International Law, Human Rights Beneficiaries, and South Africa: Some Thoughts on the Utility of International Human Rights Law

Ronald C. Slye
I. INTRODUCTION

Few would dispute that international human rights law has grown exponentially in the last few decades. Legal arguments based on international human rights law, as well as domestic law that is interpreted or otherwise influenced by international human rights law, are increasingly common. The pressing question is no longer whether international human rights law exists, but whether, to what extent, and how, international human rights law makes a difference.

It is not surprising that there is some skepticism about the relevance of international human rights law. One need only look to the last half century to see atrocities and genocide committed with seeming impunity. In response to the call of "never again" after the Nazi genocide, the Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention") was drafted and ratified by most of the world's states. The Genocide Convention obligates states to "undertake to prevent and to punish" acts of genocide wherever committed.\(^1\) Yet genocide continues to be committed, most notably and recently (but by no means exclusively) in Cambodia, Bosnia, and Rwanda.

In the field of international law, a rich body of scholarship has developed among social scientists, international relations theorists, and legal academics focusing on the relationship between international law and the behavior of states. That inquiry, however, has primarily focused on the impact of law on the behavior of states vis-à-vis each other (or on the behavior of sub-state institutions, such as courts or parliaments),

and not directly on the impact of law on the individuals within those states. This is
not surprising, given that international law was traditionally understood to have as its
subject and object the nation-state, with private individuals deriving benefits, if at all,
through and at the discretion of the state. This view of international law has changed,
both with the development of areas of international law which explicitly identify
private individuals as the subject and object of international law—most notably
international human rights law—and with the recognition that international law is
not restricted to international institutions, but is embedded in a much more
complicated and pervasive environment of transnational legal interactions. 2

In this article, I want to focus the question of the relevance of international
human rights law and ask about its impact on those it is designed to benefit—the
poor and oppressed of the world. For ease of discussion, I will refer to this broad class
of people as “human rights beneficiaries.” Recognizing that every individual is a
beneficiary of human rights, I intend to focus on those whose rights have already been
violated and continue to be violated.

The application of this relevance inquiry to international human rights is
relatively new. It is an inquiry that until recently engaged very few specialists in
international human rights law and has been mostly taken up by social and political
scientists. 3 This essay is in part a suggestion that international legal scholars, and
particularly those of us specializing in international human rights law, incorporate
into our teaching and scholarship the empirical and normative research undertaken by
some of our colleagues in the social sciences. Incorporating such materials may make
our undertaking more relevant to the everyday concerns of the victims of human
rights violations throughout the world. While the focus on law-making and normative
rhetoric at the international level is important, it often appears quite removed from
the real concerns of those individuals on whose behalf many of those efforts are
undertaken.

What follows are some brief thoughts on how one might approach a scholarship
of human rights that more closely reflects the concerns of the oppressed. My interest
in this question arises in part out of my work and research over the past four years in
connection with South Africa’s transition from apartheid to democracy. I will thus
discuss the question in the context of recent South African legal history, and in
particular in the context of the role international human rights law has played, and

---

2. For a general discussion of this transnational legal process school, see Henry J. Steiner, Detlev F.
Vagts, and Harold Hongju Koh, eds, Transnational Legal Problems: Materials and Text (Foundation
2599 (1997) (summarizing strands of international legal scholarship, including the transnational
legal process school).

3. The most notable addition to this field is Thomas Risse, Stephen C. Ropp, and Kathryn Sikkink,
International Law, Human Rights Beneficiaries, and South Africa

continues to play, in the creation of a democratic South Africa that promotes, protects, and preserves the fundamental rights of its people.

South Africa is a particularly fruitful area of study because it has played a unique, and in some senses a foundational, role regarding international human rights law. If World War II was the impetus for the birth of the modern international human rights movement, the fight against apartheid in South Africa played a crucial role in sustaining and shaping that movement during its formative years. The fight against apartheid resulted in an enormous number of resolutions at the United Nation's General Assembly. Debates over the legitimacy and utility of sanctions—military, economic, and cultural; primary and secondary—in the modern era were developed and debated in the context of apartheid South Africa. The near universal opposition to apartheid and the military aggression of the apartheid government were crucial to the emergence and development of an African regional human rights regime.

