these were U.S. and Cambodian labor groups, as well as the conflicting objectives of American textile importers and American textile producers. Also highly relevant were U.S. foreign policy objectives strongly supported by President Bill Clinton, both advancing labor standards in U. S. trade relations and supporting Cambodia's "emergence from the wilderness" in 1996. The challenges of establishing respect for workers' rights through improved labor laws, in a country which never really considered workers' interests significant until they were faced with the loss of tariff preferences under the Generalized System of Preferences (GSP), were extreme.

U.S. unions opposed Johnson's "carrot" approach that would have rewarded Cambodia with an increased textile quota for progress on worker rights. Textile importers wanted increased imports regardless of labor issues, while the American textile industry opposed imports more generally. The ultimate package followed the carrot approach and depended on training by the International Labor Organization (ILO) in Cambodia (largely financed by the United States) and regular assessments by the American Embassy in Phnom Penh. A package that survived for six years, until Cambodia became a member of the WTO in 2004, and in principle for some years thereafter because of that nation's generally good record on labor rights,[13] was attractive to many U.S. importers, such as GAP and Levi Strauss, and was successful, despite competing interests, unbalanced reporting by the *Wall Street Journal*, and some unhappy members of Congress. Johnson is justly proud of his pivotal role in constructing a mechanism that the Carnegie Endowment for International Peace concluded "has been one of the most successful and cost-effective programs to promote worker rights abroad the US government has ever funded" (p. 503).[14]

Among the broader lessons offered by this example, Johnson concludes:

> [I]t is impossible to make all the competing interests happy with trade negotiations . . . . Therefore, I revised my approach . . . . [M]y goal was not to try to please all of the interest groups but to try to make all of them only moderately unhappy." (P. 500)

Even for those who consider themselves trade experts in the period under discussion, the insights that Johnson provides will enhance readers' understanding of one of the few U.S. government successes in promoting labor rights abroad. Unfortunately, relatively few U.S. diplomats write in detail about the negotiations they chaired. This first-person history adds significantly to the value of the discussion and strongly reinforces my belief that *The Wealth of a Nation* is required reading for lawyers, economists, policy officials, and academics who pride themselves on an understanding of American trade policy.

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Beyond Human Rights: The Legal Status of the Individual in International Law. By Anne Peters. Cambridge, UK: Cambridge University Press, 2016. Pp. xxxv, 602. Index.
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In *Beyond Human Rights: The Legal Status of the Individual in International Law*, Anne Peters, Director of the Max Planck Institute for Comparative Public Law and International Law and a professor at the universities of Heidelberg, Free University of Berlin, and Basel, undertakes an ambitious project regarding the international legal status of the individual.

[13] By 2017, the situation in Cambodia had changed. *See Stitched UP: The Cambodian Government Threatens Labor Rights*, Economist (Oct. 26, 2017), *at* https://www.economist.com/business/2017/10/26/the-cambodian-government-threatens-labour-rights (reporting a squeeze on garment workers by the government).

[14] *Citing* Sandra Polaski, *Central America and the U.S. Face Challenge—and Chance for Historic Breakthrough—on Workers' Rights* (Carnegie Endowment for International Peace Issue Brief: Trade, Equity and Development Project, Feb. 2003).

Observing a "paradigm shift" in international law (p. 1), in which "human beings are becoming the primary international legal person" (back cover), Peters sets out to describe, systematize and evaluate "in a legally meaningful way" "the phenomenon of the growth of individual rights and duties under international law," particularly over the last thirty years (p. 7).

The survey project is an important and welcome contribution to the literature. There is indeed no other single source that systematically looks at the scope, status, and development of individual rights across the broad stretch of international law. Few scholars, moreover, are better qualified than Peters to undertake such a survey given the extraordinary depth and breadth of her intellectual engagement across fields of international law.

There is one field, however, that Peters insists her study does not engage: the international law of human rights. As human rights are already "the central and entirely undisputed element of the international legal status of the individual," Peters explains, "they are not an object of this study" (p. 32).[1] Rather, her project is to "bracket" (p. 8) and look "beyond" human rights, a theme elevated to central prominence by her title, to show "how rich and differentiated" and "widespread and refined" what she collectively calls "international individual right[s]" are outside of the human rights field *(id.)*. A clearer vision can thereby be had of how entrenched and interwoven these rights have become in the twenty-first century, and hence how difficult it would be for states to attempt to dismantle them (*id.*). It is indeed a preoccupation with the legal possibility that states could coordinate a complete dismantlement of individual rights in international law that drives Peters's project.

Keeping human rights out of such a project would serve an admirable purpose. In particular, it would open the door to fresh analysis about how individual rights are structured in distinct fields of international law, what their enforcement mechanisms look like, and who can (and especially cannot) claim these rights before distinct oversight and decisional bodies. Such an analysis, unburdened by the often highly distortionary tropes about individual rights that pervade the human rights field, could then profitably have been used in a set of follow-up projects to provide greater insight and practical perspective into current legal and political debates in the human rights field, particularly those centered on the relative enforcement capabilities of distinct sets of rights and rising intellectual critiques of alleged "rights inflation."

