and almost 1500 had a more limited status." The result? The "proliferation of transnational activities... produced an international field of human

L. 161, 161 (2002) [hereinafter Spiro, Accounting for NGOs] ("Non-governmental organizations have enjoyed a phenomenally rapid rise on the world scene.").

50 Klug, supra note 43, at 88.


52 DAVID P. FORSYTHE, HUMAN RIGHTS IN INTERNATIONAL RELATIONS 166-72 (2000).


54 For an early discussion, see David P. Forsythe, The Red Cross as Transnational Movement: Conserving and Changing the Nation-State System, 30 INT'L ORG. 607 (1976); see also Martens, supra note 49, at 5.


56 Yves Dezalay & Bryant G. Garth, Constructing Law Out of Power: Investing in Human Rights as an Alternative Political Strategy, in CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA 354, 360-64 (Austin Sarat & Stuart Scheingold eds., 2001) [hereinafter Dezalay & Garth, Constructing Law Out of Power] (describing how the field of international human rights began to develop); see also KECK & SIKKINK, supra note 51, at 79 ("As recently as 1970, the idea that the human rights of citizens of any country are legitimately the concern of people and governments everywhere was considered radical."); id. at 89-102.

57 Jacobson, supra note 12, at 155.
rights with substantial autonomy from national states and legal systems.”

The number of organizations in itself, however, was not overly remarkable. Rather, it was the degree of influence NGOs gained in political processes at a global level that was striking. NGOs have long existed, but what changed was the willingness of states and international institutions to formally recognize a NGO voice in the architecture of international institutions. “Significant evidence” exists to show that NGOs “have joined states as participants in organised international relations.” As Anne-Marie Slaughter describes it:

[NGOs] are making a mockery of the old-fashioned and always highly stylized image of states as the only or at least the principal actors in the international system. NGOs seek increasingly formal status in international organizations and as recognized subjects of international law. They want litigation rights before international and supranational tribunals.

The change of focus away from the territorial state has had ripple effects. The participation of non-state actors has been significant enough that some states have even sponsored or created their own human rights organizations as a way to exert greater influence in the international arena. And as the number of NGOs has grown, the way

---

58 Dezalay & Garth, Constructing Law Out of Power, supra note 56, at 354; see also Transnational Social Movements and Global Politics: Solidarity Beyond the State (Jackie Smith et al. eds., 1997).


60 Steve Charnovitz, Two Centuries of Participation: NGOs and International Governance, 18 MICH. J. INT’L L. 183 (1997). Not only have NGOs been around in multiple forms, but so too has the idea of transnationalism, transnational networks, and declining territorial state power. Slaughter, Breaking Out, supra note 48, at 14.

61 Id. at 12-13 (describing the proliferation of NGOs as “[t]he central phenomenon transforming both public and private international law in the 1990s” and stating that “few developments could be more important for the social construction of international legal rules than a change in the relevant ‘actors’”); cf Spiro, Accounting for NGOs, supra note 49, at 162 (arguing for full and formal recognition of NGOs as a way to increase accountability). For criticism on legitimacy grounds, see Kenneth Anderson, The Ottawa Convention Banning Landmines, the Role of International Non-Governmental Organizations and the Idea of International Civil Society, 11 EUR. J. INTL L. 91, 112-19 (2000).


63 Slaughter, Breaking Out, supra note 48, at 16.

64 Olivier de Frouville, Domesticating Civil Society at the United Nations, in NGOs in International Law: Efficiency in Flexibility? 71 (Pierre-Marie Dupuy & Luisa Vierucci eds., 2008) (describing a servile society); Pierre-Marie Dupuy, Conclusion: Return on the Legal Status of NGOs and on the Methodological Problems Which Arise for Legal Scholarship, in NGOs in International Law: Efficiency in Flexibility?, supra, at 204-05 (noting problems of captured NGOs). For a more optimistic account, see Sonia Cardenas, Sovereignty
legal rules develop has changed. The concept of rights has similarly expanded: "Human rights is increasingly seen as extending to a range of social, economic, and cultural rights such as the right to food and to housing—thus defining much more broadly the obligations of a state to its citizens."

2. Domestic Courts and Universal Jurisdiction

The chipping away at territoriality, however, lay not just in the promotion and rising influence of non-state actors. The assault also occurred by virtue of changes to jurisdictional doctrines and the use of domestic courts to provide civil remedies for human rights violations. In the United States, this began most prominently in the 1980s with litigation under the Alien Tort Statute and the expansion of universal jurisdiction.


65 Kathryn Sikkink, Transnational Advocacy Networks and the Social Construction of Legal Rules, in GLOBAL PRESCRIPTIONS: THE PRODUCTION, EXPORTATION, AND IMPORTATION OF A NEW LEGAL ORTHODOXY, supra note 48, at 37 (describing the increasingly important role that NGO networks play in producing international norms).

66 Austin Sarat & Stuart A. Scheingold, State Transformation, Globalization, and the Possibilities of Cause Lawyering: An Introduction, in CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA, supra note 56, at 3, 11; see also CHANDLER, supra note 5, at 89 ("Only during the 1990s did the ethical and moral dimension of international policy-making become treated as a legitimate factor, which could and, in fact, should influence and shape national and international policy-making.").


68 This trend occurred beyond the human rights context as transnational litigation expanded in a whole host of areas. Samuel P. Baumgartner, Is Transnational Litigation Different?, 25 U. PA. J. INT’L ECON. L. 1297, 1300 (2004) (describing the expanding number of transnational cases); Harold Hongju Koh, Transnational Legal Process, 75 NEB. L. REV. 181, 199 (1996) (describing how transnational public law litigation has allowed international law to seep into domestic legal systems). In recent years, U.S. courts have applied a wide range of domestic laws extraterritorially to solve global challenges. See generally Mark A. Behrens et al., Global Litigation Trends, 17 MICH. ST. J. INT’L L. 165 (2009) (explaining how other countries are
The doctrinal history is well-known. In 1980, with the landmark *Filartiga v. Pena-Irala* case, the Second Circuit catapulted the Alien Tort Statute to the forefront as a tool to remedy human rights abuses. What began as a law intended to avoid unnecessary conflict between the United States and foreign countries developed first into a law to remedy human rights abuses by foreign officials, then to a law to penalize corporate malfeasance, and finally, to a law that attempts to constrain U.S. governmental action. Through now well-studied cases such as *Tel-Oren v. Libyan Arab Republic*, *Kadic v. Karadžić*, Doe

adopting reforms that mimic American-style litigation); Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16 EUR. J. INT’L L. 369, 403 (2005) [hereinafter Krisch, *Unequal Power*] (explaining how the United States “took an early lead in applying its own law to situations with little connection to itself other than a widely defined ‘effect,’ and it has succeeded in reshaping (or at least destabilizing)” traditional jurisdictional conceptions); Parrish, *Reclaiming International Law*, supra note 28, at 846-48 (listing areas of law where the United States regulates conduct abroad through the extraterritorial application of domestic law); cf Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 430 (2003) (“National courts, too, are increasingly being called upon to apply international law and to interact with these international courts and with the courts of other nations.”). For an empirical analysis challenging the claim that the United States is experiencing a transnational litigation explosion, see Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481 (2011). For an argument urging more extraterritorial litigation, see Jens Dammann & Henry Hansmann, *Globalizing Commercial Litigation*, 94 CORNELL L. REV. 1 (2008) (supporting increased extraterritorial litigation, and arguing that jurisdictions with strong courts should provide incentives to attract foreign litigants).