Moreover, the end of apartheid did not signal the end of South Africa's importance to the development of international human rights law. In what is certainly one of the most abrupt shifts in international reputation, South Africa moved from one of the most morally suspect nations in modern history to the poster child of the international human rights movement; because of its peaceful transition from apartheid to democracy, South Africa is often cited as the ultimate success story of the triumph of the human rights ideal.

To be sure, the relationship between South Africa and international human rights law is a more complicated one than this simple summary suggests. There is no doubt that international human rights law played a major role in bringing about the end of apartheid. There is also no doubt that international human rights law has played a crucial role in shaping the nature of post-apartheid society. The relationship between the newly democratic government in South Africa and international human rights law is, however, a complex one. The unease with which the apartheid government viewed international law, and in particular international human rights law, can be discerned, however dimly, in the post-apartheid government's relationship with that same body of law. This is not to say, of course, that there are not dramatic, indeed fundamental, differences between the human rights policy of the old and new South African governments. The substantive laws and policies on almost every human rights question have improved under the new government. This improvement has occurred, however, more through changes in the domestic South African legal regime than from the direct incorporation of international law as a source of binding domestic authority.

For the remainder of this article I will use the case of South Africa to illustrate four effects of international human rights law on human rights beneficiaries. First, international human rights law acts as a constraint on state action. Second, it is a source of norms that can be incorporated into, and thus interpreted and implemented by, domestic legal institutions. Third, it acts as a direct or indirect constraint on the
actions of international governmental and non-governmental organizations. Fourth, it directly empowers individual victims.

II. INTERNATIONAL CONSTRAINT ON ACTIONS OF STATES

The role of international law in constraining states is part of the classical inquiry of the relevance of international law. If states do not obey international law, so the argument goes, then what is its relevance? Many have studied the power of international law to affect the decisions and actions of states. The international law-international relations body of scholarship directly addresses the question of how much law, as opposed to power, interests, or other forces, affect or constrain states. I will focus on one area of some contention—the obligation to hold government officials accountable for their wrongful acts—to make some general observations about this state level of inquiry. In particular, I will focus on the consequences of holding a former official accountable for his previous violative acts. More specifically, I will focus on the consequences for that official's victims, the victims of other wrongdoers, and the future victims of future wrongdoers. While there is some international law concerning the obligation to hold former officials accountable, there is a growing amount of state practice that informs an emerging body of customary international law known as transitional justice.

Few assert that holding, or threatening to hold, a former official accountable for his wrongful acts has no impact. Obviously such accountability has some impact on the individual being held accountable. More interesting, and somewhat more controversial, is the impact such accountability has on others. There are four major target audiences for such accountability: the victims who suffered under the hands of the person held accountable; the victims of those who suffered under the hands of others; the unascertained victims of future wrongdoers; and, related to the previous category, the unascertained officials who may become those future wrongdoers.

The victims of the person being held accountable are the group for which it is easiest to ascertain benefits from holding the perpetrator accountable. Whether one takes a more retributive or restorative position on accountability, there is broad consensus that a victim derives satisfaction from seeing justice done, and from seeing one's wrongdoer brought to account. From my own work in South Africa, for example, I witnessed a number of examples of victims expressing satisfaction with the truth and reconciliation process, including the granting of amnesty to their wrongdoers. It is less clear to me how effective or satisfying such forms of accountability may prove to be to such victims in the long run. While some victims

claimed to be satisfied with the amnesty process in the context of a dramatic change to
democracy in the mid-1990s, that satisfaction may dissipate if the promise of societal
transformation is not kept. The same question of effectiveness applies whether
accountability is provided through retributive forms of punishment or restorative
forms of apology and reparations.

For victims of those who suffered under the oppression of others, the holding to
account of someone else’s perpetrator may provide some benefits. In addition to the
indirect benefit of seeing justice done and re-affirming a collective notion of right
versus wrong, additional benefits from holding a perpetrator accountable may transfer
to unrelated victims, such as the establishment of a precedent that could be used to
hold their own perpetrator accountable.

For the yet-to-be-injured victims of the future, any benefit is dependent upon the
amount of deterrence provided by the accountability. This is where the claim
concerning the benefits of such accountability to beneficiaries is most contested.
There are two classes of beneficiaries that are the subject of this debate: those within
the country undertaking the transition, and those in states that have yet to make such
a transition. There is little debate over whether holding former officials accountable
has an impact on these two classes of beneficiaries. The disagreement concerns the
nature of that impact, some arguing that it results in an increase in human rights
compliance, and others that it results in a decrease in human rights compliance.

