

RESEARCH ARTICLE

Legal doctrine as human rights ‘practice’

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Abstract

‘Practical’ approaches to human rights hold that analysis of legal human rights must attend to the practice(s) of international human rights law and that the nature and justification of international human rights is best determined by attending to their role(s) in international human rights law’s system of normative practices, not analogous moral rights outside it. These core tenets plausibly explain the apparent normativity of international human rights law despite controversies about the status of many ‘rights’ in the ‘International Bill of Rights’. Yet plausible practical approaches require clear and compelling accounts of which practices qualify as human rights practices. Most existing accounts view ‘responses’ to claims made in the name of the international legal community as key to the identification of human rights. Activities by domestic governments and non-governmental actors qualify as relevant practices. While understandable, these ‘responsive’ accounts of practice create more problems than they solve. This work accordingly promotes a largely unexplored account on which ‘human rights practices’ are strictly defined by international legal doctrine. This ‘doctrinal’ account of practice is most likely to maintain practical approaches to human rights’ potential benefits without generating an unduly expansive rights register or adopting strong theoretical commitments about the nature of law.

Keywords: Human rights; international human rights law; international legal doctrine; international normative practices; legal doctrine

I. Introduction

International human rights law (IHRL) makes claims on actors within the international legal system and purports to be ‘normative’ in the action-guiding sense.¹ Regardless of whether IHRL constitutes a ‘legal’ or objectively normative system, its purported normativity is clear. Human rights (HR) claims are demands for actions. IHRL requires that

¹The meaning of ‘normativity’ is contestable. Yet the *Routledge Encyclopedia of Philosophy* entry and most textbooks agree that one form demands certain acts. Leading accounts of IHRL’s normativity suggest that it provides ‘reasons for action’: Charles R Beitz, *The Idea of Human Rights* (Oxford University Press, Oxford, 2009); Joseph Raz, ‘Human Rights Without Foundations’, in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press, Oxford, 2010) 321. ‘Reasons’ language helps clarify IHRL’s purported ‘normativity’, but little turns on my own use of reasons language, which other practical approaches omit. On action-guidingness, see also Cristián Rettig, ‘The Claimability Condition: Rights as Action-Guiding Standards’ (2020) 51(2) *Journal of Social Philosophy* 322.

actors fulfil some claims to be in good normative standing within its system. Compliance with the system's rules further establishes the system's (at least) apparent normativity. Subjects view themselves as receiving normative guidance from the IHRL system and follow its demands: they are not merely motivated by IHRL, but believe it provides standards to which they should conform.² This persists even when the 'rights' undergirding demands for action to be good international legal actors lack moral analogues whose violation is considered ethically 'bad' or 'wrong.' IHRL's apparent normativity accordingly does not depend only on external moral norms.

This insight is central to a leading view in contemporary philosophy of HR, the 'practical' approach.³ That approach (or, better, series of approaches as the basic tenets admit variety) is characterized first by a belief that analysis of legal (especially international) HR must attend to and analyse IHRL's practice(s).⁴ Proponents are interested in the ways in which the IHRL system can be understood as providing normative guidance to actors within it.⁵ They then hold that IHRL's nature and justification are best determined by attending to the role(s) its 'rights' play in its system of normative practices, not analogous moral rights outside it. Contrary to once-dominant 'orthodox' approaches, IHRL practices can be justified even if they do not recognize and attempt to further

²The extent of and reasons for compliance with those norms remain contested. 'Monist' states that directly incorporate international law into their domestic laws view international norms as 'binding', although many 'dualist' states that do not directly incorporate international laws also show some signs of viewing those laws as normative by, for example, continuing to describe the rules as legal, appealing to those rules to justify their international conduct, using them as interpretative guides to domestic laws, or issuing reports on their compliance with those rules. Janne E Nijman and André Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law* (Oxford University Press, Oxford, 2009) provide an overview of monism/dualism. Notably, IHRL performs an explanatory normative role even if states only follow norms out of self-interest (Andrew T Guzman, 'A Compliance-Based Theory of International Law' (2002) 90(8) *California Law Review* 1823) or power differences (Martti Koskeniemi, 'Human Rights Mainstreaming as a Strategy for Institutional Power' (2010) 6(1) *Humanity* 47). The normativity is simply not moral in nature on those accounts, but instead practical, political, and so on. One can more easily argue that IHRL only provides motivating reasons for action in such cases. Yet actors view themselves as subject to standards for being a good IHRL actor even there. Recent shocks to the international legal system have not changed this much. Many – for example, attempts to leave international criminal law, trade, or global/transnational public health agreements – can be read as states leaving the relevant domain, not challenging whether it provides them with reasons qua actors within it.

³For example, Beitz (n 1); Raz (n 1); Samantha Besson, 'The Law in Human Rights Theory' (2013) 7(1) *Journal for Human Rights* 120; Allen Buchanan, *The Heart of Human Rights* (Oxford University Press, Oxford, 2013); Cristina Lafont, *Global Governance and Human Rights* (Royal Van Gorcum, Assen, 2012); Patrick Macklem, *The Sovereignty of Human Rights* (Oxford University Press, Oxford, 2015); Jonathan Wolff, *The Human Right to Health* (WW Norton, New York, 2012). Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (2nd ed) (Princeton University Press, Princeton, NJ, 1996) provides a proto-practical account that predates any 'practical turn'.

⁴The descriptions in this paragraph draw on the sources in (n 3) and collections focused on the relationship between practical and non-practical approaches to human rights, like Rowan Cruft, S Matthew Liao and Massimo Renzo (eds), *Philosophical Foundations of Human Rights* (Oxford University Press, Oxford, 2015); Reidar Maliks and Johan Karlsson Schaffer (eds), *Moral and Political Conceptions of Human Rights: Implications for Theory and Practice* (Cambridge University Press, Cambridge, 2017); and Adam Etinson (ed), *Human Rights: Moral or Political?* (Oxford University Press, Oxford, 2018).

⁵See (n 1) on 'reasons' language. The point here is that IHRL at least purports to make demands on its members and can thus be understood as normative and the validity of this normativity need not rely on moral rights.

specific moral rights.⁶ These tenets plausibly explain IHRL's apparent normativity despite the controversial status of many of its recognized 'rights' in non-legal theories.⁷ This should favour practical approaches. A theory is better for being able to explain actions taken in its name. If practical approaches' core claims are true, practical approaches can also secure other benefits for legal theory, including a means of analysing IHRL without positing controversial connections between law and ethics.⁸

Unfortunately, plausible practical approaches require a clear and compelling account of *which* practices qualify as *human rights* practices and many practical approaches adopt overly inclusive views on which practices are relevant to the question of what qualifies as an international HR. HR may be an 'emergent practice',⁹ but it must have at least core features to secure practical approaches' potential benefits. It is difficult to even assess whether 'IHRL' constitutes a normative domain severable from the moral one without clarity on what constitutes IHRL's practice. With few exceptions,¹⁰ existing accounts fail to address how the IHRL's purported and apparent normativity rests on the way it operates as a law-like, if not legal, system with a doctrinal understanding of relevant norms. More expansive views of practice that look beyond doctrine and view things like non-governmental organizations' (NGOs) efforts as constitutive of HR norms are understandable but create more problems than they solve. Limited enforcement and rampant non-compliance raise questions about whether IHRL can operate as a legal system.¹¹ An NGO's activities evidence its normativity, supporting accounts of practice that incorporate broader arrays of responsive activities. Yet non-doctrinal approaches elide distinctions between what HR are and how we should further them, leaving us unable to use practices to plausibly identify genuine responses. They either specify an implausibly large number of HR practices or must appeal to an independent moral standard to identify genuine HR, giving up on practical approaches' most basic commitment.

A variant in which 'HR practices' are strictly defined by legal doctrine remains under-examined. The possibility was quickly discarded in classic practical texts, which counted a broader range of responses to purported HR norms, 'responsive activities', among relevant practices.¹² But those who adopt practical approaches should recognize international HR's claim to 'legal' normativity and look to doctrine for uniquely relevant practices to identify HR.¹³ Such a 'doctrinal' account can identify a plausibly circumspect yet normative domain of HR without appealing to external moral standards and an internal 'morality' of IHRL that allows one to judge the IHRL system and claims within it,¹⁴ maximizing practical approaches' purported benefits. 'Human rights' identification should be institutionally dependent, not responsiveness dependent. The IHRL system's own 'legal' institutions most appropriately and clearly specify HR therein.

⁶Famous orthodox positions include James Nickel, *Making Sense of Human Rights*, (2nd ed) (University of California Press, Berkeley, 2007) and James Griffin, *On Human Rights* (Oxford University Press, Oxford, 2008).

⁷For example, Charles Fried, 'Positive Rights', in *Right and Wrong* (Harvard University Press, Cambridge, MA, 1978) 108.

⁸Debates between natural law theorists and positivists are orthogonal to my aims for reasons below.

⁹Beitz (n 1) xii.

¹⁰Allen Buchanan and Gopal Sreenivasan, 'Taking International Legality Seriously', in Etinson (n 4) 211 is the clearest example, but Buchanan appears to go beyond legal doctrine alone in other works.

¹¹Beitz (n 1) admits non-doctrinal practices for this reason.

¹²Ibid and Buchanan (n 3) both begin with positive legal practices but then expand their accounts of practice. See also Macklem (n 3). Even these scholars do not defend the positivist methods they employ.

¹³Compare Buchanan and Sreenivasan (n 10).

¹⁴For 'internal morality' language, see Macklem (n 3). I detail arguments for these claims below.

The following defends the doctrinal account by explaining how alternatives fail to fully secure practical approaches' purported benefits or create larger issues. My argument is conditional: if a practical approach is plausible, it is most plausible where it adopts a doctrinal view of practice. I accordingly conditionally adopt practical approaches' denial of strong claims about the necessary connection of law and morality. My arguments are thus unlikely to convince natural law theorists. I seek to examine the IHRL system's status as a normative order and bases of normative action within it, not the 'nature' of law. My arguments can succeed if the IHRL system operates as a normative system distinct from the moral one,¹⁵ but I am less interested in whether IHRL objectively provides reasons for action in the sense of telling people what to do when all things are considered than in how IHRL purports to be normative and operates according to an internal logic indexed to standards for being a good actor within a system. While one can debate whether the IHRL system provides normative reasons to its actors in the all things considered sense, the same is true of other legal systems and other (plausibly) normative domains (e.g. etiquette, epistemology).¹⁶ If, as I argue, IHRL provides standards of compliance that people view as reason-giving, it as 'normative' as those domains. If the basis of the distinction between IHRL's 'normativity' and moral normativity is law-like, claims that the rules of IHRL are not 'real' laws are less forceful, providing secondary contributions to related debates concerning international law's 'legal' status and the nature of laws. Yet such findings will be incidental to my purpose: determining what could serve as 'practice' in a unique order capable of achieving practical approaches' purported/potential salutary ends. I contend that looking to positive international 'law' to identify HR provides the best alternative to moral views.