What is astonishing in this evolution is how, in a very short span of time, a change in mindset occurred. Before the 1980s, the idea that foreign nationals could sue or be sued in domestic courts for conduct abroad was almost unheard of. In the 1980s and 1990s, however, scholars welcomed the use of domestic courts and universal jurisdiction as a means to promote accountability for human rights violations. Human rights advocates made efforts to "deploy domestic courts around the world to implement the human rights policies not only of their own countries but of the international community as a whole." As a result, human rights litigation underwent a "significant expansion, both in terms of the number of cases filed as well as the scope of the claims raised." Domestic courts—cooperating together across national boundaries—began to shape international norms. While liberal internationalists tended to cheer the trend, neo-realists and sovereigntists condemned it as an attempt at world government by

---

76 403 F.3d 708 (9th Cir. 2005) (post-settlement order).

It is remarkable to think that it was only slightly more than a decade and a half ago that the prospects of bringing to trial torturers and murderers from Paraguay or Ethiopia or Indonesia or Guatemala or Haiti or anywhere else seemed completely out of the realm of the possibility. Much has changed in a relatively short period of time. The U.S. has now opened its courts to those who have suffered human rights abuses.

Id.

80 Slaughter & Bosco, supra note 10, at 104.
81 See, e.g., AMNESTY INT'L., UNIVERSAL JURISDICTION: 14 PRINCIPLES ON THE EFFECTIVE EXERCISE OF UNIVERSAL JURISDICTION (1999); see also LUC REYDAMS, UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES 1 (2003) (noting that a "veritable 'transnational advocacy network' organizes and strategizes for... effective implementation" of universal jurisdiction).
84 Benvenisti & Downs, supra note 11 (explaining how domestic courts are beginning to engage more aggressively in the interpretation and application of international law); Melissa A. Waters, Creeping Monism: The Judicial Trend Toward Interpretative Incorporation of Human Rights Treaties, 107 COLUM. L. REV. 628, 652-94 (2007) (describing methods by which domestic courts incorporate international human rights law); see also ENFORCING INTERNATIONAL HUMAN RIGHTS IN DOMESTIC COURTS, supra note 3; PETER HENNER, HUMAN RIGHTS AND THE ALIEN TORT STATUTE: LAW, HISTORY AND ANALYSIS (2009); BETH STEPHENS ET AL., INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS (2d ed. 2008). For a general discussion of this phenomenon, see Parrish, Reclaiming International Law, supra note 28, at 852-56.
judicial elites. Some scholars now suggest that American-style litigation is the future in this area, as transnational public law litigation has become more common in other countries too.

3. Humanitarian Intervention

Also indicative of the move away from a territorial approach has been the use of humanitarian intervention in the name of protecting human rights. The primary focus of international law post-World War II was initially to avoid armed conflict. States were prohibited from

---

85 POSNER, THE PERILS OF GLOBAL LEGALISM, supra note 27, at 207-25, 227-28 (arguing that American legal academics are drawn to European visions of international law and the willingness to allow judges to make policy and "regulation by litigation"); Kersch, supra note 24, at 346-47.


In the past decade, criminal complaints or investigations have been instituted before courts in Austria, Canada, Denmark, France, Germany, the Netherlands, Senegal, Spain, Switzerland, and the United Kingdom for atrocities in Europe, Africa, and South America . . . and current or former leaders of Chad, Cuba, Iraq, Iran, the Democratic Republic of Congo, the Ivory Coast, the Palestinian Authority, Israel, the United States, and other countries.


88 For a recent article that provides a good overview of the legal issues, see Saira Mohamed, Restructuring the Debate on Unauthorized Humanitarian Intervention, 88 N.C. L. REV. 1275 (2010). For a discussion of humanitarian intervention and territorial sovereignty, see Helen Stacy, Relational Sovereignty, 55 STAN. L. REV. 2029, 2035-37 (2003).

89 U.N. Charter art. 1, para. 1 (stating that the purpose of the United Nations is "[t]o maintain international peace and security"); id. at pmb. (stating that the goal of the United Nations is "to save succeeding generations from the scourge of war" and "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained"); see also Declaration of Four Nations on General Security, Nov. 1, 1943, in FOREIGN RELATIONS OF THE UNITED STATES: DIPLOMATIC PAPERS 1943, at 755, 756 (1963) (noting the intent of the United States, the United Kingdom, the Soviet Union and China to establish an international organization "for the maintenance of international peace and security").
using or threatening to use force in international relations. Exceptions to this prohibition existed only when self-defense was required in face of an "armed attack," or when the Security Council authorized intervention. While the United Nations Charter encourages states to promote and respect human rights, because of its territorial imperatives, international law prohibited unauthorized humanitarian intervention.

More recently, however, some have been willing to look beyond the law and override territorial sovereignty as a way to save threatened populations through the use of military force. In the 1980s and 1990s, mass atrocities against civilians perpetrated by warring factions pushed many human rights groups to lead the charge to stop armed conflict, even when doing so was of dubious legality. Growing acceptance of the idea that force must be used to prevent atrocities "fuelled calls for..."
humanitarian interventions in the Balkans, Rwanda, Burma, Burundi, Liberia, Sierra Leone, Congo, and the Darfur region of Sudan," among others.\textsuperscript{98} Human rights scholars assert that intervention in the internal affairs of other states is now affirmatively required under international law to prevent genocide and other atrocities, and that states can waive their right to territorial sovereignty if they ignore human rights abuses within their borders.\textsuperscript{99} Illustrative of how much change occurred in the shift away from territoriality, some scholars urge foreign military invasions even absent human rights abuse,\textsuperscript{100} while still others have justified not just intervention, but full foreign occupation, on human rights grounds.\textsuperscript{101}

C. Reasons for Discarding Territoriality

The move away from territoriality and the embrace of non-territorial methods for governance occurred for a number of reasons. One was pragmatic: treaties and multilateralism take time.\textsuperscript{102} Human
rights treaties particularly were viewed as cumbersome and slow, and even ineffective if countries asserted too many reservations.\textsuperscript{103} Also, treaties and multilateral agreements sometimes have lacked meaningful enforcement mechanisms.\textsuperscript{104} Frustrated with the slow pace of progress, the human rights community perceived non-territorial methods as an attractive way to more rapidly achieve change and effective enforcement.\textsuperscript{105} Relatively, the use of transnational law in its myriad forms became a way to exert global influence without having to worry over the constraints and mutual obligations that treaties and state-to-state lawmaking involve.\textsuperscript{106} Globalization and changes in communication and technology compounded the pressure for change, as it became easier for like-minded groups to interact and territoriality, from a descriptive sense, became less important.