Within the country undertaking such a transition, the dilemma may be posed as
follows: should the state risk its own instability by holding still powerful actors
accountable for crimes of the past or forego short-term justice for long-term peace and
stability? On the one hand, amnesty and amnesia are a price worth paying for ending
current human rights violations by facilitating a peaceful transition to democracy. On
the other hand, holding past officials accountable is not just desirable but necessary to
ensure future adherence to human rights and the rule of law.

For beneficiaries within states that have yet to undertake a democratic transition,
the question is whether the precedent of holding former officials accountable for their
criminal acts prolongs their destructive rule or hastens their departure. What is the
impact of such international precedents on the actions of state actors? What is the
impact of the establishment and enforcement of an international rule of accountability
for government officials on the behavior of current dictators?

South Africa, in creating its Truth and Reconciliation Commission (“TRC”),
adopted what some have called a “third way” between amnesic amnesty and systematic
criminal prosecutions. Contrary to some popular perceptions, however, South Africa
did not reject the option of prosecuting crimes committed during the apartheid era.
The two surviving former heads of state of apartheid South Africa did not apply for,
and thus did not receive, amnesty. While it is politically unlikely that South Africa
will prosecute either F.W. de Klerk or P.W. Botha, it is less clear whether either might be subject to criminal or civil legal actions if they choose to travel abroad. In fact the TRC in its final report recommended that those who had not received amnesty should be criminally prosecuted. The use of an accountable amnesty by South Africa thus leaves open an important question: will such an amnesty be recognized and enforced by other jurisdictions? In other words, will those who received amnesty in South Africa be able to travel internationally without fear of being criminally prosecuted or held civilly liable before a foreign court?

This inquiry in turn raises the question of the consequences of enforcing South Africa’s amnesty internationally. It cannot be disputed that the move to hold former officials accountable under international law in a foreign or international court marginally decreases the likelihood that current officials who might be vulnerable to international human rights claims will easily give up power. While there is still some debate about whether a former head of state may be held accountable for acts committed by his regime, there is much less debate concerning a sitting head of state. Thus to the extent that national and international courts are more likely to entertain cases holding a former head of state accountable, a sitting head of state may be more reluctant to give up power peacefully. In practice this may mean that human rights beneficiaries in a particular state may suffer years of violations under a dictatorship that, but for the prospect of international accountability for former heads of state, would have ended sooner. How much longer a dictatorship will last as a result of the increased risk of international accountability, and how many violations will be committed that otherwise might not have been committed, are empirical questions that, as far as I am aware, have yet to be adequately answered. There is no doubt that there is some negative impact, or cost, on the margins. How much of that cost is offset by the benefit created by holding such individuals accountable is a question for which we have little empirical data; and one for which empirical data may not even be adequate or appropriate.

What then is the argument for holding officials accountable? The hope is that doing so will provide the types of benefits identified above to victims, along with increasing the legitimacy and thus strength of a newly democratic society. In particular, deterrence theory suggests that a consistent practice of holding former officials accountable...

5. The same issue exists for those who received amnesty, since it is not clear whether the South African amnesty will be recognized or rejected. Consider Roman Boed, The Effect of a Domestic Amnesty on the Ability of Foreign States to Prosecute Alleged Perpetrators of Serious Human Rights Violations, 33 Cornell Int’l L.J. 297 (2000).


7. Until recently, it was generally accepted that a sitting head of state was immune from international legal accountability, but with the indictment of Slobodan Milosevic by the prosecutor for the International Criminal Tribunal for the Former Yugoslavia while the former was still President of Yugoslavia challenges that assumption.
government officials, including former heads of state, accountable will decrease the willingness of current government officials throughout the world to engage in activities that may result in their own punishment. More ambitiously, the increase in accountability may strengthen human rights norms sufficiently so that they are internalized into every day government practice—that is, internalized so that the pull of the norm itself, rather than the threat of coercion, motivates socially desirable acts.

