

INTERNATIONAL HUMAN RIGHTS LAW,  
NORMATIVE HIERARCHY, AND  
DEVELOPMENT POLICY

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*International human rights law (IHRL) is often conceived of and taught as a system for enforcing specific, individual and group rights. In fact, IHRL’s mandate extends beyond individual rights to imposing broad constraints on state measures. Like most other fields of public international law, IHRL is normally viewed as a system primarily applicable to state actors. Beyond this, however, IHRL occupies a uniquely important role in international law due to its intrinsic connection with the main constitutive value of the modern world public order: human dignity. This article argues that IHRL’s central role puts it in a hierarchically superior position relative to other fields of international law and policy. Notwithstanding this priority, international practice has not fully integrated IHRL into other fields of public international law. The consequences of this incomplete convergence are felt most strongly in those other fields of international law and policy that directly affect human dignity. We argue that of these fields, international economic law and global development policy are most important to examine. The article argues for a reconciliation of these fields with IHRL as a precondition for good governance at the international level, and analyzes the potential means of integration. It concludes with a discussion of the implications of the theory developed here, for international policymaking.*

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## I. INTRODUCTION

When international lawyers speak of normative hierarchy, they are usually referring to the relationship of *ius cogens* rules to other rules of international law, or of the relationship between precatory norms—so-called “soft law”—to binding law.<sup>1</sup> Some are skeptical or dismissive of the idea that public international law includes any normative hierarchy.<sup>2</sup> This position is not shared by human rights authorities. The Committee on Economic, Social and Cultural Rights, most prominently, has insisted that other fields of law, particularly international economic law (IEL), must conform to the requirements of international human rights law (IHRL).<sup>3</sup>

Plainly, state practice does not reflect the subordination of all forms of public international law to the mandates of IHRL, as Dinah Shelton observed years ago.<sup>4</sup> But state practice is an imperfect indicator of the substance of international law.

1. See, e.g., Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT'L L. 291, 291–92 (2006) (arguing the hierarchy of international law is widely supported in literature but not in state practice).

2. See, e.g., PIERRE-MARIE DUPUY, DROIT INTERNATIONAL PUBLIC 14–16 (3d ed. 1995); Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413, 423 (1983) (arguing the widely accepted nonhierarchical regime of international law is shattered by the acceptance of *jus cogens* theory).

3. See, e.g., Comm. on Economic, Social & Cultural Rights (CESCR), Rep. on the Eighteenth and Nineteenth Sessions, U.N. Doc. E/1999/22, at 93 (1999) (emphasizing that economic international organizations should assist governments in meeting their human rights obligations in the economic sphere).

4. Shelton, *supra* note 1, at 294.

If strict conformity between practice and doctrine were necessary, IHRL could hardly be said to exist on a global level. Indeed, many fields of international law, such as international environmental law, international humanitarian law, and international trade law itself, would lose their status as law. Much more important are the convictions of the political and legal elites of the international community, and few if any of these have ever openly avowed that the fact that a state is engaged in international trade or investment somehow exempts it from its obligations under IHRL.

But on what basis could IHRL be considered hierarchically superior to IEL and, therefore, a mandatory consideration in international economic decisionmaking? The answer will require some elaboration, but it begins with the primary constitutive norm of the modern world public order: human dignity. IHRL has a more complex and intimate relationship with human dignity than has any other part of international law. Of course, IHRL is not the only field of international law, much less the sole tool available to states, to promote human dignity. Prominent among these fields are international humanitarian law, international criminal law, and international refugee law. What is often overlooked is that IEL and the related field of global development policy also have considerable potential to support human dignity.<sup>5</sup> IEL is the field of international law relating to cross-border trade in goods and services, foreign investment, sovereign debt, and international currency regulation. Global development policy, as we use the term, relates to the manner in which IEL is interpreted and applied by states and intergovernmental organizations, such as the World Trade Organization (WTO), World Bank, or the International Monetary Fund, to assist states to increase their economic and technological resources; to improve their infrastructure; and to enhance their economic growth in the long term, ideally for the general benefit of their populations.

Global development policy is indirectly but invariably concerned with human dignity in its quest to make available the resources necessary to serve such fundamental interests as public education, sanitary water, social safety nets and univer-

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5. Not always overlooked. *See generally, e.g.,* AMARTYA SEN, DEVELOPMENT AS FREEDOM (1999) (arguing that economic development is a means to freedom and human rights, as well as a goal of freedom and human rights).

sal health care. However, IEL and global development policy serve other, and sometimes conflicting, objectives. Macroeconomic growth can and should serve human dignity by supporting the economic and social conditions necessary for the realization of many human rights, but it does not necessarily or always do so. Due to institutional failings, weak capacity, or pervasive corruption, the benefits of development may be funneled to the personal coffers of political or economic elites; it may be wasted on vanity projects or foreign aggression; it may perpetuate or exacerbate existing inequalities; it may fuel domestic conflict; or it may be appropriated to strengthen the hand of an autocratic state that oppresses its population. Only international development policies that promote or require good governance reliably promote human dignity.

IHRL does not directly create a general human right to freedom from government corruption or economic malfeasance. Still less does it impose obligations *ipsis verbis* on intergovernmental organizations to ensure that development policies always maximally advance human dignity. Indeed, as will be discussed, references to IHRL as binding rules are rarely integrated into global development policy. It will be argued here that this approach to global development misconstrues the relationship between IHRL and other fields of international law such as IEL, and in particular that it misses a critical opportunity to synergize the fields for the protection and promotion of human dignity.

As noted, the argument begins from the supremacy of human dignity as the basic principle of the world public order, and of international human rights law as the most direct and comprehensive body of law promoting human dignity. It points out that other bodies of law, both international and municipal, must conform to these priorities in order to maintain legitimacy. IEL and global development policy were identified as fields with great potential to advance human dignity, especially when working with IHRL, but they have been hampered by the fragmentation of public international law. Both fields evolved separately from IHRL, with the result that IEL and development policy do not consistently advance human dignity, and have sometimes worked at cross-purposes with IHRL. Although some efforts have been made to nudge both IEL and development policy toward greater consistency with IHRL, the

efforts to date are woefully incomplete for a variety of reasons, none of which is insuperable.

Finally, it argues that, through several different features and mechanisms, IHRL has definite and significant implications for how development policy should be structured. It concludes by clarifying that IHRL does not obligate international development agencies to treat promoting human rights as their primary concern. At the same time, the modern international legal order does not give international development actors the authority to operate on principles contrary or indifferent to human dignity in their policymaking decisions, nor does it give license to ignore the binding rules of IHRL. A set of mandatory policy priorities and specific substantive rules are built into IHRL and imposed on states through diverse legal channels, and development agencies can no more ignore them than can the states that directly and indirectly make global development policy.

## II. HUMAN RIGHTS AND LEGAL REGIME HIERARCHY

### A. *The Unique Role of IHRL in the World Public Order*

The constitutive role of human dignity in the world public order emanates from the realignment of public international law away from the supremacy of state sovereignty, as represented by government policy, and its replacement with popular sovereignty.<sup>6</sup> Before the adoption of the U.N. Charter, the great majority of states considered the concept of sovereignty to signify nearly complete authority to determine domestic policy, including measures inimical to human dignity.<sup>7</sup> Thus

6. See W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 869 (1990) (arguing that international law protects the people's sovereignty, not the sovereign's); Kurt Mills, *Reconstructing Sovereignty: A Human Rights Perspective*, 15 NETH. Q. HUM. RTS. 267, 268 (1997) (proposing human rights as a standard for assessing sovereignty). For a fuller development of this argument, see Aaron Fellmeth & Siobhán McInerney-Lankford, *International Human Rights Law and the Concept of Good Governance*, 44 HUM. RTS. Q. 1 (2022).

7. Although some attempts have been made to romanticize pre-1945 state sovereignty in early modern Europe as integrating compulsory sovereign responsibilities, see, for example, Luke Glanville, *The Antecedents of 'Sovereignty as Responsibility'*, 17 EUR. J. INT'L RELS. 233, 235 (2010), such arguments rely for evidence on lofty nonbinding declarations, intellectual musings, and minority lobbying. However, state practice defines sovereignty as a

Hermann Göring tried to defy the Nuremberg Tribunal by exclaiming about the extermination of millions of Jews: “That was our right! We were a sovereign state and that was strictly our business.”<sup>8</sup>

Following the Second World War, the U.N. Charter and Universal Declaration of Human Rights replied to the mass atrocities of that war by transforming state sovereignty from a principle upholding a sitting government’s almost absolute and unchallengeable domestic jurisdiction, to a principle of “self-determination,” reflecting popular sovereignty and the collective right of peoples to determine their own form of government subject to their respect for human rights. Sovereignty has come to be understood by civilized nations as a responsibility for the welfare of the domestic population and not a bulwark against the international community’s concern for that same welfare.<sup>9</sup>

Specifically, the Charter codified a prohibition on armed aggression for territorial gain or to undermine the political independence of another state,<sup>10</sup> and it backed that mandate with a collective security regime,<sup>11</sup> repeated U.N. and treaty affirmations of the self-determination of peoples as a constitu-

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legal concept, and with depressing consistency before 1945, that practice privileged sovereign autonomy over any other considerations, usually excepting only international law itself (and that very unevenly). *See generally* AARON X. FELLMETH, *THE HISTORY OF PUBLIC INTERNATIONAL LAW*, ch. 4–7 (forthcoming manuscript on file with authors) (documenting the supremacy of sovereign governmental self-interest in international behavior from the Age of Discovery until 1945).

8. Luke Glanville, *Sovereignty and the Responsibility to Protect: A New History* 146–47 (2013).

9. Reisman, *supra* note 6, at 872; *see also* Daniel Levy & Natan Sznaider, *Sovereignty Transformed: A Sociology of Human Rights*, 57 *BRITISH J. SOCIOLOGY* 657 (2006) (explaining how global human rights discourse has transformed national sovereignty); *cf., e.g.*, U.N. SCOR, 59th Sess., 4011th mtg. at 12, U.N. Doc. S/PV.4001 (June 10, 1999), at 12 (reporting that the Netherlands stated that “Today, we regard it as a generally accepted rule of international law that no sovereign State has the right to terrorize its own citizens.”); Christopher Greenwood, *Humanitarian Intervention: The Case of Kosovo*, 2002 *FIN. Y.B. INT’L L.* 141, 174 (2002) (“An oppressive government can no longer violate the most basic tenets of human rights and international humanitarian law, inflict loss of life and misery on a huge scale upon part of its population and expect to hide behind the concept of State sovereignty . . .”).

10. U.N. Charter art. 2, ¶ 4.

11. *Id.* arts. 33–51.

tive principle of the world public order,<sup>12</sup> and the development of customary international law to broadly define the qualifications for membership in the international community.<sup>13</sup> States lost their status as vehicles for the empowerment and protection of autocratic or imperialistic elites and instead became more stable political units recognized as acting on behalf of their entire populations. The cost to be paid for the legal right to protection from external aggression was the commitment to respect the principles of the United Nations. Most prominently, this means refraining from international aggression and committing to the protection and promotion of human rights and the self-government of communities.

The popular sovereignty that undergirds the modern world public order is founded on two related, constitutive principles: the dignity of the individual human being and the right of all peoples to self-determination.<sup>14</sup> Article 1 of the U.N. Charter stated as the purposes of the United Nations the maintenance of international peace and security, the development of international relations “based on respect for the principle of equal rights and self-determination of peoples,” and international cooperation in solving “problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fun-

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12. See U.N. Charter art. 1, ¶ 2 (enshrining as a purpose of the United Nations the development of friendly relations between states based on the respect for the principle of equal rights and self-determination of peoples); International Covenant on Civil and Political Rights art. 1, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] (protecting the right to self-determination); International Covenant on Economic, Social, and Cultural Rights art. 1, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR] (protecting the right to self-determination); G.A. Res. 2625 (XXV), Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (Oct. 24, 1970) (explaining the principle of equal rights and self-determination).

13. See, e.g., Montevideo Convention on the Rights and Duties of States art. 1, Dec. 26, 1933, T.S. No. 881, O.A.S.T.S. No. 37 (determining the criteria for statehood).

14. The international bill of human rights is comprised of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the optional protocols to the latter. Off. of the High Comm’r for Hum. Rts. [OHCHR], Fact Sheet No. 2 (Rev. 1), The International Bill of Human Rights (1996), <https://perma.cc/Z246-8JMF>.

damental freedoms for all without distinction as to race, sex, language, or religion.”<sup>15</sup>

Through the Universal Declaration of Human Rights, the members of the international community pledged themselves to the universal respect for human rights,<sup>16</sup> not in certain, limited times and places, but as a general practice. The connection between human dignity, human rights, and popular sovereignty was reaffirmed more explicitly in preamble to the International Covenant for Civil and Political Rights:

The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms . . . .<sup>17</sup>

The Covenant goes on to reaffirm the right of all peoples to self-determination<sup>18</sup> by democratic elections.<sup>19</sup> The International Covenant on Economic, Social, and Cultural Rights in-

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15. U.N. Charter art. 1.

16. G.A. Res. 217 A (III), Universal Declaration of Human Rights, pmbl. (1948) [hereinafter UDHR].

17. ICCPR, *supra* note 12, pmbl.

18. *Id.* art. 1(1).

19. *Id.* art. 25.

cludes an identical provision on self-determination as the basis of state legitimacy.<sup>20</sup>

As these statements and provisions of law indicate, the human dignity on which the world public order is based encompasses much more than the intrinsic value of human life. Although the inherent value of human life is the most basic principle protected by IHRL,<sup>21</sup> the principle of self-determination of peoples and the individual right to democratic political participation reflect a conception of dignity as encompassing rights to an important measure of control over each person's environment, relationships, and destiny—personal, economic, social, cultural, and political.

These binding treaties and solemn declarations embodied a revolutionary political theory. The test of a government's legitimacy under international law has become whether the government is based on, and responsible to, the will of its population and respects that population's human rights consistently. In short, state sovereignty was transformed from a Westphalian *entente* among state governments to respect each other's internal affairs and to leave each other a free hand to oppress or govern their populations as they decide, to a tool for the organization of the international community into discrete, self-governing political units that exist to serve the will of each state's population in a manner respectful of human dignity.

The respect for human dignity is embodied in IHRL not only in the form of the mere preservation of human life, but in the maintenance and improvement of the quality of life of the population. This ampler conception of dignity is evident from the fact that most human rights protected by IHRL are unnecessary for survival. Most are instead intended to promote a wide variety of basic human values and interests, such as the rights to education and to protection from defamation.

These values, embodied in the human rights defined by treaties and customary law, serve fundamental human physio-

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20. ICESCR, *supra* note 12, art. 1(1).

21. *See, e.g.*, UDHR, *supra* note 16, art. 3; ICCPR, *supra* note 12, art. 6; Convention on the Rights of the Child art. 6, Nov. 20, 1989, 1577 U.N.T.S. 3; European Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, Nov. 4, 1950, 312 E.T.S. 5 [hereinafter ECHR]; American Convention on Human Rights art. 4, Nov. 22, 1969, 9 I.L.M. 673 [hereinafter ACHR]; African Charter on Human and Peoples' Rights art. 4, June 27, 1981, 1520 U.N.T.S. 26363 [hereinafter Banjul Charter].

logical and psychological needs, such as political participation, physical security, autonomy, belonging, self-esteem, and hope for the future. The *corpus iuris* of IHRL is thus designed to promote a concept of human dignity that reflects the wide variety of basic human physical, mental, and emotional needs and aspirations.

### B. IHRL and Regime Hierarchy

#### i. IHRL's Claim to Normative Priority

IHRL's special role in the world public order can be inferred from two prominent characteristics. First, any state measure interfering with human rights must be justified by an exceptionally weighty reason and must satisfy a proportionality test to escape condemnation.<sup>22</sup> Second, those acts that most fundamentally offend human dignity, such as slavery, genocide, and torture, are considered to violate *ius cogens*—peremptory rules of international law that are non-derogable *semper ubique et ab omnibus*.<sup>23</sup> According to Article 53 of the Vienna Convention on the Law of Treaties, a treaty is void if, at the time of its conclusion, it conflicts with a norms of *ius cogens*. State measures conflicting with most other fields of international law do not provoke the same legal consequences. The violation of an obligation under a trade treaty or seaport docking concession in service of a foreign policy objective may result in some form of countermeasure, but the offending

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22. See ICCPR, *supra* note 12, art. 21; ICESCR, *supra* note 12, art. 4; ECHR, *supra* note 21, art. 8–11; *Handyside v. United Kingdom*, App. No. 5493/72, 1976 Eur. Ct. H.R. 5, ¶¶ 48–49 (1976) (noting that a state's "margin of appreciation" is not unlimited and highlighting that restrictions must be "proportionate to the legitimate aim pursued"); *Claude-Reyes et al. v. Chile*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 151, ¶¶ 89–91 (Sept. 19, 2006) (noting that, under the American Convention on Human Rights, restrictions imposed on freedom of thought and expression must be "intended to satisfy a compelling public interest," such as "the protection of national security, public order, or public health and morals"). See generally JONAS CHRISTOFFERSEN, FAIR BALANCE: PROPORTIONALITY, SUBSIDIARITY AND PRIMACY IN THE EUROPEAN CONVENTION ON HUMAN RIGHTS 33–40 (2009) (discussing the European system approach to human rights limitations).