Territoriality also had troubling baggage, which made it easy to attack. Some states invoked territorial sovereignty to shield outside criticism and scrutiny of internal state practices.\textsuperscript{107} Territoriality had

\textsuperscript{formation of customary international law); cf. Oona A. Hathaway, Treaties’ End: The Past, Present, and Future of International Lawmaking in the United States, 117 YALE L.J. 1236, 1241 (2008) (“[C]ompared to congressional-executive agreements, treaties have weaker democratic legitimacy, are more cumbersome and politically vulnerable, and create less reliable legal commitments.”); Beth Lyon, The Unsigned United Nations Migrant Worker Rights Convention: An Overlooked Opportunity to Change the “Brown Collar” Migration Paradigm, 42 N.Y.U. J. INT’L L. & POL. 389, 413-14 (2010) (“Seven human rights treaties are pending on the Foreign Relations Committee calendar and six of them have been pending for more than 10 years.”).\textsuperscript{103} For criticism of the U.S. approach to reservations, see Krisch, Unequal Power, supra note 68, at 388-89 (noting that “the practice of reservations is so important to the US that the Senate has urged the President not to accept any treaty provisions excluding them”); see also JOSEPH D. BECKER, THE AMERICAN LAW OF NATIONS: PUBLIC INTERNATIONAL LAW IN AMERICAN COURTS 41 (2001) (describing how in the 1990s, “the United States . . . adopted the practice of attaching reservations (or their equivalent) to ratified treaties”); Margaret E. McGuinness, Medellin, Norm Portals, and the Horizontal Integration of International Human Rights, 82 NOTRE DAME L. REV. 755, 759 (2006) (arguing that even with treaties that the United States has ratified, the United States “has become more sophisticated in its use of reservations, understandings and declarations to limit its obligations under the central human rights regimes”). For a recent, more optimistic perspective, see Tara J. Melish, From Paradox to Subsidiarity: The United States and Human Rights Treaty Bodies, 34 YALE J. INT’L L. 389 (2009).\textsuperscript{104} Oona A. Hathaway, Between Power and Principle: An Integrated Theory of International Law, 72 U. CHI. L. REV. 469, 489-91 (2005) (describing how international law often lacks enforcement and contrasting enforcement in domestic lawsuits).\textsuperscript{105} Koh, supra note 48, at 2602. Dean Koh’s work builds, in part, on the public law litigation work by Abram Chayes in the 1970s. See Abram Chayes, The Role of the Judge in Public Law Litigation, 89 HARV. L. REV. 1281 (1976).\textsuperscript{106} Nico Krisch, More Equal than the Rest? Hierarchy, Equality and US Predominance in International Law, in UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 135, 156, 162-63 (Michael Byers & Georg Nolte eds., 2003); see also Krisch, Unequal Power, supra note 68, at 369.\textsuperscript{107} CHANDLER, supra note 5, at 128-29 (noting how “[t]he core concept behind international law, sovereign equality, is seen as a legal fiction for abusers of power to hide behind” and quoting theorists who view sovereignty as the “central barrier to peace and justice” because it provides “a ‘cloak of impunity’”); Catherine Powell, Locating Culture, Identity, and Human Rights, 30 COLUM. HUM. RTS. L. REV. 201, 206-07 (1999) (criticizing government invocations of territorial
also historically been closely associated with colonialism and foreign imperialism. Western ideals of territorial sovereignty were initially associated only with the "civilized" European nations. Indigenous groups, for example, historically had few rights under international law because they did not qualify as territorial nation-states. International law "regarded the cultural survival, territorial integrity, and self-determining autonomy of indigenous peoples as matters within the exclusive jurisdiction of the settler state regimes." This use of territoriality was either antithetical to human rights ideals, or at least problematic for human rights organizations seeking to cultivate new and broader alliances with indigenous groups. The territorial sovereignty of the nation-state in the 1980s also became associated with the new right's neo-liberal economic policy, which human rights

sovereignty as a way of limiting compliance with international human rights law); see also THE RESPONSIBILITY TO PROTECT, supra note 97 (describing an emerging trend to redefine state sovereignty not as a privilege against foreign scrutiny, but as the responsibility to protect human rights and dignity).

108 CHANDLER, supra note 5, at 123-24; see also Christopher Clapham, Sovereignty and the Third World State, 47 POL. STUD. 522, 522 (1999) ("Westphalian sovereignty provided the formula under which territories which did not 'count' as states according to the criteria adopted by the European state system could be freely appropriated—subject only to their capacity to conquer the incumbent power holders—by those which did count.").


110 ANAYA, supra note 109, at 23-26; see also Mary Ellen Turpel, Indigenous Peoples' Rights of Political Participation and Self-Determination: Recent International Legal Developments and the Continuing Struggle for Recognition, 25 CORNELL INT'L L.J. 579, 580 (1992) ("Indigenous peoples are entrapped peoples—enclaves with distinct cultural, linguistic, political and spiritual attributes surrounded by the dominant society.... Indigenous peoples are truly 'nations within.'"); Siegfried Wiessner, Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis, 12 HARV. HUM. RTS. J. 57, 59 (1999) (describing how indigenous peoples became what scholars have characterized as "entrapped peoples" or "nations within" (internal quotation marks omitted)).

111 Roger A. Williams, Jr., Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World, 1990 DUKE L.J. 660, 672; see also ANAYA, supra note 109, at 26 ("The major premises of the late-nineteenth and early-twentieth century positivist school ensured that the law of nations, or international law, would become a legitimizing force for colonization and empire rather than a liberating one for indigenous peoples."); cf. Lawrence Rosen, The Right to be Different: Indigenous Peoples and the Quest for a Unified Theory, 107 YALE L.J. 227, 227 (1997) (book review) ("Americans have favored the ideal of unitarian nationhood without relinquishing their romance of community.").

112 For those in the human rights movement who are most concerned about the effects of neo-liberal globalization, it is somewhat ironic that the protests are often against global financial institutions, which themselves have promoted the erosion of the territorial state. For a discussion of this irony, see Acharya, supra note 34, at 107-08 (describing strategies of "counter-hegemonic coalitions" (internal quotation marks omitted)).
groups viewed with inherent distrust. And lastly, territoriality as a concept of law had been repudiated in the United States in a host of contexts.

These changes dovetailed with another shift in focus. As human rights groups sought to reach out and ally themselves with indigenous and environmental groups, it became convenient to distance the movement from the original architects of territorial theories of international law. "An earlier [male] WASP establishment" was largely responsible for crafting international law in the immediate post-World War II period. More recently though, a new generation of scholars, which included more women and minorities, sought to distinguish themselves by focusing more on "[i]ssues of social and economic justice, the treatment of women, minorities, and indigenous peoples, and environmental and human rights concerns" that at one point had been relegated to the margins. In this context, the move to a new approach seemed logical.

But the embrace of non-territorial approaches to human rights also can be viewed through a different lens. It is a story of U.S. domestic political struggles playing out in both the national and international arena. As conservatives in the 1980s came to push back on a domestic civil rights agenda, liberals turned to the international arena as

---


114 For a more detailed discussion of these trends, see Parrish, Changing Territoriality, supra note 28 (describing the rejection of territoriality in the personal jurisdiction context); Parrish, The Effects Test, supra note 14 (describing the rejection of territoriality in the legislative jurisdiction context). See generally RAUSTIALA, supra note 6.

115 Klug, supra note 43, at 88 ("[T]he recognition of the right to self-determination became not only the lodestar of the international human rights framework but also the means to question the authority of states over people, and eventually over individuals.").


117 Slaughter, Breaking Out, supra note 48, at 25.

a way to project influence abroad and to strengthen domestic positions. The Cold War had been central to the construction of the international human rights field because both conservative and liberal domestic groups saw human rights as a way to promote democratic regimes friendly to the United States. The end of the Cold War, however, was marked by the fraying of old alliances. Unable to easily garner sufficient support for international treaties, non-territorial approaches allowed human rights activists to reach out to a broader range of sub-state institutions (courts, local governments, etc.) that appeared more sympathetic to the human rights cause than did the federal executive during the Reagan and Bush administrations. The language of human rights also gave domestic interests moral authority and external legitimacy that was useful in domestic political struggles. The attack on territoriality might even be viewed as a particular form of post-Cold War U.S. hegemony: a more palatable way of building empire through law rather than through armies and guns.