¹⁵Whether there is a legal or political normativity distinct from the moral one remains contested. This debate is not confined to the natural law–positive law dichotomy. See Jonathan Leader Maynard and Alex Worsnip, 'Is There a Distinctively Political Normativity?' (2018) 128 *Ethics* 756. The way the IHRL system operates as if it has a unique normativity suffices even without uniquely 'legal' or 'political' normativity. This also avoids the charge that my view relies on an implausible view of 'law'. HLA Hart, *The Concept of Law* (2nd ed) (Oxford University Press, Oxford, 1961/1974) 10 is often taken to be a canonical version of the view that international law is not positive law, although the precise nature of Hart's account there is the subject of decades of debate. I grant that international and domestic systems differ in important ways and may not be directly analogous. This does not undermine the sense in which the international system purports to provide reasons for actions for actors within it and could be understood as having been viewed as doing so by actors within it. The chapter in Hart is often understood as also arguing that international law lacks a 'rule of recognition' necessary in *legal* systems. Yet this system operates as a normative order even if it does not create 'law' analogous to municipal law. See the final substantive section of this work for more on this issue.

¹⁶On areas that provide 'standard-relative' norms that do not contribute to all things considered judgements, see Susanne Mantel, 'Do Epistemic Reasons Bear on the Ought Simpliciter' (2019) 29 *Philosophical Issues* 214, 217 (also noting that their existence is accepted by many notable philosophers, including John Broome), although she adopts a more radical view on differences between 'norms'. See (n 1) on the meaning of normativity and related issues. The conditions in Hart (n 15) may be conditions for distinguishing law from other normative orders, like religion and morality. If so, there can be an IHRL doctrine-based normative order without an international legal system. Discussions of law as a 'modal kind' in Hart's debates with Lon Fuller and Ronald Dworkin are relevant here – for example, see John Gardner, 'The Supposed Formality of the Rule of Law' in *Law as Leap of Faith: Essays on Law in General* (Oxford University Press, Oxford, 2014) 195. (Gardner elsewhere distinguishes legal doctrine (or 'artefacts') from legal 'practice' ('The Legality of Law' (2004) 7(2) *Ratio Juris* 168). This may be appropriate for full accounts of law simpliciter. Yet doctrine purports to provide normative guidance for action and so constitutes the source of normative guidance in the system.)

II. Definitions/limitations

For present purposes, ‘practice’ refers to ‘a connected set of actions in which actors view themselves as subject to shared reasons’. This definition serves the functions intended by advocates of practical approaches below (e.g. commitments to shared actions, normativity) without begging questions by adopting definitions loaded towards existing views or my alternative.¹⁷ ‘IHL’ refers to the system of laws created by and authoritative within the UN-based legal order. The International Bill of Rights is my paradigm case, but other documents produced by UN organs are also representative.¹⁸ This definition does not entail a stand on whether ‘IHL’ properly so called also or only includes African, European or Inter-American jurisprudence. I simply take UN-based law as exemplary. Whether its ‘practice’ creates ‘real law’ is outside my scope of inquiry.

These definitions raise related challenges that complicate, rather than undermine, my project. First, one may argue that ‘practice’ so-defined is at odds with its intended role in practical approaches. Second, one may argue that doctrinal IHL lacks features necessary to meet *any* plausible definition of a practice: UN-based IHL in particular is a mere collection of contractually endorsed rules, not a genuine ‘practice’ understood as observable patterns of behavior.¹⁹

Complete doctrinal accounts must address these challenges in depth, but the present inquiry is important regardless of whether it is a practical approach properly so-called or whether UN law best exemplifies IHL. It is admittedly difficult to define ‘practice’ in a way that avoids begging questions and yet identifies something that can fulfil the basic functions purportedly played by ‘practices’ in practical approaches. But my minimalist definition is at least neutral between competing practical approaches and I detail how doctrinal IHL so defined serves the intended functions of ‘practices’ in practical approaches below. If, in turn, my definition’s neutrality misses important aspects of ‘practice’, my doctrinal position may not be a proper ‘practical approach’, but would still be a useful middle position between practical approaches and moral accounts.²⁰ I admittedly differ from Charles Beitz and many other proponents of practical approaches in focusing on legal, rather than political, phenomena.²¹ While other practical approaches also claim fundamental interests in ‘legality’, I am happy to be read as providing a ‘legal approach’ rather than a practical approach, so long as it is understood that I aim to present the best alternative to moral approaches and my concerns are with extant practical approaches. Viewing me as a (largely friendly) challenger to practical approaches creates little conceptual loss.²²

¹⁷The next two sections outline these functions.

¹⁸This Bill includes Universal Declaration of Human Rights, UN Doc A/810, (1948) [UDHR]; International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3, art 12 [ICESCR]; and International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171. Other laws are below.

¹⁹I thank an excellent peer reviewer for this point.

²⁰Ibid.

²¹Beitz (n 1) 40. See also Alain Zysset, ‘Charles Beitz’s Idea of Human Rights and the Limits of Law’ (2020) 25(1) *Critical Review of Social and Political Philosophy* 87–106. Buchanan and Sreenivasan (n 10) present a genuinely legal approach. Nuances in (n 10 and n 12) complicate this concern, but do not fully address it.

²²This fits the move towards legal normativity in, for example, Buchanan and Sreenivasan (n 10) but raises attendant challenges discussed in (n 15). I address further challenges regarding the existence of a genuine ‘system’ below.

Regarding IHRL's ability to fulfil *any* definition of a 'practice', I argue below that IHRL establishes a normative order that at least serves the intended functions of a 'practice'. Empirical data suggest IHRL is a messy 'practice' even by its own (normative) standards,²³ yet IHRL provides standards that are distinct from and comparable with regional and domestic ones and actors view themselves as jointly bound by them. Its 'normativity' is observable even if (merely) contractual. If people then flout its standards, this is also true of other normative domains.

Finally, I remain agnostic about whether the UN-based system *best* exemplifies IHRL.²⁴ UN-based law is just a good case study. It is the least controversial example of a genuinely 'international', rather than 'regional' or 'transnational', system meant to promote HR through at least *law-like* rules. It is also one of the oldest candidate systems and produced a substantial amount of purported legal doctrine, responsive activities, and scholarship that can be used to complete and evaluate HR theories. If the UN-based system can fruitfully be understood in isolation from other purported 'IHRL' systems, our case study can further discussion of whether there can be a unique IHRL system. If there is substantial overlap between the 'laws' of the UN-based and other candidate systems, the former may be representative. Examining use of 'human rights' therein would then offer general insight into the plausibility of doctrinal views.²⁵ Given comparative regional HR's nascent status,²⁶ determinative statements on potential overlap are premature. Yet, even if these systems differ radically, the UN-based system remains an important, severable, closed domain of use of HR language. Comparing use in UN-based and regional systems can clarify what HR means as a transnational legal phenomenon. I thus cite works with different approaches to the relevant 'practice' and 'doctrine' below, and examine how each addresses the present task. However, I start by highlighting the *prima facie* normative UN system.

Accordingly, my methodology does not beg the question of whether my doctrinal practical approach is persuasive. From an implementation and interpretation perspective, UN-based IHRL is admittedly less developed than regional HR law.²⁷ Some even question whether the Vienna Convention on the Law of Treaties [VCLT], the widely recognized source of a treaty-based system for public international law simpliciter, let alone IHRL, applies to IHRL.²⁸ The latter statement is likely too strong, but EU law or some other

²³Beitz, Buchanan et al. note this much. I cite further support below. But for helpful overviews of these empirical issues, see entries in Anthea Roberts *et al.*, *Comparative International Law* (Oxford University Press, Oxford, 2018); Daniel Moeckli *et al.*, *The Human Rights Covenants at 50: Their Past, Present, and Future* (Oxford University Press, Oxford, 2018).

²⁴Compare the strong argument that PAs should focus on regional, rather than global, law in Alain Zysset, *The ECHR and Human Rights Theory: Reconciling the Moral and Political Conceptions* (Routledge, London, 2016) with Samantha Besson, 'The *Erga Omnes* Effect of Judgments of the European Court of Human Rights – What's in a Name?' in Samantha Besson (ed), *The European Protocol of Rights After Protocol 14* (Sculthess, Zurich, 2011) 125, 128. Besson notes that EU law is formally international law but also has a constitutional character absent from many international legal documents. The larger article highlights challenges for doctrinal approaches discussed below.

²⁵Cf. Julio César Montero, 'Human Rights, International Human Rights, and Sovereign Political Authority: A Draft Model for Understanding Contemporary Human Rights' (2014) 7(4) *Ethics & Global Politics* 143.

²⁶Başak Çalı *et al.*, 'Comparative Regional Human Rights Regimes: Defining a Research Agenda' (2018) 16(1) *International Journal of Constitutional Law* 128.

²⁷I again thank a reviewer for this point.

²⁸Besson (n 24). I follow George Letsas, 'Strasbourg's Interpretive Ethics: Lessons for the International Lawyer' (2010) 21(3) *European Journal of International Law* 509, 512; Richard Gardiner, *Treaty*

system may provide a better source for a doctrinal view. My primary purpose here is to demonstrate how a doctrinal account could fit the basic desires of any theory of HR that rejects moral accounts. UN-based law is useful for this explanatory purpose, despite its challenges. Analysis of it vindicates doctrinal views.

III. Core claims of practical approaches

While practical approaches differ, plausible practical approaches must be consistent with the approaches' central claims. The first is that HR are constituted by their role in practices.²⁹ Beitz states that the system is a political project with 'distinctive purposes, forms of action, and culture'.³⁰ We should understand HR in light of their role in that unique normative system:³¹ the provision of what are at least taken to be reasons for actors within it.³² Theories must be 'accountable' to that 'practice'.³³ Other proponents similarly focus on practice.³⁴ The second is that the rights' justification does not depend on their correspondence to phenomena in other domains. Contra any 'mirroring view', legal rights need not 'reflect' moral ones.³⁵ Whether they justifiably constrain action can be a function of the system itself.³⁶ IHRL could be justified in a way that justifies its content or HR could be justified as requirements of an acceptable system. Beitz describes this using 'reasons': HR is a *sui generis* practice that can provide *sui generis* reasons for action.³⁷ But the central point does not rely on reasons-based metaethics. The IHRL system at least purports to provide normative guidance to actors within it and may be justified in doing so.