Unfortunately, however, Peters does not keep human rights out of her book. Nor is her analysis shielded from the highly distortionary tropes about human rights that pervade the field. Rather, those tropes are embraced as the central, if indirect, driver of the book's entire analysis. "Human rights" are thus raised pointedly and directly in every chapter, with examined categories of "international individual rights" interrogated as to whether they could or should be considered "human rights" or some "other" category of rights.[2] And, yet, Peters never defines what is meant by human rights, merely concluding that investor, refugee, consular, labor, or environmental rights are "different" and, in the absence of "an additional category of rights," we would be compelled to qualify them as "quasi-human rights" (p. 318). Again and again these statements are made, on the unexplained and circular assumption that we must consider

[1] The assertion that Peters's book "does not deal with human rights" (p. 318) and that human rights "are not the subject of this book" (p. 530) is made repeatedly throughout the chapters.

[2] For examples, see p. 188 ("Are [individual rights to remedy and reparation] *human rights* guarantees or claims under ordinary law?"); p. 318 ("The international substantive rights of investors . . . are best not understood as human rights in themselves—maybe with the exception of the right to property."); p. 359 ("Are [consular rights] human rights?"); p. 442 ("it appears mistaken to qualify these rights [to property and due process] themselves as specific human rights"); p. 446 ("procedural environment rights are not themselves human rights"); p. 449 ("the right of option is not itself a human right"); p. 454 (refugee rights "are distinct from human rights"). The International Court of Justice (ICJ) has concluded the classification question itself is irrelevant to concrete questions put before it. *See, e.g.*, Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 ICJ Rep. 12, para. 124 (Mar. 31).

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an individual right a "human right" if we cannot place it in another named category. The reason for these odd and seemingly misplaced comparisons did not become evident until the very end of Peters's six-hundred-page book.

And it is there, in the third part of Peters's book, that the most deeply concerning elements of the book for human rights become apparent. Peters, long a leading advocate of "global constitutionalism," uses the concept as a structure to undo and disassemble the entire international human rights system as it exists today. Indeed, reflecting a rising elite intellectual criticism of "rights inflation" and the "rights of others,"[3] Peters proposes a hierarchically tiered division of international individual rights in which the "ordinary" or "simple" rights she studies in the first half of her book are joined by a set of less-worthy "human rights" that are "rezoned downward" from a superset. The remaining superset of "human rights" would be immune from state dismantling or even modification, whereas the "ordinary" rights (including rezoned human rights) could be modified and dismantled at will by states. The fact that this proposal is advanced in a book that claims not to deal with human rights is a jolt by any standard.

A grand irony thus pervades the book: while presented as a scholarly and detached effort to *protect* the individual's legal status as a person in international law, it in fact makes proposals that threaten to undermine the entire foundational system of protection for such legal personhood. The fact that this is pursued through an argument that advocates the complete dismantlement of the comprehensive structure of post-war human rights, while simultaneously purporting to "scientifically" and "stably" ground the international legal personality of the individual *in* international human rights law (albeit ignoring what human rights law actually says about that concept) makes the irony all the more intense.

None of the above is to diminish the substantial intellectual contribution or research quality of Peters's book. Rather, it is to call out the political implications of Peters's specific proposals for the future of international human rights law and to place them more squarely within a larger intellectual debate in the human rights field about *how* and *by whom* human rights are to be defined and deployed. It is also important to consider who benefits and who loses from such proposals. The balance of this review will look at what may be seen as the three distinct and severable parts of Peters's book project.

Peters's six-hundred-page book is indeed more accurately three separate books. The first (chs. 4–12) does most directly and valuably what the book jacket describes. It is a broad, richly researched descriptive survey of the scope and content of individual rights in nine broad subfields of international law "not relating to human rights" (p. 7): international humanitarian law, criminal law, investment law, consular law, environmental law, protection of individuals against acts of violence and natural disasters, refugee law, and labor law. Outside Chapter 2, it is where Peters is at her best. Indeed, showcasing her tremendous and unique breadth of knowledge and detailed expert command over the substance and scholarly debates in a broad range of substantive international law fields, it is the book that undoubtedly makes the greatest practical contribution.

The primary weakness in this set of chapters is that they were not more streamlined and focused on empirical uses and use patterns across the subfields of international law, especially over the last thirty years. The discussions often felt over-penetrated with abstract legal status theory and related forays into technical subquestions that distracted from the descriptive purposes of the survey as well as the ability to draw larger conclusions therefrom. There was indeed no chapter dedicated to drawing together, comparing, and systematizing lessons and patterns across fields. The reader was also constantly puzzled at the interrogation within chapters as to whether the individual rights at issue could or should be considered "human rights" or some "other" category of rights. Both elements tended to take away from the accessibility and clarity of the chapters, and make the reader wish for a shorter volume focused exclusively on the current empirical

[3] *See* sources in note 15, *infra*.

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status of individual rights across fields. Had Peters limited her book to this primary end, framed by her strong and persuasive Chapter 2, it would have been an excellent and highly useful stand-alone contribution. It would also have shortened the book by half, making it more user-friendly and accessible to both the scholar and practitioner, as well as excerptable for the classroom.