23. See Vienna Convention on the Law of Treaties arts. 53, 64, May 23, 1969, 1155 U.N.T.S. 331 (providing rules for treatment of conflicts between *ius cogens* norms and treaties in international law).

state will hardly become a subject of major global concern, much less a despised pariah, on that account.

The constitutive nature of human dignity in the world public order, and the nature of IHRL as its most direct and comprehensive expression, have important consequences for all aspects of law, international and municipal. Government legislation and public policy must be interpreted in light of IHRL in a manner not required of most other bodies of law. This is not merely because several rules of IHRL have achieved the status of *ius cogens*, but because IHRL encodes a system of rules entitled to superior weight in considerations of public policy. Limitations on human rights must be justified according to highly restrictive criteria to be consistent with IHRL.<sup>24</sup> The interaction between IHRL and other fields of law is not, therefore, a horizontal dynamic involving the reconciliation of conflicts or other inconsistencies between equal regimes. No law, whether domestic or international, has a credible claim to legitimacy if it is inconsistent with IHRL, and this establishes a certain hierarchical relationship.<sup>25</sup>

The fact that much law, both public international law and the municipal law of states, may pre-date the Universal Declaration of Human Rights and human rights treaties does not alter the point. With the replacement of the Westphalian sovereignty by an order based on the dignity of the individual came the need to realign preexisting fields of law with the new basis for legitimacy. Interpretations of law that continue to assume the supremacy and absolute opacity of the state merely turn the law into a living anachronism.<sup>26</sup> This point applies to all fields of law, including IEL and global development frameworks, many institutions of which precede the foundation of modern IHRL. States, as creatures of international law, must act in conformity with international law not merely as a matter of formal compliance with mandates of positive IHRL binding on them, but because the very legitimacy of states as political authorities is dependent on their commitment to the

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24. See *supra* sources cited in note 22.

25. Cf. Jure Vidmar, *Norm Conflicts and Hierarchy in International Law: Towards a Vertical International Legal System?*, in *HIERARCHY IN INTERNATIONAL LAW: THE PLACE OF HUMAN RIGHTS* 25–27 (Erika de Wet & Jure Vidmar eds., 2012) (noting that *ius cogens* norms are “of a special character” in the normative hierarchy of international law).

26. Cf. Reisman, *supra* note 6, at 873.

constitutive norms of the system of which they form functional parts. This is not to say that the legitimacy of states depends on their unvarying compliance with international law. States obviously may and do depart from rules of international law from time to time without sacrificing their justification for continued existence. But a state measure having the net effect of undermining the constitutive norm of the world public order becomes *ipso facto* illegitimate. A state measure whose net effect is to harm human dignity, or one that is utterly indifferent to human dignity, lacks foundation in any widely accepted source of authority. Worse, the measure tends to undermine the world public order by diluting or degrading its constitutive principles.

It is not really necessary to accept this line of reasoning, however, to arrive at the conclusion that all state measures must be compatible with human dignity. Proponents of social contract, Libertarianism, and theories of political authority based on consent or natural rights would arrive at a similar conclusion based on different assumptions and reasoning. The political theories of Locke, Rousseau, Jefferson, Mill, and their intellectual progeny assume that states exist solely to serve the interests of their populations, and any state act generally harmful to that population is illegitimate.<sup>27</sup> Different theories base that conclusion on different beliefs about the interests that states may legitimately serve and how they may legitimately serve them. But all such theories rely on the assumption that the state is obligated to serve some fundamental interests of the individual, and these interests relate to a conception of human dignity and flourishing with some affinities to the val-

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27. See JOHN STUART MILL, ON LIBERTY 126–28 (1859) (noting the reciprocal obligation of states and individuals to “not injur[e] the interests of one another”); JEAN-JACQUES ROUSSEAU, DU CONTRAT SOCIAL; OU, PRINCIPES DU DROIT POLITIQUE ch. 7 (1762) (observing that a sovereign state, having been formed by the people who compose it, cannot have an interest contrary to its citizens); JOHN LOCKE, TWO TREATISES OF GOVERNMENT 208–10 (1690) (discussing that the primary limitation on the exercise of legislative power is it cannot “possibly be absolutely arbitrary over the lives and fortunes of the people,” as the legislature is “but the joint power of every member of the society”); THE DECLARATION OF INDEPENDENCE (U.S. 1776) (“All men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed”).

ues underlying modern IHRL, such as the rights to life, privacy, personal liberty, and property.

Government policies and laws that disserve these values undermine the state's legitimacy and justify resistance to the state's authority. A state, and by necessary extension a state's government, has no rights that are not directly or indirectly derivative of the interests of its population. Any alternative theory must rely on a reification of the state and attribution to it of natural rights superior to those of any individual or group of individuals. Theories of this kind, such as Hegel's *Elements of the Philosophy of Right*, represent the fetishization of the state as a moral entity greater than any individual or, by logical extension, any group of individuals that comprise it. These are postulated to be always subordinate to the state, and therefore they cannot have rights other than what the state may choose to grant.<sup>28</sup>

Such theories are not only anachronistic; they are mythological in nature, because they are based on beliefs about the inherent characteristics of artificial entities, and artificial entities can have no inherent attributes except those tautologically necessitated by the linguistic expression that denotes them. In other words, an abstract concept like "state" has only the attributes implicitly agreed upon by the persons discussing that concept. Because such concepts are ontologically subjective, they cannot have rights in the absence of a general agreement of relevant individuals that states have rights. Inevitably, any rights of a state are derivative of the individuals who populate it,<sup>29</sup> because states are instrumentalities of public policy, sustained by human beings solely to serve a utilitarian purpose. And if that purpose is not to protect and to promote the interests of the state's population, the state must exist to serve the

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28. See G.W.F. HEGEL, GRUNDLINIEN DER PHILOSOPHIE DES RECHTS [Elements of the Philosophy of Right] § 33 (1821):

The state, or freedom, which, while established in the free self-dependence of the particular will is also universal and objective. This actual and organic spirit [a] is the spirit of a nation, [b] is found in the relation to one another of national spirits, and [c] passing through and beyond this relation is actualised and revealed in world history as the universal world-spirit, whose right is the highest.

29. See generally MEIR DAN-COHEN, RIGHTS, PERSONS AND ORGANIZATIONS ch. 4 (2d ed. 2016) (explaining the nature of organizational rights).

interests of some politically elite subset of that population or a group of individuals outside the state. Only one of these fundamental purposes is consistent with the values upon which the modern world public order is based.

ii. *The Consequences of Normative Priority in International Law*

That the legitimacy of all law depends on its consistency with IHRL is not the same as saying that all law must in some way advance a recognized human right. There is an important distinction between inconsistency with a field of law and promotion of that field's policies. Contradiction is not the same as compatible indifference. The dynamic of regime interaction with IHRL is complex. On one hand, no law can completely ignore human rights, because the broad scope of IHRL makes it probable that most government measures will affect at least one human right in one way or another. For example, as the Inter-American Commission on Human Rights noted, even when looking as far afield as environmental law, the state cannot blind itself to human rights concerns:

Climate change affects human rights in different ways. The consequences of climate change lead to deaths, injuries, and displacement of individuals and communities because of disasters and events such as tropical cyclones, earthquakes, tornadoes, heat waves, and droughts. . . . Addressing climate change from a human rights perspective makes it possible to identify the rights that are at serious risk as a result of this problem. It also helps to ensure that responses to climate change are coherent, effective, and receptive to the concerns of those most affected.<sup>30</sup>

While some may decry such observations as confusing IHRL with good governance, one point of this article is to demonstrate that sharply dichotomizing the two is simplistic in conception and futile in application. IHRL imposes a multi-layered regime of positive obligations, both structural and specific, on states to protect *all* human rights and to take reasonable measures to ensure enjoyment of the most basic human

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30. Press Release, Inter-Am. Comm'n on Hum. Rts., IACHR Expresses Concern Regarding Effects of Climate Change on Human Rights, Inter-Am. Comm'n on Hum. Rts. Press Release 140/15 (Dec. 5, 2015), <https://perma.cc/6Q7N-VBTY>.

rights.<sup>31</sup> While the connection between climate change and IHRL is probably not caused by the acts of an individual state with sufficient directness to justify the international community in treating incremental, global climate change as a human rights violation in practice,<sup>32</sup> many government measures causing environmental degradation do proximately affect protected human rights and require evaluation in light of IHRL.<sup>33</sup>

Moreover, even when a state's measures are directly linked to an effect on persons under its jurisdiction, not all such measures affect human dignity equally, and there is no reason why any given law or regulation must advance any specific human right appreciably, or even human dignity itself, if it serves other morally justifiable values. Indeed, in the service of such values, law can legitimately interfere with some human rights to the extent strictly necessary, such as to protect the rights of others or *ordre public*, or otherwise for the public interest.<sup>34</sup> This is the general basis for the limitations on human rights accepted by all international human rights bodies and courts. For example, neither the European Court of Human Rights nor the African Court of Human and Peoples' Rights will condemn an interference with human rights if the interference is prescribed by law, serves a legitimate state aim, and the means employed are reasonably proportionate to that

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31. This point will be developed more fully in Part IV, *infra*.

32. See HURST HANNUM, *RESCUING HUMAN RIGHTS* 47–50 (2019) (discussing the relationship between climate change and the human rights responsibilities of states).

33. Much has been written on this point. See, e.g., COUNCIL OF EUROPE, *MANUAL ON HUMAN RIGHTS AND THE ENVIRONMENT* 7, 18–19 (2012) (evaluating international legal protections related to the environment); *THE HUMAN RIGHT TO A HEALTHY ENVIRONMENT* 1–16 (John H. Knox & Ramin Pejan eds., 2018) (examining the role of a healthy environment in the full enjoyment of human rights); SIOBHÁN MCINERNEY-LANKFORD, MAC DARROW & LAVANYA RAJAMANI, *WORLD BANK STUDY: HUMAN RIGHTS AND CLIMATE CHANGE: A REVIEW OF THE INTERNATIONAL LEGAL DIMENSION* 12, 29–30 (2011) (linking specific human impacts of climate change to human rights obligations under international law); Alan Boyle, *Human Rights and the Environment: Where Next?*, 23 *EUR. J. INT'L L.* 613, 620 (2012) (considering the state's responsibility to protect against environmental harms); John H. Knox, *Human Rights, Environmental Protection, and the Sustainable Development Goals*, 24 *WASH. J. INT'L L.* 517, 519–23 (2015) (probing the developing relationship between environmental protection and human rights).

34. See *supra* sources cited in note 22.

aim.<sup>35</sup> Similarly, the U.N. Human Rights Committee has validated interferences with human rights when “based on reasonable and objective criteria” and are both “directly related and proportionate” to the need addressed.<sup>36</sup>

The question of what policies apart from the protection and promotion of human rights are justifiable to pursue ultimately depends on one’s political theory and values. But not all such theories have equal effects on human dignity, and not all are equally compatible with IHRL. Obviously, political theories that suppress democracy,<sup>37</sup> discriminate invidiously based on a personal characteristics or opinions,<sup>38</sup> or impose religious disciplines or viewpoints on the population<sup>39</sup> are inconsistent

35. *E.g.*, Belgian Linguistics Case (No. 2), 1 Eur. H.R. Rep. 252, ¶ 10 (1968); S.A.S. v. France, App. No. 43835/11, 60 Eur. H.R. Rep. 11, ¶ 111 (2014); Konaté v. Burkina Faso, No. 004/2013, Judgment, Afr. Ct. H.P.R., ¶ 176 (Dec. 5, 2014).

36. *E.g.*, Young v. Australia, Hum. Rts. Comm., Commc’n No. 941/2000, 42 I.L.M. 1244, ¶ 10.4 (Aug. 6, 2003); U.N. Human Rights Comm., Gen. Comment No. 22, 48th Session ¶ 8, U.N. Doc. HRI/GEN/1/Rev.1 (1994); *see also, e.g.*, Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council v. Kenya, Communication 276/2003, Afr. Comm’n H.P.R., ¶ 172 (Feb. 4, 2010); Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84, Inter-Am. Ct. H.R., (Ser. A) No. 4, ¶¶ 55–57 (Jan. 19, 1984).

37. *See* UDHR, *supra* note 16, art. 21; ICCPR, *supra* note 12, art. 25; American Declaration of the Rights and Duties of Man, art. XX, May 2, 1948, <https://perma.cc/7TPX-L7FY> [hereinafter ADRDM]; ACHR, *supra* note 21, art. 23; ECHR, *supra* note 21, Protocol I, art. 3; *see also* Human Rights Council Res. 19/36, Human Rights, Democracy and the Rule of Law, U.N. Doc. A/HRC/RES/19/36 (Apr. 19, 2012) (reaffirming that democracy and respect for human rights are interdependent); Hirst v. United Kingdom, 42 Eur. H.R. Rep. 41, ¶ 59 (2005) (“[T]he right to vote is not a privilege. . . . Universal suffrage has become the basic principle.”).

38. *See* UDHR, *supra* note 16, art. 7; ICCPR, *supra* note 12, arts. 2, 26; ICESCR, *supra* note 12, arts. 2(2), 3; ADRDM, *supra* note 37, art. II; ACHR, *supra* note 21, arts. 1, 24; ECHR, *supra* note 21, art. 14 & Protocol No. 12, art. 1; *see also* Mike Campbell (Pvt) Ltd v. Republic of Zimbabwe, S. Afr. Dev. Cmty. Trib. Case No. 2/2007, 48 I.L.M. 533 (2008) (“[D]iscrimination of whatever nature is outlawed or prohibited in international law.”).

39. *See*, UDHR, *supra* note 16, art. 18; ICCPR, *supra* note 12, art. 18; ADRDM, *supra* note 37, art. III; ACHR, *supra* note 21, art. 12; ECHR, *supra* note 21, art. 9; *see also* Refah Partisi v. Turkey, 37 Eur. H.R. Rep. 1, ¶¶ 90–92 (2003) (“The Court . . . considers that the State’s duty of neutrality and impartiality [in matters of religion] is incompatible with any power on the State’s part to assess the legitimacy of religious beliefs.”).

with specific human rights guarantees, and therefore violate international law. But, as noted, IHRL is more comprehensive in its demands on government policy than might at first appear from a review of the specific rights guaranteed by human rights treaties. IHRL imposes a substantial body of procedural and substantive obligations on states parties that affect the style, content, and the very priorities of government policy making.<sup>40</sup> As we will discuss in the subsequent parts of this article, the expansive and complex nature of IHRL provides a basis for assessing whether both international policies align with human dignity and, therefore, are compatible with international law.

This conclusion is not universally accepted by scholars. Dinah Shelton, for example, has argued that international trade law and other forms of IEL need not conform to IHRL because the former are *lex specialis*, presumably based on the view that IHRL is *lex generalis*, and *lex specialis derogat legi generali*.<sup>41</sup> But such pithy maxims do not adequately reflect the complex relationship between IHRL and other fields of international law. IEL is *lex specialis* only in the very narrow sense that it applies to specific kinds of interaction between states. IEL is not designed to set up a complete *corpus iuris* that excludes other rules of international law from consideration; therefore, the maxim does not apply. The World Trade Organization's Appellate Body recurrently relies on general rules and principles of international law, such as the law of treaties,<sup>42</sup> in its inter-

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40. See, e.g., ICESCR, *supra* note 12, art. 7 (committing parties to ensure fair wages and safe and healthy working conditions) & 11(2) (committing states to take measures to improve methods of agricultural production, conservation and distribution); Convention on the Elimination of All Forms of Discrimination Against Women art. 2(f), Dec. 18, 1979, 1249 U.N.T.S. 13 (committing parties to take appropriate measures to "modify or abolish existing laws, regulations, customs and practices" that discriminate against women); International Convention on the Elimination of All Forms of Racial Discrimination art. 7, Dec. 21, 1965, 660 U.N.T.S. 195 (committing parties to adopting immediate and effective measures in teaching, education, culture and information, and otherwise, to combat racial prejudice and to promote interracial understanding).

41. Shelton, *supra* note 1, at 294.

42. See Isabelle Van Damme, *Treaty Interpretation by the WTO Appellate Body*, 21 EUR. J. INT'L L. 605, 606 (2010) (discussing the WTO Appellate Body's acceptance of principles of treaty interpretation, including those codified in the Vienna Convention on the Law of Treaties).

pretation of state obligations under the WTO Agreements for precisely this reason. IEL's mandates are confined to specific forms of state interaction such as trade and investment, but there is no evidence the parties to WTO Agreements, IBRD Articles of Agreement, or other IEL treaties and instruments ever intended them to be hermetically sealed off from general rules of international law, of which IHRL forms a critical part.