The third central claim is that the content of the class of HR is constrained by the role they are supposed to (presumably justifiably) play in the system. The discursive role of rights defines the nature and explains the content of existing rights.³⁸ It can also influence the content of legal rights.³⁹ For instance, Beitz argues that whether HR actually provide reasons and what their content should be are separate questions from what they are, but maintains that the questions are related and an account of the nature of rights should constrain the content as the content must be suited to its expected political role.⁴⁰ According to Beitz, any purported HR should thus establish a standard whose violation could plausibly warrant third-party (international) concern, if not interference, in states' exercise of their jurisdiction.⁴¹ Each claim should be evaluated in light of that role.

Interpretation (2nd ed.) (Oxford University Press, Oxford, 2015) 13ff; Daniel Moeckli, 'Interpretation of the ICESCR: Between Morality and State Consent', in Moeckli et al. (n 23) 52ff in seeing it as applying to all international treaties, including international HR treaties.

²⁹Beitz (n 1).

³⁰Ibid 13.

³¹Ibid 68.

³²Ibid 8.

³³Ibid vii.

³⁴For example, Buchanan (n 3); Macklem (n 3).

³⁵Buchanan, *ibid*.

³⁶Beitz (n 1), in a view shared by other practical theorists in (n 3), including Buchanan (n 3).

³⁷Beitz (n 1). Also recall Samantha Besson, 'Human Rights *qua* Normative Practice: *Sui Generis* or Legal?' (2010) 1(1) *Transnational Legal Theory* 127, a contemporaneous review of Beitz focused partly on our issue.

³⁸Beitz (n 1) 99.

³⁹Beitz (n 1) 99–100.

⁴⁰Beitz (n 1) 104–6.

⁴¹Beitz (n 1) 128.

Recognized rights should be interpreted in light of competing interpretations' ability to provide plausible standards. Yet this is not the only available tack. Another model focused on HR's doctrinal grounding in dignity in IHRL could judge every claim by asking whether it is plausibly connected to the protection of dignity in IHRL-bound states.⁴² The fourth, related, claim is that HR can be evaluated in light of their intended role in a HR system. Something must fill that role and fit into the structure of larger normative practices, avoiding flat contradictions with existing practices' content/justification, to qualify as a justifiable right in the system.⁴³

IV. The need to identify relevant 'practices'

Successful practical approaches should explain IHRL's apparent normativity and allow analysis without positing controversial connections between law and morality. The impetus for minimal theoretical commitments motivating practical approaches should also lead to a practical approach that does not require resolution of debates about the nature and scope of moral rights. PAs must subscribe to a 'separation thesis' holding that legal rights need not reflect moral rights and the legal domain need not reflect the moral one, which is inconsistent with the view that the justification for or content of international HR is necessarily moral. Yet saying that international rights need not correspond to or gain primary justification from moral rights is consistent with legal and moral rights connecting in other ways. Concepts such as 'rights' can share features across domains. Ethical norms can even play strong roles in justifying international legal rights. Saying that an international right need not correspond with a moral right does not entail that the legal right cannot share features with or further moral rights.⁴⁴ Practical approaches' underlying separation thesis, then, need not be a 'strong' thesis holding that legal and moral domains are wholly unconnected. Indeed, use of 'rights' language in IHRL should bear *some* resemblance to use in other domains.

Practical approaches' weaker separation thesis holding that legal rights need not depend on moral rights allows HR to serve multiple purposes.⁴⁵ According to Beitz, no justification for 'rights' applies to all seemingly normatively salient international uses of 'human rights'.⁴⁶ Pluralistically justified rights can then do various things: if they are not strictly designed to fulfil moral rights, they can help to realize the 'good' and other moral phenomena. Being able to evaluate each claim individually, rather than justifying them all under one banner, creates a manageable subject for stakeholders. It is also functionally valuable and explains why difficulties identifying IHRL's core feature that justifies its

⁴²Dignity's foundational role in IHRL is well established. For a classic discussion that is critical of the concept of dignity but defends one of its legal roles, see Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19(4) *European Journal of International Law* 655. For a recent theoretical discussion with an overview of competing views, see Pablo Gilabert, *Human Dignity and Human Rights* (Oxford University Press, Oxford, 2019).

⁴³This is implicit in practical texts in (n 3 and 4). Each debates how to do so.

⁴⁴For example, Michael Da Silva, 'Correlativity and the Case Against a Common Presumption About the Structure of Rights' (2020) 54 *Journal of Value Inquiry* 289, which does not directly defend a practical approach.

⁴⁵This dependence thesis has multiple interpretations: see Kristen Hessler, 'Theory, Politics, and Practice: Methodological Pluralism in the Philosophy of Rights', in Malik and Schaffer (n 4). This interpretation reflects a standard reading of Beitz, Buchanan et al.

⁴⁶Beitz (n 1) 198.

roster of rights need not undermine the system.⁴⁷ Where leveraging international HR and the IHRL system *has* fulfilled multiple ends, being able to justify the system despite non-correspondence between its ‘rights’ and moral rights at least appears valuable.

These facts again help explain why IHRL actors view the IHRL as a source of normative guidance even without a clear understanding of whether many international HR have moral analogues. IHRL’s apparent normativity may even be less mysterious on practical approaches: while IHRL can be accused of relying on undue moral universalism, the only moral universal that needs to exist to justify the IHRL system is a principle under which state parties should live up to their commitments. All states are signatories to at least one treaty recognizing international HR.⁴⁸ Viewing them as normatively bound to at least respect those rights is less contentious than viewing them as necessarily bound by universal norms instantiated in those laws simply by virtue of the laws’ moral necessity. Practical approaches can avoid charges of undue moral universalism while explaining why states must follow the rules. The fact that states agreed to these rules then evidences buy-in to them. While some sign treaties due to external pressures, the commitments retain normative force without an account of the pressures’ offsetting normativity.

Successful practical approaches will also provide a means of analysing claims. While some practical approaches are criticized for failing to provide an external standard for evaluating HR practices,⁴⁹ practical approaches need not be normatively inert. On classical practical approaches, practices can be judged for their consistency as a normative order.⁵⁰ This helps to identify the purpose(s) of the international legal order one can use to test its *moral* value. Emphasis on IHRL’s ‘internal morality’ is sometimes treated as an acknowledgement that the rights need not perfectly mirror existing ethical rights,⁵¹ and sometimes as a call for attending to the systems’ claimed moral justifications on their own terms.⁵² Both approaches provide a means of judging claims and can justify change: if a recognized ‘right’ does not fulfil HR’s purported role in a system, it should be removed. Applying this framework requires identifying IHRL’s purpose(s), but this is possible. For instance, Patrick Macklem argues that international HR remedy ‘pathologies’ of a global system divided into nation-states, so valid claims should address identifiable pathologies, which he identifies.⁵³ A right is thus justified if it addresses a pathology. HR systems can then be evaluated for whether their purported justification/s is/are worth promoting. So, if remedying pathologies is not morally valuable, systems cannot be justified by their remedial abilities.

⁴⁷Fried (n 7); Onora O’Neill, *Towards Justice and Virtue* (Cambridge University Press, Cambridge, 1996). Gopal Sreenivasan can thus critique moral right to health claims in ‘A Human Right to Health? Some Inconclusive Scepticism’ (2012) 86(1) *Proceedings of the Aristotelian Society, Supplementary Volumes* 239 while accepting legal recognition thereof in accordance with Buchanan and Sreenivasan (n 10).

⁴⁸Indeed, all states are signatories to at least one recognizing a specific ‘positive’ right, the right to health; Stephen P Marks ‘The Emergence and Scope of the Human Right to Health’, in Jose M Zuniga, Stephen P Marks and Lawrence O Gostin (eds), *Advancing the Human Right to Health* (Oxford University Press, Oxford, 2013) 20.

⁴⁹For example, Johan Karlsson Schaffer, ‘The Point of the Practice of Human Rights: International Concern or Domestic Empowerment’, in Maliks and Schaffer (n 4) 37.

⁵⁰See also Moeckli (n 23) 66-71 on ‘coherence’, an interpretive legitimacy requirement alongside ‘adherence’ (viz., use of principles the system views as legitimate), and ‘transparency’.

⁵¹Buchanan (n 3).

⁵²Macklem (n 3). Beitz (n 1) 201-9 also discussed pathologies.

⁵³Ibid.

Difficulties identifying moral rights to, for instance, health or a paid vacation cannot alone render international HR thereto implausible in practical approaches. IHRL recognizes both HR and can justifiably do so without corresponding moral rights with the same content.⁵⁴ Yet those who find either implausible international HR need not accept their justification. One can examine the system to see whether recognition of such rights performs a necessary normative role therein.

The right to health could, for instance, be necessary to fulfil the IHRL's stated aim of preserving dignity: health-related entitlements can be necessary for dignity and appeals to dignity may help to specify a plausible scope for a right to healthcare, if not a right to health.⁵⁵ At least healthcare rights can thus be circumscribed enough to guide action within the system: states must secure entitlements necessary for a dignified existence and doctrinal decisions concerning the right should be evaluated in light of that goal. The right could also be justified to remedy the international legal system's negative impacts on health.⁵⁶ If either dignity or remedying injustices is sufficient to justify IHRL systems, one could plausibly justify the right to health and an international system that recognizes it. Making similar arguments for the right to a paid vacation is much more difficult, so practical approaches secure tools for critiquing recognized international HR. While practical approaches likely cannot justify systems that fulfil improper ends, they can avoid reductive claims that modern IHRL is unjustifiable because it recognizes implausibly bourgeois 'rights'.⁵⁷

These considerations can help in evaluating new HR claims. For instance, LGBTIQ+ rights claims appeared before wide domestic or international legal recognition.⁵⁸ Practical approaches can evaluate those claims in light of whether recognition is necessary or warranted under IHRL's 'internal logic'. While the sanguine may view that issue as doctrinally moot, the same tool can be used to evaluate other claims.⁵⁹ For instance, international recognition of a right to water is incomplete despite strong advocacy.⁶⁰ Attending to whether such a right is necessary for dignity or remedying injustice, and

⁵⁴For a 'practical' defence of ICESCR (n 18)'s right to health, see Wolff (n 3). For an overview of criticisms of the right to a paid vacation in UDHR (n 18), see Jeff King, *Judging Social Rights* (Cambridge University Press, Cambridge, 2012) 21 n 8, citing the critique in Maurice Cranston, *What are Human Rights?* (Bodley Head, London, 1969).

⁵⁵Wolff (n 3). Michael Da Silva, 'The International Right to Health Care: A Legal and Moral Defense' (2018) 39(3) *Michigan Journal of International Law* 343 is a healthcare-specific variant.

⁵⁶Macklem (n 3).

⁵⁷See (n 54).

⁵⁸This goes without saying, but see Dennis Altman and Jonathan Symons, *Queer Wars: The New Global Polarization Over Gay Rights* (Polity Press, Cambridge, 2016) (also noting continuing controversy on their status).