Some of these trends were likely motivated as much by convenience and familiarity than any grand theory. The increased use of the Alien Tort Statute provides a good illustration of this. American lawyers graduating from elite law schools, who felt a

---

119 Makau Mutua, Human Rights International NGOs: A Critical Evaluation, in NGOs AND HUMAN RIGHTS, supra note 59, at 151. The author describes:

The human rights community, whose activists and leaders are mostly Democrats or sympathetic to the Democratic party, in the case of the United States, or Social Democrats and Labor Party sympathizers in Europe—liberals or those to the left of center in Western political jargon—viewed with alarm Reagan’s and Margaret Thatcher’s push for free markets and support for any pro-Western government, notwithstanding its human rights record.

Id. at 158. See also Dezalay & Garth, supra note 116, at 310, explaining:

[L]abor unions and environmental groups in the United States today take their fights for influence over domestic policy into transnational arenas such as NAFTA and the Multilateral Investment Agreement. Success in the transnational arena helps particular groups build domestic legitimacy and protect their national power and influence from erosion through transnational decision making and rule construction.

120 In the early days, liberal and conservative groups were largely allied out of convenience, using human rights as a tool in Cold War politics. Dezalay & Garth, supra note 25, at 60-73 (connecting the human rights strategy with the Cold War and the 1950s foreign policy establishment); see also Andras Sajo, New Legalism in East Central Europe: Law as an Instrument of Social Transformation, 17 J.L. & SOC’Y 329, 330 (1990) (explaining how liberation of Central Europe meant curtailing the power of states); cf. Mary L. Dudziak, Desegregation as a Cold War Imperative, 41 STAN. L. REV. 61 (1988) (describing how Cold War politics was a key motivation behind desegregation).

121 Dezalay & Garth, supra note 25; David Chandler, Expanding the Research Agenda of Human Rights: A Reply to Bellamy, 7 INT’L J. HUM. RTS. 128, 137-38 (2003); Dezalay & Garth, From the Cold War to Kosovo, supra note 118.

122 Koh, supra note 69, at 2364-65 (describing “a growing acceptance by litigants of United States courts as instruments of social change” and arguing that this was one of two trends that “engendered a new generation of transnational public law cases”). For a description of the changing role of courts in the United States, see Chayes, supra note 105, at 1281.
connection with the human rights community, were more at ease with litigation than treaty negotiation. They had cut their teeth and had become experienced litigating public law civil rights claims. They were familiar with the federal judiciary, and comfortable turning there.

II. LIMITATIONS OF NON-TERRITORIAL MODELS

Non-territorial approaches to global governance and human rights enforcement have their advantages. But legal scholars often overplay their advantages and reflect less on their limitations. This Part attempts to remedy this oversight. It also seeks to highlight two concepts that are often mistakenly conflated as one. Globalization has made territorial borders less important as a descriptive matter. That change, however, does not necessarily mean that territoriality must play a lesser role in law. On the contrary, territorial approaches are consistent with progress in human rights and may be important as a way to constrain the excesses of a globalized world.

A. Legitimacy

A number of reasons exist for why norms created at the sub-state or transnational level are perceived to be less legitimate than norms developed through multilateral state-to-state agreement. Because multilateral treaties are a product of negotiation and consent, they are

123 Dezalay & Garth, Constructing Law Out of Power, supra note 56, at 367 ("There is mobility in the human rights community, between the human rights community and the foundations that support it, and between the elite human rights organizations and the legal academy.").

124 Chayes, supra note 105. For a discussion of this phenomenon with lawyers associated with the civil rights movement, see Dezalay & Garth, From the Cold War to Kosovo, supra note 118, at 246.


126 Cf. RAUSTIALA, supra note 6, at 117-21 (noting that while "it is tempting to interpret [the growth of extraterritoriality] as a simple story of legal rules tracking the deepening of globalization," this account is "incomplete and in some senses misleading" in part because earlier waves of globalization did not result in extraterritoriality).

127 See v note 30, art. 19, 1155 U.N.T.S. at 341 (noting that treaties only create obligations and rights through consent); see also Curtis A. Bradley & Jack L. Goldsmith, Treaties, Human Rights, and Conditional Consent, 149 U. PA. L. REV. 399, 436-37 (2000) (explaining how states are only bound to treaty obligations after providing consent and how this is "[o]ne of the most established principles in international law"); cf. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF
less likely to be viewed as being hegemonically imposed than are unilateral, extraterritorial domestic laws, and for that reason, are more easily enforced.\textsuperscript{128} Weaker states, which are granted formal equality in negotiating international multilateral agreements, see themselves as having greater influence in multilateral processes and thereby are drawn to treaties. While “[m]ultilateralism and multilateral institutions may not be the quickest, most efficient or decisive producers of normative change,” they “make fundamental transformations legitimate and peaceful.”\textsuperscript{129}

In contrast, transnational rules (such as international norms derived from domestic decision-making or NGO-developed soft law) are often viewed as a form of legal imperialism, and for that reason alone are seen as illegitimate.\textsuperscript{130} Other countries view extraterritorial domestic regulation—even in the name of human rights—to be antithetical to democratic self-governance.\textsuperscript{131} Human rights litigation is no longer just an American phenomenon.\textsuperscript{132} As foreign lawsuits become more prevalent,\textsuperscript{133} it is likely that Americans will similarly react negatively to attempts by other countries to impose their conception of human rights

\begin{flushright}
\textsuperscript{128} Cf. James C. Hathaway, \textit{America, Defender of Democratic Legitimacy?}, 11 EUR. J. INT’L L. 121, 129 (2000) (criticizing various forms of unilateralism and noting that “[w]hatever breadth is sacrificed by insistence on evidence of consent is, in my view, more than compensated for by gains in both political legitimacy and meaningful enforceability that accrue from an understanding of international law as a system of consent-based rules and operations”).

\textsuperscript{129} Acharya, \textit{supra} note 34, at 113.

\textsuperscript{130} Richard A. Falk, \textit{The Role of Domestic Courts in the International Legal Order} (1964) (discussing how retaliation can occur based on extraterritorial domestic actions); see Bradley, \textit{supra} note 83, at 461 (explaining how in the human rights context, “other nations may retaliate by allowing suits against US government actors”).


\textsuperscript{132} See \textit{supra} notes 86-87.

law on the United States. Foreign judges are viewed by many in the United States with inherent distrust.

Territorial sovereignty is also important for a definitional reason that relates to legitimacy. Human rights are not easy to define and represent contested ideals over which groups will continue to struggle. They often reflect both religious and secular ideals. And debates exist over the legitimacy of first generation (civil and political), second generation (economic and social) and third generation (collective, environmental and developmental) rights, as well as the inherent tensions in defining these rights. Additional debates exist over the classification of negative and positive rights, and issues of universality and cultural relativity. Jeremy Rabkin has explained it this way:

If we could all agree on a universal church, we might want to establish bishops of that church as authoritative monitors on our governments. But we do not all agree. Most of us may agree, in broad terms, on many moral and religious premises. But we do not agree on all the details nor on the conclusions that should follow from these premises in particular circumstances. These disagreements can sometimes matter a great deal.

134 POSNER, THE PERILS OF GLOBAL LEGALISM, supra note 27, at 228 (noting that “American legalism does not extend very far from its shores” and that Americans do not support decisions unless made by “American courts, which are staffed by Americans who share American values and interests”). See generally Alfred P. Rubin, Can the United States Police the World?, 13 FLETCHER F. WORLD AFF. 371, 374 (1989) (explaining how imposing a U.S. version of international law “creates a defensive reaction in even our allies . . . . It creates a precedent and sense of righteousness in others who would apply their laws and their versions of international law to Americans whose actions they do not like.”).