Peters, however, did not limit her book to this end. She had two other central motivating objectives. The first was concerned with showing not merely the "difficulty" of any coordinated effort to dismantle the vast network of individual rights recognized in international law today (the specific object of book 1), but the "legal impossibility" of doing so. The central motivating question of this part (chs. 3, 13) was thus: is international legal personality ultimately controllable by states? To answer, Peters undertakes a civil law-inspired search in positive international law sources for a "stable" and "scientific" grounding for the concept that can be understood as "independent of the state," and hence irrevocable by state action.

It is necessary to pause here to capture the organizing frame within which Peters presents her topic (ch. 1). The book's central premise is that there are two "rivalling Grundnorms" (p. 3) in international law, each seeking to justify the international legal order. The first, based in the statist/dualist paradigms of legal positivism of the eighteenth and nineteenth centuries, sees international law as a purely "state-centered system," in which states are the exclusive legal subjects of the order and individuals have no independent legal status or standing. Any rights or position individuals might possess, through treaty or custom, are bestowed at the pure and sole discretion of states, and hence may be *revoked, even dismantled* in their entirety, at any time.

A second rival Grundnorm has long pushed back against this state-centric narrative. With individuals, not states, at its center, it sees the individual as the "true subject" and "natural person" of international law. Grounded in natural law theories of the sixteenth and seventeenth centuries, as revived in the individualist international law legal theories of the nineteenth and twentieth centuries, this Grundnorm has peaked with twenty-first century academic celebrations of cosmopolitan globalization and assertions of an unstoppable transformation from "international law" to "world law," "global law," a "new *jus gentium* of humanity," or "humanity's law."

Peters presents these Grundnorms as locked in an epic battle for the soul and future of international law. From this vantage, Peters, a celebrant of the latter Grundnorm, sees storms brewing on the international horizon with geopolitical power shifts and assertions of the "re-sovereignization of international law" (p. 555). She points to "the rise of the BRICS States . . . and concomitant decline of the United States and Europe" (p. 3), heightened Chinese and Russian emphasis on sovereign state prerogative, and growing backlash against "overindividualization" in international law (p. 6). These power shifts, she fears, threaten the very legal status of the individual in international law. Her project is therefore an effort to build a legally impenetrable fortification around the status of the individual, thereby precluding state intrusion into an untouchable and absolute set of individual rights.

This framing will be difficult for some readers, not least because it presupposes a view of law as independent from and superior to politics and power, a view not easily squared with everyday realities. The excessive legal formalism of the approach, especially in its search for impenetrable absolutes, trumps, and categorical hierarchies that can predetermine outcomes (rather than requiring fact-based balancing of competing rights and interests, proportionality and reasonableness assessments, and principles-based justification of policy choices), is a weakness that will make much of the analysis in the second and third parts of the book feel artificial and circular to some readers. This can be seen in a variety of aspects.

For one, in the search for an absolutely protectable core of meaning that is beyond the control of states, Peters advocates a definition of international legal personality of the individual that is so thin and contentless (ch. 3) as to render

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superfluous the entire subsequent "search" for a stable source for the concept in international law (ch. 13). Indeed, Peters defines the concept as nothing more than a "capacity" or "potential." It is, she explains, merely a "void," fillable *and emptyable* at will by states. Hence, she concedes, it can be "entirely empty or without function if no specific rights are granted" (p. 59). And, yet, if states are without constraint in revoking/creating new individual rights, why it matters if the potential itself is revocable/recreatable is never explained. Peters appears to recognize this, repeatedly querying whether the concept is merely "superfluous," "useless," "empty," or a "theoretical game," and citing prominent authors who have argued the same (pp. 40–41). Yet, she offers no direct answer,[4] simply leaving the concept alone for nine chapters, before seeking a grounding for it in a recognized international law source that can render it immune from potential state attempts to dismantle it.

This sourcing exercise, however, raises its own circularity concerns. Indeed, Peters begins her book with a clear rejection of the notion that "international legal personality" can legitimately be grounded in natural law. This is so both because that paradigm fails "today's scientific standards of intersubjective comprehensibility" (p. 25) and because it has been "almost unanimously rejected so far" (p. 34). A *different*, more "stable" and "scientific" basis for the concept must therefore be identified in positive public law that is "independent of state control." A seemingly impossible charge is thus assigned to Chapter 13. Peters had indeed already conceded that "international law has no general codified norm governing the definition and attribution of international legal personality," neither in "relevant treaties nor generally accepted principles of customary international law" (p. 35). Her Chapter 13 analysis of the three primary authorized sources of international law—treaties, custom, and general principles (from ICJ Statute Article 38.1)—then went on to concede that none met the requirement of independence from state control.

Natural law suddenly no longer looked so problematic. Peters thus circles back to it, landing on *human rights* as a "kind of positivized natural law" (p. 430). Reasoning that human rights "often end[] up being tantamount to a trivial form of natural law" and do "not stand on much more solid ground" than natural law (p. 429), she concludes by grounding the "original legal personality of the individual" in human rights, and specifically in Article 6 of the Universal Declaration of Human Rights (UDHR) and Article 16 of the International Covenant on Civil and Political Rights (p. 430). She then uses a self-described "teleological argument" (*id.*) to expand said norms from their concededly intended application to legal recognition of personhood in *domestic* law to a "new" right to such recognition in *international* law, which Peters now calls a "human rights itself" (p. 431). The fact that this "dynamic" and "evolutionary" process of new norm derivation looks suspiciously similar to the "human rights inflation" Peters condemns as "trivializing" and "devaluing" human rights in the third part of her book (thereby justifying her proposed "downward rezoning" of such new rights to a layer of entirely revocable norms) is difficult to overlook.