⁵⁹Doctrinal recognition rests largely on United Nations Human Rights Council, *Protection against violence and discrimination based on sexual orientation and gender identity*, HRC Res 32/2, UNHRC, 33rd Sess, UN Doc A/HRC/RES/32/2 (2016), which post-dates *ibid*. Doctrinal concerns likely still apply, as noted in a review of *ibid*, Anthony J Langlois, 'Queer Rights?' (2017) 71(3) *Australian Journal of International Affairs* 241, which also explicitly highlights how the question of whether these rights are human rights remains open in Beitz, (n 1).

⁶⁰The purported right to water likely exists on specifications of doctrinalism that admit 'soft' law into the relevant practice. Consider e.g., United Nations Committee on Economic, Social and Cultural Rights, *General Comment 15: The Right to Water*, 29th Sess, UN Doc E/C.12/2002/11, 2002); United Nations General Assembly, *The human right to water and sanitation*, GA Res 64/292, UNGA, 64th Sess, UN Doc A/RES/64/292 (2010). But the claimed 'right' is not explicitly included in a treaty or recognized as custom, so its status remains contestable.

whether appealing to HR norms can specify a right to water with plausible correlative duties, is a valuable exercise even in the absence of moral water rights.

Practical approaches cannot have these purported benefits without an adequate account of what qualifies as ‘practice’; accounts of practice should specify international HR in a way that secures such benefits. A successful account should thus explain why various HR practices are plausibly normative without relying on moral rights for their justification and provide a means of identifying licit and illicit uses of ‘rights’-based language within the system that tracks basic understandings of when rights language is appropriate. HR practices should thus be plausibly justifiable as sources of normative guidance and licit use of rights language without relying on corresponding moral rights. Their domain will also provide data for identifying an ‘internal morality’ that allows one to judge existing laws without collapsing into defences thereof or adopting even more implausible theses.⁶¹ It should accordingly be specifiable so we can identify HR and judge new HR claims and attempts to realize them. The specified rights should be circumscribed enough to allow us to analyse them and avoid claims that the practical approach is simply providing normative justification to all purported claims and defending the status quo. It should be possible to distinguish genuine and purported HR practices and to use genuine HR practices that are identified as a guide to analysing the IHRL system and new HR claims.

V. The problem with ‘practice’ in many practical approaches

Practical approaches often go beyond legal doctrine in their accounts of relevant practice(s) in ways that create problems for the general approach. For instance, while Beitz appeals to the need to account for ‘doctrine’,⁶² like the Universal Declaration of Human Rights and core international treaties,⁶³ he later becomes sceptical about whether IHRL can provide an account of ‘human rights’: HR’s *content* cannot be fixed by IHRL sources, necessitating an account of practice that includes actual responses to international claims by foreign *and* non-governmental institutional actors.⁶⁴ All responsive activities plausibly qualify. Allen Buchanan, in turn, stresses the need for a legally sensitive practical approach,⁶⁵ but similarly thinks doctrinal *and* institutional aspects of IHRL must be part of the relevant practice.⁶⁶ Buchanan initially limits analysis to the UN-based IHRL, ‘the institutions that support it’, and some regional entities,⁶⁷ ‘the heart of modern’ practice.⁶⁸ He also clearly considers IHRL documents as ‘the most important’ conceptual-discursive component of the ‘practice’.⁶⁹ Yet Buchanan elsewhere discusses ‘practice’ and IHRL as distinct phenomena, and appeals to NGOs and non-legal actors to specify what HR *are*.⁷⁰ His ‘practice’ then includes law, law creation processes, legal monitoring, *and*

⁶¹See (nn 14, 50–52), surrounding.

⁶²Beitz (n 1) 48, 88.

⁶³Ibid, Ch 2, s 5. References to authoritative interpretations then appear in case studies in Ch 7.

⁶⁴Ibid vii–viii.

⁶⁵Buchanan and Sreenivasan (n 10).

⁶⁶Buchanan (n 3).

⁶⁷Ibid 6.

⁶⁸Ibid 274.

⁶⁹Ibid 6.

⁷⁰Ibid 34.

acts by NGOs and domestic actors and courts.⁷¹ In each case, 'practice' goes beyond strict legal doctrine.

While I understand the impetus to account for other phenomena, I propose that Buchanan's 'heart' of HR practice should be the *uniquely* relevant domain of practice for identifying HR.⁷² Focusing on actual responses to HR claims as indicative of what could qualify as relevant practice makes sense. Practical theorists claim that IHRL is a normative order, but the claimed normativity often seems mysterious. Actual responses to HR law provide evidence that actors within the system view the system as providing them with reasons and they act accordingly. This is a kind of normativity (if also an apparent one). Excluding responses by NGOs and other legally relevant actors from the domain of practices that identify HR can seem odd if they also evidence IHRL's normativity. However, admitting responsive activities into the domain of practices one must address when identifying rights in the IHRL system comes at the expense of practical approaches' ability to secure their purported benefits, creating more problems than it solves.

Response-based views of practice elide distinctions between what HR are and what we do to realize them. For instance, even if NGO activities are 'legal' means of realizing HR, it is unclear why they should help identify those rights without an account that identifies the rights and the means of realizing them. Such an identification cannot withstand scrutiny. The possibility of different answers to 'What is a human right?' and 'How can we best implement it?' alone suggests that broad accounts of practice actually discuss multiple, severable practices. Even if responsive activities provide the best answer to the latter question, identifying both is implausible.

This issue is not just a function of HR practice being emergent. It stems from fundamental differences between elements of relevant domains. If practice includes all possible actions made in the name of international HR, interpretations by different actors are equally authoritative: actions taken pursuant to those interpretations speak to HR's nature. It is difficult to articulate which acts properly define HR in a non-ad hoc manner without a prior understanding of the 'rights' to which they are supposed to respond. Combining doctrinal and non-doctrinal accounts may best answer the question 'How do we evaluate HR claims?' all things considered. But those seeking to establish HR elements in a claim should appeal to doctrinally recognized rights.

Attempts to apply non-doctrinal accounts of practice raise other problems. Notably, the lack of a clear rule for determining what qualifies as a genuine responsive activity on such accounts risks broadening the relevant domain too widely, presenting a 'too much normativity' problem. Admitting all responsive activities implausibly provides all actions with some normative valence. On Beitz's account, whereby 'practice' picks out things one should consider morally serious, all actions gain a *moral* valence. Such specifications of practice raise questions about whether we can identify 'neutral' HR. If all responses are of normative concern by definition and qualify as parts of 'practice' that all theorists must address, it becomes very difficult to distinguish rights, rights we should care about morally, and rights the law should instantiate.⁷³

⁷¹Ibid 5–6. A reviewer suggests that there is no single IHRL 'practice' and this explains any confusion. There may even be a wide number of morally important IHRL-related 'practices.' Yet we still must determine which are important for which ends. Doctrinal IHRL provides the best account of what constitutes 'practice' for the purpose of identifying international HR. I return to this point from another perspective below.

⁷²Insofar as the 'heart' in Buchanan (n 3) is the relevant 'practice,' this text is a friendly amendment.

⁷³My own distinction relies on a positivist view whereby the legal system defines which purported norms are 'legal' and properly understood as normative within the system. No such distinction is available for

Buchanan is more circumspect in the institutional responses admitted into his 'practice',⁷⁴ but faces similar problems. Buchanan moves beyond his 'core' and admits domestic entity and NGO actions. UN-based IHRL does not directly incorporate those actors into the domain of responsive activities that identify, rather than further, HR. Existing legal systems may not admit everyone Buchanan seeks to include in the domain of actors who specify international HR. Another legal rule for defining constitutive practices must then capture the broader range of actions. It is unclear how we can identify one outside existing legal systems. Buchanan could avoid these concerns by focusing on his 'core', yet granting that the core alone identifies rights within the system also grants that the doctrinal view has more merit than Buchanan will grant.⁷⁵

The existence of 'too much' normativity and the failure to distinguish HR from actions taken in their names then admits an implausibly broad range of actions into the domain of HR practice(s). Beitz may be right to suggest that these activities provide the methods of IHRL implementation necessary for an active practice beyond mere words on a page,⁷⁶ but if all activities taken pursuant to HR claims qualify as 'practice', the category is problematically broad. Worries that practical approaches violate an 'is-ought' distinction are forceful when we admit all responses that 'are' into our discussion of what 'should be'. This creates too much normativity at a theoretical level. It also makes it difficult to distinguish genuine and purported HR claims and generates an implausible number of the former, violating normative and linguistic standards. Contentious and even problematic foreign policies and NGO activities are non-imaginary.

Many actions taken in the name of HR, and thus purporting to qualify as HR practices on responsive accounts, are even morally worrisome.⁷⁷ It is not merely the case that the work of LGBTIQ+ advocates plausibly qualifies as furthering HR prior to their legal implementation, which is not itself worrisome. Advocates for rights to a basic income and other controversial social policies may qualify. This makes it difficult to distinguish genuine and purported HR claims. It is difficult to say whether basic income is an HR without an authority on the matter. More problematically, organizations seeking to further contrary ends can all qualify as HR actors so long as their claims engage in a network of related practices. One needs a principle that explains why advocates on differing sides of controversial issues, such as female genital mutilation, do not each qualify as HR actors under the relevant framework. If opposing actors purport to be furthering rights and their 'rights' claims deny that the other rights exist, rather than producing a 'conflict of rights', some principle must identify who is making the valid rights claim. That principle is lacking where all activities made in the name of IHRL are HR activities. Many such responses then differ from legally recognized HR 'practices' in ways that challenge any search for a common internal morality.

While IHRL recognizes that contestable 'rights' and injustices in the name of IHRL are also non-imaginary,⁷⁸ doctrine at least provides a clear means of identifying real HR,

separating valid and invalid responses if phenomena other than strictly 'positive' international 'legal' phenomena are part of the system's rules for identifying normative practices. Adopting a mode of distinction then amounts to adopting doctrinalism.

⁷⁴Buchanan (n 3) vii–viii, 5–6, 34, 274.

⁷⁵Note, for example, how he goes beyond mere doctrine in the passages in the previous note.

⁷⁶Beitz (n 1) 42.

⁷⁷Recall, for example, Koskenniemi (n 2). Uses of the responsibility to protect doctrine or governmental and non-governmental economic development programs in low-income countries also raise this concern.

⁷⁸Ibid.

limiting problematic cases, and there are ways of challenging decisions in the system. Separating HR and responses thus also avoids making all problematic responses part of HR 'practice'. This alone provides reason to favour a doctrinal account of practice. Further reasons appear below.