Even those scholars who accept the relevance of IHRL to other fields of international law do not necessarily accept that a hierarchical relationship exists between the two.<sup>43</sup> That observation is formally correct. There is no general principle of public international law requiring that all other rules be interpreted to maximize compliance with IHRL. The international law of treaties, for example, does not demand that all treaties be interpreted in a manner that facilitates compliance with IHRL.<sup>44</sup> International trade treaties, climate change treaties, double taxation treaties, and extradition treaties are interpreted according to rules set forth in the Vienna Convention on the Law of Treaties,<sup>45</sup> not in whatever manner best protects or promotes human rights.<sup>46</sup> The Vienna Convention mentions human rights only in the preamble and includes no rule that makes human rights relevant to the general method of treaty interpretation.

The same applies to other bodies of public international law. The International Court of Justice has held that diplomatic immunity from the jurisdiction of national courts is generally preserved under customary international law, despite

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43. See, e.g., Philipp Dann, *Institutional Law and Development Governance: An Introduction*, 12 L. & DEV. REV. 537, 546 (2019) (noting the overlapping nature of IHRL with other principles of international law).

44. However, in practice, the Strasbourg court has sometimes suggested that rules of treaty interpretation may differ for the ECHR: "regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms." *Soering v. United Kingdom*, App. No. 14038/88, 11 Eur. H.R. Rep. 439, ¶ 87 (1989).

45. Vienna Convention on the Law of Treaties arts. 31–32, May 23, 1969, 1155 U.N.T.S. 331.

46. See Menno T. Kamminga, *Final Report on the Impact of International Human Rights Law on General International Law*, in *THE IMPACT OF HUMAN RIGHTS LAW ON GENERAL INTERNATIONAL LAW* 1, 9–10 (Menno T. Kamminga & Martin Scheinin eds., 2009) (noting that the Vienna Convention on the Law of Treaties does not support special rules of interpretation for human rights treaties).

the fact that such immunity may result in impunity for brutal violators of human rights.<sup>47</sup> The Strasbourg court has taken a consonant view.<sup>48</sup> Nor did a proposal by the U.N. Special Rapporteur on Diplomatic Protection succeed in obligating states to exercise diplomatic protection on behalf of their nationals whose human rights had been violated, even when *ius cogens* was at stake.<sup>49</sup> Similarly, the law relating to state jurisdiction is widely considered to limit a state's responsibility for complying with IHRL to territories under the state's sovereignty or direct control.<sup>50</sup> Such an interpretation of jurisdiction could hardly be less conducive to compliance with IHRL, yet it is the one generally accepted, however unconvincing a human rights advocate might find the rationale.

The fact that IHRL is not consistently incorporated into other bodies of international law does not undermine its hierarchical superiority, however. As the body of law most directly concerned with, and completely codifying, the constitutive principle of human dignity, IHRL plays a central normative role in the world public order, much like the U.N. Charter's general prohibition on the use of force in international relations.<sup>51</sup> This is not the same as saying that the entire *corpus*

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47. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. Rep. 3, ¶ 58 (Feb. 14). However, it appears that the International Law Commission currently rejects immunity *ratione materiae* in its Draft Articles on the Immunity of State Officials from Foreign Criminal Jurisdiction, at least with respect to some atrocities, such as genocide, torture, and enforced disappearances. Int'l Law Comm'n, Seventh Rep. on Immunity of State Officials from Foreign Criminal Jurisdiction, art. 7, U.N. Doc. A/CN.4/729 (Apr. 18, 2019). Moreover, the International Criminal Court rejects head of state immunity with regard to international courts. *E.g.*, Prosecutor v. Omar Hassan Ahmad Al-Bashir, ICC-02/05-01/09, Judgment in the Jordan Referral re Al-Bashir Appeal, ¶¶ 1–2 (May 6, 2019), <https://perma.cc/ZSM3-2EG4>.

48. Al-Adsani v. United Kingdom, App. No. 35763/97, ¶ 61 (Nov. 21, 2001) <https://perma.cc/Y74E-WN74>.

49. John Dugard, *The Future of International Law: A Human Rights Perspective—With Some Comments on the Leiden School of International Law*, 20 LEIDEN J. INT'L L. 729, 732 (2007).

50. See generally Ralph Wilde, *Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties*, 40 ISR. L. REV. 503 (2007) (discussing the spatial test for triggering the applicability of human rights law and the law of occupation).

51. Martin Scheinin has referred to the “constitutional dimension” of IHRL in public international law as a reason for not reducing it to “one of many branches of international law.” Martin Scheinin, *Impact on the Law of*

*iuris* of IHRL partakes of the constitutive character of human dignity. Rather, it means that IHRL maintains a position of priority due to the importance of the human dignity it serves, and the nature of its guarantees as “rights,” rather than mere policy preferences.

Finally, although the body of peremptory rules of international law, also known as *ius cogens*, is decidedly limited, most *ius cogens* rules are part of IHRL. These include prohibitions on slavery, torture, and genocide, and in the view of some human rights authorities encompass a much broader selection of rules of IHRL, including self-determination, the right to effective protection of law, and the right to nondiscrimination based on race, sex, religion, or other status.<sup>52</sup> While certain other norms of international law outside the field of human rights are widely considered *ius cogens*, such as the prohibition on piracy and the renunciation of aggressive warfare codified in Article 2(4) of the U.N. Charter, most norms of *ius cogens* do relate directly or indirectly to human rights.<sup>53</sup> Indeed, some publicists have qualified the bulk or even the whole of IHRL as representing *ius cogens*<sup>54</sup> a position that, if accurate, is consistent with the nature of human rights as integral to human dignity. It is hardly conceivable that the international community would recognize as legally binding a treaty whereby states agree to suppress a recognized human right for any but a compelling reason in the public interest. Even so, it is not neces-

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*Treaties*, in THE IMPACT OF HUMAN RIGHTS LAW ON GENERAL INTERNATIONAL LAW (Menno T. Kamminga & Martin Scheinin eds., 2009).

52. See, e.g., Case of Expelled Dominicans and Haitians v Dominican Republic, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 282, ¶ 264 (reiterating the *jus cogens* principle of effective protection of law and nondiscrimination).

53. Cf. *Draft Articles on the Law of Treaties*, [1966] 2 Y.B. Int'l L. Comm'n 248, U.N. Doc. A/CN.4/Ser.A/1966/Add.1 (debating whether to add examples of *ius cogens* principles, each of which either directly or indirectly related to human rights).

54. E.g., MYRES S. McDOUGAL, HAROLD D. LASSWELL & LUNG-CHU CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER 345 (1980) (stating that the bulk of human rights should be viewed as *jus cogens*); Karen Parker & Lyn Beth Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INT'L & COMP. L. REV. 411, 413–14 (1989) (Most areas of great human rights concern . . . are governed by *jus cogens*); *Southwest Africa Cases (Eth. v. S. Afr.; Liber. v. S. Afr.)*, Judgment, 1966 I.C.J. Rep. 6, 250, 298 (July 18) (Tanaka, J., dissenting) (suggesting that if *ius cogens* exists, then the court should consider human rights principles as *ius cogens*).

sary to welcome the entire body of IHRL into *ius cogens* to accept the general priority of its norms over state interests that do not rise to the level of rights.

### C. *Is IHRL Too Fragmented to Guide Governance?*

As a body of law codified in multiple multilateral and regional treaties, IHRL performs its functions through a variety of institutions and regimes that do not always interact seamlessly.<sup>55</sup> Like IEL, IHRL does not have a single, global mechanism for its development, interpretation, and enforcement. It consists of multiple regimes with different sources of law, varied legal content, different bound parties, and diverse institutions and procedures for its interpretation and enforcement, each of which inevitably grapples with the challenge of IHRL's fragmentation.<sup>56</sup> Some of the *corpus iuris* of IHRL is codified in global treaties with many parties, but even these treaties have limited subject matter and, with only a few exceptions, lack universal membership. Some treaties deal with broad subjects, such as economic, social, and cultural rights; others with more specific subjects, such as the human right against torture or the rights of disabled persons. Many of these treaties create institutions to interpret and facilitate enforcement of the specific treaty, but with no broader mandate to reconcile norms across regimes.

Further contributing to the fragmentation of IHRL is the proliferation of regional treaty regimes. These regimes establish geographically defined systems that may be broadly consistent with the multilateral regimes in the content of state legal obligations, but they diverge in some respects both from the multilateral regimes and each other. Inconsistencies between

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55. On the issue of “more favorable protection clauses” contained in different human rights treaties and its potential use as an interpretative tool to address fragmentation and the allocation of competence across international and national courts, see generally Adamantia Rachovitsa, *Treaty Clauses and Fragmentation of International Law: Applying the More Favourable Protection Clauses in Human Rights Treaties*, 16 HUM. RTS. L. REV. 77 (2016).

56. For a discussion of these issues in the context of the European Court of Human Rights, see generally MAGDALENA FOROWICZ, *THE RECEPTION OF INTERNATIONAL LAW IN THE EUROPEAN COURT OF HUMAN RIGHTS* 313–51 (2010); Adamantia Rachovitsa, *Fragmentation of International Law Revisited: Insights, Good Practices and Lessons to Be Learned from The Caselaw of the European Court of Human Rights*, 28 LEIDEN J. INT'L L. 863 (2015).

regional and multilateral human rights systems do sometimes occur.<sup>57</sup> Some regimes, most notably the Council of Europe's system, are far in advance in terms of the scope of obligations, the richness of jurisprudence, and the effectiveness of enforcement. This divergence is especially visible in the Middle East and Asia, where the regimes are weak, frequently inconsistent with multilateral rules of IHRL, and lack independent authorities for the law's interpretation and enforcement.

Fragmentation has been widely commented upon with respect to the U.N. treaty bodies, including within the work product of individual monitoring bodies.<sup>58</sup> The fragmentation of law between different human rights frameworks has also been the subject of academic critique—whether between the Council of Europe system and the ICCPR,<sup>59</sup> or between different human rights treaties that include a “most favorable standard” clause.<sup>60</sup> At times the European system conflicts with the global system, such as when the Strasbourg court upheld a law requiring Sikhs to remove their turbans for identity photos, whereas the Human Rights Committee considered the law to violate the right to freedom of religion.<sup>61</sup> Nevertheless, the

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57. See generally, e.g., Alexander Orakhelashvili, *Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights*, 14 EUR. J. INT'L L. 529 (2003).

58. See, e.g., Mehrdad Payandeh, *Fragmentation within International Human Rights Law*, in A FAREWELL TO FRAGMENTATION: REASSERTION AND CONVERGENCE IN INTERNATIONAL LAW 297, 317–18 (Mads Andenas & Eirik Bjorge eds., 2015) (discussing the widespread discourse on fragmentation including by U.N. monitoring bodies through the I.C.J.).

59. See, e.g., Siobhán McInerney-Lankford, *Fragmentation of International Law Redux: The Case of Strasbourg*, 32 OXFORD J. LEGAL STUD. 609 (2012) (discussing the risks posed by the fragmentation between the ECHR and the ICCPR).

60. See, e.g., Adamantia Rachovitsa, *Treaty Clauses and Fragmentation of International Law: Applying The More Favourable Protection Clause in Human Rights Treaties*, 16 HUM. RTS. L. REV. 77 (2016) (discussing the impact of different interpretations regarding more favorable protection clauses in various treaties).

61. Contrast *Singh v. France*, App. No. 24479/07, Eur. Ct. H.R. (Nov. 13, 2008) (ruling inadmissible a challenge to the law requiring bareheaded identity photographs), with *Singh v. France*, U.N. Hum. Rts. Comm., Comm'n No. 1876/2009, U.N. Doc. CCPR/C/102/D/1876/2009 (Sept. 27, 2011) (concluding the requirement to appear bareheaded in identity photographs infringes on the freedom of religion).

case law of the Strasbourg court is still viewed by some<sup>62</sup> as an example of a systematic and coherent approach to fragmentation of IHRL through its elaboration of an autonomous interpretative principle allowing it to construe the ECHR in light of other norms of public international law.

Customary IHRL does exist as a truly global system, but its coherence is hampered by the notorious difficulty of ascertaining and enforcing customary international law norms and the absence of a single authority to perform either of these functions. The U.N. Human Rights Council, Office of the High Commissioner for Human Rights, the U.N. General Assembly, and the International Court of Justice, to name the most prominent examples, have all played an important role in convergence of customary IHRL. However, their ability to develop a coherent, cohesive, and consistently enforced customary IHRL is limited by their circumscribed authority and the absence of a reliable system to enforce their interpretations.

Finally, individual states themselves play a central role in developing and enforcing IHRL. Indeed, states are the primary and sometimes the sole enforcers of IHRL. This contributes perhaps most of all to IHRL's fragmentation, partly because not all states diligently consult global or regional sources of human rights in their decisionmaking, and partly because not all have adopted a formal practice of uniformly consulting each other's jurisprudence. More importantly, the commitment of states to IHRL varies dramatically, with some having genuinely absorbed IHRL into their constitutions or legislation and others that, at best, make an outward show of respect for IHRL while systematically suppressing the human rights of their populations.

Nonetheless, the fragmentation of IHRL is easily exaggerated. Both multilateral and regional human rights treaties were negotiated in the shadow of the Universal Declaration of Human Rights and a network of multilateral human rights treaties of very wide subscription. While a few rules of IHRL vary between geographic regions, and international human rights authorities such as the U.N. Human Rights Council; the European Court of Human Rights; the Inter-American Com-

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62. *E.g.*, FOROWICZ, *supra* note 56, at 351 (stating that the reasoning of the European Court of Human Rights has somewhat reduced fragmentation between the ECHR and international humanitarian law).

mission on Human Rights; and the Committee on Economic, Social, and Cultural Rights diverge in their authoritative interpretations of some human rights, their interpretive methodologies overlap greatly, and the basic norms they apply are identical on the vast majority of important points. What is notable about the global and regional systems of IHRL is not so much their fragmentation as their synergy.

The prescriptions of the Convention on the Rights of the Child, for example, are all but universal.<sup>63</sup> Moreover, that convention was drafted and negotiated with an eye for consistency with the Universal Declaration of Human Rights (“UDHR”) and a panoply of multilateral human rights treaties, including the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Convention on the Elimination of All Forms of Discrimination Based on Race; the Convention on the Elimination of All Forms of Discrimination Against Women; the Convention Relating to the Status of Refugees; and various earlier treaties relating to children, such as the International Labor Organization’s Minimum Age Convention.<sup>64</sup> Although some human rights authorities have disagreed on some points of application, such as whether institutional detention of a child asylum seeker ever qualifies as serving the best interests of a child,<sup>65</sup> the validity of the best interests standard itself has never occasioned dispute.

The methodology of human rights analysis differs somewhat among the various human rights tribunals and treaty bodies, but over time the various strains of human rights analysis have merged into a general pattern. As noted, in the context of state measures, a law or policy that interferes with a

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63. Every country in the world except the United States is a party to the Convention on the Rights of the Child.

64. International Labor Organization, Convention Concerning Minimum Age for Admissions to Employment, No. 138, June 26, 1973, 1015 U.N.T.S. 297.

65. *Contrast* U.N. High Comm’r for Refugees, Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention, ¶ 51 (2012) (rejecting child detention as never in the child’s best interests), *with* U.N. Hum. Rts. Comm., Gen. Comment No. 35, ¶ 18, U.N. Doc. CCPR/C/GC/35 (Dec. 16, 2004) (implying that it is possible for detention to be in a child’s best interest when used “as a measure of last resort and for the shortest appropriate period of time”).

protected human right, or that fails to appropriately protect or fulfill a human right, will be invalid under IHRL unless it is prescribed by law and necessary in a democratic society. “Necessary in a democratic society” has been further elaborated as serving a “legitimate aim” in a manner proportional to that aim.<sup>66</sup> Proportionality, in turn, requires that the government measure be reasonably effective at promoting its aim and that it not unduly burden the right or minimally invasive of the right, depending on the authority.<sup>67</sup> All major international and regional human rights authorities use some version of this analysis.

Convergence within IHRL is further fostered by the fact that international and regional human rights authorities often consult one another’s work in practice, to create a more uniform body of law. Thus, the Inter-American Court of Human Rights and African Court on Human and Peoples’ Rights regularly cite the work of the European Court of Human Rights, and all three regional courts and both commissions give due deference to the communications and treaty commentaries of the treaty bodies, the U.N. Human Rights Council, and other multilateral authorities.<sup>68</sup> Municipal courts frequently do the same,<sup>69</sup> albeit with great variability in their respective commit-

66. See *supra* sources cited in note 22; see also *Herrera-Ulloa v. Costa Rica*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 107, ¶ 123 (July 2, 2004); *Tanganyika Law Society v. Republic of Tanzania*, No. 009/2011, Decision, Afr. Ct. H.P.R., ¶ 106.1 (June 14, 2013).

67. See, e.g., *Toonen v. Australia*, Hum. Rts. Comm., 50th Sess., Commc’n No. 488/1992, U.N. Doc. A/49/40, at 226, (Sept. 21, 1994); Comm. on Economic, Social and Cultural Rights, Gen. Comment No. 20, ¶ 13, U.N. Doc. E/C.12/GC/20 (July 2, 2009); *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, (Sept. 17, 2003).