Finally, the express grounding of the international legal personality concept in human rights law raises an additional irony about Peters's chosen definition of that new "human right." Peters indeed goes to pains in Chapter 3 to define "international legal personality" as only a potential or capacity to "have" or to "hold" rights, and not a capacity to "exercise" or "enforce" them. She thus embraces a complete "decoupling" thesis between rights and their exercisability (p. 50), explicitly rejecting the "principle of effectiveness" as applicable to the concept at the international level (pp. 48–49), and maintaining that the practical ability to claim rights or be in a position to

[4] She merely states that a failure to define the concept would make it impossible to "confer *new* rights on an actor," thereby trapping the status of the legal subject "in the current state of positive law" (p. 41). Yet, this appears to conflict with her own adopted definition, which recognizes that states may create and revoke rights at will (p. 59).

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actually exercise them is not a part of the right to legal personality as she seeks to use it (pp. 44–45).

And, yet, human rights tribunals and treaty law tell us the exact opposite. Indeed, regional human rights tribunals and UN treaty bodies have been explicit that the right to recognition of legal personality encompasses not only the abstract capacity to *hold* rights (which in itself gives protection to no one), but to *exercise and enforce them, personally and directly*, when threatened with deprivation or interference.[5] Treaties on the human rights of women and persons with disabilities are textually explicit on this point,[6] given the legal doctrines of incompetence and guardianship and other legal barriers that have long been used to prevent individuals within such groups from exercising and enforcing their rights in practice. It is also why the right to an effective legal remedy for alleged breaches of rights is foundational to human rights law.[7]

By ignoring the substance of human rights law in her chosen definition, Peters thus diverts attention away from the very issues human rights-based legal capacity analysis requires us to focus on: the practical and effective exercisability of individual rights by all people, without distinction, once granted by positive law. This was surprising, as her Chapter 2 discussion had appeared to be a set-up for targeting precisely these practical enforcement issues in the surveys of individual rights across subfields in Chapters 4–12.

Chapter 2, the most compelling and accessible in the book, indeed takes the reader on a pleasurable journey through the history of legal status theory, from the natural law origins of the individual as subject of law in the sixteenth and seventeenth centuries, through the individual's displacement by the statism, legal positivism, and dualist theories of the eighteenth and nineteenth centuries, back through the re-rise of individualistic theories in the late nineteenth and twentieth centuries. Most significantly, however, it then pairs this theory survey with an overview of *actual legal practice* from 1900 forward, querying whether "these ideas on the international legal status of the individual [have in fact] been reflected in legal practice" (p. 25), a question the analysis answers in the negative.

Chapter 2 thus presents somewhat of a foil for the rest of the book. It has two unmistakable take-aways. The first is that, *regardless* of the changing tides of legal status theory, states have consistently created and conferred individual rights in international law when, where, and how it served particular practical and political

[5] *See, e.g.*, UN Committee on the Rights of Persons with Disabilities, General Comment No. 1, Art. 12: Equal Recognition as a Person Before the Law, paras. 11–14, UN Doc. CRPD/C/GC/1 (May 19, 2014) [hereinafter CRPD] (defining legal capacity as the "ability to hold rights and duties (legal standing) and *to exercise* those rights and duties (legal agency)," and insisting that the two strands "cannot be separated" for the right to be fulfilled); Shtukaturov v. Russia, App. No. 44009/05 (Eur. Ct. H.R. 2008) (deprivation of legal capacity in judicial proceeding to directly and personally represent own interests violated right to fair trial and right to private life); Stanev v. Bulgaria, App. No. 36760/06 (Eur. Ct. H.R. 2012) (individuals placed under guardianship must be able to directly and personally challenge their placement before courts); Bámaca Velásquez v. Guatemala, Judgment, Inter-Am. Ct. H.R. (Ser. C), No. 70, para. 179 (Nov. 25, 2000) (capacity to exercise).

[6] Convention on the Elimination of All Forms of Discrimination Against Women, Art. 15(2), GA Res. 34/180, UN Doc. A/34/180 (*entered into force* Sept. 3, 1981) ("same opportunities to exercise that capacity"); Convention on the Rights of Persons with Disabilities, Art. 12, UN Doc. A/RES/61/106 (*entered into force* May 3, 2008) (guaranteeing safeguards with respect to the "exercise" of legal capacity). *See also* CRPD, General Comment No. 1, *supra* note 5, paras. 11–14.