Practical theorists could avoid some concerns by appealing to *justifiable* responsive activities as the relevant 'practice', as Beitz seems to do.⁷⁹ Yet this gives up on the possibility of a non-moral account of 'practice'. HR cannot be justified by their role in a practice alone if we grant that a substantial number of actions therein are unjustified. Another moral phenomenon is necessary to distinguish purported and real 'rights' within it. HR then substantially relies on a pre-existing moral account of what a right can be. The concern is not that IHRL must be 'grounded' in some moral right⁸⁰ – that could be consistent with the weak separation thesis above. Rather, the concern is that identifying HR relies on a pre-existing moral account of what can *be* a right. It is at best difficult to see how this could be consistent with practical approaches' central tenets. Even if one renders this view consistent with denying the mirroring view, it seemingly abandons an equally fundamental aspect of practical approaches: the commitment to identifying and justifying (at least most) HR free from appeal to moral rights. If genuine responses must be identified using moral standards, practice as such seems irrelevant. External moral standards do the real work. Moreover, if all HR must be appropriate, 'neutral' or 'bad' HR practices seem mysterious.⁸¹ Distinguishing a concept, when we should care about it, and when law should respond to it is important for conceptual clarity and normative guidance.⁸² Yet using strict moral criteria to identify HR begs key questions and leaves us unable to distinguish neutral or bad cases.

Avoiding *this* charge by stating that what qualifies as 'justifiable' should be settled according to the legal system's own rules just grants the doctrinal approach's plausibility.⁸³ An 'inclusive positivist' could, for instance, argue that responses identified as justificatory by the legal rules of the international community and treated as morally justified by that system can count as moral standards.⁸⁴ Might this allow for appealing to non-doctrinal sources to identify HR without denying practical approaches' weak separation thesis? In short, no. Admitting moral standards in an inclusive positivist framework just accepts that IHRL's rules determine what HR are. IHRL is a 'closed normative order' with its own normative standards that do not rely on any external analogues.⁸⁵

⁷⁹Beitz (n 1).

⁸⁰Andrea Sangiovanni, 'Are Moral Rights Necessary for the Justification of International Human Rights?' (2016) 30(4) *Ethics & International Affairs* 471 (criticizing a stronger separation thesis than the one common to all PAs).

⁸¹See (n 73), surrounding.

⁸²This point is common – for example, Ruth Gavison, 'Privacy and the Limits of Laws' (1980) 89(3) *Yale Law Journal* 421 (on privacy); Michel Seymour, 'On Redefining the Nation' (1999) 82(3) *The Monist* 411 and Anna Moltchanova, 'Nationhood and Political Culture' (2007) 38(2) *Journal of Social Philosophy* 255 (on nations); Scott A Anderson, 'The Enforcement Approach to Coercion' (2010) 5(1) *Journal of Ethics and Social Philosophy* 1 (on coercion); and Andrew Rehfeld, 'On Representing' (2018) 26(2) *Journal of Political Philosophy* 216 (on representation).

⁸³I thank a reviewer for this point.

⁸⁴WJ Waluchow, *Inclusive Legal Positivism* (Oxford University Press, Oxford, 1994) is a classic articulation of relevant views.

⁸⁵'Closure' here need not entail that the purportedly system provide unequivocal answers to all legal questions, as it may on an interpretation in Joseph Raz, *The Authority of Law: Essays on Law and Morality* (2nd ed) (Oxford University Press, Oxford, 2009) 75–77, 192–93. A core set of identifiable norms should

Inclusive and exclusive positivists disagree on the contours of doctrine, and on whether and when moral standards can be part of relevant doctrine, not the means of identifying normative guidance within the system. Where 'inclusive' approaches admit moral concerns into interpretative calculi, they may identify different sets of rules that could undermine the sense in which doctrine selects a manageable subject. Yet this should not be assumed ex-ante and leaves my 'doctrinalism' no worse than the alternatives. Indeed, those who wish to admit more actions into IHRL properly so called may find that inclusive positivism blunts concerns with doctrinal views.

Non-doctrinal accounts of practice, then, either identify an implausibly large number of HR – even eliding distinctions between what they are and how we further them – or, somewhat paradoxically, simultaneously use moral claims to identify a practice while denying a necessary connection between morality and HR practice(s). Moving beyond IHRL doctrine and adding 'foreign policy and the actions of international institutions and NGOs' or Buchanan's range of institutional responses to the practice risks eliminating the possibility of an external standard for evaluating claims. One cannot avoid these concerns by denying that the search for a unique domain of HR practices necessary for evaluating claims is useful. Any move above comes at the expense of international HR's severability or normativity. Either (1) IHRL is not severable from other normative domains and IHRL and the rules within it fundamentally rely on moral standards, such that practical approaches' central tenets do not hold, or (2) the IHRL system does not clearly provide reasons for action for those within it but only describes a class of actions. Descriptively, in turn, some actions purportedly taken pursuant to HR norms are not HR practices and external moral standards do not specify what qualifies as a HR or response thereto. IHRL's own rules for what qualifies as normative better identify HR and genuine responses.

VI. Defending a doctrinal account

A doctrinal account of 'practice' better secures practical approaches' purported benefits than views admitting a wider array of responsive activities. Doctrinal IHRL presents a closed, at least plausibly normative order that allows one to identify a suitably constrained number of HR that distinguishes genuine and purported cases and differences between HR and responses thereto. It thus not only explains why IHRL appears to provide normative guidance to actors within it, but does so in a way that explains the purported norms' law-like nature and allows one to judge the IHRL system and actions within it on the basis of their conformity to that apparent normativity.

IHRL operates as a closed normative order that allows one to identify HR in a non-ad hoc manner and distinguish them from purported HR and responses thereto. IHRL's interpretative tools provide shared procedures for articulating the content and purposes of international law to which all relevant actors have agreed. Actors within the system agree not only on some core cases of 'rights' within the system, but also on who gets to resolve conflicts. While HLA Hart famously argued that international law lacks a clear rule of recognition and so is disanalogous to domestic law,⁸⁶ the IHRL system at issue here

suffice. IHRL's provision of rules for deciding how to resolve equivocal cases should then avoid some concerns with his view. 'Closure' also does not require a causal independence in the sense discussed for states in John Rawls, *The Law of Peoples* (Harvard University Press, Cambridge, MA, 1999). I discuss the sense of 'separation' required on my view above.

⁸⁶See (nn 15–16).

at least has clear second-order rules for determining what qualifies as rights and guidelines on which bodies are capable of resolving claims made within it. The Statute of the International Court of Justice (ICJ) clearly articulates what qualifies as sources of IHRL's doctrine.⁸⁷ The International Bill of Rights establishes the canon of UN-based IHRL.⁸⁸ The ICJ can make decisions about the scope of international law that the broader UN-based system takes to be binding and apply those decisions – often by triggering Beitzian justified reasons for international intervention – while treaty-mandated committees identify relevant HR and their scope (though admittedly often without 'binding' states to realize them).⁸⁹ Doctrinal IHRL accordingly specifies a circumscribed number of rights and identifies clear authorities who can resolve disputes in the IHRL system.

While I discuss further doctrinal difficulties below, 'core' doctrinal IHRL practice is clear and distinguishes true HR within the logic of the IHRL better than alternatives. Doctrinal IHRL distinguishes genuine and purported HR: only rights recognized in legal doctrine are genuine HR. It also distinguishes them from responses. HR are the reasons for action provided by the system's rules. We can then evaluate responses by examining whether they justly respond to violations of those rules. Something only qualifies as a genuine responsive activity if it furthers norms specified by the system. A positive appraisal of a claim for enforcement of a HR likely requires that the claim should fit with IHRL's underlying logic and that non-compliance justifies responsive action on plausible views of what actors should do when doctrinal rules are breached. But these elements speak to distinct phenomena. International legal rules determine whether responsive activities are legal responses properly so called or mere responses to the fact of the law. The system defines its own domain of normative application.

NGO activities are not truly 'legal' responses according to the system's own rules, as NGOs are not proper subjects of international law. Their 'responsive' actions can remain as evidence of the IHRL system's normativity insofar as they demonstrate that people view the system as a source of normative guidance. Yet 'legal' responses are those made within the IHRL system. Political scientists may view non-legal activities as responsive to international HR. The idea that IHRL can pressure persons to perform certain actions when not 'bound' by the 'law' is non-mysterious. But international HR law's primary purpose is not to create such pressure beyond its self-defined boundaries. NGOs' actions are only HR-related responses to pre-existing legal facts. The way that all relevant actions jointly highlight the IHRL system's purported and apparent normativity without equating HR and responses to it negates the need to recognize all responsive activities as HR practices to explain IHRL's (at least apparent) normativity.

The doctrinal list of rights specified in international rules is more circumscribed than the list provided in accounts that include all possible actions made in the name of international HR as relevant practice, but this is appropriate. Once more, calling something an HR does not provide it with a normative valence and providing all actions taken in the name of HR with a normative valence will produce a contradictory set of claims that fails to fulfil the action-guiding role expected of any normative system, closed or otherwise. Again, many responsive activities make contradictory claims on actors; several do not fulfil any plausible normative or semantic understanding of 'rights'.⁹⁰ IHRL plausibly circumscribes the number of HR.

⁸⁷26 June 1945, 33 UNTS 993 [ICJ].

⁸⁸See (n 18).

⁸⁹For example, Malcolm D Evans (ed), *International Law* (5th ed) (Oxford University Press, Oxford, 2018).

⁹⁰Cf discussion of non-doctrinal accounts in the previous section.

While a circumscribed number of rights without plausible normative grounding cannot secure the benefits of practical approaches, doctrinal accounts also explain the purported and apparent normativity of IHRL and the rights that lie therein. There is broad, if imperfect, contractualist agreement on basic IHRL doctrine. Actors agree on at least core cases of what qualifies as a reason-giving ‘right’ within the system and on who can resolve conflicts. While actors disagree about whether decision-makers’ conclusions should or do bind them outside the system, most grant that the system can make claims on them and that doctrine specifies those claims.⁹¹ Some simply hold that there are all things considered reasons why they are not bound to comply with all of the system’s decisions, even where failure to comply makes them culpable qua system member. Rights within the IHRL system can be pluralistically justified if they do not contradict other HR or the IHRL system’s underlying norms. But their normativity need not rely on external justifications. Doctrinal rights claims are normative within the confines of a contractually defined IHRL system because they provide reasons according to its norms. This need not justify all recognized international rights, but it explains the purported and even apparent normativity of many doctrinal IHRL claims (while offering contractualist tools for accounts of IHRL’s actual normativity that one might use).