68. See generally Ludovic Hennebel, *Les références croisées entre les juridictions internationales des droits de l’homme*, in *LE DIALOGUE DES JUGES I* (Paul Martens et al. eds., 2007) (summarizing cross-citation of regional human rights courts); Wayne Sandholtz, *Human Rights Courts and Global Constitutionalism: Coordination Through Judicial Dialogue*, 10 *GLOB. CONSTITUTIONALISM* 439 (2020).

69. See, e.g., Gerald L. Neuman, *The External Reception of Inter-American Human Rights Law*, 2011 *REV. QUÉBÉCOISE DE DROIT INT’L* 99, 104–06, 116–19 (referring to the acceptance of international courts at the municipal level); Frans Viljoen, *INTERNATIONAL HUMAN RIGHTS LAW IN AFRICA* 517–62 (2007) (discussing the domestic implementation of IHRL in Africa).

ments to the global harmonization of IHRL. While the convergence is plainly incomplete and some fragmentation remains at the margins, IHRL's broad coherence as a global body of law is not in doubt.

Nonetheless, the foregoing discussion may seem to paint an ambivalent picture of IHRL as an overarching system of international law in the world public order. It might even seem natural to question how a somewhat fragmented body of law could require other—indeed, often more cohesive—bodies of public international law to be interpreted in conformity with it. Still less might IHRL seem capable of justifying an integral and hierarchically elevated place in the domestic legal orders of sovereign states.

The answer is that fragmentation does not mean incoherence, just as unity and diversity do not necessarily conflict. Indeed, diversity in the form of pluralism is inevitable in an international community characterized by political and cultural decentralization and the absence of a global legislature. What matters is that, first, the diverse elements are bound together within a common body of principles and methods that determine the source of legal authority and that give each diverse element its binding force; second, rules and principles exist and are applied that can resolve conflicts between different bodies of law and institutions; and third, different courts and tribunals take proper account of the persuasive authority of each others' jurisprudence and practices.<sup>70</sup>

Notwithstanding its diverse sources of authority, interpretive bodies, and enforcement mechanisms, IHRL possesses certain unique attributes that justify a much higher degree of integration into other fields of public international law, including (and especially) IEL, as well as the domestic orders of states. As a body of law protecting universal fundamental values, IHRL is applicable, with very limited exceptions, in all places and at all times, and it is entitled to a high degree of deference in both international and municipal policymaking as a constitutive body of law protecting the most fundamental values. Indeed, the values protected by IHRL are so fundamen-

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70. See Christopher Greenwood, *Unity and Diversity in International Law*, in *A FAREWELL TO FRAGMENTATION* 37, 39–40 (Mads Andenas & Eirik Bjorge eds., 2015) (explaining that courts take account of foreign decisions and judicial principles).

tal that, as noted, a significant part of IHRL has made its way into the *sanctum sanctorum* of *ius cogens*.<sup>71</sup> The same cannot be said of the law of the sea, IEL, or any other field of law, except for international humanitarian law, which is *lex specialis*.

### III. THE ROLE OF HUMAN RIGHTS IN INTERNATIONAL ECONOMIC LAW AND DEVELOPMENT POLICY

#### A. *The Unique Role of Development Policy*

Franklin Delano Roosevelt, President of the United States from 1933-1945, famously proclaimed that “true individual freedom cannot exist without economic security and independence. Necessitous men are not free men.”<sup>72</sup> This perspective inspired the economic rights first incorporated into the Universal Declaration of Human Rights and later elaborated in the International Covenant on Economic, Social, and Cultural Rights.<sup>73</sup>

The coupling of economic, social, and cultural rights with civil and political rights in Roosevelt’s “Four Freedoms” speech<sup>74</sup> and in the text of the UDHR reflect the recognition that poverty, and the absence of infrastructure to serve the health, water, sustenance, education, and other needs of the population, harm human dignity at least as much as deprivations of such rights as participation in elections or freedom of religion. That recognition was also a factor motivating the creation of the Bretton Woods institutions and, less productively,

71. See Andrea Bianchi, *Human Rights and the Magic of Jus Cogens*, 19 EUR. J. INT’L L. 491 (2008) (exploring the fundamental nature of IHRL).

72. Franklin Delano Roosevelt, Message to Congress on the State of the Union (Jan. 11, 1944), <https://perma.cc/76P8-2YX5>. Roosevelt had previously declared “freedom from want” as an essential human freedom that should undergird the world public order. Franklin Delano Roosevelt, Message to Congress on the State of the Union (Jan. 6, 1941), <https://perma.cc/XN4L-8HLP>.

73. See PAUL GORDON LAUREN, *THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS: VISIONS SEEN* chs. 6–7 (3d ed. 2011) (explaining the development of economic rights in international agreements); ELIZABETH BORGWARDT, *A NEW DEAL FOR THE WORLD: AMERICA’S VISION FOR HUMAN RIGHTS* (2005) (highlighting the American vision for human rights grounded in the New Deal).

74. Franklin Delano Roosevelt, Message to Congress on the State of the Union (Jan. 6, 1941), <https://perma.cc/XN4L-8HLP>.

the declarations sometimes made of a “human right to development.”<sup>75</sup>

Among the most important fields of public international law closely affecting human dignity and flourishing is IEL and the related field of global development policy. IEL consists of specific rules for state interaction in the fields of trade, investment, finance, and currency exchange. Development policies comprise the set of rules, guidelines, and best practices that global actors such as the World Bank and International Monetary Fund have adopted to govern their activities and the activities they finance which are carried out by their client countries. Development policy has the potential to serve human dignity through its pursuit of ending poverty in all its forms, everywhere,<sup>76</sup> but the story of development has not been a uniformly positive one from a human rights perspective. The constitutive treaties of most multilateral development institutions do not include any mention of human rights or human dignity. Allegations of harm to human rights during the pursuit of global economic development are well known, whether imputed to the activities or policies of regional and international development actors, the absence of human rights policies or explicit consideration of human rights,<sup>77</sup> or the human rights records of individual client countries.<sup>78</sup>

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75. See *infra* text accompanying notes 89-92.

76. See G.A. Res. 70/1: Transforming Our World: the 2030 Agenda for Sustainable Development, at 14 (Oct. 21, 2015) (outlining the Sustainable Development Goal to end poverty).

77. See, e.g., MAC DARROW, BETWEEN LIGHT AND SHADOW: THE WORLD BANK, THE INTERNATIONAL MONETARY FUND AND INTERNATIONAL HUMAN RIGHTS LAW (2003) (exploring human rights-based critiques of, and potential reforms to, the World Bank and IMF); PETER UVIN, HUMAN RIGHTS AND DEVELOPMENT (2004) (exploring how to reconceptualize development enterprise to give human rights a more prominent space); Dana L. Clark, *The World Bank and Human Rights: The Need for Greater Accountability*, 15 HARV. HUM. RTS. J. 205 (2002) (discussing the need for more substantive policies to protect human rights within developmental contexts); Leonardo A. Crippa, *Multilateral Development Banks and Human Rights Responsibility*, 25 AM. U. INT'L L. REV. 531 (2020) (analyzing whether Multilateral Development Banks can be held liable for human rights violations occurring in projects in developing countries); Caroline Dommen, *Trade and Human Rights: Towards Coherence*, 2 SUR - INT'L J. HUM. RTS. 7 (2005) (exploring how trade and trade rules can be developed such that they promote human rights).

78. See, e.g., Philip Alston (Special Rapporteur on Extreme Poverty and Human Rights), *Report on Extreme Poverty and Human Rights*, U.N. Doc. 26/

At the state level, policies and programs for the exploitation of natural resources and the access and delivery of basic social services are frequently pursued by states in the name of development without sufficient recognition of relevant or applicable human rights obligations. States often fail to comply with their obligation to formulate development policies on the basis of the active, free, and meaningful participation of their populations. Many states also fail to regulate business activities to prevent or mitigate their negative impact of the human rights of persons affected by them.

According to the U.N. Office of the High Commissioner for Human Rights (OHCHR):

[A]n absence of accountability and the rule of law in the economic sphere, inequality, corruption, mismanagement of public resources, austerity measures and conditionalities continue to trigger civil unrest in many parts of the world, which in turn undermine the sustainability of long-term development and growth. . . . Unless addressed, the underlying causes of gaps in the development and the economic sphere lead to repetitive cycles of violations, shrinking democratic spaces, entrenched discrimination and a blatant disregard for the rule of law.<sup>79</sup>

Other observers, such as Human Rights Watch, have pointed to inequality and discrimination in the distribution of development aid, alleging direct harm to local community members and their livelihoods resulting from development projects, and reprisals against critics of projects labeled as development initiatives.<sup>80</sup>

This history of development policy and practice has however prompted the adoption environmental and social policies since the mid-1990s, covering the gamut of concerns about the impacts of development policy on human dignity. These poli-

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3.A/70/274 (Aug. 4, 2015) (tying economic inequalities to detrimental effects on human rights).

79. OHCHR, OHCHR Management Plan 2014–2017: Working for Your Rights 63 (2014), <https://perma.cc/JR7Q-QZY4>.

80. See, e.g., *World Bank Accountability Body Addresses Attacks on Critics*, HUMAN RIGHTS WATCH (Oct. 17, 2017), <https://perma.cc/N5Q5-868A> (noting that whistleblowers believe they have been threatened or face retaliation for voicing their concerns about development projects).

cies now require states receiving development aid to carry out extensive environmental and social due diligence and to mitigate the potential harm to the state's population. Most include mandatory consultation with and participation of affected communities, measures that advance the inclusion and protection of vulnerable and marginalized groups, requirements related to grievance redress, occupational health and safety and labor requirements, as well as proscriptions on gender-based violence.<sup>81</sup>

While many of these policies are not explicitly human rights-based, and while the references to human rights in such policies are occasional and mostly preambular, some of the procedures required by the standards, such as mandatory consultation with affected persons and communities and the establishment of grievance mechanisms, can call attention to human rights violations caused or exacerbated by development projects. In addition, while development actors tend to formulate policies based on instrumental rather than normative rationales, it is fair to say that such policies have been adopted because they promote sustainable development *and* because they reflect an ethical imperative to do no harm.

Notwithstanding their potential to promote human dignity, a noteworthy feature of development policies is their near uniform lack of direct operational provisions on public international law or IHRL. Many include an isolated mention of human rights in aspirational or non-binding provisions.<sup>82</sup> A number of development financiers, including the European

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81. See, e.g., INT'L FIN. CORP., PERFORMANCE STANDARDS ON ENVIRONMENTAL AND SOCIAL SUSTAINABILITY (2012), <https://perma.cc/Z8CT-PKVJ> (documenting provisions requiring developers to consider the impacts of their project on women and indigenous communities, and to include these groups in the development process); *Environmental and Social Framework*, WORLD BANK GRP., <https://perma.cc/Y6SK-8UXD> (last visited Nov. 26, 2021) (detailing the mechanisms that enable the World Bank and borrowers to manage the environmental and social risks of development projects); EQUATOR PRINCIPLES FIN. INSTS., EQUATOR PRINCIPLES (2020), <https://perma.cc/9B7H-7X36> (detailing voluntary standards for risk management in development finance for adoption by financial institutions). The regional development banks, such as the European Bank for Reconstruction and Development, the Asian Development Bank, and the Inter-American Development Bank have adopted similar lending guidelines.

82. E.g., WORLD BANK, ENVIRONMENTAL AND SOCIAL FRAMEWORK 1–2 (2017), <https://perma.cc/D9T6-MT7Q>.

Union, have gone further and adopted rights-based approaches that reflect key human rights principles which are normatively and operationally oriented towards the realization of human rights.<sup>83</sup> What is rarely seen, however, is a deliberate or systematic link between development policy and the structures of IRHL treaties and obligations of both partners and donors.<sup>84</sup> Development policy does not reflect or engage systematically with public international law or the international human rights treaties that govern in the spheres in which development policy also applies and in which development activities are pursued.

Despite its lack of anchoring in public international law doctrines, development policy has an outsized influence in governing the flow of funds to developing countries and in developing countries' sectoral policies and priorities. The Sustainable Development Goals (SDGs) offer a recent illustrative example of this—they constitute the global blueprint for development until 2030, and they overlap significantly with the areas covered by IHRL, but the goals are not legally binding and lack direct or systematic anchoring in international law.<sup>85</sup> If, like their predecessor (the Millennium Development Goals, or MDGs), the SDGs are not met, this will not result in legal liability or a violation of international law. The SDGs, like other international development frameworks, are both relevant for all and legally opposable by none. With respect to IHRL, the overlap is noteworthy, particularly compared with the more limited coverage of the MDGs.<sup>86</sup> But the SDGs are a

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83. See EUR. PARLIAMENT, COUNCIL OF EUR. UNION & EUR. COMM'N, THE NEW EUROPEAN CONSENSUS ON DEVELOPMENT (2017), <https://perma.cc/KB69-M6NJ> (declaring a commitment to a rights-based approach to development action).

84. The 2008 Canadian Overseas Development Assistance Accountability Act 2 is one notable exception. Official Development Assistance Accountability Act, S.C. 2008, c 17 (Can.) (requiring that development assistance be provided only if, among other things, it is consistent with international human rights standards).

85. This is so, despite multiple references in the GA resolution that proclaimed the SDGs, including in the provisions of "Transforming Our World" and its preamble to the SDGs. G.A. Res. 70/1, *supra* note 76.

86. See OHCHR, CLAIMING THE MILLENNIUM DEVELOPMENT GOALS: A HUMAN RIGHTS APPROACH, at 1–5, U.N. Doc. HR/PUB/08/3, U.N. Sales No. E.08.XIV.6 (2007), <https://perma.cc/65JS-6S4D> (describing the MDGs and discussing their shortcomings regarding human rights).

missed opportunity rather than an advance in terms of explicit commitments to human rights or a human rights goal. Despite multiple references to human rights and international law in the U.N. General Assembly resolution that proclaimed the SDGs, a substantive commitment to IHRL in the Goals is absent.

B. *The Convergence Between Development Policy and International Human Rights Law*

i. *Human Rights and Multilateral Development Institutions*

International human rights law and international economic law grew up almost contemporaneously. The UDHR was adopted in 1948, just four years after the Bretton Woods Conference<sup>87</sup> established the International Monetary Fund (“IMF”) and International Bank for Reconstruction and Development (“IBRD” or “World Bank”<sup>88</sup>), and just one year after the General Agreement on Tariffs and Trade (“GATT”). IHRL and IEL did not grow up as siblings in more than a temporal sense, however. As IHRL was developed in the U.N. General Assembly, the International Law Commission, and regional human rights organizations such as the Council of Europe and Organization of American States, international development frameworks and policy evolved along a separate track at the World Bank, just as international monetary policy did at the IMF, and international trade law did in the recurrent rounds of GATT negotiations. Although the idea of a human right to development has made its way into some declarations<sup>89</sup> and

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87. Officially known as the United Nations Monetary and Financial Conference, a gathering of delegates from forty-four nations that met from July 1 to 22, 1944 in Bretton Woods, New Hampshire, to agree upon a series of new rules for the post-WWII international monetary system. *Bretton Woods and the Birth of the World Bank*, THE WORLD BANK, <https://perma.cc/Y6A7-GBZA> (last visited Nov. 26, 2021).

88. The World Bank comprises the IBRD and the International Development Association (“IDA”) which was established in 1960 to provide concessional lending to then newly independent developing countries. *History*, THE WORLD BANK, <https://perma.cc/R2QZ-ENF2> (last visited Nov. 15, 2021).

89. See, e.g., G.A. Res. 41/128, Declaration on the Right to Development (Dec. 4, 1986) (“Confirming that the right to development is an inalienable human right and that equality of opportunity for development is a prerogative both of nations and of individuals who make up nations.”); *ASEAN Human Rights Declaration*, ¶ 35 (Nov. 19, 2012),

scholarly arguments,<sup>90</sup> it has been incorporated into very few international human rights treaties, and even then, in the most abstract terms.<sup>91</sup> Framed as a human right to development, integration would be in any case problematical, because, for all the benefits development may bring to a state's population, economic development itself, without more, does not necessarily serve human dignity. Development remains a policy preference—a potentially laudable and important one—but not a fundamental human right.<sup>92</sup> One important strength of IHRL is that it grants “rights” directly supportive of human dignity that cannot be restricted based on mere policy

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X4NM. In addition, the U.N. Human Rights Council has appointed a special rapporteur on the right to development, seemingly validating the concept.

90. See, e.g., Arjun Sengupta, *On the Theory and Practice of the Right to Development*, 24 HUM. RTS. Q. 837, 841–42 (2002) (arguing that it is an “undeniable fact” that the right to development is a human right).