[7] Louis Henkin, The Age of Rights 1–5 (1990); Universal Declaration of Human Rights, Art. 8, GA Res. 217A(III), UN Doc. A/810 (1948) ("Everyone has the right to an effective remedy"); International Covenant on Civil and Political Rights, Art. 2.3, GA Res. 2200A (XXI), UN Doc. A/6316 (1966), 999 UNTS 171 (*entered into force* Mar. 23, 1976) ("any person whose rights or freedoms as herein recognized are violated shall have an effective remedy."); UN Comm. Econ., Soc. & Cult. Rts, General Comment No. 9: The Domestic Application of the Covenant, UN Doc. E/C.12/1998/24 (Dec. 3, 1998) (finding States Parties required to provide effective legal remedies for all protected rights in the International Covenant on Economic, Social and Cultural Rights (ICESCR) under Article 2 of the Covenant); Report of the Special Rapporteur on Extreme Poverty and Human Rights, Magdalena Sepúlveda Carmona, on Access to Justice for People Living in Poverty, UN Doc. A/67/278 (Aug. 9, 2012).

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needs of the moment. This explains why individual rights are created so unevenly across fields and political process actors, a fact evident in the discussions in Chapters 4–12 but not explained as such. It also explains large variations in the kinds of enforcement mechanisms or institutions that are created across fields and why so many barriers to enforcement and exercisability are erected despite formal rights creation.

The second take-away went to precisely what legal status theory *is* typically used for vis-à-vis individual rights: to impose theory-based *doctrinal barriers* to the direct and personal exercise of certain individual rights, especially by less powerful and privileged actors, once said rights are formally created in law. Thus, just as Peters recounts the usages of object theory in the nineteenth century to disable the capacity of enslaved persons to exercise their individually granted rights to contest their captivity under the 1890 General Act of Brussels (pp. 13–14), so too do theorists today use legal theories of "justiciability" and, most recently, "inflation" to disable rights-holding individuals from legally claiming their recognized rights before distinct enforcement bodies. Peters's repeatedly glowing citations to Judge Antônio Cançado Trindade is striking in this regard for those familiar with his legal opinions and scholarship. His Inter-American Court of Human Rights jurisprudence, for example, is famous for rhetorically extolling the individual legal subjectivity of all human rights in abstract dicta, while basing the court's *ratio decidendi* in traditional doctrinal tropes that bar individuals from directly and personally exercising their autonomously guaranteed economic, social, and cultural rights in regional treaty law.[8]

The long history of human rights is indeed not primarily an effort to revoke broadly framed rights (to life, liberty, dignity, security, due process) once granted. Rather, it is an effort by those powerful and privileged enough to have had their own particularized historical claims to such rights successfully recognized to *draw up the ladder*, seeking to prevent other less powerful claimant groups from applying those same legal rights to their own particularized group-specific experiences of abuse, vulnerability, and injustice.[9] This is especially true of "new" groups (women, racial/ethnic/religious minorities, persons with disabilities, LGBTQI communities) who seek to make visible and address directly the particularized and group-specific ways their own life, dignity, security, due process, and liberty rights are unjustifiably and disproportionately harmed within status quo relations and distributive policy choices.

The theory-based doctrines employed to draw up the human rights ladder have varied across the years. They have shifted from the powerfully engineered biological explanations of innate human difference and group separation of the nineteenth century (i.e., to justify the continued exclusion of women and racial/ethnic minorities from the benefits of "universal" rights),[10] to the manipulated doctrines of "justiciability" in the twentieth century (to preclude legalized

[8] *Compare* Juridical Status and Human Rights of the Child, Advisory Opinion OC-17/02 (Inter-Am. Ct. H.R. Aug. 28, 2001), Concurring Opinion Antônio Cançado Trindade, para. 28 *and* "Five Pensioners" Case v. Peru, Inter-Am. Ct. H.R. (ser. C) No. 98 (Feb. 28, 2003), Concurring Opinion Antônio Cançado Trindade, para. 24 ("The individual is subject *jure suo* of International Law, and to the recognition of the rights which are inherent to him corresponds ineluctably the procedural capacity to vindicate them, at national as well as international levels.") *with "Five Pensioners" Case v. Peru* (finding individual claimants incapable of making direct and personal claims of violation of their economic, social and cultural rights under Article 26 of the American Convention on Human Rights, despite affirming Court's subject matter jurisdiction over said norms). For a critical discussion of the latter case, see Tara J. Melish, *Rethinking the "Less as More" Thesis: Supranational Litigation of Economic, Social and Cultural Rights in the Americas*, 39 N.Y.U. J. INT'L L. & POL. 171 (2006); Tara J. Melish, *The Inter-American Court of Human Rights: Beyond Progressivity*, *in* SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN COMPARATIVE AND INTERNATIONAL LAW 372 (Malcolm Langford ed., 2008).

[9] *See, e.g.*, WIKTOR OSIATYŃSKI, HUMAN RIGHTS AND THEIR LIMITS (2012).

[10] *See, e.g.*, LYNN HUNT, INVENTING HUMAN RIGHTS: A HISTORY 186–96 (2007) (describing nineteenth century biological explanations of exclusion)

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claimmaking to policy protections for economic, social, and cultural rights by the socially marginalized and economically excluded),[11] to the new doctrines of "inflation" in the twenty-first century, which insist that the proliferation of human rights claimmaking to address unjust policy exclusions, disproportionate impacts, and distributive policy choices is "dangerous" to "core" human rights in their alleged "diluting" and "trivializing" effect.

