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Essay

Secondary Human Rights Law

Monica Hakimi†

I. INTRODUCTION

In recent years, the United States has appeared before four different treaty bodies to defend its human rights record.[1] The process is part of the human rights enforcement structure: each of the major universal treaties has an expert body that reviews and comments on compliance reports that states must periodically submit.[2] What's striking about the treaty bodies' dialogues with the United States is not that they criticized it or disagreed with it on the content of certain substantive rules. (That was all expected.) It's the extent to which the two sides talked past each other. Each presumed a different set of secondary rules—rules governing how and by whom human rights law may be made, applied, and enforced[3]—so their arguments on substance appeared irresolvable.

Here is a fairly typical example: The committee that oversees the International Covenant on Civil and Political Rights (ICCPR) interprets that instrument to contain a rule on *refoulement*.[4] The committee also understands its interpretations to be, in some way, authoritative.[5] During the report-and-comment process, the United States contested both points. It argued, first, that the ICCPR has no rule on *refoulement*, and, second, that the ICCPR committee has no authority to establish one.[6] Substance and process were intertwined. The disagreement on whether the ICCPR regulates *refoulement* could not be resolved without defining the nature of the lawmaking process—

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1. For related documents, see Office of the High Comm'r for Human Rights (Treaty Bodies Database), http://tb.ohchr.org/default.aspx (enter "United States of America" for Country) (last visited Mar. 31, 2009).

2. *See, e.g.*, International Covenant on Civil and Political Rights art. 40, Dec. 16, 1966, S. EXEC. DOC. E, 95-2 (1978), 999 U.N.T.S. 171 [hereinafter ICCPR].

3. On secondary rules, see H.L.A. HART, THE CONCEPT OF LAW 79-99 (2d ed. 1994).

4. U.N. Human Rights Comm., *General Comment No. 20*, ¶ 9 (1992), *reprinted in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1, at 30 (July 29, 1994) [hereinafter ICCPR General Comment No. 20].

5. *See, e.g.*, U.N. Human Rights Comm., *Concluding Observations of the Human Rights Committee: United States of America*, ¶ 10, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006); *infra* note 20 and accompanying text.

6. *See* U.N. Human Rights Comm., *Comments by the Government of the United States of America on the Concluding Observations of the Human Rights Committee*, at 8-11, U.N. Doc. CCPR/C/USA/CO/3/ Rev.1/Add.1 (Feb. 12, 2008).

and specifically what weight (if any) to give the ICCPR committee's prescriptive claims.

The U.S. approach might be dismissed as idiosyncratic. In fact, it reflects a deep tension in human rights law and illuminates the lack of consensus on many of the applicable secondary rules. The problem initially appears resolvable by reference to the secondary rules that govern other areas of international law.[7] At its core, the human rights system is structured much like other international regimes. States are principal actors. They sometimes prescribe law by treaty. The treaties contain substantive rules of conduct and establish international monitoring bodies. Beyond that core, however, the structure of the human rights system has taken particular shape. States—the traditional prescribers and enforcers of international law—designed a system that is weak. Treaty-based rules of conduct are typically ambiguous[8] and sometimes inoperative.[9] And treaty monitoring bodies lack formal authority to "harden" those rules through conclusive interpretations or adjudications of wrongdoing. That framework—soft substantive rules with decisionmaking authority largely in state hands—discords with the system's operational norms. In practice, treaty bodies and other nonstate actors claim considerable authority to specify and enforce treaty-based rules. The breadth of that disconnect between the formal framework established by states and the informal, operative norms sows confusion on which secondary rules govern.

The lack of consensus on the applicable secondary rules strains the human rights system. First, it inhibits the system's capacity to specify substantive rules of conduct. Without defining the processes for making law and distinguishing it from mere aspirations, the system cannot resolve what the law requires. Second, the lack of consensus breeds dissidence within the system, as international actors regularly invoke and enforce their version of law without acknowledging conflicting versions and without resolution on which version is authoritative. This Essay calls attention to that problem and seeks to initiate a conversation on how best to mitigate it. Throughout, I draw on the jurisprudential insights of my mentor and friend, Professor Michael Reisman. For those and many other insights, I honor him with this Essay.