91. See, e.g., ICESCR, *supra* note 12, art. 6(2) (“The steps to be taken . . . to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.”); Banjul Charter, *supra* note 21, pmbll., art. 22 (“1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. 2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.”); Arab Charter on Human Rights art. 37, May 22, 2004, *translated in* Mohammed Amin Al-Midani, Mathilde Cabanettes & Susan M. Akram, *Arab Charter on Human Rights 2004*, 24 B.U. INT’L L.J. 147 (2006) (“The right to development is a fundamental human right. All State Parties shall establish development policies and take measures to ensure this right”).

92. The *ignis fatuus* of an “inalienable human right” to “development” could never achieve the status of a meaningful legal right for both conceptual and practical reasons. Development is a continuous and relative process; there is no concrete measure of achievement that could ground a legal right. More important, except for certain rights exercisable by cohesive ethnic groups with unified leadership, such as indigenous nations, human rights are individual rights. No individual could have standing to assert a claim for infringement of a “right to development” on behalf of himself or herself, much less an entire “people.” Insofar as the “right” is really a call upon economically wealthy states to provide material aid to developing countries, whatever claims ground these calls must be moral or political, not legal. Cf. DAVID KINLEY, *NECESSARY EVIL: HOW TO FIX FINANCE BY SAVING HUMAN RIGHTS* 136 (2018) (arguing that the “right to development” is an unattainable myth).

preferences like economic development, except when necessary to meet a pressing social need that serves human dignity in a manner generally compatible with the internationally protected human right being limited.

As for IEL, neither the IBRD nor the International Development Association (“IDA”) Articles, nor those of the IMF, include the protection of human rights or human dignity among their purposes.<sup>93</sup> The same can be said of the GATT, and the WTO Appellate Body has steadfastly refused to consider the human rights implications of disputes before it,<sup>94</sup> even in cases involving obvious human rights violations.<sup>95</sup> Although some E.U. bilateral preferential trade agreements include human rights commitments and some U.S. bilateral and regional free trade agreements include some provisions on labor rights,<sup>96</sup> most bilateral trade agreements do not integrate wide-ranging human rights guarantees, and even in those including human rights-related provisions, there is meager evidence of real-world enforcement.

The fragmentation of international law in this realm may seem natural, even deliberate, given the distinct roles the World Bank, IMF, and GATT were originally assigned play as

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93. International Bank for Reconstruction and Development Articles of Agreement [IBRD] art. I, June 27, 2012, <https://perma.cc/76JV-HDT4>; Articles of Agreement of the International Monetary Fund art. I, July 22, 1944, 60 Stat. 1401, 2 U.N.T.S. 39.

94. See Alexia Herwig, *WTO Non-Violation or Situation Complaints: A Remedy for Extraterritorial Effects on the Human Right to an Adequate Standard of Living*, 3 GLOB. POL’Y 471 (2012) (arguing that the WTO is a limited remedy in human rights cases because only three panels have been “willing to make adverse findings in non-violation or situation complaints, which did not involve human rights claims”).

95. See Julia Ya Qin, *Pushing the Limits of Global Governance: Trading Rights, Censorship and WTO Jurisprudence: A Commentary on the China-Publications Case*, 10 CHINESE J. INT’L L. 271 (2011) (describing the WTO’s decision on a Chinese censorship case as strictly textualist, ignoring important context and policy considerations).

96. See Emily Hafner-Burton, *Trading Human Rights: How Preferential Trade Agreements Influence Government Repression*, 59 INT’L ORG. 593, 606, 612 (2005) (describing examples of human rights reforms that occurred due to pressure imposed through PTAs); Meredith Kolsky Lewis, *Human Rights Provisions in Free Trade Agreements: Do the Ends Justify the Means?*, 12 LOY. U. CHI. INT’L L. REV. 1, 6 (2014) (noting that many Free Trade Agreements include human rights provisions, but arguing that these are not particularly effective and don’t reach countries with the worst human rights abuses).

facilitators of state economic growth and stability policies, consistent with the division of labor across a variety of international institutions established after the Second World War. Nonetheless, there were, even at the outset, significant spheres of overlap between IHRL and the international development policy concomitant to IEL in particular. Most obviously, the financing and technical assistance the World Bank was expected to provide would help build the world's economies for peacetime production, to the economic benefit of workers.<sup>97</sup> The international economic regimes are not intended for the enrichment of an elite, influential minority or the political disempowerment of the general citizenry of any state. They are intended to improve the material situation of the state's populations through stable economic conditions, more open markets, growing economic opportunity and technological progress, and the improved legal and physical infrastructure that make these possible. Human rights and development policy are thus both broadly based on a commitment to human dignity and human flourishing. As one of the authors has explained, "human rights and development may be viewed as converging in shared principles such as equality, participation, accountability, transparency, and voice, as well as in attention to vulnerable groups, all of which are principles that have become hallmarks of good development practice."<sup>98</sup>

Beyond the conceptual convergence of IHRL and IEL, their substantive overlap has also increased. It is evident in the

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97. See, e.g., International Bank for Reconstruction and Development Articles of Agreement art. I, *supra* note 93 (listing among the Bank's purposes:

(i) to assist in the reconstruction and development of territories of members by facilitating the investment of capital for productive purposes, including the restoration of economies destroyed or disrupted by war, the reconversion of productive facilities to peacetime needs and the encouragement of the development of productive facilities and resources in less developed countries. . . . (iii) To promote the long-range balanced growth of international trade and the maintenance of equilibrium in balances of payments by encouraging international investment for the development of the productive resources of members, thereby assisting in raising productivity, the standard of living and conditions of labor in their territories.)

98. Siobhán McInerney-Lankford, *Human Rights and Development: Regime Interaction and the Fragmentation of International Law*, 4 THE WORLD BANK LEG. REV. 123, 126 (2013).

expansion of development projects in health, education, women's empowerment, universal access and disabilities, access for indigenous peoples, social protection, jobs and safety nets. Today, a significant proportion of development projects and programs financed by multilateral and bilateral donors relate to areas governed by core international human rights treaties.

In addition to substantive areas of overlap, the policies governing development financing now incorporate human rights principles to a greater extent. Examples of such principles include participation, accountability, empowerment, inclusion and equal treatment—these are most often reflected in environmental and social safeguard policies of development actors.<sup>99</sup> Soft law proclamations of convergence and mutual reinforcement date back to the 1960s, with the Proclamation of Tehran, the 1986 Declaration on the Right to Development through to the Vienna Declaration and Programme of Action, the Rio Declaration and more recently the Rio+20 and Vienna+20.<sup>100</sup> High level declarations and development goals have increasingly referenced human rights.

In the area of aid effectiveness for example, the Accra Agenda for Action makes the following commitment: “Developing countries and donors will ensure that their respective development policies and programmes are designed and implemented in ways consistent with their agreed international commitments on gender equality, human rights, disability and environmental sustainability.”<sup>101</sup> This was followed by the Busan Partnership document which made the following assertion:

As we embrace the diversity that underpins our partnership and the catalytic role of development co-operation, we share common principles which—consistent with our agreed international commitments on human rights, decent work, gender equality, environmental sustainability and disability—form the foun-

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99. See WORLD BANK, *supra* note 82 (describing the World Bank's sustainable development priorities).

100. The SDG and Rio+20 processes had begun in parallel but were eventually merged into one global development agenda with an overall goal of sustainable development; a coordination mechanism also exists to oversee these processes (the Open Working Group on Sustainable Development).

101. *Accra Agenda for Action*, ¶ 13(c) (Sept. 4, 2008), <https://perma.cc/RGH8-QB92>.

dition of our co-operation for effective development.<sup>102</sup>

Proclaimed by the U.N. General Assembly in the 2000 Millennium Declaration, the MDGs comprised eight global goals,<sup>103</sup> which ranged from halving extreme poverty rates to halting the spread of HIV/AIDS and providing universal primary education, all by the target date of 2015. They formed a shared development plan to which all the world's countries and all the world's leading development institutions agreed. Following the MDGs, the SDGs were proclaimed to chart the path through 2030.<sup>104</sup> The SDGs comprise seventeen goals and were widely hailed as being more reflective of human rights.<sup>105</sup> The substantive overlap of the new goals was certainly more expansive than that of the MDGs, with a far greater number of human rights issues covered. For example, human rights principles such as participation, inclusion, equality and accountability can be identified in the goals related to women's equality, reducing inequality, and strong institutions. Moreover, the preamble to the SDGs, *The Future We All Want*, declared that the SDGs should be consistent with international law (presumably including IHRL), and build upon commitments already made to the full implementation of the

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102. *Busan Partnership for Effective Development Cooperation Outcome Document*, ¶ 11 (Dec. 1, 2011), <https://perma.cc/CF3V-GA8Z>.

103. The eight goals included: (i) to eradicate extreme poverty and hunger; (ii) to achieve universal primary education; (iii) to promote gender equality and empower women; (iv) to reduce child mortality; (v) to improve maternal health; (vi) to combat HIV/AIDS, malaria, and other diseases; and (vii) to ensure environmental sustainability. They were accompanied by 21 targets and 60 indicators. G.A. Res. 55/2, United Nations Millennium Declaration (Sept. 8, 2000).

104. G.A. Res. 70/1, *supra* note 76.

105. The seventeen SDGs are the following: (i) Eliminate Poverty; (ii) Erase Hunger; (iii) Establish Good Health and Well-Being; (iv) Provide Quality Education; (v) Enforce Gender Equality; (vi) Improve Clean Water and Sanitation; (vii) Grow Affordable and Clean Energy; (viii) Create Decent Work and Economic Growth; (ix) Increase Industry, Innovation, and Infrastructure; (x) Reduce Inequality; (xi) Mobilize Sustainable Cities and Communities; (xii) Influence Responsible Consumption and Production; (xiii) Organize Climate Action; (xiv) Develop Life Below; (xv) Water; (xvi) Advance Life On Land; (xvii) Guarantee Peace, Justice, and Strong Institutions; and (xvii) Build Partnerships for the Goals. These SDGs were accompanied by 169 targets and 247 indicators. *Id.*

outcomes of all major summits in the economic, social, and environmental fields.<sup>106</sup>

A range of policies illustrate more concerted efforts to anchor human rights as legal obligations in global development policy. For example, in 2008, the Development Assistance Committee of the Organization for Economic Cooperation and Development (OECD) released an Action Oriented Policy Paper<sup>107</sup> in which human rights are central to development:

[H]uman rights constitute a unique, internationally shared and accepted normative framework reflecting global moral and political values. International human rights law has evolved to protect and safeguard the integrity and dignity of the persona by establishing legal obligations on states.<sup>108</sup>

The first of the ten principles announced in the policy paper calls on states to “build a shared understanding of the links between human rights obligations and development priorities through dialogue.”<sup>109</sup>

Similarly, U.N. guidance on a Human Rights–Based Approach to Development<sup>110</sup> confirms the central role of the international human rights treaty framework to all development

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106. *Id. see also* U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), annex I (Aug. 12, 1992) (proclaiming 27 principles of sustainable development); U.N. Conference on Environment and Development, *The Future We Want*, U.N. Doc. A/CONF.216/16 (June 22, 2012) (detailing the outcome of the follow-up conference to the 1992 conference).

107. *See also* U.N. Development Group [UNDG], *The Human Rights Based Approach to Development Cooperation Towards a Common Understanding Among UN Agencies* (2003), <https://perma.cc/GAH3-DYAH> (ensuring the consistent application of a human rights-based approach by UN agencies, funds, and programs) [hereinafter UNDG, *Human Rights Based Approach to Development*]; U.N. Development Group [UNDG], *UN Inter-agency Common Learning Package on Human Rights-based Approach to Programming* (2017), <https://perma.cc/8YDQ-ZZAX> (aiming to strengthen the capacity of UN staff to apply a HRBA to UN common country programming).

108. Dev. Assistance Comm., Org. for Econ. Coop. & Dev. [OECD], *Action-Oriented Policy Paper on Human Rights and Development*, ¶ 5, OECD Doc. DCD/DAC (2007)15 (Jan. 26, 2007).

109. *Id.* at ¶ 40(1).

110. UNDG, *The Human Rights Based Approach to Development*, *supra* note 107.

cooperation programs. The guidance proposed best practices including the following:

- Programs identify the realization of human rights as ultimate goals of development;
- People are recognized as key actors in their own development, rather than passive recipients of commodities and services;
- Programs focus on the empowerment of marginalized and excluded social groups;
- Programs aim to reduce economic disparities and empower the least fortunate;
- Human rights standards guide the formulation of goals and progress indicators;
- National accountability systems are developed or strengthened to ensure independent review of the programs and to ensure access to remedies for injured individuals.

U.N. guidance recommended shifting the development approach from fulfilling the needs of the population by delivering services to them to orienting development programs toward protecting and promoting human rights through the education, as well as the economic, political, and legal empowerment, of the population. The guidance resulted in the 2009 establishment of the U.N. Human Rights Mainstreaming Mechanism to coordinate U.N. system wide work on human rights in development cooperation. The Mechanism was transformed into the U.N. Sustainable Development Group's Human Rights Working Group in 2015, where it appears to have lost momentum.<sup>111</sup>

While the conceptual overlap and compatibility of aims between IHRL, IEL, and development policy have existed in theory since the 1940s, and the foregoing legal and policy initiatives illustrate the substantial efforts that have been made to forge a more coherent and systematic rapprochement between IHRL and modern development policy, important points of divergence must be noted. From a formal legal perspective, the UDHR and human rights treaties were not in existence in

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111. Indeed, over six years later, the United Nations website still refers to the obsolete Human Rights Mainstreaming Mechanism as one of its activities. See *Our Work: Protect Human Rights*, U.N., <https://perma.cc/NH6E-RHPK> (last visited Sept. 25, 2021).

1944 when the Bretton Woods institutions were established, and the idea of human rights could not realistically have been reflected in either of their constituent instruments. More importantly, the practices of IHRL and IEL institutions diverged over the decades that followed, particularly in certain highly publicized cases of development projects allegedly interfering with the enjoyment of human rights.<sup>112</sup> These include allegations of despoliation of the natural environment upon which communities depend; the toxification of indigenous lands through natural resource mining and drilling; torture, rape, murder, coerced labor, and disappearances in indigenous communities and among opponents of major development projects; the displacement of vulnerable communities by dams and other large infrastructure projects; and the rewarding of corruption by government officials.<sup>113</sup>

These vectors of divergence illustrate how IEL's path to human dignity is an indirect one, fraught with side roads leading to practices that are counterproductive to human rights. Economic development can be a potent force for empowering governments to protect human rights and make widely available the resources necessary for giving their populations a chance to realize the core values that IHRL promotes. This grounds the rationale for assessing the validity and legitimacy of IEL and development policy against human rights standards and the conception of human dignity they express and uphold.

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112. See Katarina Tomasevski, *Monitoring Human Rights Aspects of Sustainable Development*, 8 AM. U. INT'L L. REV. 77, 80–82 (1992) (“Human rights are not included in analyzing development; and thus, development and freedom are presented as two distinct, separate, and sometimes unrelated facets in “measuring” the performance of countries.”); Abby Rubinson, Note, *Regional Projects Require Regional Planning: Human Rights Impacts Arising from Infrastructure Projects*, 28 MICH. J. INT'L L. 175, 176–91 (2006) (providing examples of tension between development efforts and advancing human rights). See generally Siobhán McInerney-Lankford, *Human Rights and Development: A Comment on Challenges and Opportunities from a Legal Perspective*, 1 J. HUM. RTS. PRACTICE 51 (2009) (discussing challenges of integrating human rights in development and the divergences of discourse and policy frameworks).

113. See, e.g., Korinna Horta, *Rhetoric and Reality: Human Rights and the World Bank*, 15 HARV. HUM. RTS. J. 227, 231–37 (2002) (providing examples of corruption, environmental harm, and violence in connection with development).

ii. *Human Rights and Regional Development in Europe*

The policies of the European Union, the European Bank for Reconstruction and Development (EBRD), and the Council of Europe Development Bank (CEB), each reflects a more deliberate operational integration of human rights in its respective policies, explicitly linking human rights treaty obligations to the policy requirements of development cooperation. Since 1995, the EU has adopted “a distinct policy” on human rights in its external relations. According to Article 10 of the Lisbon Treaty, “[t]he Union’s action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.”<sup>114</sup> EU law mandates the integration of a “human rights clause”<sup>115</sup> into all trade and development agreements concluded between the EU and third countries:<sup>116</sup> the protection of human rights is therefore an essential element of all such agreements.<sup>117</sup> For instance Article 9 of the Cotonou Agreement reflects “Essential Elements and Fundamental Element” including the respect for all human rights and fundamental freedoms. The

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114. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community art. 10, Dec. 13, 2007, 2007 O.J. (C 306) 1, *codified in* Treaty on European Union (Consolidated Version) art. 21, Apr. 15, 2008.

115. “The essential element” of an agreement, or “human rights essential element clause.” Commission Communication on the Inclusion of Respect for Democratic Principles and Human Rights in Agreements Between the Community and Third Countries, at 15, COM (95) 216 final (May 23, 1995).