A doctrinal approach, then, can explain the purported and apparent normativity of IHRL and the rights therein without making all HR *claims* normative. It can also explain why the system purports to provide a form of legal normativity without making controversial claims about whether international law is ‘law’ properly so called. ‘International human rights’ need not describe Hartian ‘laws’ to serve normative functions within a system.⁹² They can be independently (pluralistically) justified elements of a justified set of normative practices absent mirroring rules in moral philosophy and strict formal ‘legality’. If IHRL is a closed system with its own set of rules, one can analyse choices within it and the system itself in light of its internal morality, regardless of whether the system is truly ‘legal’.⁹³ The way IHRL purports to give reasons in the form of HR and the way people act as if HR actually provide those reasons thus justify viewing that system as normative in a relevant respect. Yet the manner in which it purports to provide reasons also explains why it claims to provide a *legal* normativity.⁹⁴

IHRL has some secondary law-like, if not properly ‘legal’, rules for identifying HR. Decision-makers identified by those rules serve judge-like roles. The result is a body of doctrine that purports to provide legal reasons. While minimal enforcement of IHRL raises questions about whether its system provides real ‘laws’, the way IHRL operates as a closed normative order claims to be a legal method and at least approximates operations in recognized ‘legal’ systems. The creation and authority of doctrinal rules is central to this practice. These rules are taken to provide normative standards in a law-like manner. This account accordingly cannot be faulted for ignoring the ‘international legal’ character of international ‘rights’,⁹⁵ even as it makes no strong claims about whether IHRL is ‘real law’. A doctrinal view explains IHRL’s law-like nature and claim to legal status and

⁹¹While Besson (n 24) 137 states that any distinctly legal, rather than persuasive or moral, authority needs to be able to bind all subjects to it, the account of normativity at issue here does not require it. I am, again, less concerned with whether it is ‘legal’, but I think it is appropriately described as such.

⁹²See also (n 15). But see below on how Hart’s method of identifying laws can be used here.

⁹³See (n 61).

⁹⁴This produces the result rightly desired by Buchanan and Sreenivasan (n 10).

⁹⁵Ibid.

normativity. Its ability to do so without making strong claims about whether IHRL is law properly so called should favour it.

Empirical data on IHRL practices present challenges for doctrinal views, but merely require nuancing doctrinalism. The most forceful challenges stem from aforementioned concerns about whether IHRL is a distinct 'practice'. Positive law does not interpret itself.⁹⁶ Whether and when international bodies such as the ICJ can *legitimately* constrain action is a live issue.⁹⁷ Even those bodies do not uniquely interpret international rules. Treaty bodies are also relevant: they give domestic actors options for how to respond to their decisions, suggesting that even the UN-based IHRL system does not view itself as wholly distinct from other domains.⁹⁸ Not attending to regional or domestic interpreters then appears ad hoc.⁹⁹ Yet they commonly deviate from international 'rules' and even create procedures for resolving difficulties that do not perfectly fit international standards.¹⁰⁰ One may accordingly (and I think fairly) question whether there is *an* international legal practice distinct from other legal orders.

These concerns raise challenging questions, including 'Is IHRL distinct and normative?', 'Is it justifiable?', and 'How does it relate to other systems?' Abstracting from implementation issues places me on a par with Beitz, so these criticisms apply equally to classic practical approaches.¹⁰¹ Yet whether and when IHRL provides enough guidance on its rules to provide distinct normative reasons remains puzzling. So do questions about whether and when people view themselves as having to respond, and do actually respond, to those rules. I should at least sketch responses.

Concerns about whether IHRL is a distinct normative system are less forceful on the standard doctrinal position that the VCLT applies to UN-based law.¹⁰² The VCLT provides a common contractual standard under which all parties accept interpretive constraints.¹⁰³ The ICJ and treaty bodies understand themselves as subject to those constraints and largely act within them.¹⁰⁴ While many worry that the VCLT does not provide a single interpretive rule appropriate for and used in all relevant contexts,¹⁰⁵ this does not undermine IHRL's ability to provide a standard set of internationally recognized decisions. Treaty bodies taking different approaches also does not undermine IHRL's 'systematic' nature where existing treaty body decision-making fits under the VCLT's rules.¹⁰⁶ Their decisions are considered authoritative, if not formally 'binding', within the

⁹⁶Seyla Benhabib, 'Another Universalism: On the Unity and Diversity of Human Rights' (2007) 81(2) *Proceedings and Addresses of the American Philosophical Association* 7; Besson (n 24).

⁹⁷Letsas (n 28) 511. See also George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (2nd ed) (Oxford University Press, Oxford, 2009).

⁹⁸See especially Zysset (n 21).

⁹⁹This is especially true of sources such as those in (n 96) and, perhaps, (n 98), who believe regional or domestic authorities alone can legitimately resolve disputes about borderline cases of purported HR violations.

¹⁰⁰Çalı (n 26); Letsas (n 28). See also Besson (n 24). Letsas makes the stronger claim that the European Court of Human Rights ignores the VCLT that is supposed to instantiate, but grants that that court makes use of variance permitted under the VCLT at 520.

¹⁰¹Beitz (n 1). See also Zysset (n 21) 6.

¹⁰²See (n 26).

¹⁰³See (n 26). See also Zysset (n 21) for a critique of contractualist views.

¹⁰⁴See (n 26), but recall nuances in (n 100).

¹⁰⁵Letsas (n 28) 532–36

¹⁰⁶For example, Moeckli (n 28). His point supports me despite his broader account of 'practice'.

IHRL system,¹⁰⁷ and ICJ and treaty body decisions fill gaps in written texts, clarifying international legal reasons for action that are distinct from other reasons.

Differences in interpretation across international, regional, and domestic ‘HR’ contexts could, in turn, simply evidence the systems’ severability. Which system best furthers relevant values is debatable, but doctrinalism is not committed to IHRL providing the best normative standards and severing systems provides the subjects necessary for comparison and external debate.¹⁰⁸ One may, of course, still worry about who gets to decide whether any legal system is internally consistent and about what to do when those who interpret legal rules make mistakes. But these problems apply to any legal system. On a doctrinal view, international legal documents specify rights and the ICJ and treaty bodies have been empowered to interpret them. External actors can look at new laws and new interpretative decisions to see whether they are consistent with each other and with the system’s own internal norms. There may not always be formal mechanisms for resolving any inconsistencies that arise, but this problem also occurs in domestic contexts. Constitutional decisions at odds with constitutional norms are non-imaginary.¹⁰⁹

Concerns that IHRL ‘becomes a legal “practice” via its domestication by domestic authorities’ also do not fully undermine doctrinalism.¹¹⁰ The stronger version of this critique, suggested by Alain Zysset, holds that the IHRL does not end at the international level *on IHRL’s own terms*.¹¹¹ Zysset demonstrates that IHRL contains mechanisms

¹⁰⁷Ibid 51 (noting that the ICJ heavily weighs them). Whether domestic ‘systems’ admit a single interpretative approach is also debatable, so this point may prove too much. Indeed, the various ways in which other domestic actors respond to domestic judicial decisions also present an analogous ‘problem’ to that discussed here. See, for example, Geoffrey Sigalet *et al.* (eds), *Constitutional Dialogue: Rights, Democracy, Institutions* (Cambridge University Press, Cambridge, 2019).

¹⁰⁸The extent to which international law depends on domestic law(s) is debatable, but being able to debate the point assumes some distinction between international and non-international realms. Roberts *et al.* (n 23) rightly notes that international law operates differently across domestic contexts, but domestic actors can still be chastised when offering interpretations at odds with international legal documents or UN bodies’ interpretations of them. Doctrinal views could plausibly accept and even account for some difficulties in securing proper domestic responses. For example, Başak Çalı persuasively argues that the extent of international influence on domestic actors is dependent on domestic norms, including domestic laws: see Başak Çalı, ‘Influence of the ICCPR in the Middle East’ in Moeckli (n 28) 124. Yet Çalı presents countries’ reservations as evidence of their non-compliance with international law. This could qualify as compliance on a doctrinal view where reservations themselves depend on positive law standards. This does not address the further question of whether people frequently respond to international rules as intended. There must be *some* clear standards to which people believe they can be held to account and some compliance for this as a doctrinal account to guide action. I am unconvinced by any claims that some ambiguities in some international rules or variety in domestic responses make extant international law unable to meet this standard, especially where international legal doctrine specifies multiple apt responses. Perhaps more controversially, people viewing themselves as subject to IHRL but responding in different ways than IHRL desires could be evidence of normativity on the definition above. Whether international influence on domestic law needs to constitute full compliance remains contested. For example, Nicole Hassoun, *Global Health Impact: Extending Access to Essential Medicines* (Oxford University Press, Oxford, 2020) argues that inspiring even incomplete domestic reform is a core function of IHRL. These responses going beyond initial legal intent do not change the fact that they are responses to doctrinal norms. It is again notable that we can distinguish what IHRL requires and responses to it, and use the former to judge the latter.

¹⁰⁹This helps to explain phenomena in Sigalet *et al.* (n 107). Judicial competence issues also motivate Grégoire Webber *et al.*, *Legislated Rights: Securing Human Rights through Legislation* (Cambridge University Press, Cambridge, 2018).

¹¹⁰I thank a reviewer for this point.

¹¹¹Zysset (n 21).

whereby international decisions do not require strict compliance, but only require that domestic actors respond in some way, leaving many details up to domestic actors themselves. States largely get to decide on how they follow up on international compliance. If this is so, one might argue that IHRL is not a genuinely 'closed' normative order even by its own doctrinal lights. Where regional and domestic actors also do a lot of interpretive work in deciding how international rules apply, Zysset is likely right to suggest that 'the practice' of HR 'cannot be grasped without paying attention to the broader relationship that states entertain with international law'.¹¹² Variance in regional and domestic interpretation could then cut against any claims about a single international legal doctrine.

This challenge does not make IHRL anything less than a closed normative order. Doctrine still tells states what they must respond to and when, and there are international standards against which we can compare regional and domestic responses and evaluate whether they are genuinely responsive in accordance with recognized legal norms. Zysset notes that 'the legal duty' triggered by treaty body decisions 'is not to comply with the decision but to examine and respond to it through distinctively legal procedures'.¹¹³ But this is a 'binding' duty of a kind: people at least see themselves as having received reasons for action in such cases. While some international standards are vague or imperfectly implemented, there is still a distinct international normative order with a legal form that still at least approximates a 'practice' and creates a list of standards that can serve the functions intended for 'practices' within extant practical approaches. Moreover, international decision-makers may not always bind all parties and possess broad 'juridical authority',¹¹⁴ but such bindingness may not be required where their decisions are normative in the present sense.¹¹⁵ Bindingness speaks to decisions' broader legitimacy, not basic normativity.¹¹⁶

While one may still worry that international interpretations are externally illegitimate, that would not undermine the argument at hand. Zysset is not alone in highlighting domestic authorities' international importance. Seyla Benhabib also highlights the apparent need to contextualize IHRL via domestic authorities.¹¹⁷ Samantha Besson likewise argues that international HR can only be interpreted 'in a context' and only domestic contexts are appropriate, as contexts are always 'political'.¹¹⁸ Yet the apparent need for *domestic* contextualization is established by appealing to accounts of legitimacy that rely on substantive moral considerations that one need not adopt. Domestic interpretation may be unnecessary for an international practice or system to exist. Indeed, where HR treaties are meant to constrain domestic actors, leaving implementation and interpretation up to states risks giving up on the point of such treaties.¹¹⁹ Zysset notwithstanding,

¹¹²Ibid. 3.