136 See DELAET, supra note 19, at 14 (“Ultimately, human rights are not something concrete that we can simply define, identify, and implement, although human rights activists and scholars certainly wish for such simplicity.”); Jerome J. Shestack, The Philosophical Foundations of Human Rights, 20 HUM. RTS Q. 201, 203 (1998) (“What makes certain rights universal, moral, and important, and who decides?”).


138 Discussion of the generations can be found in PETER R. BAEHR, HUMAN RIGHTS: UNIVERSALITY IN PRACTICE 6-7 (1999).


Territorial approaches in international law provide a convenient (although by no means perfect) way of organizing and allowing these debates to play out, as well as a mechanism for reaching compromise—within certain parameters. Viewed differently, territorial approaches allow individuals and communities a way to freely construct their own conceptions of the good and live according to them.\(^{141}\) Compartmentalizing these debates through a state-centric system of laws permits rights to be reconciled with internal cultures and norms prior to being brought to the international arena.\(^{142}\) International multilateral institutions in turn provide forums where "sovereign states can come together to share burdens, address common problems and seize common opportunities."\(^{143}\) In many ways, the state-centered system is a foundation for democratic self-government and self-determination, even if decisions made within those states are not always human rights friendly.

B. Longevity and Stability

But legitimacy is not the only concern; longevity is of equal importance. The struggle to advance human rights is not intended to realize fleeting gains, but rather to instill long-term global reform and respect for human dignity. Human rights based on sub-state, non-territorial approaches are less likely to have the staying power that more traditional multilateral, state-centric approaches do.

The multilateral norms and institutions that territorial states create are less vulnerable to later shifts in power; they will thus be relatively stable even if the power of states that are generally favorable to human

\(^{141}\) See MERVYN FROST, ETHICS IN INTERNATIONAL RELATIONS: A CONSTITUTIVE THEORY (1996) (arguing that human rights are constructed within particularist communities through dialogue and democracy). An increasing body of work demonstrates the benefits of allowing human rights to develop in localities. Globalization—and the circulation of ideas and people—means that locals are increasingly attuned to international human rights and locally can build consensus for human rights positions. See, e.g., Sally Engle Merry et al., Law From Below: Women’s Human Rights and Social Movements in New York City, 44 LAW & SOC’Y REV. 101 (2010) (exploring how human rights provide important resources for American grassroots activists). Recent analysis has detailed the difficulties of humanitarian intervention sponsored by NGOs. LINDA POLMAN, THE CRISIS CARAVAN: WHAT’S WRONG WITH HUMANITARIAN AID? (Liz Waters trans., 2010) (describing the unintended, although devastating, results of NGO efforts to provide humanitarian aid).

\(^{142}\) A variation of this approach has been advanced in a parallel context relating to tribal self-governance, even in the face of illiberal practices. See Angela R. Riley, (Tribal) Sovereignty and Illiberalism, 95 CALIF. L. REV. 799 (2007).

\(^{143}\) Shashi Tharoor, Saving Humanity from Hell, in MULTILATERALISM UNDER CHALLENGE? POWER, INTERNATIONAL ORDER, STRUCTURAL CHANGE, supra note 3, at 21, 31.
rights concerns, like the United States, decline. Multilateral institutions are similarly more likely than sub-state and transnational norms to preserve, for some time, an order that reflects existing human rights preferences. Strong territorial states are essential for effective enforcement of human rights norms against multi-national and transnational corporations. Because history has shown that the success of human rights is intrinsically tied to domestic political battles, the strength of transnational actors, like human rights NGOs, is likely to wax and wane. They obtain strength as alliances of convenience are made, but then those same alliances will be quickly discarded when later politically expedient.

Even if the above were not of concern, related pragmatic considerations also suggest the greater advantage of multilateral, territorial approaches to international law. Those who seek to erode or bypass the state are unlikely to succeed. The state-centric model has shown considerable resilience. Historically, human rights organizations have existed as a counterweight to the state only until actors in those organizations have succeeded in gaining power. At that point, the key players invest in supporting, rather than undermining, the state and the new leadership within the state. To the extent that the organizations have not achieved power within the state, the transplantation of human rights norms often fail. The human rights movement remains integrally "structured around the U.S. state and the

---

144 Krisch, Unequal Power, supra note 68, at 373, 377-78 (noting how multilateral treaty regimes "are less vulnerable to later shifts in power" and are "relatively stable even if the hegemon declines").
146 Alfred van Staden & Hans Vollaard, The Erosion of State Sovereignty: Towards a Post-Territorial World?, in State, Sovereignty, and International Governance 165, 182 (Gerard Kreijen ed., 2002) ("[N]onterritorial governance will survive only if it is embedded within a secure legal and political framework compelling States to abide by the standards of conduct and committing them to maintain regional or world order.").
147 See generally supra note 118.
148 Acharya, supra note 34, at 109. Acharya asserts:

   The territorial integrity norm faces no powerful challenge nowadays, having survived post-Cold War challenges in Eastern Europe and Kosovo. And despite the ongoing demands for Security Council reform, states will pragmatically accept inequality in their foreign relations as long as unanimity/consensus remains the principal decision-making rule in most other multilateral institutions, and the nonintervention norm constrains Western intervention in their domestic affairs.
149 Dezalay & Garth, Constructing Law Out of Power, supra note 56, at 368.
150 Id. For a general discussion, see James Q. Whitman, Western Legal Imperialism: Thinking About the Deep Historical Roots, 10 THEORETICAL INQUIRIES L. 305, 306-07 (2009).
strategies that are used in U.S. politics.” More telling, as influential as transnational NGOs have become, they still lack the powers of traditional domestic interest groups.

This resilience plays out in another way. Once reforms are made, a strong territorial state becomes critical for maintaining respect for human dignity. In fact, human rights discourse, although suspicious of the territorial state, usually always relies on a strong territorial state to provide basic civil, political, economic and social rights. As David Kennedy has described it:

By consolidating human experience into the exercise of legal entitlements, human rights strengthen the national governmental structure and equates the structure of the state with the structure of freedom. To be free is...to have an appropriately organized state.

In contrast, weak states often have among the poorest human rights records.

C. Competing Voices and Uncomfortable Pluralism

A non-territorial approach is also problematic because it promotes a degree of pluralism that sits uncomfortably with the goals of most in the human rights community. Until recently, because of their sheer

---

151 Dezalay & Garth, From the Cold War to Kosovo, supra note 118, at 253 (“The issues that are put on the international human rights agenda, through the same logic, are issues that can gain attention in the media and in the academies of the United States—human rights, the environment, ethnic cleansing and violence against women are scrutinized today as were torture, apartheid, and disappearance tied to U.S.-supported dictatorships in Latin America in an earlier day.”).

152 CHANDLER, supra note 5, at 59 (“[W]ith neither a membership capable of influencing elections, nor the financial capacity to make donations or influence election campaigns, human rights NGOs lack the powers of traditional interest groups in the domestic political sphere.” (citing DAVID P. FORSYTHE, HUMAN RIGHTS IN INTERNATIONAL RELATIONS 169 (2000))).


Although the human rights vocabulary expresses relentless suspicion of the state, by structuring emancipation as a relationship between an individual right holder and the state, human rights places the state at the center of the emancipatory promise. However much one may insist on the priority or pre-existence of rights, in the end rights are enforced, granted, recognized, implemented, their violations remedied, by the state.

Id.