While these arguments concerning the utility of holding former government officials accountable appear to be in conflict, they may in fact be compatible. The cost of increased violations as a result of current abusive leaders not stepping down for fear of being held accountable for their wrongs may be a transitional cost. This is particularly the case insofar as increased accountability has a deterrent impact. As the certainty of being held accountable increases, regimes that regularly violate human rights may prolong their stay in power; at the same time new governments may be less likely to engage in gross violations that would make them subject to accountability either by the international community or a successor regime. As members of regimes who engage in human rights violations leave power, either naturally through death or by force, the cost of the newly enforced rule of accountability may lessen; at the same time, new regimes and rulers may be more reluctant to engage in systematic violations that trigger international accountability. This transitional cost of accountability may be lessened if international law recognizes mitigating factors in determining accountability. If culpability or sentencing are tempered by recent good deeds—so that a dictator who succeeds in substantially lessening human rights violations and facilitates a peaceful transition to democracy may be treated with more leniency—the transitional cost may be lowered. In analyzing the costs and benefits of such increased enforcement for human rights beneficiaries, we may want to look to related scholarship in the legal field (concerning other areas of law enforcement, from criminal to tax), as well as the work of social scientists, sociologists, and anthropologists on the relationship among legal norms, social behavior, and social benefits.

III. DOMESTIC CONSTRAINT ON STATE ACTION

The incorporation of international human rights law into domestic law transforms the inquiry concerning the relevance of human rights law into a variation on the question of what benefits a domestic legal system provides to its beneficiaries. Incorporation can occur through a country’s constitution, its legislation, its judiciary, its executive agencies (such as human rights commissions), and (as discussed in the next section) its non-governmental or civil society sectors. As an illustration of domestic constraints on state action, one can look at the South African Constitution and the legislation establishing that country’s Truth and Reconciliation Commission.

The South African Constitution incorporates international law in three ways: 1) through provisions that derive their inspiration from international human rights law;
2) through provisions directly incorporating international law as international law into the domestic legal system; and 3) through provisions regarding the interpretation of domestic law in light of international law.

A. THE CONSTITUTION

The South African Constitution incorporates many of the rights and obligations found in the two covenants that make up the international bill of rights. Thus the central provisions of international human rights law have become, through their inclusion in the Constitution, the fundamental rights of the domestic South African legal order. In addition, international law is directly incorporated through the interpretation and implementation of some provisions of the bill of rights. Thus derogation from certain provisions of the bill of rights in a state of emergency is allowed so long as “consistent with the Republic's obligations under international law applicable to states of emergency.”

The influence of international human rights law did not end with the drafting of the South African Constitution. Developments regarding the interpretation and implementation of international human rights law, and international law generally, must be “consider[ed]” in interpreting the bill of rights. The Constitution directs the courts to prefer an interpretation of any domestic legislation that is consistent with international law over any that is inconsistent with international law. In the first few years of its existence, the South African Constitutional Court has frequently looked to international and comparative human rights law to interpret its Constitution's bill of rights.

The oft-cited decision declaring capital punishment unconstitutional illustrates the increased relevance of international law in the South African legal regime as compared to, for example, the United States. The framers of the South African Constitution explicitly declined to address the question of whether capital punishment should be allowed. There is no provision in the Constitution concerning capital punishment. Instead there are the provisions found in most modern constitutions concerning the right to life and the right to be free from cruel, inhuman or degrading treatment or punishment. The constitutionality of capital punishment was thus left to the court to decide through the interpretation of the more general provisions in the Constitution’s bill of rights. In deciding the issue, the South African

---

9. Id at § 39, cl 1.
10. Id at § 233.
11. See State v Makwanyane, 1995 (6) BCLR 665 (CC), 1995 SACLR LEXIS 218 (finding the death penalty unconstitutional, and citing to a variety of international human rights instruments and decisions).
13. Id at § 12, cl 1(e).
Constitutional Court was unable to look to the “original intent” of the drafters for the answer, since the drafter’s clear original intent was to provide no answer. Consequently the court turned to international and comparative law, as directed by the Constitution, to resolve the question. In declaring capital punishment unconstitutional under its own bill of rights, the Constitutional Court drew upon international, regional, and municipal court decisions. International and comparative law thus played a crucial, maybe even determinative, role in determining the constitutionality of capital punishment in South Africa.