¹¹³Ibid 12

¹¹⁴Besson (n 24) 151–52

¹¹⁵Recall (n 1).

¹¹⁶Uptake of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (UNGA, 63d Sess, GA Res 63/117, UN Doc A/RES/63/117, 2008) could also produce an implementation body that could create 'binding' decisions on socio-economic matter to supplement the Human Rights Committee's existing powers over civil and political matters. IHRL would then meet more demanding 'bindingness' requirements.

¹¹⁷Seyla Benhabib, 'Claiming Rights Across Borders: International Human Rights and Democratic Sovereignty' (2009) 103(4) *American Political Science Review* 691, 692.

¹¹⁸Besson (n 24) 150, 174.

¹¹⁹Moeckli (n 28) 49.

many arguments for primary domestic authority rely on substantive norms to which practical approach proponents and doctrinal authors need not subscribe. For instance, Benhabib is primarily interested in strengthening popular sovereignty in the face of globalization and with promoting ‘communicative freedom’.¹²⁰ These morally loaded ends need not uniquely justify IHRL. Moreover, her goal of ensuring that domestic actors can use HR terms to create new claims, change, and so on need not entail that they should exclusively specify HR.¹²¹ It merely highlights the many ways to realize that HR and that other non-rights-based concerns matter.

While HR cannot be justified by their role in an illegitimate system, Benhabib and Besson’s claims that only domestic authorities can provide legitimate interpretations given moral pluralism and the need to translate universal norms into domestic contexts are likely too strong. Contractualist decisions to provide legitimacy to international actors who meet basic standards for just decisions to which all persons could agree could be legitimate.¹²² If existing bodies fail to meet these standards now, they still could do so. For instance, Zysset and Antoinette Scherz argue that IHRL interpretation must attend to competing underlying individual and collective values to provide legitimate decisions, and that adopting a proportionality requirement can ‘generate legitimacy’ by providing a mechanism for resolving tensions between the values; the VCLT is potentially broad enough to permit this requirement, which interpreters should adopt.¹²³ One can debate the details of their account, but it makes IHRL’s necessary illegitimacy non-obvious and IHRL’s normativity need not rely on its legitimacy given our account of normativity anyway.¹²⁴

Doctrinal approaches, then, secure most of practical approaches’ purported benefits. While empirical data require further nuances, the doctrinally determined IHRL system is a closed normative order with clear rules about what qualifies as a HR and who can resolve conflicting claims within it. Its closure limits the number of possible claims in a non-ad hoc manner and secures an authority for resolving problem cases, distinguishing HR and responses from imposters. The purported and apparent normativity of the system and its rights is explicable without reference to moral standards for what should qualify as HR or how IHRL furthers moral analogues. Rights recognized by the IHRL system plausibly ground claims on others in a manner connected to historical uses of rights language. Actors at least view themselves as subjects of claims.

Understanding IHRL as a closed normative order also secures a means of assessing decisions within it. While IHRL too can be criticized for recognizing too many HR or providing normative cover to questionable actions taken in their name, this opportunity for internal critique blunts those concerns. On a doctrinal view, one can look to the limited set of rights to evaluate IHRL-related claims and ask, ‘Is the claim consistent with the account of HR in relevant laws?’¹²⁵ Non-doctrinal practices are even less developed, so

¹²⁰Benhabib (n 117) 697 n 28, 707. See also Benhabib (n 117) 692 (on democratic legitimacy/change).

¹²¹Benhabib (n 117) 696 n 24.

¹²²For example, Moeckli (n 28).

¹²³‘Proportionality as Procedure: Strengthening the Legitimate Authority of the UN Committee on Economic, Social, and Cultural Rights’ (2021) 10(3) *Global Constitutionalism* 524.

¹²⁴Evaluating HR within IHRL to produce the best (most coherent) possible system could, however, help resolve legitimacy debates and may identify a legitimate international legal order.

¹²⁵Buchanan (n 3) and Macklem(n 3) support similar outcomes.

their standards for evaluation are at best incomplete. We need another viewpoint from which we can judge the claims. When we focus on doctrine, the range of interpretations is limited by purportedly *legal* practices. Assessment questions can apply to existing HR to determine whether the system erred and to new claims to determine whether a right should be recognized. They can also apply to ‘enforcement’ measures to determine whether responses to HR fulfil broader systemic norms.

Recall ‘rights’ to health, water, and a paid vacation. Legal rights to health and a paid vacation exist in the absence of moral analogues. The right to health’s contours are specified in various IHRL sources. It guarantees a minimum core of goods necessary and progressive steps are taken to ensure that persons can enjoy the ‘highest attainable’ standard of health.¹²⁶ At least its healthcare-related components are clear: it guarantees essential medicines, vaccinations, basic infant and maternal care, and primary healthcare, procedural justice in other healthcare-related decisions, and institutions necessary to secure the other parts.¹²⁷ This is a circumscribed right that one can imagine states have a duty to fulfil. Recognizing it is consistent with IHRL’s basic commitment to dignity, given the listed healthcare goods’ import.¹²⁸ While advocates claim rights to other healthcare goods (and broader social determinants of health necessary to achieve the higher standard), we can and should distinguish claimed entitlements from those clearly recognized in law. The dignitarian internal morality undergirding the recognized entitlements likely justifies further healthcare entitlements. It certainly justifies some other health-related entitlements. But simply advocating for something as an HR or appealing to the moral necessity of broader ‘rights’ cannot make it an HR here. IHRL can be justified while recognizing narrower rights. Yet one can use its internal morality to evaluate state action or advocate for change. States fail to fulfil HR when they do not conform to IHRL doctrine.

The same internal morality can also be used to evaluate more controversial existing rights, such as the right to a paid vacation, and rights with only nascent doctrinal recognition, including the right to water. It is, for instance, difficult to see how dignity requires paid vacations or how any principle one can use to explain why the IHRL register is justified must recognize a right to a paid vacation on pain of justificatory inconsistency, let alone contradiction.¹²⁹ Concerns about that right thus continue to operate in my framework. Claims for fulfilment of a ‘right’ to water can be evaluated in terms of whether recognition thereof is at least helpful for realizing one of IHRL’s central ends. The question is, ‘Can one specify a circumscribed right to water that states can be expected to fulfil that is justified by the same concerns as other rights in the IHRL system or the IHRL system’s own justification?’ The ‘right’ is not a genuine international right absent doctrinal recognition, the existence of which remains debatable, but water entitlements can become genuine HRs in my framework and we can judge claims to the ‘right’ and the IHRL system’s responses by answering the preceding question. Advocacy by right to water advocates is thus non-dispositive of whether the right exists, but tools for internal

¹²⁶United Nations, Committee on Economic, Social and Cultural Rights, *General Comment 14: The Right to the Highest Attainable Standard of Health*, 22d Sess, UN Doc E/C.12/2000/4 (2000).

¹²⁷Da Silva (n 55).

¹²⁸Ibid. On dignity, see (n 42).

¹²⁹This account can thus address concerns about ‘rights inflation’. Yet, unlike in Fried, O’Neill et al., external moral standards do not set the limits on what can be recognized on a doctrinal practical approach. One cannot point to the lack of correspondence between legal and moral rights and thereby identify ‘rights inflation’.

critique of IHRL law can be used to warrant recognition in the absence of a moral right to water.¹³⁰

This approach implies that advocates for LGBTIQ+ rights prior to doctrinal recognition were not defending international HR. Yet any attendant unpleasantness is more semantic than substantive, and alternatives do not provide better results. Even if such advocates were not furthering international HR prior to international recognition, they were doing important work that furthered moral rights and can be described as non-legal responses to non-discrimination norms for IHRL reform purposes.¹³¹ That description secures many of the benefits of recognizing their work as HR work even if we do not view them as engaging in *legal* responsive activities. There is little substantive loss here, especially where the advocates secured doctrinal reform and used IHRL's internal morality as a tool to do so. Not being able to describe their work as 'furthering international human rights' is only a loss where 'international human rights' is an unqualified good and advocacy is less good if it does not further them. Those posits are implausible, particularly where they seem to foreclose avenues for critiquing IHRL.¹³² The lack of clear guidance on what qualifies as 'human rights' work in the alternative frameworks and possible admission of religious advocacy contrary to LGBTIQ+ norms as equally authoritative on what qualifies as a right in those frameworks may produce the same result anyway.¹³³ Where alternatives have the additional problems above, any bullet here appears worth biting.

A doctrinal account of practice thus provides a means for identifying a plausible class of HR and evaluating rights claims, the systems meant to guarantee them, and actions meant to promote them in the absence of necessary appeals to moral rights outside the system. Such doctrinal understandings of international HR practice need not preclude morally 'neutral', 'good', and 'bad' cases of HR. We can evaluate claims according to internal norms. Doctrinalism offers better prospects for securing the purported benefits of practical approaches than the alternatives. Its ability to do so without relying on controversial claims about what 'practices' are justified according to external 'moral' norms helps it retain the key commitments of practical approaches. It also avoids controversial claims about the nature of law that raise other problems. Plausible practical approaches should thus use doctrine alone to identify HR. Whether something qualifies as a HR practice in a responsive sense relies on prior findings about the 'practice' of doctrinally 'legal' activities that exclusively identify same.

Doctrinal IHRL constitutes a unique (at least apparently) normative phenomenon. On my proposal, HR claims within the IHRL system can still be justified by their role in that system. A doctrinal approach thus plausibly remains practical.¹³⁴ Yet not all practices claiming to respond to IHRL norms qualify as HR on this approach, so some responses do not have the normative valence associated with HR and otherwise morally neutral cases thereof (viz., cases where HR are at least initially justified only within the legal realm) remain possible. The doctrinal approach to practice also clearly separates the stages of HR

¹³⁰For philosophical work engaging with the advocacy but taking different approaches to justification, see Matthias Risse, 'The Human Right to Water and Common Ownership of the Earth' (2014) 22(2) *Journal of Political Philosophy* 178; Tim Hayward, 'A Global Right of Water' (2016) 40(1) *Midwest Studies in Philosophy* 217.

¹³¹See (nn 58–59, 82).