Two stage-setting notes: First, I focus in this Essay on the secondary rules in human rights law. Human rights law may not be the only international regime with specialized secondary rules,[10] but it probably is unique in the degree to which those rules are contested. Second, the legal process on human rights is extraordinarily complex. In this Essay, I paint with a broad brush, erasing some nuance in order to address the system as a whole. Because I

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7. On the difficulties of applying in human rights law the same secondary rules that govern other areas of international law, see Bruno Simma, *International Human Rights and General International Law: A Comparative Analysis*, *in* IV-2 COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW 153 (1993).

8. *See infra* Section II.A.

9. *See infra* Section II.B.

10. *See, e.g.*, Daniel Bodansky, *Does One Need To Be an International Lawyer To Be an International Environmental Lawyer?*, 100 AM. SOC'Y INT'L L. PROC. 303 (2006) (arguing that international environmental law has specialized secondary rules).

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focus on the universal human rights system, I exclude from discussion the various regional ones.[11]

II. WHICH SECONDARY RULES?

A. *Rules for Lawmaking*

Professor Reisman has theorized that, to make law, decisionmakers must establish communal expectations along three axes: (1) on the policy content of a norm; (2) that those who prescribe it have the authority to do so; and (3) that it will be enforced.[12] States sometimes establish those expectations—and therefore make law—by treaty. Yet human rights treaties typically establish only *baseline* expectations on their policy content because they define their rules in amorphous or contextually variable terms. For example, the ICCPR prohibits "arbitrary" detentions without defining arbitrariness.[13] The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) requires states to take "appropriate" measures to suppress trafficking of women, but it does not specify what measures are appropriate.[14]

Because treaty-based rules are often open-ended, they require further prescription to obtain robust, shared meanings. States occasionally do that when they interpret, apply, or enforce the rules.[15] In practice, however, those functions are largely performed by an amalgamation of nonstate actors that technically lack prescriptive authority. For ease of reference, I call these actors—treaty bodies, NGOs, scholars, and U.N. experts and officials—"human rights actors." There are important differences among them, but, as a group, they are extraordinarily active in trying to harden the human rights system. That entails a prescriptive function because it requires giving content to otherwise amorphous treaty-based rules.

So might human rights actors have *some* prescriptive authority in the form of interpretation or specification?[16] The answer at one extreme is that they do not, unless states expressly delegate it to them.[17] (In the universal system, this means they do not.) According to this approach, human rights law is like other international law that is made by state consent. If states consent only to amorphous rules, so be it. Those rules must be specified through

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11. The regional system in Europe is especially distinct. For an overview, see D.J. HARRIS ET AL., LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2006).

12. W. Michael Reisman, *International Lawmaking: A Process of Communication*, 75 AM. SOC'Y INT'L L. PROC. 101, 108 (1981).

13. ICCPR, *supra* note 2, art. 9.

14. Convention on the Elimination of All Forms of Discrimination Against Women art. 6, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

15. *See, e.g.*, G.A. Res. 61/143, U.N. Doc. A/RES/61/143 (Jan. 30, 2007) (specifying state obligations on violence against women); U.S. Dep't of State, Human Rights Country Reports, http://www.state.gov/g/drl/rls/hrrpt (applying treaty-based norms to assess other states' human rights practices) (last visited Mar. 31, 2009).

16. This authority may appear insubstantial, but for amorphous treaty-based rules it is often the entire game.

17. *See, e.g.*, U.N. Human Rights Comm., *Summary Record of the 2380th Meeting*, ¶ 8, U.N. Doc. CCPR/C/SR.2380 (July 27, 2006) ("[O]nly the parties to a treaty were empowered to give a binding interpretation of its provisions unless the treaty provided otherwise."); Andrew T. Guzman & Jennifer Landsidle, *The Myth of International Delegation*, 96 CAL. L. REV. 1693, 1706-07 (2008).