154 Id.

number, human rights organizations have dominated international society.156 Human rights groups have been able to develop international norms within the field on their own terms. But this phenomenon is changing for a number of reasons. For one, other organizations—corporations,157 environmentalists, indigenous groups and others—have begun to push their own agendas, with their own demands for a seat at the international table. Just as domestically, civil rights groups were opposed by a conservative counter-revolution, so too are countermovements developing in the international arena.158 Alliances are also fraying within the human rights community itself, as it becomes more developed.159

A globalized world where many actors create international norms is unlikely to be a positive development for human rights. Most human rights organizations have a particular vision of human rights: it is a westernized (often U.S. or European) vision, focused more on civil and political rights than economic and social rights.160 The generation of norms has been controlled by a small number of countries, with a group of like-minded organizations, and in a limited number of fora. Since

---


157 Ronen Shamir, Corporate Social Responsibility: A Case of Hegemony and Counter-Hegemony, in LAW AND GLOBALIZATION FROM BELOW: TOWARDS A COSMOPOLITAN LEGALITY, supra note 7, at 92, 92. Shamir explains:

Multinational corporations (MNCs) dominate the global economy, accounting for two-thirds of global trade in goods and services. Of the one hundred largest world economies, fifty-one are corporations. . . . As a result of their vast wealth, MNCs have accumulated significant political and cultural powers . . . [that] often surpass that of national governments.

Id.

158 See Michael Ignatieff, The Attack on Human Rights, 80 FOREIGN AFF., Nov.-Dec. 2001, at 102, 115-16 (describing challenges to human rights from resurgent Islam, from within the West, and from East Asia). One example in the United States was the emergence of Sovereignist, neoliberal or revisionist scholars in the 1990s. Parrish, Reclaiming International Law, supra note 28, at 815-16, 822-27.

159 See, e.g., Benedict Kingsbury, “Indigenous Peoples” in International Law: A Constructivist Approach to the Asian Controversy, 92 AM. J. INT’L L. 414, 426 (1998) (describing how indigenous group and human rights groups support one another, but that the support “is tempered by unresolved concerns about consistency with other liberal precepts, and these concerns appear quickly in the face of such concrete issues as relations between group autonomy and individual human rights”).

160 A number of theorists have explained how human rights norms bolster powerful Western states, while delegitimizing others. See, e.g., DAVID P. FORSYTHE, HUMAN RIGHTS AND WORLD POLITICS (2d ed. 1989); see also DELAET, supra note 19, at 209 (“Relativist critics of the concept of human rights argue that, despite its secular language, international human rights law is fundamentally shaped by Christian doctrine and values . . . [and] is often inconsistent with political and cultural realities in many non-Western settings.”).
World War II, this has been beneficial for human rights. It has allowed
the message to be controlled and a consensus over what rights are
"universal" to develop. Promoting greater participation threatens to
undermine this fragile consensus. Foreign courts may well be less
likely to share the human rights community of liberal values. Even
European versions of human rights can be starkly different than
American ones. And even U.S. courts "have tended to adopt very
narrow interpretations of rights protected under international human
rights and humanitarian law treaties."

This concern can be viewed from a different angle. In the
international sphere, the United States has been successful over the last
sixty years in promoting a particular vision of human rights. This may
have been empire building and legal imperialism in disguise, but it
imposed a legal perspective often favorable to the respect of human
dignity and respect for rights. But if law migration becomes
prevalent, the human rights community may well be uncomfortable if
the norms being created are illiberal, non-western and perhaps counter
to traditional concepts of individual rights. There is little reason to
believe that organizations in other states (some not friendly to human
rights concerns) will not equally be able to influence and effect change
in a post-territorial pluralistic legal system.

161 This is true, for example, with the "global rise in religious fundamentalism." Riley, supra
note 142, at 806. After all, law is embedded in the culture and history of a nation and its peoples.
See, e.g., ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 42 (Isaac Kramnick ed., W.W.
Norton & Co. 2007) (1835) (explaining that social condition is the source of laws).

162 See Robert R. Gasaway & Ashley C. Parrish, Structural Constitutional Principles and
Rights Reconciliation, in CITIZENSHIP IN AMERICA AND EUROPE: BEYOND THE NATION-STATE?
206 (Michael S. Greve & Michael Zoller eds., 2009) (describing the difference between
American and European approaches to rights).

163 Bradley, supra note 83, at 466 (arguing that U.S. federal judges have used judicially-
created doctrines to limit, not advance, human rights litigation); David Sloss, Using International

164 See Peter J. Spiro, Globalization and the (Foreign Affairs) Constitution, 63 OHIO ST. L.J.
649, 727-30 (2002) (asserting that globalization has restructured how nation-states exercise their
powers and has left the "United States more vulnerable to the imposition of international norms,
and opining that "no country—not even the supposed sole superpower—can resist or insulate
itself from global forces").

165 For a leading analysis of the problems of tolerating illiberal groups in the context of
American Indian tribal sovereignty, see Riley, supra note 142.

166 See Yves Dezalay & Bryant Garth, Dollarizing State and Professional Expertise:
Transnational Processes and Questions of Legitimation in State Transformation, 1960-2000, in
TRANSNATIONAL LEGAL PROCESSES: GLOBALISATION AND POWER DISPARITIES 197, 199
(Michael Likosky ed., 2002) (describing importing and exporting of ideas and norms); cf.
POSNER, THE PERILS OF GLOBAL LEGALISM, supra note 27, at 228 (arguing that "before long"
China, Russia, India, and Brazil "will be able to advance their views about international law—
views that will no doubt serve their interests" and noting that "Russia has quickly learned that
pliable human rights language and the precedents of Kosovo and Iraq can be turned to its
advantage"). See generally MUNCK, supra note 8, at 77 ("[W]hile a weaker nation-state may
seem an advantage in the short term to a contestatory movement it does, at the same time, remove
the sovereign power that could be made accountable for human rights. The new transnational
That other states and organizations can influence change is significant. No "universally accepted philosophical justification for human rights exists."\textsuperscript{167} Not even all NGOs are sympathetic to a western version of human rights,\textsuperscript{168} not to mention that human rights causes may be subject to capture by groups with very different political agendas.\textsuperscript{169} In fact, it may be that governments are already controlling to a significant degree the agendas of human rights NGOs.\textsuperscript{170} To the extent that local courts become the primary promulgators of norms, those norms will likely reflect the diverse political, economic, cultural and ideological forces that shape each state's unique culture and identity.\textsuperscript{171}

Said differently, the disaggregation of the nation-state may lead to a pluralism that we are uncomfortable with. In many ways, the proliferation of non-state actors and the use of non-territorial approaches to human rights law raise the very problem of fragmentation that international law scholarship has begun to grapple with.\textsuperscript{172} A plural legal order can lead to unhelpful norm conflict,\textsuperscript{173} inconsistency within
case law, forum shopping and “may jeopardize the unity of international law and, as a consequence, its role in inter-State relations.”

Extraterritorial solutions inevitably lead to a patchwork of inconsistent adjudications as different courts and organizations from different countries approach international issues using different laws and procedures. Territoriality therefore becomes a way not to topple the status quo, but to preserve a human rights approach that took root after the Second World War.

Indeed, an increasing number of pluralism scholars who encourage pluralist dialogue are quick to point out that their vision of governance is unlikely to be embraced by those who favor human rights. Humanitarian intervention is one example. While many human rights groups supported NATO’s bombing of Kosovo, Russia’s invasion of Georgia on the same purported humanitarian grounds was roundly condemned.