116. Marise Cremona, *Human Rights and Democracy Clauses in the EC’s Trade Agreements*, in *THE EUROPEAN UNION AND WORLD TRADE LAW AFTER THE GATT URUGUAY ROUND 62*, 63–66 (N. Emiliou & D. O’Keefe eds., 1996); Eibe Reidel & Martin Will, *Human Rights Clauses in External Agreements of the EC*, in *THE EU AND HUMAN RIGHTS* (Philip Alston ed., 1999).

117. *See* Partnership Agreement Between the Members of the African, Caribbean, and Pacific Group of States of the One Part, and the European Community and Its Member States, of the Other Part, art. 9, June 23, 2000, 2000 O.J. (L 317) 3 [hereinafter Cotonou Agreement] (“Cooperation shall be directed towards sustainable development centered on the human person, who is the main protagonist and beneficiary of development; this entails respect for and promotion of all human rights.”).

provision is explicitly grounded in the Parties international obligations and commitments concerning respect for human rights.<sup>118</sup>

The operational impact of human rights in E.U. development cooperation derives from the legal commitments of the European Union itself<sup>119</sup> and the treaty obligations of its member states.<sup>120</sup>

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118. Article 9 of the Cotonou Agreement provides in relevant part:

1. Cooperation shall be directed towards sustainable development centered on the human person, who is the main protagonist and beneficiary of development; this entails respect for and promotion of all human rights.

Respect for all human rights and fundamental freedoms, including respect for fundamental social rights, democracy based on the rule of law and transparent and accountable governance are an integral part of sustainable development.

2. The Parties refer to their international obligations and commitments concerning respect for human rights. They reiterate their deep attachment to human dignity and human rights, which are legitimate aspirations of individuals and peoples. Human rights are universal, indivisible and inter-related. The Parties undertake to promote and protect all fundamental freedoms and human rights, be they civil and political, or economic, social and cultural. In this context, the Parties reaffirm the equality of men and women.

. . .

Respect for human rights, democratic principles and the rule of law, which underpin the ACP-EU Partnership, shall underpin the domestic and international policies of the Parties and constitute the essential elements of this Agreement.

. . .

3. . . . Good governance, which underpins the ACP-EU Partnership, shall underpin the domestic and international policies of the Parties and constitute a fundamental element of this Agreement. . . .

4. . . . These areas will also be a focus of support for development strategies. The Community shall provide support for political, institutional and legal reforms and for building the capacity of public and private actors and civil society in the framework of strategies agreed jointly between the State concerned and the Community.

Cotonou Agreement, *supra* note 117, art. 9.

119. *Human Rights Based Approaches in EU Development Policies*, INT'L HUM. RTS. NETWORK, <https://perma.cc/5ZNR-SSE2> (last visited Dec. 4, 2021). Internal commitments are based on the Treaty on European Union and were confirmed in the Treaty of Amsterdam and the EU Charter of Fundamental Rights (legally binding since the 2009 Lisbon Treaty) and the European Instrument for Democratization and Human Rights (2006).

120. According to the International Human Rights Network,

The EU's 2007 European Instrument for Democracy and Human Rights provides support for the promotion of democracy and human rights in non-EU countries.<sup>121</sup> Its objectives include enhancing respect for human rights and fundamental freedoms in countries and regions where they are most at risk and supporting and strengthening the international and regional framework for the protection of human rights, justice, the rule of law and the promotion of democracy.<sup>122</sup> Like other EU measures governing development cooperation is anchored explicitly in international human rights legal frameworks,<sup>123</sup> and confirms that such assistance is aimed at enhancing the respect for human rights.<sup>124</sup>

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"Human rights is at the forefront of EU Development Cooperation" with similar commitments to its humanitarian aid and Common Foreign and Security Policy. The policies flow from the legal obligations of its Member States, as well as from EU treaty provisions which recognize human rights as common values underpinning EU partnership and dialogue with third countries.

*Id.*

121. Regulation 1889/2006, of The European Parliament and of the Council of 20 December 2006 on Establishing a Financing Instrument for the Promotion of Democracy and Human Rights Worldwide, 2006 O.J. (L 386) 1, 4.

122. *Id.* art. 1, ¶ 2(b) ("[Such assistance shall aim in particular at] (b) supporting and strengthening the international and regional framework for the protection, promotion and monitoring of human rights, the promotion of democracy and the rule of law, and reinforcing an active role for civil society within these frameworks."). However, it is worth noting that the 2010 EU Communication on the MDGs does not highlight the role of human rights frameworks in any significant way, other than to mention that "[MDGs] emphasise the importance of a Human Rights based approach to development." *Communication From the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Regions: A Twelve-Point EU Action Plan in Support of the Millennium Development Goals*, at 3, COM (2010) 159 final (Apr. 21, 2010).

123. *Id.* pmb., ¶ 7 ("The Community's contribution to the development and consolidation of democracy and the rule of law, and of respect for human rights and fundamental freedoms is rooted in the general principles established by the International Bill of Human Rights, and any other human rights instrument adopted within the framework of the United Nations, as well as relevant regional human rights Instruments.").

124. *Id.* art. 1, ¶ 2 ("Such assistance shall aim in particular at (a) enhancing the respect for and observance of human rights and fundamental freedoms, as proclaimed in the Universal Declaration of Human Rights and other international and regional human rights instruments . . .").

In the sphere of international trade, a 2010 European Parliament resolution ensures the respect of human rights and social and environmental standards in international trade agreements, mandating that these take precedence over WTO law and encouraging greater cooperation at the multilateral level between the WTO and the main UN human rights institutions.<sup>125</sup>

The primacy of human rights and a human rights-based approach (HRBA) to development for the EU were confirmed in the E.U. Action Plan on Human Rights and Democracy for the period 2015-2019, which outlines that sustainable peace, development and prosperity are possible only when grounded in respect for human rights, democracy and the rule of law. A development path in which human rights are not respected, protected, and fulfilled cannot be sustainable, and would render the notion of sustainable and inclusive development meaningless. E.U. development actions require systematically integrating a rights-based approach, encompassing all legally protected human rights.

In addition, on May 19, 2017, the European Union adopted a new European Consensus on Development, “Our World, Our Dignity, Our Future.” As the E.U. response to the whole of the 2030 Agenda and its SDGs, it balances the three dimensions of sustainable development—economic, social, environmental—as well as promoting peaceful and inclusive societies. It defines a new and collective European development policy for E.U. institutions and member states; it confirms that human rights, democracy, the rule of law, and good governance are essential preconditions to achieve sustainable development and long-term stability. It also confirms that a HRBA is the principal working methodology guiding E.U. development action.<sup>126</sup> In 2021 the Commission released an update of the European Union’s 2014 Toolkit on a Human Rights-Based Ap-

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125. European Parliament Resolution 2009/2219(INI) of Nov. 25, 2010, On Human Rights and Social and Environmental Standards in International Trade Agreements, 2012 O.J. (C 99) 31.

126. The Consensus confirms the EU’s commitment to a HRBA as outlined in several documents. See Council of the European, EU Strategic Framework on Human Rights and Democracy, No. 11855/12 of June 25, 2012, at 2 (“In the area of development cooperation, a human rights based approach will be used . . . .”); European Commission, *A Rights-Based Approach, Encompassing All Human Rights For EU Development Cooperation*, SWD

proach in line with its commitments to the Sustainable Development Goals and to reducing all forms of inequalities, including gender inequality. This is designed to make interventions more inclusive and sustainable. It applies to the programming, design and implementation of all sectors of E.U. external action, as also called for by NDICI–Global Europe, the new financing instrument for 2021–2027.<sup>127</sup>

The European Investment Bank (EIB) is also bound by the Charter of Fundamental Rights of the EU.<sup>128</sup> The EIB has recently launched a consultation process on its new Environmental and Social Policy which recognizes that the advancement of human rights is central to sustainable finance;<sup>129</sup> is based on the Charter of Fundamental Rights of the European Union and guided by the fundamental rights and freedoms recognized by the European Convention on Human Rights, as well as the principles of the Universal Declaration of Human Rights and the EU Human Rights Sanctions regime.<sup>130</sup> According to the Policy, “The EIB shall not, to the best of its knowledge, finance projects that have the effect of limiting people’s individual rights and freedoms or violating their human rights.”<sup>131</sup>

EIB The Policy includes the following due diligence provisions on human rights: “4.11 The EIB pursues an integrated human rights-based approach to its ECS (environmental, climate and social) due diligence and monitoring. It conducts a human rights-responsive due diligence process whereby impacts and risks are screened and assessed against its E&S Stan-

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(2014) 152 final (Apr. 30, 2014) (concerning the development of a toolbox for a rights-based approach to development operations).

127. Regulation 2021/947, of the European Parliament and of the Council of 9 June 2021 establishing the Neighbourhood, Development and International Cooperation Instrument – Global Europe, Amending and Repealing Decision No 466/2014/EU and Repealing Regulation (EU) 2017/1601 and Council Regulation (EC, Euratom) No 480/2009, 2021 O.J. (L 209) 1 (noting the EU must ensure consistency in its external actions, and promote human rights through those actions).

128. *Human Rights and the EIB*, EUR. INV. BANK, <https://perma.cc/C2KZ-ZVQG> (last visited Dec. 4, 2021).

129. The EIB Group Environmental and Social Policy Draft, EUROPEAN INV. BANK GROUP, Section 2.1 (June 3, 2021), <https://perma.cc/R5DM-QRMB> (last visited December 22, 2021).

130. *Id.* at Recital 14 of the Preamble.

131. *Id.* at Section 4.4.

dards, which in turn are grounded in human rights principles. The process is guided by considerations of likelihood, frequency, and severity of human rights impacts, thereby ordering the prioritisation of mitigation measures.”

The protection and promotion of human rights is a principal purpose of the Council of Europe. The Council of Europe Development Bank (CEB) operates under the aegis of the Council of Europe and its policies and activities are grounded in the European Convention of Human Rights and Fundamental Freedoms (ECHR) and the European Social Charter.<sup>132</sup> Under Article XIII of the CEB Articles of Agreement, “c. Applications for loans or guarantees shall be submitted to the Administrative Council after receipt of the Secretary General’s opinion as to admissibility based on the project’s conformity with the political and social aims of the Council of Europe.”<sup>133</sup> Moreover, CEB loan regulations stipulate that all CEB-financed projects conform with provisions of the ECHR. Moreover, the 2016 CEB Environmental and Social Safeguard Policy stipulates that “the CEB will not knowingly finance projects which . . . are identified as . . . undermining human rights.”<sup>134</sup>

### iii. *The Challenge of International Fragmentation and Divergence*

As the foregoing brief review illustrates, the substantive overlap of human rights and development regimes is significant and growing, but the international practice surrounding

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132. See Resolution 1495 of the Administrative Council of the Council of Europe Development Bank of 17 November 2016, Loan Regulations, art. 3.3(g)(iii), <https://perma.cc/RD3A-4JFM> (providing that the Bank may demand early reimbursement of a loan if a project’s implementation leads to a human rights violation, a unique feature).

133. Council of Europe Development Bank, *Articles of Agreement*, (updated December 31, 2020), <https://perma.cc/9CXR-S226>.

134. Council of Europe Development Bank, *Environmental and Social Safeguards Policy*, (adopted Nov. 16, 2016), <https://perma.cc/QLS6-YR79>. A bilateral example emerges in Canada’s 2008 Official Development Accountability Act which contains a human rights clause requiring development operations financed by Canada to be consistent with international human rights standards. Official Development Assistance Accountability Act, S.C. 2008, c. 17. It states in section 4(1) that “Official development assistance may be provided only if the competent minister is of the opinion that it (a) contributes to poverty reduction; (b) takes into account the perspectives of the poor; and (c) is consistent with international human rights standards. *Id.*

it is widely divergent. Part II.C above discussed the relevance of the fragmentation of IHRL. But international law on the whole is highly fragmented, split into “highly specialized ‘boxes’ that claim relative autonomy from each other and from the general law.”<sup>135</sup> That fragmentation has resulted in a lack of synergy between IHRL on one hand and IEL and global development policy on the other. The examples range from lofty invocations of human rights, sometimes in proclamations and preambles, to discreet references to human rights in specific policy provisions, to more definite policy commitments to human rights and the HRBA to development. Given this range and the relatively recent emergence of efforts aimed at promoting greater policy coherence, such as those of the European Union or Canada, that make human rights obligations more integral to and operational in development policy, it is difficult to see any strong global convergence emerging in public international law.

Moreover, while the trend in both political statements and policy frameworks appears to be moving toward the increased integration of human rights into development policy and toward some recognition of the potential relevance human rights obligations in development contexts, the majority of development policy frameworks treat human rights as an entirely separate legal and policy regime. Development policy still evidences an inconsistent treatment of IHRL, full of rhetorical flourish and lip service alongside a failure to articulate a systematic approach that could result in effective legal and policy convergence. Despite the growing subject matter overlaps and convergence in preambular commitments and human rights principles, the interplay between development and human rights obligations is inconsistent at best.

This is at least partly attributable to the general neglect of public international law in development policy frameworks and the qualitative differences between the frameworks governing development and the international treaties that ground human rights. Human rights impose both moral duties and legal obligations, but they do more. As discussed in Part II above, they undergird the world public order by codifying its

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135. Int'l Law Comm'n, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, U.N. Doc A/CN.4/L.682, ¶ 13.

core values, and they impose the binding obligations that most directly serve the fundamental purpose of all law and indeed all legitimate policy: the protection and promotion of human dignity and flourishing.

Yet, the divergence remains. The reasons have been the subject of extensive academic commentary. Philip Alston has opined that the diversity of policy formulations emanating from international organizations can be explained by

[A] desire to maintain as much policy flexibility as possible. This helps to accommodate a broad array of approaches on the part of different governments, gives the organization itself considerable leeway to define or re-define its priorities, and makes it easier to move away from failed policies towards new ones.<sup>136</sup>

This argument justifiably extols the institutional autonomy and flexibility resulting from the policy priorities and policymaking procedures of individual institutions with limited mandates. Analogous arguments are sometimes raised in the context of fragmentation of international law, to the effect that fragmentation may benefit specialized regimes.<sup>137</sup>

Without a doubt, imposing additional IHRL obligations on intergovernmental organizations with varied mandates in such spheres as military cooperation, economic development, world trade, or the law of the sea would necessarily curtail each organization's policy latitude and possibly reduce its effectiveness at specific tasks. It would, moreover, limit the organization's independence by requiring consideration of expertise from human rights authorities external to the organization. A World Intellectual Property Organization obligated to consider the consequences for human dignity of policies that doggedly increase global intellectual property protection might not only need to moderate its drive toward the expansion of intellectual property rights; it could possibly be constrained to cede some interpretive authority by periodically

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136. Philip Alston, *What's in a Name? Does it Really Matter if Development Policies Refer to Goals, Ideals or Human Rights?*, in HUMAN RIGHTS IN DEVELOPMENT CO-OPERATION 95, 97 (Henny Helmich & Elene Borghese eds., 1998).

137. See, e.g., Bruno Simma, *Fragmentation in a Positive Light*, 25 MICH. J. INT'L L. 845, 845 (2004) (noting that fragmentation is often now discussed in a more positive light).

consulting with outside experts such as the U.N. High Commissioner for Human Rights; the Committee on Economic, Social and Cultural Rights; or a Human Rights Council special rapporteur. Such activities could pose special problems to intergovernmental organizations whose mandates and functions do not expressly include protecting human rights and whose constitutive instruments proscribe political activities by the organization and interference in the political affairs of members.

Margaret Young has noted that, in the absence of a single global legislature or appellate court to mold a unified body of international law, states implicitly or explicitly conceptualize specific issues and problems individually or thematically, and respond to narrow needs and problems by creating new international legal regimes and supporting organizations tailored to those demands.<sup>138</sup> Young argues that the unwieldy and intransigent nature of such regimes is often intentional and may reflect a desire by powerful states to protect their dominance. But, unlike human dignity, a state's longing for geopolitical power reflects no fundamental value of the world public order.

The lack of international coordination at the individual state level, sometimes termed "horizontal incoherence," reflects the state practice of adopting inconsistent national policies in international fora, and opacity within regimes, may cause further fragmentation.<sup>139</sup> As Pierre-Marie Dupuy has aptly reflected,

[T]he creation of new jurisdictions and institutions of control entails some inherent dangers. For example . . . the danger of creating the illusion of completely autonomous sub-systems, each equipped with its own judicial or controlling system. These sub-systems operate as if they are independent from the general international legal order, which would no longer be needed to apply the basic principles . . . .

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138. Margaret A. Young, *Introduction: The Productive Friction Between Regimes*, in REGIME INTERACTION IN INTERNATIONAL LAW 1, 2 (Margaret A. Young ed., 2012).

139. See Margaret A. Young, *Regime Interaction in Creating, Implementing and Enforcing International Law*, in REGIME INTERACTION IN INTERNATIONAL LAW, *supra* note 138, at 85, 94 ("A further impediment to regime interaction is a lack of transparency and openness within a particular regime.").