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subsequent state action. As a practical matter, this approach frustrates efforts to establish robust rules of conduct because many states have not and will not consent to them. The "unpleasant implication," in Martti Koskenniemi's words, is that "people have human rights only so far as actually accepted by states."[18]

At the opposite extreme, human rights actors claim considerable prescriptive authority, irrespective of state consent. Those who take this approach are usually more subtle. Human rights actors claim interpretive (rather than prescriptive) authority; they then adopt aggressive interpretations and treat those interpretations as dispositive.[19] The ICCPR committee has claimed that states must accept its interpretive authority and that reservations incompatible with its interpretations could be severed.[20] Human rights actors adopt this same approach when citing each other's interpretations as law.[21] For instance, treaty texts are ambiguous on the extent to which they prohibit corporal punishment.[22] Many states practice and accept certain forms of corporal punishment,[23] but various human rights actors assert that it is prohibited absolutely.[24] They cite each other's assertions as evidence of law.[25]

Those two approaches define the extremes, but they reveal a lack of consensus on the process for making human rights law. Each approach purports to shield lawmaking from large groups of relevant actors. The state-consent position sidelines human rights actors. Many of these actors are deeply committed to advancing human rights; they will not accept the law established by states unless they believe it satisfies their substantive interests.[26] The opposite position tries to circumvent recalcitrant states, and

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18. Martti Koskenniemi, *The Pull of the Mainstream*, 88 MICH. L. REV. 1946, 1951 (1990).

19. A prevalent but watered down variant of this approach asserts that treaty-body pronouncements are in some way authoritative. *See, e.g.*, Michael O'Flaherty, *The Concluding Observations of United Nations Human Rights Treaty Bodies*, 6 HUM. RTS. L. REV. 27, 32-37 (2006) (collecting views of high-profile human rights actors).

20. U.N. Human Rights Comm., *General Comment No. 24*, ¶¶ 11, 18, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Nov. 4, 1994).

21. For an early criticism of this "myopic and incestuous" trend in the human rights literature, see Philip Alston, *Making Space for New Human Rights: The Case of the Right to Development*, 1 HARV. HUM. RTS. Y.B. 3, 8-11 (1988).

22. For relevant treaty texts, see ICCPR, *supra* note 2, art. 7; Convention on the Rights of the Child arts. 19, 37, Nov. 20, 1989, 1577 U.N.T.S. 3; Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment arts. 1, 16, Dec. 10, 1984, S. TREATY DOC. NO. 100-20, 1465 U.N.T.S. 85. For a more detailed discussion, see NIGEL S. RODLEY, THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW 309-24 (2d ed. 1999).

23. *See, e.g.*, Comm. on the Rights of the Child, *General Comment No. 8*, U.N. Doc. CRC/C/GC/8 (Mar. 2, 2007) [hereinafter CRC Comment No. 8] (noting widespread practice and acceptance).

24. *See* ICCPR General Comment No. 20, *supra* note 4, ¶ 5; CRC Comment No. 8, *supra* note 23; *see also* Karima Bennoune, *"A Practice Which Debases Everyone Involved": Corporal Punishment Under International Law*, *in* 20 ANS CONSACRÉS À LA RÉALISATION D'UNE IDÉE 203 (1997).

25. *See, e.g.*, Amnesty Int'l, *Corporal Punishment*, *in* FAIR TRIALS MANUAL, *available at* http://www.amnestyusa.org/international_justice/fair_trials/manual/25.html (last visited Mar. 30, 2009); Letter from Alice Farmer, Aryeh Neier Fellow, Human Rights Watch, to Delmer C. Stamps, President, Jackson Pub. Sch. Dist. Bd. of Trs. (Mar. 26, 2008), *available at* http://www.hrw.org/en/news/2008/03/26/do-not-reinstate-corporal-punishment-schools.

26. *See* W. Michael Reisman, *On the Causes of Uncertainty and Volatility in International Law*, *in* THE SHIFTING ALLOCATION OF AUTHORITY IN INTERNATIONAL LAW 33, 36-42 (Tomer Broude & Yuval Shany eds., 2008).

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sometimes the reactionary groups that operate within them. This approach, too, is unsustainable. States are unlikely to treat as law the norms advanced by human rights actors if states believe the norms are illegitimate,[27] or face domestic pressure not to comply.[28]

B. *Rules for Law-Finding*

Separately, there is confusion on the rules for finding human rights law. At first glance, these may appear the same as the rules for making law. Once the prescriptive process is defined, what comes out of it presumably is law. But in the human rights system, some of that output is decidedly not law. In other words, decisionmakers may choose *not* to establish operative prescriptions, even when they use the prescriptive process and communicate in legal form.[29] That is nothing new. Human rights treaties go through an accepted prescriptive process but are widely understood to be part aspirational.[30] The difficulty is identifying which provisions constitute law, and which reflect aspirations.