Finally, the South African Constitution contains explicit provisions regarding the domestic relevance of treaties and customary international law. Customary international law is binding within the country so long as it is not inconsistent with the Constitution or an act of Parliament.\(^\text{14}\) Thus customary international law is a direct source of law for South African courts that takes precedence over the historic common law. A provision of a treaty ratified by the government becomes a part of domestic law either if it is incorporated into national legislation, or if it is self-executing and is not inconsistent with a law of Parliament or the Constitution\(^\text{15}\) (a rule strikingly similar to that of the United States).

The question of the relevance of international human rights law in the case of domestic incorporation may be broken down into two related parts. First, there is the general inquiry regarding the relevance of law in any domestic social order. The relevance of the international right to freedom of expression for a South African citizen may be reduced to a question of the relevance of the South African Constitution’s provision providing for freedom of expression. This inquiry assumes that the effect of international human rights law is restricted to its initial effect as a model for incorporation into a domestic legal system. The impact of international law is no more and no less than the impact of the provisions of domestic law that were modeled after international law. The effect of a particular rule of international human rights law on individuals within a society is, under this analysis, dependent on its status as domestic law, and thus is related to the effectiveness of law generally within that society.

This “domestication” is only one (relatively narrow) measure of the impact of international human rights law through incorporation. International human rights law is dynamic; it evolves independently from its domestic incorporation, and thus may continue to have an impact beyond that of a constitutional or legislative model. This is a question of how much international law as international law permeates a domestic legal system. Such permeation may occur in one of two ways: 1) through

---


\(^{15}\) S Afr Const § 231.
rules of interpretation, or 2) through direct and ongoing incorporation of the international legal system as part of the domestic legal system. First, international law may continue to be relevant if it is an accepted source of authority for interpreting domestic law. This is the case in South Africa, at least with respect to the Constitutional Court, which is directed to refer to international law when interpreting the bill of rights. The capital punishment case is a prime example of international law as a source of interpretation for domestic law.

Second, international law may continue to be relevant if it is considered coextensive with, rather than separate from, the domestic legal system. The traditional distinction is between monist states—where the international legal system is directly absorbed into the domestic legal system, so that changes in international law are automatically reflected in domestic law—and dualist states—where international law is not automatically a source of authoritative law, and thus not automatically absorbed into domestic law. But in reality, few if any states conform completely to either of these two polar categories. For purposes of this discussion, it is sufficient to note that some states, either by constitution or statute, open the door of domestic law to some forms of international law.

As international law evolves, the rule of decision incorporated (by statute or constitution) also changes. In the case of South Africa, as noted above, customary international law is directly applicable so long as it does not conflict with the Constitution or any pre-existing statutes. Changes in customary international law, therefore, will have a direct impact on the domestic law of South Africa insofar as they are not in direct conflict with the South African Constitution or an act of Parliament. Legal systems that directly incorporate international human rights law in this way provide a more immediate benefit to human rights beneficiaries than legal systems that rely upon some additional domestic act of incorporation. How much additional benefit is provided depends on the quality of international human rights law as it develops internationally, and the extent to which the relevant domestic society views international law and international law-making as legitimate.

B. THE TRUTH AND RECONCILIATION COMMISSION LEGISLATION

Incorporation is not limited, of course, to a constitution. International law may also be incorporated, either directly or indirectly, through legislation. The legislation establishing South Africa’s TRC was both inspired by developments in international human rights law and was interpreted in light of that law. In drafting the enabling act for the Commission, the South African Parliament held extensive public hearings where both domestic and international human rights organizations testified. The Parliament paid particular attention to developments in international human rights law regarding accountability for gross violations of human rights in drafting the amnesty and other related provisions of the legislation. In interpreting the scope of its mandate as set forth in its enabling legislation, the TRC drew upon international
human rights law to interpret some of the more general provisions of the legislation. The Commission, for example, drew heavily upon the international law of armed conflict and the provisions of the major international human rights treaties to determine what acts constituted a "gross violation of human rights" under the legislation. 16 What constituted a gross violation of human rights determined whether an individual qualified as a victim under the legislation, and thus whether that individual was eligible for reparations.