All, however, operate on the same basic logic of zero-sum competition between vying claimant groups. The solution offered to such conflicts is not context-specific balancing and optimization across rights, as human rights law intends, but rather a search for hierarchical status and categorical trumps that ensure winner-take-all outcomes, usually to the most historically privileged. The losers in these games are inevitably those with the least power, who are cut off from human rights claiming on the argument that their claims to more inclusive, equitable, participatory, and justified policymaking are less worthy or even "dangerous."[12]

And it is here that red flags abound as Peters promotes her particularized notion of "global constitutionalism" in the third part of her book (chs. 14–17). In contrast to regional versions of "transformative constitutionalism" more popular among scholars of the global South, which seek to lift up and empower new voices and rights claims as equal and valuable to democratic society,[13] Peters's version has a more exclusionary and hierarchical set of goals. Premised on the idea that there are now "too many" competing individual rights, it claims the proliferation of new claimmaking is weakening the value of older claims. To protect against the "devaluation," "trivialization," and "overstraining" that allegedly comes with such human rights "inflation" (pp. 443–45), these "new" rights, Peters argues, must be "rezoned" downward into a category of "ordinary" rights "below the level of human rights" (p. 444). This lower level of "ordinary" rights (including downward "rezoned" human rights) would then be summarily stripped of specialized enforcement mechanisms, could never prevail over conflicting super-rights, and would be revocable and modifiable at will by states. Their structurally inferior status and vulnerability to complete override by claims to individualized super-rights would thus be globally "constitutionalized." Peters is indeed explicit that the purpose of this hierarchical differentiation is to "reduce the weight" of the "downward rezon [ed]" rights in any balancing or proportionality exercise (pp. 445–47).

By contrast, an elite set of "especially important" human rights would be structurally and permanently protected as part of a hierarchically superior layer of "international constitutional law." This elite set could never be modified or revoked by treaty, would be subject to permanent specialized international enforcement, and would always prevail (regardless of the extent of harms or how many people were adversely impacted) over conflicting "ordinary" rights of others (p. 447). A claim to such rights would thus serve as a categorical trump over "less important" rights, which would no longer have standing or legal recognition. The very idea of human rights "indivisibility" and "universality" would thus be put on the proverbial chopping block.

Peters provides no definitive formula as to how this "constitutional" division would be accomplished, nor who would be competent to do it. She is clear, however, that neither express recognition in a human rights treaty or UN declaration nor authorized interpretation by a competent human rights tribunal or treaty body is sufficient to "save" a human right from downward rezoning in her global scheme. Indeed,

[11] *See, e.g.*, Michael J. Dennis & David P. Stewart, *Justiciability of Economic, Social and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?*, 98 AJIL 462 (2004); Melish, *Rethinking the "Less as More" Thesis*, *supra* note 8.

[12] *See, e.g.*, Aryeh Neier, *Social and Economic Rights: A Critique*, 13(2) HUM. RTS. BRIEF 1 (2006) (arguing recognition of economic, social and cultural rights as human rights is "dangerous" for civil and political rights).

[13] *See* TRANSFORMATIVE CONSTITUTIONALISM IN LATIN AMERICA: THE EMERGENCE OF A NEW *IUS COMMUNE* (Armin Von Bogdandy, Eduardo Ferrer Mac-Gregor, Mariela Morales Antoniazzi, Flavia Piovesan & Ximena Soley eds., 2017).

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rights in the UDHR and ICESCR would explicitly not make her cut. For Peters, these and other rights "seem exaggerated" (p. 443), including the rights to rest, sport, family planning, breastfeeding, sexual rights, indigenous peoples' right to their land, procedural rights, and labor protections (pp. 444–45). Other frequently asserted rights, she says, are "either nitty-gritty or specifications of broader basic rights" that "seem too specific and/or not foundational enough to warrant the human rights label in themselves" (p. 444).

And, yet, what may appear "nitty-gritty" or "non-foundational" for one group of interlocutors (because it has no lived experience with such issues) may for another constitute the most basic barriers to their lives, dignity, security, and well-being. A closer look at most alleged "fringe" claims—from breastfeeding, to sanitation, to work place and education accommodations, to indigenous access rights to land—shows they are neither novel nor trivial; they go to the very core of the dignity and equality issues at stake.[14] The fundamental question is "who decides?" And what are the implications of denying entire groups the ability to contest policies, practices, and behaviors that cause them direct or disproportionate harm, yet which cannot be objectively justified "in a democratic society" under any standard of proportionality or reasonableness review?

Peters is not alone in her inflation criticisms. She joins an increasingly vocal group of prominent academics and civil libertarians, mostly from Europe and North America,[15] who see the primary danger to human rights in the twenty-first century as lying not in the fact that *too few* people can claim their rights in democratic society, but that *too many* can. Like Peters, they argue that a set of "core rights" must be separated from the rest, elevated to a higher status, and protected from balancing against "less important" ones. For most of these scholars, however, "core rights" have a stricter and more determinate meaning than Peters allows: they are the eighteenth century catalogue of classic civil and political liberties. Dominique Clément thus defines "core rights" as limited to freedom of religion, association, assembly, press, speech, due process, and equal treatment.[16] Michael Ignatieff, Aryeh Neier, and James Griffin similarly define them as those basic civil and political liberties necessary for (certain kinds of) human agency,[17] while Brian Grodsky defines them as "'integrity of person' violations, including arbitrary arrest, disappearance, detention, torture and political killing."[18]