Returning to Professor Reisman's framework, law is accompanied by expectations of authority and control—that those who prescribed the norms had authority to do so, and that the norms will be enforced.[31] Law thus is distinguishable from aspirations by the signals of authority and control that attach to it. Those signals are muddied in the human rights system. First, authority signals sometimes attach to mere aspirations. To use the example from above, treaties contain aspirations that appear authoritative because expressed in the form of law. Second, control signals are often weak or inconsistent. The system has long tolerated high levels of noncompliance, which means that legally operative norms are poorly enforced. The kicker is that aspirations are sometimes also enforced. (One *modus operandi* among human rights actors is to enforce aspirations as if they were law.) I elaborate on the enforcement process in the next Section. At this point, I underscore that, because authority and control signals are muddied, norms that are intended to be aspirational may appear authoritative or controlling, and legally operative norms may appear noncontrolling. That complicates efforts to distinguish between the two. Some interpret the muddied signals to mean that most human-rights-related declarations are law; others draw the opposite conclusion.[32] No shared rules exist to resolve the issue.

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27. *Id.* On the importance on perceived legitimacy in inducing compliance, see TOM R. TYLER, WHY PEOPLE OBEY THE LAW 161-78 (1990).

28. *See* Simma, *supra* note 7, at 167.

29. *See* Reisman, *supra* note 26, at 43.

30. *See, e.g.*, Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 457 (2000); Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 89 (2005).

31. *See* Reisman, *supra* note 26, at 34-35 ("Legal communications are distinguished from the daily bombardment of 'you-shoulds' and 'you-oughts' by the symbols of authority and commitments of control that attend to them."); Reisman, *supra* note 12 and accompanying text.

32. This has long been a problem for the International Covenant on Economic, Social and Cultural Rights. *See* International Covenant on Economic, Social and Cultural Rights art. 2(1), Dec. 16, 1966, 993 U.N.T.S. 3. Some actors assert that the Covenant's provisions constitute law, but others

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C. *Rules for Law-Enforcing*

Finally, there is disagreement on the rules governing enforcement—on the appropriate processes for adjudicating and then sanctioning instances of wrongdoing. Many of the classic international mechanisms for enforcement (e.g., treaty suspension and tit-for-tat countermeasures) are premised on reciprocity.[33] But human rights law is not structured around a reciprocal exchange of rights and obligations. States have only erratic incentive to police each other's conduct. And even when they do, the proper remedy for a violation is not to allow other states to also violate rights.

The human rights system has responded by developing its own enforcement mechanisms. The mechanisms under the universal treaties are the report-and-comment process and, for some parties to some treaties, the consideration of individual petitions. Neither is binding. Treaty bodies review state conduct but lack authority to decide conclusively that a state has violated the law or to penalize it if it has. Yet here again treaty bodies claim authority—this time, enforcement authority—beyond what is specifically delegated to them.[34] For example, most have made the report-and-comment process more robust by inviting NGOs to submit shadow reports on state practices,[35] and by developing follow-up procedures that pressure states to comply with their comments.[36]

Outside the treaty process, international actors have developed more informal enforcement tools: fact-finding and naming-and-shaming devices, the suspension of assistance programs, support for local activist groups, suits in domestic courts, and so on. These tools often sting more than the ones envisioned in the treaty texts, but they are disjointedly employed.

The question is whether all of those tools are legitimate. Even if they are, might they become illegitimate because applied inconsistently or by particular actors? Some may find these questions curious. They expect human rights rules to be enforced whenever possible and through whatever means available. Yet international law has long regulated enforcement jurisdiction. Many states assert that enforcement in the human rights system has become

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understand them to be mostly aspirational. *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 AM. J. INT'L L. 462, 465 (2004).