The same trend is likewise encouraged within some circles of specialized technical experts and diplomats, such as in international protection of the environment. Due to their lack of solid background in public international law, some of these rather narrow specialized “experts” do not necessarily see the implications, connections and legal relationships between some newly established machineries and the norms of general international law which are still applicable, with respect for example to the international responsibility of States for breach of treaty obligations.<sup>140</sup>

The expansion of development policy alongside the growing number of human rights treaties, declarations, guidelines, and case precedents, without an overarching framework to promote international policy coherence, has resulted in a highly fragmented legal and policy context globally. Given the increased spheres of overlap between development policy and IHRL, the risks of norms conflicting directly or indirectly are constantly growing.<sup>141</sup> The inevitable consequence is the evolution of international law and practice that is not only indifferent to the basic values of the world public order embodied in IHRL, but sometimes working directly against them.

### C. *Policy Coherence between IHRL, International Law, and Development Policy*

The division between IEL, global development policy, and IHRL is partially a product of the fragmentation just discussed. In light of the special place of IHRL in international law, there are sound reasons for deploring fragmentation in general and integrating IHRL more closely into development policy in par-

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140. Pierre-Marie Dupuy, *The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice*, 31 N.Y.U. J. INT'L L. & POL. 791, 796–97 (1999).

141. See Andreas Fischer-Lescano & Gunther Teubner, *Regime Collision: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT'L L. 999 (2004) (locating the cause of fragmentation not just in the lack of jurisdictional hierarchy but also in norm collision emanating from underlying conflicts between policies pursued by different international organizations and regulatory regime). “Collisions between legal norms are merely a mirror of the strategies followed by new collective actors within international relations, who pursue power-driven special interests without reference to a common interest.” *Id.* at 1003.

ticular. Closer integration will benefit not only the human dignity that IHRL protects and development policy has the potential to promote, but will strengthen both regimes.

While it is sometimes argued that fragmentation in international law is inevitable<sup>142</sup> and even endemic,<sup>143</sup> many point to the risks of systemic ambiguity and policy incoherence.<sup>144</sup> A premise of the argument presented here is that, as the International Court of Justice has observed, “[i]nternational law is not a series of fragmented specialist and self-contained bodies of law, each of which functions in isolation from the others; it is a singly unified system of law.”<sup>145</sup> This section advances arguments in support of this conclusion, underpinned by the advantages of policy coherence. Although these arguments have general applicability in the field of public international law, the backdrop in the context of this article is the mandatory and universal nature of IHRL and the relative neglect of human rights obligations in IEL and development policy. The absence of a clear, governing legal baseline where these regimes interact and where their norms conflict requires elucidation.

Policy coherence aims to prevent duplication and avoid contradiction in government policy by promoting effective measures across related subject matters and assessing the impacts of diverse areas of international policy on one another.<sup>146</sup> It operates both vertically, by ensuring that states im-

142. A growing body of literature is emerging on global administrative law which addresses, among other themes, the “constraints and enduring reasons for ‘non-convergence’” and assesses “the normative case for and against the promotion of a unified field of global administrative law.” Benedict Kingsbury, Nico Kirsch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 15 (2005).

143. Stephen Humphreys, *Structural Ambiguity: Technology Transfer in Three Regimes*, in REGIME INTERACTION IN INTERNATIONAL LAW 195 (Margaret A. Young ed., 2012).

144. See, e.g., MARGOT SALOMON, GLOBAL RESPONSIBILITY FOR HUMAN RIGHTS 106 (2007) (highlighting the need for policy coherence in order to ensure that human rights obligations are being constantly applied in “all international policy-making processes”).

145. Ahmadou Sadio Diallo (Guinea v. Dem. Rep. of Congo), Judgment, 2012 I.C.J. Rep. 324, 391 (June 19) (declaration of Greenwood, J.).

146. Policy coherence is relevant also to efforts in the UN human rights mechanisms to enhance coherence and harmonization between treaty bodies. See Int’l Hum. Rts. Instruments, Rep. of the Working Group on Harmonisation of Working Methods of Treaty Bodies, U.N. Doc. HRI/MC/

plement international law obligations through legislation, policies, and regulations; and horizontally, by ensuring that the policies of intergovernmental organizations and states in their interactions with each other are consistent, or at least compatible, with one another.<sup>147</sup>

Promoting policy coherence in development has long been a priority for the Organization for Economic Cooperation and Development (OECD) as evidenced in the 2008 Declaration on Policy Coherence for Development and the international platform for policy coherence in development.<sup>148</sup> “Aid alone cannot address the needs of the developing world. Policies that go “beyond aid” in areas such as agriculture, trade, environment, energy, health, security, investment, tax policies, migration have a profound impact on developing countries.”<sup>149</sup> The 2008 Declaration on Policy Coherence for Development similarly acknowledged the increased “economic inter-dependence among countries as well as between development policies, and other areas of public policy.”<sup>150</sup>

In the EU context,<sup>151</sup> policy coherence was first enshrined in the 1992 Maastricht Treaty, and later strengthened in the

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2007/2 (2007) (offering proposals for harmonizing the working methods of various treaty bodies); Int'l Hum. Rts. Instruments, Rep. on Working Methods of the Human Rights Treaty Bodies Relating to State Party Reporting Processes: Note by the Secretariat, U.N. Doc. HRI/MC/2007/4 (2007) (providing an overview of the coordination between seven human rights treaty bodies); Int'l Hum. Rts. Instruments, Rep. on the Implementation of Recommendations of the Fifth Inter-Committee Meeting and the Eighteenth Meeting of Chairpersons: Note by the Secretariat, U.N. Doc. HRI/MC/2007/6 (2007) (delineating the steps taken by the treaty bodies to implement the revised harmonization guidelines).

147. See Siobhán McInerney-Lankford, *Human Rights and Development: Regime Interaction and the Fragmentation of International Law*, 4 THE WORLD BANK LEG. REV. 123, 147 (2013).

148. OECD, Policy Coherence for Sustainable Development, <https://perma.cc/J3S6-4VRY> (last visited Dec. 4, 2021).

149. OECD, Ministerial Declaration on Policy Coherence for Sustainable Development, <https://perma.cc/4PU7-CFU6> (last visited Dec. 4, 2021).

150. OECD, Declaration on Policy Coherence for Development, OECD Doc. C/MIN(2008)2/FINAL (June 4, 2008), <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0364>.

151. See POLICY COHERENCE AND EU DEVELOPMENT POLICY (Maurizio Carbone ed., 2009) (analyzing the linkage between EU aid and non-aid policies and the impact of those policies on international development).

provisions of the 2009 Lisbon Treaty.<sup>152</sup> It implies “strengthening synergies and weeding out inconsistencies between non-aid policies and development objectives.”<sup>153</sup> According to the EU, policy coherence for development aims at minimizing contradictions and building synergies between different EU policies to benefit developing countries and increase the effectiveness of development cooperation. It integrates economic, social, environmental elements of sustainable development at all levels of policy making. The Development Committee of the European Parliament has maintained a Standing Rapporteur on Policy Coherence for Development since 2010 for the purpose of facilitating greater interaction between the parliamentary committee on development and other committees. Within the EU Commission, focal points for policy coherence for development were appointed in all Directorates General (DGs) and within the External Action Service. The 2017 new reiterated the importance of policy coherence in development and more recently, the Council of the EU reaffirmed the centrality of policy coherence in EU development policy in its conclusions,<sup>154</sup> asserting the Council underlines the importance of PCD as a fundamental part of the EU’s contribution to achieving the 2030 Agenda and the Sustainable Development Goals (“SDGs”).

As Ian Brownlie suggested, fragmentation and policy incoherence threaten “the quality and coherence of international law as a whole” noting that “there may be serious conflicts and

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152. In the EU context Article 208 of the Lisbon Treaty requires that “The Union shall take account of the objectives of development cooperation in the policies that it implements which are likely to affect developing countries.” Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1, art. 208; *see also* European Commission, *2019 EU Report on Policy Coherence for Development*, SWD (2019) 20 (Jan. 28, 2019) (examining the recent results of Article 208). Although some observers have voiced criticism of the implementation of this objective, including in relation to human rights. *E.g.*, *Reaction to the EU Trade Strategy*, CONCORD (Apr. 12, 2021), <https://perma.cc/D6KB-XDT9>.

153. EU 2011 Report on Policy Coherence for Development, at 10, SEC (2011) 1627 final (Dec. 15, 2011).

154. Council Conclusions on Policy Coherence for Development (PCD), ¶ 1, No. 9132/19 of 16 May 2019; *see also* European Commission, *supra* note 148 (taking stock of progress made concerning PCD over the period 2015–2018 both in the Member States and at the EU level). *See also* *2019 EU report on Policy Coherence for Development*, SWD (2019) 20 final (Jan. 28, 2019).

tensions between the various programmes and principles concerned.”<sup>155</sup> Fragmentation has a potentially detrimental effect on the protection afforded by IHRL through the emergence of “special normative regimes in various areas of technical cooperation, described as ‘self-contained’ in order to highlight their operation outside general international law.”<sup>156</sup> This, in turn, leads to the potential “erosion of international law, emergence of conflicting jurisprudence, forum shopping and the loss of legal security.”<sup>157</sup> Some scholars argue that it undermines the international rule of law as a whole.<sup>158</sup> In this context, fragmentation resulting in international policymaking that disregards human rights erodes the human dignity on which the rule of international law is based.

IHRL is a legal reality. Neither SDGs nor development programs or projects are pursued or implemented in a legal vacuum. As noted, IHRL is *lex generalis*; it applies all the time and in all places.<sup>159</sup> That means that IHRL rules also apply when states are engaged in development activities, whether as donors, borrowers, or as members of development organizations or international financial institutions. Relatedly, the same governments participate as members of financial institutions and as state parties to international human rights treaties. There is therefore a factual overlap of membership which justifies an interrogation of the legal consequences of human rights obligations in the context of development policy. A key

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155. Ian Brownlie, *The Rights of Peoples in Modern International Law*, in *THE RIGHTS OF PEOPLES* 1, 15 (James Crawford ed., 1988).

156. Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 *LEIDEN J. INT’L L.* 553, 560–61 (2002); see also Bruno Simma, *Self Contained Regimes*, 15 *NETH. Y.B. INT’L L.* 111, 135 (1985) (“The question whether treaty subsystems on the protection of human rights constitute ‘self-contained regimes’, is a very controversial one. . . . [T]he views put forward in favour of such a qualification are both unconvincing and dangerous for the effectiveness of international human rights law.”).

157. *Int’l Law Comm’n*, *supra* note 132, ¶ 9.

158. See, e.g., Martin Scheinin, *Human Rights Treaties and the Vienna Convention on the Law of Treaties—Conflicts or Harmony*, in *THE STATUS OF INTERNATIONAL TREATIES ON HUMAN RIGHTS* 43, 43–45 (Venice Comm’n ed., 2006) (discussing how the call for stronger normativity under human rights treaties within the fragmentation approach weakens international law in general).

159. Some rules of IHRL are overridden in specific situations, such as during armed conflict, but these are not relevant to a general discussion of the global development context.

contention of this article is that development policy should reflect IHRL as such, and as appropriate, even if it is clear that development agencies do not have any monitoring or enforcement role with respect to IHRL. The following discussion examines regime interaction in international law with respect to human rights and development. It analyzes international human rights treaties<sup>160</sup> and the importance of vertical and horizontal policy coherence based on governments' human rights obligations.<sup>161</sup>

From this it outlines how international legal coherence could be pursued by development actors to strengthen development regimes for the ultimate benefit of individuals and communities in developing countries.<sup>162</sup>

The potential of IEL and global development policy to either promote or threaten the conditions for the enjoyment of human rights make them compelling candidates for synchronicity with IHRL. Commentators, such as Philip Alston, have argued specifically for policy coherence in development policy, anchored directly in IHRL.<sup>163</sup> Similarly, the UN Guiding Principles on Business and Human Rights address policy coherence by reference to alignment with IHRL:

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160. In this it does not disregard the potential source of obligations in custom or general principles of law but focuses on treaties as the most visible and clear source of such obligations for the purposes of the present discussion. For a more elaborate discussion of this argument, see Siobhán McInerney-Lankford, *International Financial Institutions and Human Rights: Select Perspectives on Legal Obligations*, in INTERNATIONAL FINANCIAL INSTITUTIONS AND INTERNATIONAL LAW 239 (Daniel D. Bradlow & David B. Hunter eds., 2010).

161. John Ruggie (Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises), *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. A/HRC/17/31, at 11–12 (Mar. 21, 2011).

162. See Siobhán McInerney-Lankford, *supra* note 147.

163. See Philip Alston, *Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals*, 27 HUM. RTS. Q. 755, 827 (2005) (detailing “the key elements in a new approach to ensuring effective complementarity between human rights and the Millennium Development Goals”); PHILIP ALSTON & MARY ROBINSON, HUMAN RIGHTS AND DEVELOPMENT: TOWARDS MUTUAL REINFORCEMENT I (2005) (addressing the “ways in which the strengths, resources, and support of the international human rights and development communities can be mobilized in order to reinforce one another in their efforts to achieve shared goals”).

States should ensure that governmental departments, agencies and other State-based institutions that shape business practices are aware of and observe the State's human rights obligations when fulfilling their respective mandates, including by providing them with relevant information, training and support.<sup>164</sup>

The arguments in favor of such coherence have an *a fortiori* character in the development context, both because the goals of development policy generally align with those of IHRL, and because, as noted previously, the impact of major development projects on the enjoyment of human rights by the affected population is often substantial. As noted, some development actors have indeed made international policy coherence a priority.<sup>165</sup> Yet, such efforts have so far been partial and tentative.

More decisive efforts to reconcile IHRL with IEL and development policy have come from the United Nations. In 2000, the UN Sub-Commission on Human Rights took the following position on the relationship of IHRL to other fields of international law. In Resolution 2000/7, the Sub-Commission:

3. *Reminds* all Governments of the primacy of human rights obligations over economic policies and agreements;
4. *Requests* all Governments and national, regional and international economic policy forums to take international human rights obligations and principles fully into account in international economic policy formulation;
5. *Requests* Governments to integrate into their national and local legislations and policies, provisions, in accordance with international human rights obligations and principles, that protect the social function of intellectual property;
6. *Requests* intergovernmental organizations to integrate into their policies, practices and operations, provisions, in accordance with international human

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164. Ruggie, *supra* note 161, at 11.

165. See OECD, Recommendation of the Council on Policy Coherence for Sustainable Development, OECD Doc. OECD/LEGAL/0381 (Dec. 11, 2019), <https://perma.cc/XGG4-SVC6> (stating that policy coherence is a necessity for sustainable development).

rights obligations and principles, that protect the social function of intellectual property . . . .<sup>166</sup>

More recently, the Committee on Economic, Social, and Cultural Rights declared in General Comment No. 24 that state parties to the ICESCR “should identify any potential conflict between their obligations under the Covenant and under trade or investment treaties, and refrain from entering into such treaties” when the treaty provisions conflict with economic, social, and cultural rights.<sup>167</sup> Moreover, “[t]he interpretation of trade and investment treaties currently in force should take into account the human rights obligations of the State, consistent with Article 103 of the Charter of the United Nations and with the specific nature of human rights obligations.”<sup>168</sup>

Such calls have not been answered by decisive, coordinated action by the international community. At least three types of international legal fragmentation persist to varying degrees in the relationship between IEL and global development policy on one hand, and IHRL on the other.<sup>169</sup> First, there is substantive fragmentation, meaning “different regimes or disciplines laying claim to autonomy and being self-contained fragmented regimes.” Second, institutional fragmentation is associated with the lack of formal hierarchy between international courts and tribunals and consequent potential for conflicting decisions with no supervening authority to reconcile them. Third, there is methodological fragmentation with re-

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166. Off. of the High Comm’r for Hum. Rts., Sub-Commission on Human Rights Res. 2000/7, Intellectual Property Rights and Human Rights, U.N. Doc. E/CN.4/Sub.2/RES/2000/7 (Aug. 17, 2000).

167. Comm. on Economic, Social & Cultural Rights, General Comment No. 24 (2017) on State Obligations Under the International Covenant of Economic, Social and Cultural Rights in the Context of Business Activities, ¶ 13, U.N. Doc. E/C.12/GC/24 (Aug. 10, 2017).

168. *Id.*

169. Others have distinguished functional from geographic fragmentation; or institutional fragmentation from ideational fragmentation. See Anne Peters, *A Refinement of International Law: From Fragmentation to Regime Interaction and Politicization*, 15 INT’L J. CONST. L. 671, 675 (2017) (emphasizing the productive uses of multiplicity in refining international law).

spect to sources of law, and between treaties and customary international law in their respective fields in particular.<sup>170</sup>

The growing reach of the IEL and development policy<sup>171</sup> into areas governed by human rights treaties increases the regime interaction between IHRL and development policy, as evidenced in the substantive and policy overlaps previously discussed. This interaction also augments the likelihood of norm conflict, which in the current context is compounded by the partial and poorly understood points of convergence between human rights and development regimes, the uncertain operational implications of human rights language in development frameworks, the general neglect of human rights obligations and the absence of a clear, governing legal baseline where the regimes do interact. Such fragmentation may therefore yield legal uncertainty and risk, forum shopping, and a dilution of standards of protection of human rights.