These definitions unify in a revealing way: each rejects any kind of rights claim that might be conceived as addressing "social justice" or questions of "redistribution." This includes all economic and social rights (other than individual property rights) and rights that might conflict with the dominance of majority-determined "culture." These issues, such scholars contend, are not genuine "human rights" and hence must be confined exclusively to the realm of

[14] As Pearl Eliadis notes, moreover, the difference is often a simple question of framing. Thus, the sit-ins and protests at lunch counters in the 1960s could be "trivially" reframed as fighting for "the right to have lunch," while the ejection of a black woman from a downtown theatre could be recast as a struggle for "the right to go to the movies." Pearl Eliadis, *Too Many Rights?*, *in* DOMINIQUE CLÉMENT, DEBATING RIGHTS INFLATION IN CANADA: A SOCIOLOGY OF HUMAN RIGHTS 106 (2018).

[15] *See, e.g.*, ERIC POSNER, THE TWILIGHT OF HUMAN RIGHTS LAW 94 (2014); ARYEH NEIER, THE INTERNATIONAL HUMAN RIGHTS MOVEMENT (2012); MICHAEL IGNATIEFF, HUMAN RIGHTS AS POLITICS AND IDOLATRY (2001); DOMINIQUE CLÉMENT, DEBATING RIGHTS INFLATION IN CANADA: A SOCIOLOGY OF HUMAN RIGHTS (2018); Wiktor Osiatyński, *Beyond Rights, in* ABUSE: THE DARK SIDE OF FUNDAMENTAL RIGHTS 309–27 (András Sajo ed., 2006); OSIATYŃSKI, *supra* note 9, at 187–88; CONOR GEARTY, CAN HUMAN RIGHTS SURVIVE? 144 (2006); András Sajo, Illiberal Rights (unpublished paper on file with author); Jacob Mchangama & Guglielmo Verdirame, *The Danger of Human Rights Proliferation*, FOR. AFF. (July 24, 2013); JAMES GRIFFIN, ON HUMAN RIGHTS 187, 192–93 (2008).

[16] CLÉMENT, *supra* note 15, at 24–30.

[17] IGNATIEFF, *supra* note 15, at 89–90; NEIER, *supra* note 15, at 57–59; Neier, *A Critique*, *supra* note 12, at 2; GRIFFIN, *supra* note 15, at 187, 92–93.

[18] Brian Grodsky, *Weighing the Costs of Accountability: The Role of Institutional Incentives in Pursuing Transitional Justice*, 7 J. HUM. RTS. 353, 361 (2008).

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politics, where "compromise" and "negotiation" prevail.[19] Of course, it is precisely in this domain, unchecked by independent rights-based review and legal remedies, where less privileged claimants have *never* had the power to ensure their rights were effectively addressed.

A second group of human rights scholars and practitioners, especially those who work directly with more vulnerable and marginalized communities, thus roundly and emphatically reject attempts by inflation scholars to redefine and limit the human rights catalogue.[20] For this group, claims of rights inflation are not only factually ungrounded and exaggerated (given how difficult it is in practice for human rights claims to be recognized), but serve the more sinister and destructive end of disempowering and disabling the very individuals human rights law depends on for its relevance and effectiveness: those directly impacted by societal injustice, yet without power to have their claims recognized within status quo politics and public policies.

Indeed, the direct disabling of the rights-claiming capacity of these individuals is, for many human rights observers, simply another way to usurp the larger reformatory agenda of human rights law. It helps to transform that law from a governance framework for democratizing state-society-individual relations into one in which selective claimant groups are empowered to use their individualized "liberties" as trumps to block rights-based initiatives aimed at reforming public policies, i.e., making them fairer and more equitable in their distributions of costs and benefits across population subgroups.

The point of human rights law, in this view, is not to "freeze" in time what constitutes unjustifiable or abusive conduct. Rather, it is to provide individuals and communities (especially those who have the least political power) with a set of legal resources to be in a practical position to challenge arbitrary, disproportionate, or otherwise unjustified interferences with their dignity and well-being, whenever and however they occur.[21] It is precisely through this iterative process of diverse claimmaking (geographically, temporally, and circumstantially), advanced through the prism of affirmative state duty and justifiable conduct, that human rights content is rendered in the first place.

From this perspective, hierarchies and categorical trumps have little place in human rights law. Rather, that law is about "balance," "proportionality," "optimization," and "voice," ensuring that public authorities properly weigh the impacts of distributional choices on the enjoyment of human rights by "everyone" in public policymaking (with special attention to the most vulnerable). Where arbitrary or disparate impacts are felt by particular groups and those impacts cannot be justified under rights-based proportionality or reasonableness review standards, those groups can demand policy-based relief and guarantees against repetition as part of democratic society.