¹³²*Ibid.*

¹³³Indeed, Beitz faces questions about LGBT rights practices, *ibid.*

¹³⁴But recall 'Definitions/limitations'.

analysis without wholly disconnecting them. Doctrine identifies HR but doctrinal actors may not exhaust means of implementing it. We can then evaluate attempts to implement HR in light of a doctrinal understanding of the relevant standards for successful implementation and thereby see how the lack of good enforcement mechanisms within the IHRL does not undermine its ability to set normative standards.¹³⁵

Debates about what qualifies as ‘doctrine’ in IHRL will continue, but related concerns are largely marginal. The contours of the IHRL’s doctrinal sources (viz., international conventions, customary international law, general principles of law, and subsidiary sources ‘such as judicial decisions and teachings of the most highly qualified publicists’) are also contested.¹³⁶ There is, for instance, wide debate about how to treat ‘soft law’ documents, such as authoritative but technically non-binding ‘General Comments’ by human rights committees, in international law.¹³⁷ Ongoing discussion of ‘comparative international law’ suggests that states view and implement international law in different ways, undermining claims that there is widespread agreement on the nature of relevant commitments (and motivating some concerns above).¹³⁸

Yet there likely is sufficient agreement as to IHRL’s basic features of IHRL to identify a workable understanding of what the ‘doctrinal’ view is supposed to be; we now know how we should address it and how we can use it to judge other accounts. Treaties, judicial decisions, and customary international law clearly qualify as doctrine.¹³⁹ These alone provide insights into the reasons IHRL purports to give to actors within the IHRL system. The International Bill of Rights clearly specifies a core set of international rights and decades of work developed workable (if sometimes controversial) understandings of what those rights entail as a doctrinal matter without raising serious questions about whether such basics are proper doctrine.¹⁴⁰ The existence and basic features of international HR to healthcare, housing, and education, for just three morally controversial examples, is clear at IHRL despite concerns about purported moral analogues.¹⁴¹ Core cases of doctrine can then help to resolve controversies. For instance, General Comments being products of ‘treaty bodies’ suggests they have a greater claim to doctrinal status than the work of academics with no formal role in the system.¹⁴² Yet any doctrinal authority they have remains subsidiary and General Comments cannot create new rules on their own.¹⁴³

¹³⁵The distinctions raised here and priority of positive law that they entail may be implicit in Beitz (n 1) notwithstanding his scepticism about treaties. This would explain why he talks about doctrine as the central focus at times and primarily uses doctrine for identifying the rights in his case studies but broadens his scope when discussing the kinds of actions people take to implement the rights in conformity with the reasons they understand the rights to have given them. They may also be implicit in Buchanan (n 3). If so, making these distinctions explicit is an improvement. If not, consider this a necessary amendment for identifying a topic for analysis.

¹³⁶For example, discussion of ICJ (n 87), art 38 in Evans (n 89).

¹³⁷For example, Alan Boyle, ‘Soft Law in International Law-Making’ in Evans (n 89) 119.

¹³⁸For example, Roberts (n 23).

¹³⁹ICJ (n 87).

¹⁴⁰See above; Daniel Moeckli *et al.* (eds), *International Human Rights Law* (2nd ed) (Oxford University Press, Oxford, 2010).

¹⁴¹King (n 54) thus views the denial of the possibility of social rights as a ‘bad argument’. Compare Cristián Rettig’s concern that not all social rights are determinate in other PAs: Cristián Rettig, ‘Is There a Human Right to Subsistence Goods? A Dilemma for Practice-based Theorists’ (2021) *Journal of Philosophical Research*, <https://www.pdcnet.org/jpr/content/jpr_2021_0999_6_22_162>.

¹⁴²Cf. Boyle (n 137).

¹⁴³*Ibid.*

Borderline cases of 'IHRL' alone cannot undermine the force of my earlier arguments for doctrinal accounts. Indeed, the motivating questions arise even on broader views of practice that include positive international HR as one component. Related concerns accordingly apply equally to all extant PAs and are most likely problems with PAs as such. A doctrinal account of practice remains the most plausible specification on offer given its provision of clear rules that can be used to resolve the fiercest ongoing debates about IHRL's content. IHRL remains a distinct normative system on a plausible understanding of that view, regardless of whether it is a 'practice' in Beitz, Buchanan et al.'s sense. It can thus serve the intended functions of 'practices' in practical approaches. IHRL doctrine purports to provide legal reasons to actors who respond as if they are subject to those reasons. While one may argue that those 'reasons' are sociological rather than *genuinely* normative,¹⁴⁴ the 'legal normativity' at issue at least articulates a system of actions that we can subject to normative scrutiny to evaluate IHRL and rights within it.

VII. A lingering recognition problem?

One may still worry that the preceding fails to provide a sufficiently clear rule of recognition that does not depend on strong theoretical commitments concerning the nature of law. Once empirical realities is adopted as a guidepost to the identification of legal norms, the charge that there is no *unique* phenomenon viewed by all societies as 'law' arises. Appealing to one set of actions as genuinely 'legal' then appears ad hoc. Views on what qualifies as 'human rights' are likewise multifarious (as Beitz and Buchanan make clear), providing reason to question why one should prioritize the doctrinal understanding over alternatives. Perhaps practical approaches' commitment to explaining actual sociological practices cannot uniquely pick out rights recognized by the IHRL system as 'human rights' without begging questions of what practices are important. The commitment to sociological explanation inherent in practical approaches leaves them unable to reify any particular form of recognition as uniquely 'legal' or hierarchically superior. This could make attempts to exclude NGO activities, for instance, from HR activities ad hoc or normatively loaded in ways that threaten to beg questions about what practices matter. While some other principle could identify 'human rights', appealing to that principle would again threaten the central commitment of practical approaches to empirical realities as basic theoretical grounding.

Happily, the above description of how IHRL operates as (or at least like) a closed normative order with its own rules likely suffices to blunt the force of this worry. The preceding may not identify a clear principle for determining what should qualify as 'practice', but this should be expected on any quasi-Hartian empirical-based view. Appealing to doctrinal decisions does not reify doctrine on its own, but simply uses the rules of the system as appropriate guidance for what qualifies as normative within that system. Using that system as a guide does not, in turn, assume that the system is uniquely 'legal' or that its outputs alone are normatively important. While I found in this article that the IHRL system shares features of domestic legal systems, this finding did not follow from strong theoretical commitments about what should qualify as 'law' or a 'legal system'. Likewise, while I found that the system's doctrinal rules best fulfil the desiderata of a good account of 'practice' capable of fulfilling its intended role in a practical approach, I did not assume that doctrine alone was important. My desiderata for a good practical

¹⁴⁴Zysset (n 21).

approach may be ‘theoretically loaded’, but they fall directly out of practical approaches. I am trying to identify the best specification of (or at least largely friendly alternative to) a practical approach. Adopting those desiderata accordingly does not beg questions.

Concerns that picking out the IHRL system as the relevant source of practice is itself ad hoc and there is no unique set of ‘IHRL practices’ that can account for the diversity of actions that serve functions within different normative systems are more challenging, but the underlying issue is not unique to IHRL. It is not only the case, as argued above, that it is less difficult to identify a rule of recognition for IHRL than many claim. It is also the case that it is more difficult to identify one for many domestic laws. As Victor Muñoz-Fraticelli demonstrates, Hartian empirical approaches to identifying ‘law’ in the domestic case support a ‘pluralist’ account of law.¹⁴⁵ ‘State law’ with the features common to nation-states like Germany, the United States, Israel, and so on simply does not account for all the phenomena recognized as law as a matter of fact, serving the function(s) of law identified by Hart, and doing so in a manner with the primary and secondary rules that are supposed to pick out ‘state law’ as the unique exemplar of ‘law properly-so-called’.¹⁴⁶ Transnational legal studies identifies numerous examples supporting Muñoz-Fraticelli’s theoretical claim.¹⁴⁷ Concerns that selecting ‘the IHRL system’ as my topic of interest accordingly apply equally to selecting ‘state law’ as the topic of domestic legal inquiry.¹⁴⁸

Any problem here apparently applies to classic domestic legal studies, so any objection proving that my approach is problematic likely proves too much. Yet focusing on state law and the IHRL system alike is justifiable even if other normative orders serve similar functions. Beyond the prevalence of these examples, the scope of their purported and apparent normativity warrants closer scrutiny.¹⁴⁹ If, in turn, one remains convinced that domestic legal systems have clear rules of recognition that avoid the problems in the last few paragraphs, the way in which the IHRL system uses similar rules to identify ‘human rights’ suggests closer affinities between domestic and international ‘law’ than is often supposed. This parallel at least likely suffices to justify doctrinal approaches to particular normative orders and, by extension, this inquiry.

VIII. Conclusion

Unlike alternatives, doctrinal accounts of practice can identify a plausibly circumspect and normative set of international HR, explain the purported and apparent normativity of many such rights, and still permit proponents to criticize actions within the system without appealing to external considerations. IHRL’s doctrine constitutes a unique set of rules that actors in the system view as normative. The system’s purported and apparent

¹⁴⁵Victor Muñoz-Fraticelli, *The Structure of Pluralism* (Oxford University Press, Oxford, 2014) 6.

¹⁴⁶Ibid 118.

¹⁴⁷Glancing at tables of contents of recent issues of any transnational or comparative law journal should make this clear. Margaret Davies, ‘Legal Pluralism’, in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, Oxford, 2010) 805 and Brian Z Tamanaha, ‘Understanding Legal Pluralism: Past to Present, Local to Global’ (2007) 30 *Sydney Law Review* 375 are good, if somewhat dated, accounts of different forms of ‘legal pluralism’ and their underlying empirical supports. I cite them only for empirical support for the claim in *ibid*.

¹⁴⁸See also Andrei Marmor, *Philosophy of Law* (Princeton University Press, Princeton, NJ, 2011) 50.

¹⁴⁹See (nn 23–28), surrounding. Even critical scholars above do not suggest that ‘state law’ fails to provide its own topic of inquiry. They state that it does not exhaust the category of ‘law’ in domestic jurisdictions.

normativity aids identification of an internal morality that one can use to judge new claims and actions purportedly taken according to HR norms.

Proponents of practical approaches should thus accept what IHRL views as doctrine as constitutive of ‘practice’ for the purposes of identifying rights within the system. This will best secure practical approaches’ potential benefits by ensuring the IHRL system’s status as a closed normative order and ability to non-arbitrarily distinguish HR and explain their apparent normativity. Interestingly, IHRL’s operation as a closed normative order shares affinities with how domestic legal systems identify ‘laws’ on the Hartian model, in which recognition of ‘law’ is a joint sociological-theoretical enterprise. While what qualifies as ‘law’ is not my primary focus here, this also queries Hartian arguments that international ‘law’ is never law properly so called.¹⁵⁰

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¹⁵⁰Recall, for example (nn 16–17, 92), surrounding.