This point about pluralism connects to another one. Human rights advocates have a tendency to present the development of human rights as a teleological process, with a degree of inevitable evolution. In some ways, the characterization of the post-war period experiencing a gradual, predetermined evolution to greater human rights recognition is connected to theories of universalism. This sort of predetermined inevitability, however, has never proven true. Human rights have flourished, largely because they have been a useful tool for those in power, and as a way to promote U.S. foreign policy. Human rights

---

175 Parrish, Reclaiming International Law, supra note 28, at 866 (describing this phenomenon).
179 CHANDLER, supra note 5, at 62 (arguing that the end of the Cold War encouraged Western states to use the language of human rights to justify and legitimize greater intervention abroad); Dezalay & Garth, Constructing Law Out of Power, supra note 56, at 355, 371-72 (arguing that investment in human rights was an investment in political power). For additional exploration of this, see DEZALAY & GARTH, supra note 25; and Dezalay & Garth, From the Cold War to Kosovo, supra note 118.
have been embraced when strategically advantageous. To strengthen and see progress, human rights organizations have to exploit these marriages of convenience. Territorial models provide a foundation for doing so.

III. REHABILITATING TERRITORIAL MODELS

The foregoing has attempted to show that non-territorial approaches have their limitations: that global governance based on extraterritorial regulation may be unfavorable to the human rights field. This Part attempts to tease out what re-embracing territorial models of governance would require.

A. Distinguishing Conventional Analyses

As an initial matter, it may be helpful to distinguish the position articulated here from more conventional assessments. The usual critique of human rights approaches is either that international law is illegitimate, or that human rights law threatens U.S. independence and sovereignty, or that human rights norms are problematic because they reduce the political autonomy for non-western peoples. The political autonomy point is often coupled with a lament that human rights law represents a distinct kind of legal imperialism by liberal western elites. This Article rejects these assessments.

First, to the extent these critiques convey valid concerns, they are amplified with non-territorial approaches. International human rights created through treaty-based, multilateral norms, pressure states to become more democratic and liberal. Instead of unilateral imposition, it

180 It is unclear whether, even in the United States, the complete human rights agenda would ever prevail. CHANDLER, supra note 5, at 60-61 ("[I]n the mid-1990s, polls showed that only a minority of the United States public backed human rights promotion as an important foreign policy goal, well behind stopping the flow of illegal drugs, protecting the jobs of US workers and preventing the spread of nuclear weapons." (citation omitted)); see also FORSYTHE, supra note 52, at 143.


182 See supra note 26.

requires common agreement and mutual consent. A state agrees to impose restraints on unilateral action, because by so agreeing other states do the same, thus better preserving domestic interests in the long run. Whatever force exists behind critiques of international law, they are amplified in the context of unilateral domestic actions. Although hegemonic imposition may always exist in a territorial system, at least formal equality exists for all states, regardless of military or economic inequities.\(^{184}\)

This Article, however, breaks more sharply from these traditional critiques. Unlike the traditional attack, this Article does not condemn international human rights law or international law in general. On the contrary, it supports it. Nor does it condemn the ambition that there can exist higher obligations that should apply to all states. For sovereigntists and realists, the mere participation of unelected NGOs in the international law-making process makes the norms created as a result of that participation undemocratic and illegitimate.\(^{185}\) In contrast, the problem as suggested here is not that the norms human rights NGOs create are illegitimate, but that they will always be perceived by some as illegitimate. More importantly, as the number of non-state actors increase, many of those groups are likely to advance positions that are inconsistent with human rights approaches to global issues. Indeed, it is not that NGOs should not be heard as some scholars urge.\(^{186}\) Rather, it is that we should have very little confidence that states will hear the voices of NGOs that we want them to hear.

The position that the human rights field would do better returning to territorial approaches is also contrary to what cultural relativists and pluralists urge. Human rights law may well be a hegemonic imposition of western values and ideals. But the human rights community should not shy away from that reality. Human rights discourse is incompatible with many forms of cultural pluralism. Human rights means something, and presumably those in the human rights community believe strongly in the values not because they are believed to be universal (they probably are not), but because substantively they reflect norms and values that the community believes in. If that means rejecting illiberal value and denying some cultural relativism, so be it.

In responding to these critiques and to garner greater legitimacy, human rights organizations have promised greater participation and more, not less, inclusiveness. But the greater concern should be the

\(^{184}\) Admittedly, the equality is formal only. David Slater, *Geopolitical Imaginations Across the North-South Divide: Issues of Difference, Development and Power*, 16 POL. GEOGRAPHY 631 (1997).


\(^{186}\) *Id.*
opposite. It is not that human rights are undemocratic, but that non-territorial approaches lead to a proliferation of unaccountable actors. Political autonomy and democratic self-government depends on a particular version of human rights being respected. Illiberal governments and actors inhibit the capacity for self-rule and meaningful self-determination. Non-territorial approaches do not improve these sorts of changes, but rather permit illiberal and despotic leaders and groups to gain a greater voice and to shape human rights norms themselves. Territorial based approaches, in contrast, are not about weakening the State, but rather about holding states accountable for the commitments the states themselves have made.

B. Favoring Multilateral Solutions

So what is to be done? This Article urges that to meaningfully advance protection of human rights over the long term, the human rights community should re-embrace multilateral, state-to-state solutions as the primary way to solve global human rights challenges. In the humanitarian context, the human rights community should insist on adherence to the rule of law and respect for the United Nations Charter. Attempts to steer around legal constraints lead only to poor precedent, undermine the rule of law and provide support for the belief that international law is solely used for instrumental ends. Human rights groups should also be much more reluctant to promote domestic legal actions against foreigners as a method for human rights enforcement.

At a very basic level, a global human rights regime is premised on strong, territorial states—not withering ones. As Jeff Dunoff explains:

Civil and political rights... often require the state to provide relevant institutions, such as a legislature or an independent judiciary. Moreover, the state may be required to take positive steps to ensure that a right is enjoyed or protected against infringement by private parties. More importantly,... [states must satisfy] basic human needs and well-being.... [T]he underlying vision is that of an activist state, not a hands-off night watchman.

187 Jeffrey L. Dunoff, Does Globalization Advance Human Rights?, 25 BROOK. J. INT’L L. 125, 129, 132 (1999) (arguing that a human rights regime presupposes interventionist, activist states); cf. T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP 12-18, 194 (2002) (explaining the continued validity of territorial sovereignty and that “the international regime of national states is not about to collapse”; “[n]ational sovereignty may be somewhat less secure these days, but it is still the strongest game in town”).

188 Dunoff, supra note 187, at 129-30.
In fact, as the number of non-state actors increases, some with resources greater than those of many states, territorial states become critical to protecting basic freedoms. The fight against international crime syndicates, human traffickers, large multinational corporations, and other transnational non-state actors requires states with effective enforcement mechanisms. For all the talk and rhetoric surrounding non-territorial approaches, so far strong territorial states have been a prerequisite to long-term human rights enforcement and protection.

A different point can be made. Some in the human rights community have viewed the spread of neo-liberal globalization as antithetical to human rights progress. Neo-liberalism is founded on two core theses. First, that “the best government is that which is least involved in the affairs of society.” Second, that “the international order functions best when it minimizes the relevance of national boundaries and national political institutions to the activities of members of the ‘international community.’” For those who see neo-liberalism as creating an environment not conducive to human rights protection, reinforcing the value of national boundaries and state institutions becomes a way to constrain the excesses of neo-liberal globalization.