Such approaches, to be sure, pose direct challenges to "old" ways of doing human rights. Yet, those old ways, with their narrow priority on certain classes of political claimants, absolutist constructions, and demands of state abstention and restraint, are increasingly seen as handmaidens of rising inequality and social marginalization. For growing numbers across the globe, human rights have correspondingly become not a language of liberation, equality, empowerment, and inclusion, but of exclusion, elitism, and lack of institutional concern for the needs of the people. Authoritarian demagogues, of both right- and left-wing variants, pick up on this, amplify it, and use it to bludgeon human rights still further.[22]

[19] *See, e.g.,* Neier, *A Critique*, *supra* note 12, at 2; CLÉMENT, *supra* note 15, at 49–50.

[20] *See* Nathalie Des Rosiers, *The Right Investment in Rights*, *in* DEBATING RIGHTS INFLATION, *supra* note 15, at 79; Eliadis, *Too Many Rights?*, *supra* note 14, at 97; PEARL ELIADIS, SPEAKING OUT ON HUMAN RIGHTS: DEBATING CANADA'S HUMAN RIGHTS SYSTEM (2014); Melish, *Rethinking the "Less as More" Thesis*, *supra* note 8 (rejecting the claim that limiting rights to a narrow set of civil and political liberties can enhance human rights protections for most communities).

[21] *See, e.g.*, Tara J. Melish, *Maximum Feasible Participation of the Poor: New Governance, New Accountability, and a 21st Century War on the Sources of Poverty*, 13 YALE HUM. RTS. & DEV. L.J. 1, 72–110 (2010).

[22] *See, e.g.*, Ruth Okediji, *Populism and Human Rights in Sub-Saharan Africa*, *in* HUMAN RIGHTS IN A TIME OF POPULISM: CHALLENGES AND RESPONSES

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Within this context, globalist projects like the one advocated by Peters carry little hope of strengthening human rights. Rather, by removing the capacity of the most marginal and vulnerable to challenge their policy-based exclusions from society, they threaten to deepen already deep global divides, further undermining the very promise that post-war human rights indivisibility, universality, social duty, rights balancing, and proportionality and reasonableness review held out for strengthening inclusive democratic governance and hence preventing the global catastrophes that led to the post-war human rights catalogue in the first place.

In short, there is nothing *beyond human rights* in Peters's book. To the contrary, the book joins a growing chorus of internationalist literature that misdiagnoses national-level push-back pressures to absolutized notions and selective enforcement of individual rights. Claiming the need to "save" human rights from inflation, this growing literature insists not that human rights must be made more accessible to and effective for those without historic access to them, but rather more limited, elitist, and absolutist. Unless a different narrative of the interplay between individual rights and state sovereignty is told in international law, one which sees them not as existential Grundnorm rivals in a potential zero-sum game, but as necessary partners in the consolidation of localized rights-based participatory democratic governance, we will indeed have moved "beyond" human rights.

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The Crime of Aggression, Humanity, and the Soldier. By Tom Dannenbaum. New York, Cambridge University Press, 2018. Pp. xxvii, 352. Index.

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The rights of soldiers in war have not been at the forefront of contemporary international law. Although the early laws of war focused on basic protections for wounded soldiers,[1] the twentieth century saw the emphasis shifting to the protection of civilians, in line with the rise of aerial bombardment and, later on, asymmetric warfare.[2] Accordingly, while international humanitarian law (IHL) has advanced significantly in recent decades in terms of the protections it affords to civilians, its protection of soldiers remains relatively basic. Significantly, the wholesale killing of soldiers is still tolerated by IHL, and is widely presumed to be part and parcel of the notion of military necessity.[3] The advent of the prohibition on the use of force in the mid-twentieth century (*jus ad bellum*) did not change this basic premise: the notion that *all* combatants—whether belonging to the aggressor or to the defender—remain fair game, endures as the predominant position in international law.[4] The paucity of international law concerning soldiers' rights has another, less explored manifestation: arguably, when states force their soldiers to kill other human beings in unlawful wars, they transform them into perpetrators, and deeply compromise their morality. In this context, also, international law remains aloof. Although international human rights law—including the right to conscientious objection[5]—has developed immensely in recent times, it has yet to extend

(Gerald L. Neuman ed., forthcoming 2019); Jason Horowitz, *In Matteo Salvini's Italy, Good is Bad and "Do-Gooders" Are the Worst*, N.Y. TIMES (Apr. 13, 2019).

[1] Robert Kolb, *The Main Epochs of Modern International Humanitarian Law Since 1864 and Their Related Dominant Legal Constructions*, *in* SEARCHING FOR A "PRINCIPLE OF HUMANITY" IN INTERNATIONAL HUMANITARIAN LAW 23, 38–39 (Kjeitl Mujezinović Larsen, Camilla Guldahl Cooper & Gro Nystuen eds., 2012).

[2] *See* Theodor Meron, *The Humanization of Humanitarian Law*, 94 AJIL 239 (2000).

[3] *Compare* Yishai Beer, *Humanity Considerations Cannot Reduce War's Hazards Alone: Revitalizing the Concept of Military Necessity*, 26 EUR. J. INT'L L. 801 (2016).

[4] *See* Gabriella Blum, *The Dispensable Lives of Soldiers*, 2 J. LEG. ANALYSIS 69, 117 (2010).

[5] UN Human Rights Commission, General Comment 22 (48) (Art. 18), para. 11, UN Doc. CCPR/C/21/Rev.1/Add.4 (Sept. 27, 1993).