Given the manifold forms of fragmentation between development policy and IHRL, there is a distinct possibility that global development and human rights regimes will yield different interpretations of the same rule of IHRL, which in turn risks generating confusion among states about their legal obligations and a weakening of human rights protections.<sup>172</sup> This risk is exacerbated for rules of IHRL that have benefited from expert interpretation and elaboration by treaty monitoring bodies, U.N. authorities, and international or regional courts, but could be diluted or confused by interpretations or iterations emanating from development institutions that lack technical expertise in IHRL. This has led some publicists to point to the risk of a lower standard of protection due to a specialized regime not taking into account more detailed guidance or robust protection provided for in general international law

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170. See Mads Andenas & Eirik Bjorge, *Introduction: From Fragmentation to Convergence in International Law*, in A FAREWELL TO FRAGMENTATION, *supra* note 70, at 1, 4–8 (discussing types of fragmentation).

171. See Kingsbury et al., *supra* note 142, at 16 (“Underlying the emergence of global administrative law is the vast increase in the reach and forms of transgovernmental regulation and administration designed to address the consequences of globalized interdependence.”).

172. See generally Koskenniemi & Leino, *supra* note 156 (discussing a range of views on the various risks of fragmentation).

or by other institutions.<sup>173</sup> Still others point to the failure to assess human rights impacts of policy measures, noting the potentially detrimental consequences for human rights in developing countries.<sup>174</sup>

In the context of development agencies, the substitution of broad principles for binding rules of IHRL is pervasive, with the most common principles being consultation, participation, inclusion, social cohesion, and accountability. These respond in a general way to certain IHRL imperatives, but they deflect attention from the rules of IHRL themselves—substantive rights and obligations, and the notion of legal compliance and legal accountability, as opposed to mere guidelines or “best practices.” General E&S policies or Environmental and Social Due Diligence (ESDD) cannot substitute for the legally binding principles of human rights due diligence or impact assessments, because the notion of equivalence is based on a fundamental misconception about the nature of human rights as higher order legal obligations.

The correlativity of human rights and state obligations is a necessary consequence of IHRL’s nature as a system of law<sup>175</sup> and a central and irreducible foundation of human rights accountability. Moreover, as noted, IHRL treaties include structural obligations apart from specific human rights that obligate states to prioritize important interests that subserve human dignity, such as health care, education, and the reduc-

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173. For example, in *Saadi v. United Kingdom*, the partly dissenting members of the European Court of Human Rights, were disturbed by the possibility that it was “permissible today for the Europe Convention on Human Rights to provide a lower level of protection than that which is recognized and accepted in other organizations,” such as the U.N. Human Rights Committee interpreting the ICCPR. *Saadi v. United Kingdom*, 2008-I Eur. Ct. H.R. 31, 74 (joint partly dissenting opinion of Judges Rozakis et al.).

174. SALOMON, *supra* note 144, at 106. See also her related discussion of disparate and contradictory trends in of international legal regimes and the need for international policy coherence. *Id.* at 150, 156. The recent EU Parliament proposal for binding legislation to require mandatory HRDD is noteworthy. EU Directorate-General for External Policies of the Union, *Human Rights Due Diligence Legislation—Options for the EU*, PE 603.495 (June 2020), <https://perma.cc/Z4L2-DQ7K>.

175. As noted by Hohfeld, “claim-rights,” such as those recognized by IHRL, impose correlative obligations by their nature. See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 38 (1913).

tion of disparities in opportunities based on race or sex.<sup>176</sup> And in development policy or guidance, there is no basis for accepting the claim that human rights can be effectively reflected in general principles. That argument is no more persuasive than the claim that detailed securities regulation can be effectively implemented through a securities issuer's broad policy commitment to fairness, full disclosure, and abstention from market manipulation. The general guidelines neither incorporate the rights themselves nor even identify the specific human rights obligations that development policy must respect.

As a result, if used to manage contextual human rights risk in development projects, ESDD can create points of confusion, especially when mobilized as a substitute for human rights due diligence. At best, they create obfuscation about whether human rights obligations have been breached in the course of a development project. At worst, they generate doubt about whether human rights even matter in the context of development projects<sup>177</sup> and suggest that the state's economic development or infrastructure projects should take priority over human rights.

Fragmentation in general, and these specific consequences in particular, generate a risk of accountability gaps<sup>178</sup> for the enjoyment of human rights in development processes and outcomes.<sup>179</sup> Without an explicit integration of human

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176. See generally Fellmeth & McInerney-Lankford, *supra* note 6 (discussing these structural obligations and their implications for municipal legislation and policymaking).

177. Cf. Koskenniemi & Leino, *supra* note 156, at 570 (discussing how globalization has "poised human rights against economic values").

178. There is a growing body of literature on the theme of accountability in the context of global governance and constitutionalism. See, e.g., LAW AND NEW GOVERNANCE IN THE EU AND THE US (Gráinne de Búrca & Joanne Scott eds., 2006) (charting the spread of new forms of global coordination in governance in the U.S. and E.U.).

179. Siobhán McInerney-Lankford, *supra* note 147, at 149 (2013). On this theme generally as applied to the World Bank, see Clark, *supra* note 77; SIGRUN SKOGLY, THE HUMAN RIGHTS OBLIGATIONS OF THE WORLD BANK AND THE INTERNATIONAL MONETARY FUND (2001); Daniel Bradlow, *The World Bank, the IMF and Human Rights*, 6 TRANSNAT'L L. & CONTEMP. PROBS. 48 (1996); Daniel Bradlow & Claudio Grossman, *Limited Mandates and Intertwined Problems: A New Challenge for the World Bank and the IMF*, 17 HUM. RTS. Q. 411 (1995); DARROW, *supra* note 77; WILLEM VAN GENUGTEN, THE WORLD BANK GROUP, THE IMF AND HUMAN RIGHTS (2003).

rights obligations in development policies, IHRL accountability may be difficult to establish and enforce with the result that states—whether donors or partners—can pursue development activities without undertaking systematic assessments of the human rights impacts of those activities and without formal legal recourse in cases where the impacts are negative.<sup>180</sup> The normative hierarchy atop which IHRL sits requires reconciliation of IHRL with all forms of international law and policymaking, including, and indeed especially, global development policy.

The details of how reconciliation might be structured and what actors might productively be made responsible for reconciliation are a subject for another article. From the perspective of legal interpretation, suffice it to say that there exist rules of treaty interpretation that could be relied upon to support such a reconciliation and promote strategic regime interaction to advance policy coherence between IHRL, IEL, and development policy. As one of the authors has argued elsewhere,<sup>181</sup> an approach squarely founded in public international law could be adopted using the principle of systemic integration<sup>182</sup> derived from Article 31(3)(c) of the Vienna Convention on the Law of Treaties,<sup>183</sup> It states that in addition to the treaty's con-

180. See Siobhán McInerney-Lankford, *supra* note 157, at 150. See generally Patrick Twomey, *Human Rights-Based Approaches to Development: Towards Accountability*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN ACTION 45 (Mashood A. Baderin & Robert McCorquodale eds., 2007) (outlining and exploring the evolution of human rights-based approaches to development).

181. See Siobhán McInerney-Lankford, *supra* note 147, at 151.

182. See Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 INT'L & COMPAR. L.Q. 279 (2005) (proposing that Article 31(3)(c) expresses systemic integration as a general principle of treaty interpretation); see also Vassilis P. Tzevelekos, *The Use of Article 31(3)(c) in the VCLT in the Caselaw of the ECtHR: An Effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of Human Rights Teleology? Between Evolution and Systemic Integration*, 31 MICH. J. INT'L L. 621 (2010) (considering to what extent Article 31(3)(c) is conducive to other techniques of interpretation other than systemic integration); Aadamantia Rachovitsa, *Fragmentation of International Law Revisited: Insights, Good Practices and Lessons to be Learned from The Caselaw of the European Court of Human Rights*, 28 LEIDEN J. INT'L L. 863 (2015) (arguing that international courts are developing treaty interpretation techniques that are not necessarily grounded in the text of the Vienna Convention on the Law of Treaties).

183. Vienna Convention on the Law of Treaties, art. 31(3)(c), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

text there shall be taken into account “any relevant rules of international law applicable in relations between parties.” It is, according to some “the most influential principle in terms of reception of international law”<sup>184</sup> and one that could be used more generally to argue for taking relevant binding human rights obligations into account in certain development contexts.

The essential point is that, if the case for coherence between IHRL and other fields of public international law is strong, the case for integrating IHRL into development policy is stronger still. Development policy based on IHRL standards would not perhaps look radically different from development policy today; the main objective of development policy is, after all, not making advances in the field of human rights as such, but in fostering the conditions under which human rights may be more effectively enjoyed by all. But development policy can be designed in a variety of ways, some very compatible with that objective, and others incompatible with it. By systematically assessing development policy against IHRL standards, both in its direct effects on individual rights and in its compatibility with the structural obligations imposed by IHRL, dual benefits will result. By embracing good governance as defined here, development policy will benefit from much greater legitimacy, and IHRL will have gained a valuable ally in its eternal struggle for meaningful supervision and enforcement.

#### IV. CONCLUSIONS AND IMPLICATIONS

This article noted how fields of international law other than IHRL can be used to promote human dignity, and IEL and global development policy are prominent among them. But this is not the same as saying other fields of public international law or policy explicitly embrace human dignity and flourishing among their core normative objectives. Although some such fields have an obvious connection to human dignity, many primarily serve narrower technical purposes, such as defining boundaries between states, facilitating global maritime commerce, ensuring the reliable continuation of diplomatic relations, promoting air transportation safety, or removing barriers to international trade.

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184. FOROWICZ, *supra* note 56, at 13.

The commitment of these fields of law to achieving specific technical objectives can make IHRL challenging to integrate into seemingly unrelated areas of policymaking. The effect of the laws on specific human rights is frequently indirect or tenuous. It may seem sufficient to conclude that state practice in other fields of international law need merely avoid violating any specific human right to satisfy all obligations under IHRL. There may be no obvious need for regional fisheries regulation or treaties governing the uses of outer space to “integrate” with IHRL in any real sense. They are separate and distinct fields of policy, with little if any factual overlap with spheres governed by IHRL. Thus, as long as the policies do not tread on human rights unnecessarily, one might think nothing more need be said about human rights and human dignity in this context.

Yet, the purpose of this article has been to show that IHRL requires more integration into international practice than might initially appear necessary. The basis of modern international law in human dignity means that no interpretation of international law may ever be entirely indifferent to that concept. With unencumbered state sovereignty, cults of political personality, and the single-minded pursuit of ideological purity no longer recognized as legitimate ends unto themselves, there is no basis for any rule of international law that undermines or ignores human dignity.

The close connection between IHRL and human dignity, combined with the broad structural and substantive obligations that IHRL imposes on states, puts IHRL in the position of a critical regime for defining, and requiring the implementation of, state obligations of good governance. The nature of IHRL as a system of highly prioritized norms also means that these obligations apply not only to state practice in the domestic arena, but in other international legal regimes as well. This includes IEL and development policy, which have exceptional potential to advance human dignity through the growth of resources, infrastructure, and technology that global trade and investment promote.

Most states now incorporate human rights obligations into their constitutions, frequently modeled on the UDHR or

the entire international bill of rights.<sup>185</sup> In those countries that treat their constitutions as legal documents,<sup>186</sup> this approach accords with the formal sources of legal authority and tends to maximize the compatibility of government measures with human dignity. But the absence of such provisions in the statutes of international development institutions creates opportunities for political authorities to undermine human dignity by ignoring violations of IHRL or, in the worst case, facilitating them, by or in client states.

Because IHRL obligations are focused on states, and because of uncertainties in the *lex lata* over the international human rights obligations of intergovernmental organizations, the ultimate responsibility for such violations still formally rests with the state governments rather than the intergovernmental organization. But this arrangement is inconsistent with the role of IHRL as a regime hierarchically superior to the more material regime of IEL. States lacking the resources to provide schools, courts, police protection, hospitals and clinics, job opportunities, social insurance, and the infrastructure for transportation, power, clean water, and voting systems cannot protect the full range of human rights. As noted, IEL and global development policy have the potential to help advance human dignity indirectly, by promoting the necessary conditions for the enjoyment of human rights. But they can only do so if their policies and conditions comport with and reinforce respect for IHRL. Indifference is not an option, either structurally or legally.

This is not the same as arguing that global development policy, much less IEL, must always be designed to advance a specific human right. Consistency is not the same as identity.

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185. See Colin J. Beck, Gili S. Drori & John W. Meyer, *World Influences on Human Rights Language in Constitutions: A Cross-National Study*, 27 INT'L SOCIO. 483 (2012) (describing how the global human rights movement is reflected in the language of national constitutions); Zachary Elkins, Tom Ginsburg & Beth Simmons, *Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice*, 54 HARV. INT'L L.J. 61 (2013) (examining the adoption of human rights in national constitutions after World War II).

186. Some autocracies have constitutions that incorporate human rights provisions, but the instrument cannot or will not be enforced by courts or impartial government authorities. See, e.g., Qianfan Zhang, *A Constitution Without Constitutionalism? The Paths of Constitutional Development in China*, 8 INT'L J. CONST. L. 950 (2010).

But the purpose of IEL and global development policy are not economic growth and technological advancement for their own sake. There is no coherent argument for a development policy that primarily benefits the wealthiest ten percent of the population or annihilates the way of life of ethnic minorities as the price for improved export earnings. The purpose of this article has been to show not only that all legitimate state measure must be consistent with human dignity, but that development policy in particular should play an active role in promoting human dignity. Consistency is a *sine qua non* of that goal. For this reason, Philip Alston's claim that IHRL is "a quintessentially legal domain and thus not one which is suitable for use in a general development studies context"<sup>187</sup> has little to recommend it. IHRL obligations bind state action in all times and places; it is neither suspended nor absent in particular spheres of international action or policy governed by treaties dealing with subjects other than human rights. The rules of IHRL must necessarily supply the broad framework for evaluating the legitimacy of any public policy having an appreciable effect on human dignity, whether undertaken as a domestic measure or as part of an international program. Global development policy in particular, positioned as it is to advance human dignity, should conform to IHRL.

Operationalizing the normative hierarchy in development policy should begin at the stage of conception, when project sponsors should be able to articulate how the proposed project will contribute to, or at a minimum not detract from, human dignity by identifying the basic human values the measure serves. They should be able to identify valid empirical evidence supporting the predicted effect of the measure on these values or at least be prepared to produce rational arguments supporting the claimed benefits of the measure. The evidence need not be overwhelming nor the arguments irrefutable, but more should be required than *ipse dixit*, a mere assertion that the measure advances the public interest, or evidence that the measure will increase economic growth without accounting for the distributive effects and externalities of the project. When human rights are limited by a proposed measure, alternative measures that are less invasive should be considered and com-

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187. Alston, *supra* note 136, at 101.

pared to the proposal, with the least invasive effective measure prevailing.

Finally, all legislation and other public policy measures should be checked against specific human rights treaty obligations. In the case of ambiguity or conflict, a treaty obligation and its accompanying interpretation and elaboration by the relevant expert treaty body, court, or other international authority could serve to provide substantive policy guidance grounded in the law. IHRL offer an established legal foundation upon which to base international development policy coherence:

The fact that both donors and partner countries have ratified the international human rights treaties provides a uniquely valuable reference point for harmonisation efforts. A mutually agreed, universal normative framework already exists, supported not only by political commitment, but also by the force of legal obligation. As well, at the operational level, there is growing convergence in the integration of human rights in development.<sup>188</sup>

Ultimately, human rights, democracy, and development are mutually reinforcing processes, as U.S. Secretary of State Hillary Clinton once asserted.<sup>189</sup> All have the potential to promote human dignity, but only IHRL is specifically designed for that purpose. Treating democracy or development as ends unto themselves misses the point, because both democracy and development can be used, and have sometimes been abused, to undermine human dignity. Unless guided by fundamental human interests and constrained by human rights, democracy can be abused by populist demagogues to marginalize minorities, degrade education, promote extremist religious mysticism, and foment nationalism and jingoism. Unless guided by human dignity and constrained by human rights, development policy can transfer wealth regressively, marginalize vulnerable groups, and devastate the natural environment

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188. OECD, Development Assistance Committee, *Action Oriented Policy Paper on Human Rights and Development*, OECD Doc. DCD/DAC (2007) 15 (Jan. 26, 2007).

189. Hillary Rodham Clinton, U.S. Sec'y of State, Remarks on the Human Rights Agenda for the 21st Century at Georgetown Univ., Washington, D.C. (Dec. 14, 2009), <https://perma.cc/839R-DE5C>.

on which communities depend. International human rights law is a critical system to support the constitutive values supporting the world public order, and any policy measure impacting human dignity for good or ill cannot afford to disregard it while maintaining its claim to legitimacy.