33. *See* Vienna Convention on the Law of Treaties art. 60, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (on suspension); Int'l Law Comm'n, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission to the General Assembly*, 56 U.N. GAOR Supp. (No. 10) at 43, U.N. Doc. A/56/10 (2001), *reprinted in* [2001] 2 Y.B. Int'l L. Comm'n pt. 2, at 20, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (on countermeasures).

34. *See* Andrew T. Guzman, *International Tribunals: A Rational Choice Analysis*, 157 U. PA. L. REV. 171, 229-35 (2008); Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 343-45 (1997).

35. *See, e.g.*, OFFICE OF UNITED NATIONS HIGH COMM'R FOR HUMAN RIGHTS, THE UNITED NATIONS HUMAN RIGHTS TREATY SYSTEM: AN INTRODUCTION TO THE CORE HUMAN RIGHTS TREATIES AND THE TREATY BODIES (2005), *available at* http://www2.ohchr.org/english/bodies/docs/OHCHR-FactSheet30.pdf.

36. *See, e.g.*, U.N. Human Rights Comm., *Rules of Procedure of the Human Rights Committee*, R. 101, U.N. Doc. CCPR/C/3/Rev.8 (Sept. 22, 2005).

overly "confrontational" or "politicized."[37] They argue for a more "cooperative" enforcement model.[38] Moreover, some try to channel enforcement to formal bodies that specialize in human rights but are relatively ineffective.[39] My point is not that these efforts are right or wrong, but that they reflect discontent on the operative enforcement process in human rights law.

III. ASSESSING THE DISCORDANCE

On some level, the discordance on the applicable secondary rules is inevitable. International actors have different visions for and levels of commitment to the human rights system, and they seek secondary rules that satisfy their policy preferences. Many states desire only a weak human rights system so reject secondary rules that make it more robust.[40] By contrast, human rights actors typically demand meaningful substantive standards with enforcement teeth. They insist on secondary rules that satisfy that demand. Because substance and process are intertwined, each actor has a short-term interest in assuming secondary rules that bolster its immediate policy preferences.

But the discordance also takes a toll. First, it cultivates uncertainty on the content of many substantive rules. Such uncertainty is fairly common. For example, is corporal punishment prohibited absolutely?[41] What, if anything, must states do to displace religious practices that undermine women's rights?[42] These questions will continue to yield inconsistent answers, so long as the governing secondary rules themselves are indeterminate. Without resolving how law may be made or distinguished from surrounding aspirations, the system cannot resolve what the law requires.[43]

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37. *See, e.g.*, World Conference on Human Rights, Apr. 19-May 7, 1993, *The Cairo Declaration on Human Rights in Islam*, at 3, U.N. Doc. A/CONF.157/PC/62/Add.18 (June 9, 1993) [hereinafter Cairo Declaration]; Comm. Against Torture, *Comments by China*, at 2, U.N. Doc. CAT/C/CHN/CO/4/Add.1 (Dec. 17, 2008); *see also* Felice D. Gaer, *A Voice Not an Echo: Universal Periodic Review and the UN Treaty Body System*, 7 HUM. RTS. L. REV. 109, 128-33 (2007) (reviewing impetus for cooperative approach in U.N. Human Rights Council).

38. See sources cited *supra* note 37.

39. *See, e.g.*, U.N. SCOR, 62d Sess., 5619th mtg., U.N. Doc. S/PV.5619 (Jan. 12, 2007) (debate and vote rejecting draft resolution on human rights in Myanmar).

40. For example, proposals to establish a "World Court of Human Rights" have circulated for decades, but states have not pursued them. *See* Jochen von Bernstorff, *The Changing Fortunes of the Universal Declaration of Human Rights: Genesis and Symbolic Dimensions of the Turn to Rights in International Law*, 19 EUR. J. INT'L L. 903, 921 (2008).

41. *See supra* notes 22-25 and accompanying text.