But aside from these foundational points, those in the human rights field should take other concrete steps to rehabilitate territorial-based law. First, human rights groups should present a unified stance that is wary of extraterritorial domestic litigation, such as Alien Tort Statute litigation, where foreign defendants are sued or prosecuted for conduct occurring abroad. In most instances, exercising this kind of jurisdiction is inconsistent with traditional notions of self-determination and democratic self-government. As described above, these suits threaten to create a global system that encourages other states to turn to domestic actions that may promote norms we are uncomfortable with or that are contrary to human rights goals. Indeed, the human rights community

---

189 Dinah Shelton, Protecting Human Rights in a Globalized World, 25 B.C. INT’L & COMP. L. REV. 273, 279 (2002); see also Louis Henkin, That “S” Word: Sovereignty, and Globalization, and Human Rights, Et Cetera, 68 FORDHAM L. REV. 1, 6-7 (1999) (“Giant companies have become largely independent of states, of the states that created them, of the states in which they operate. Some of them are replacing, or at least jostling, the states themselves in the state system.”).
190 See, e.g., O’Connell, supra note 113.
191 Chibundu, supra note 113, at 322.
192 Id.
193 For a more detailed discussion of the undemocratic nature of extraterritorial domestic litigation, see Parrish, The Effects Test, supra note 14, at 1483-88.
194 Alfred Rubin once described the problem as follows: Placing ourselves in the position of world policeman for our version of international law creates a defensive reaction in even our allies . . . . It creates a precedent and sense of righteousness in others who would apply their laws and their versions of international law to Americans whose actions they do not like.
itself has long recognized that the suits could be "wielded for political purposes" rather than for remedying human rights abuses.\textsuperscript{195}

This suggestion is not as provocative as it might at first appear. Taking a stand against pursuing U.S. domestic litigation over foreign activity would have little impact on human rights enforcement. These sorts of lawsuits are rarely successful, as they face a number of procedural and substantive hurdles.\textsuperscript{196} And even when a plaintiff obtains a judgment, it serves usually only a symbolic or media function,\textsuperscript{197} as the chance for enforcement is slim.\textsuperscript{198} It is also unclear whether the perceived illegitimacy of these types of lawsuits taints other aspects of the human rights agenda. The suits are usually viewed as imperialistic and unfair.\textsuperscript{199} As the International Law Association explicates:

States exercising jurisdiction on this basis may be accused of jurisdictional imperialism because universal jurisdiction is only likely to be exercised in powerful states with regard to crimes committed in less powerful states.\textsuperscript{200}

\textsuperscript{195} Chandra Lekha Sriram, \textit{Human Rights Claims vs. The State: Is Sovereignty Really Eroding?}, 1 INTERDISC. J. HUM. RTS. L. 107, 117 (2006) (noting that “those with the greatest capacity to act to protect rights are also those likely to have ulterior motives or other agendas” (citing RICHARD FALK, \textit{HUMAN RIGHTS AND STATE SOVEREIGNTY} 36 (1980))).


\textsuperscript{198} Parrish, \textit{Reclaiming International Law}, \textit{supra} note 28, at 864 nn.247-50 (citing sources and discussing diplomatic protests, blocking and clawback statutes, and other methods of preventing effective enforcement of U.S. judgments).

\textsuperscript{199} Sriram, \textit{supra} note 195, at 117 (“To the degree the proceedings take place only in the courts of powerful Western states, and often in those of former colonizers, the argument that cases are selective, and even driven by imperialistic agendas, can be and has been raised.”).

And even when not viewed as legal imperialism, U.S. human rights suits face legitimacy concerns because of a double-standard: U.S. courts more commonly permit foreigners to be sued, but do not permit human rights lawsuits against American actors.\(^{201}\)

This does not mean that proponents of human rights should discard all domestic suits. Domestic human rights litigation in the United States that seeks to impose liability when the U.S. government, U.S. corporations or other U.S. entities engage in human rights abuse, whether in the United States or abroad, should be promoted and developed. U.S. domestic litigation against U.S. defendants is consistent with traditional territorial notions of international law.\(^{202}\) And contrary to suits against foreigners for overseas activity, there is no perceived democracy-deficit with U.S. actors being subjected to U.S. law.\(^{203}\) More broadly, to the extent domestic litigation can address human rights abuses, it should be filed either in the defendant’s home country or in an appropriate supranational human rights tribunal.\(^{204}\)

Second, proponents of human rights should redouble their efforts to promote multilateral human rights treaties and effective enforcement of those treaties through international institutions. This is not to suggest that territorial sovereignty insulates a state’s treatment of its own citizens. Permanent sovereignty does not exist. On the contrary, a government’s treatment of its own citizens is a matter of international concern, not state prerogative. The issue is what methods should exist to enforce and compel compliance with human rights norms. Although empirical analysis is rare, the analysis that does exist suggests that at

\(^{201}\) See Pierre-Marie Dupuy et al., Comments on Chapters 4 and 5, in \textit{UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW}, supra note 106, at 176, 183 ("[T]he United States claims simultaneously to subject other States to respect for international law while freeing itself as far as at all possible from the constraints that same law imposes on it."); see also Bradley, supra note 83, at 469 ("The US government often assesses other nations’ compliance with international human rights standards, but it generally has been unwilling to apply international human rights law inward against domestic governmental actors.").

\(^{202}\) A number of scholars have urged that U.S. constitutional obligations should follow the U.S. government regardless of where it acts. See Neuman, supra note 15; see also Raustiala, supra note 15.

\(^{203}\) Nationality jurisdiction is a well-accepted basis for asserting jurisdiction. \textit{RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES} § 402(2) (1987); see also Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 922 (D.C. Cir. 1984) ("[A] state has jurisdiction to prescribe law governing the conduct of its nationals whether the conduct takes place inside or outside the territory of the state."). Unlike foreigners, U.S. citizens are not outsiders to U.S. politics and have a formal vote.

\(^{204}\) Dubinsky, supra note 82, at 308-09 (finding that supranational tribunals, such as the five geographically-specific atrocity courts created by the United Nations, are procedurally advantaged over domestic courts because they were “written with genocide, war crimes, and crimes against humanity in mind,” and can offer regional expertise as well as continuity). For some concerns over international tribunals, see Benedict Kingsbury, \textit{Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem?}, 31 N.Y.U. J. INT’L L. & POL. 679, 679 (1999).
least among democratic nations, ratification of human rights treaties is associated with better human rights practices. Developing human rights treaties is important not only because of the pull of legal prohibitions, but also because of the important expressive functions treaties serve: "[T]he act of ratification and the continued fact of membership in [a] treaty regime may also serve to slowly transform the country's practices as it gradually internalizes the norms expressed."

**CONCLUSION**

Scholars from a wide range of disciplines have condemned territorial approaches to international law and its state-centered focus. Territorial, state-centered conceptions of international law are commonly viewed as outdated, antiquated and ill-equipped to handle the demands of a globalized world. The human rights community has embraced this view, encouraging non-state actors to play a more prominent role in global society, promoting the use of unilateral domestic lawsuits under expanded conceptions of universal jurisdiction, and ignoring territorial borders when necessary for humanitarian intervention.

This Article has challenged that now conventional wisdom to suggest that, in the long-term, the human rights community may be better off promoting strong, territorial-based approaches to international law. Not only are strong states important to enforce and promote human rights, but also non-territorial approaches threaten, over the

---


207 Id. at 2022; see also Cassel, *supra* note 205, at 122 (explaining how "international human rights law also facilitates international and transnational processes that reinforce, stimulate, and monitor" domestic dialogues over human rights norms); Garth, *supra* note 21, at 7 ("Interviews around the globe suggest that the issues that get on the international human rights agenda are likely to be those that can gain the attention of the media in the United States, U.S. academics, the Ford Foundation, and other domestic players . . . .").
long-term, to undermine the advances already made by the human rights community.