42. *Compare* CEDAW, *supra* note 14, arts. 2(f), 5(a) (requiring states to address such practices), *and* U.N. Human Rights Comm., *General Comment No. 28*, ¶ 5, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000) (reiterating that obligation), *with* Comm. on the Elimination of Discrimination Against Women, *Declarations, Reservations, Objections and Notifications of Withdrawal of Reservations Relating to the Convention on the Elimination of All Forms of Discrimination Against Women*, U.N. Doc. CEDAW/SP/2006/2 (Apr. 10, 2006) (collecting reservations designed to preserve such practices), *and* Org. of the Islamic Conference, *Final Communiqué of the Eleventh Session of the Islamic Summit Conference*, ¶¶ 105, 112, Doc. No. OIC/SUMMIT-11/2008/FC/Final (Mar. 13-14, 2008) [hereinafter OIC 2008 Communiqué] (reaffirming "the right of States to adhere to their religious, social, and cultural specificities," and calling for a "Covenant on Women's Right in Islam").

43. *See* HART, *supra* note 3, at 92-93.

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Uncertainty on the substantive content of law is undesirable, but it is inherent in any system in which law is fuzzy or unsettled. The second and more troubling problem in the human rights system is that international actors often fail to acknowledge the extent to which the law is, in fact, indeterminate. Once they presume an applicable set of secondary rules, they apply those rules to derive what they consider to be law. Conflicting versions of law—those derived by applying different secondary rules—are not acknowledged and engaged, but rather dismissed as mere posturing. That problem is then exacerbated at the stage of application and enforcement. Decisionmakers inevitably invoke only one version of law.[44] To actors that believe in conflicting versions, the one invoked appears wrong or illegitimate. This is especially likely where the decisionmaker lacks formal enforcement authority or uses enforcement tools that themselves are considered illegitimate.

In the long term, that dynamic is likely to breed dissidence within the human rights system. States are unlikely to comply with new standards that they reject outright.[45] Actors and audiences that believe those standards constitute law may find that reality unsettling and eventually may lose faith in the efficacy of law to advance human rights.[46] Over and over again, they observe states disregard (without repercussion) what they understand to be law. Paradoxically, some may respond by engaging in the very conduct that caused their disillusionment in the first place. If states disregard law, then it is of little consequence, so they may as well invoke and enforce norms irrespective of whether the norms have legal footing.

For a variety reasons, states may also become dissatisfied. Anecdotal evidence indicates that some states believe the system has become overly politicized or illegitimate—that the norms being invoked and enforced are not legal norms and improperly reflect interest-group capture.[47] Other states may perceive the system to be unbalanced because insufficiently accommodating of competing interests.[48] Still others may contest the apparent double standard in application and enforcement.[49] Regardless of their reason, states that believe the system no longer fulfills their interests will have little reason to maintain it and may agitate against it.[50]

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44. On the problem of international fora applying different versions of law, see W. Michael Reisman, *The Democratization of Contemporary International Law-Making Processes and the Differentiation of Their Application*, *in* DEVELOPMENTS OF INTERNATIONAL LAW IN TREATY MAKING 15, 24-29 (Rüdiger Wolfrum & Volker Röben eds., 2005).

45. *See* Simma, *supra* note 7, at 167.

46. *See* Reisman, *supra* note 44, at 29.

47. For example, the Organization of the Islamic Conference has signaled that, in its view, many human rights norms have been captured by Western interests and inadequately reflect Islamic interests. *See, e.g.*, OIC 2008 Communiqué, *supra* note 42, ¶¶ 105-13; Cairo Declaration, *supra* note 37.

48. For example, several Western democracies have recently challenged or evaded interpretations advanced by human rights actors in order to satisfy counterterrorism interests. *See* Monica Hakimi, *International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide*, 33 YALE J. INT'L L. 369, 395-407 (2008).

49. On the problem of inconsistent enforcement, see Christof Heyns & Frans Viljoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level*, 23 HUM. RTS. Q. 483, 488-89 (2001).

50. Reisman, *supra* note 26, at 36.

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IV. CONCLUSION

The discordance on the applicable secondary rules strains the human rights system. This Essay calls attention to that problem and urges international actors and law scholars to respond. That requires different things in different contexts. At the very least, it requires taking the communicative process seriously—acknowledging opposing views, having meaningful dialogues to establish shared expectations, and at times compromising one's immediate policy preferences in favor of systemic coherence. That will not be easy, and it will not resolve all human-rights-related disputes. But if the processes for making, finding, and enforcing human rights law degenerate, so too may the human rights system itself.

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