How does one measure the effectiveness or relevance of these examples of the incorporation of international human rights law into a domestic institution? In the case of reparations for victims recognized by the TRC, the broadening or narrowing of the Commission's mandate in light of international human rights law has an obvious impact on those human rights beneficiaries (although minimal reparations have been provided to date). In the case of court decisions and legislation more generally, one can look at the legal reasoning of the former and the legislative history of the latter to ascertain the extent of the influence of international law. One might go a step further and compare contemporary patterns of decision and legislation with decisions and legislation in the past when international law arguments were less common. Or one might compare outcomes in cases or legislation that cite to international law arguments with those that do not; asking, in other words, what is the correlation between the frequency of reference to international law to decisions or legislation that result in the more effective protection of human rights. Such inquiries might provide fruitful insights into the quality of the impact of different types of domestic incorporation on human rights beneficiaries.

IV. DIRECT CONSTRAINT ON NON-STATE ACTORS

While much of the focus on international law, and international human rights law, is on state action, some advocates and scholars have begun to focus on corporate and other non-state actor accountability for gross violations of human rights. Feminist activists and legal scholars in particular have challenged the public/private distinction that removes "private" violence from the realm of international law concern. As feminist scholars, among others, continue to remind us, non-state actors are responsible for a substantial amount of violence. Any assessment of the impact of international law on the daily protections provided to human rights beneficiaries must take this reality into account.

The application of international human rights law to private non-state activity is a growing area of inquiry and advocacy. The height of international accountability for private actors, and in particular private business entities, occurred at Nuremberg after

World War II, where the international military tribunal oversaw the prosecution of some of the major industrial elites that supported the Nazi government. The revival of international criminal law in the last decade, ending almost half a century of dormancy since Nuremberg, has not included a robust revival of the application of international criminal law to private corporate entities. This relative silence on the accountability of private entities is partly understandable since the major crimes that have been the subject of the newly created international criminal courts (in the former Yugoslavia and Rwanda) do not appear to have involved private corporate and industrial activity to the same extent as the Nazi crimes. In addition, one of the major crimes for which individuals and organizations were held accountable at Nuremberg was the crime of waging aggressive war, a crime for which the state as an institution may be held accountable, as well as sub-state entities like the armed forces. The crime of aggression is not recognized by either of the two ad hoc international criminal tribunals.

While international criminal accountability for private organizations is not provided for in the Hague tribunals, civil liability and other forms of accountability for private non-state actors (both individuals and organizations) have been recognized in other forums. Domestic courts in the United States, for example, have begun to recognize the application of international law to private non-state actors. These cases have taken two forms: 1) the application of international human rights law to private non-state actors who are deemed to be acting as the state (that is who satisfy some state action requirement); and 2) the application of international human rights law to private non-state actors independently engaged in war crimes, genocide, or other crimes against humanity.

The first set of cases is less radical than the second, at least to a US legal audience, for it is the international equivalent of our domestic civil rights jurisprudence under 42 USC § 1983. The second set of cases does not rely on state action; rather it asserts that international law may apply to private actors without requiring any direct or indirect state involvement. Successful cases have focused on the limited areas of war crimes, genocide, and crimes against humanity, where there is clear, near unanimous, and longstanding agreement that state action is not required to hold an individual or entity accountable for such crimes. The benefit of such direct


18. See, for example, Doe v Unocal Corp, 963 F Supp 880, 892 (C D Cal 1997) (finding that Unocal acted under color of Burmese law in committing gross violations of human rights).

19. See Kadis v Karadzic, 70 F3d 232 (2d Cir 1995) (finding that a private non-state actor may be held liable for genocide, war crimes, and crimes against humanity under international law). The recent wave of legal claims against financial, insurance, and industrial companies for violations committed during World War II has succeeded, albeit decades after the wrongs were committed, in holding
criminal accountability on private non-state activity should be similar in kind to that provided by holding states and state actors accountable for such acts; since such laws have been applied less frequently to non-state actors in practice, the actual benefit provided to human rights beneficiaries to date is only now beginning to emerge.

Direct constraints on non-state actors may serve two purposes: 1) to curtail abuses committed directly by such non-state individuals and entities; and 2) to put pressure indirectly on states committing abuses by forbidding such non-state actors from doing business with or in a target country. The first concerns "horizontal" regulation—the regulation of relationships among non-state entities. The second involves "vertical" regulation—the regulation of the relationship between the state and individuals. The move from the vertical definition of rights, which focuses on the protection of individuals from nefarious state action, to a horizontal definition of rights for which many feminists have traditionally argued, is one that human rights advocates and scholars have begun to make. Direct constraints on non-state actors invariably serve both purposes. By imposing requirements on, for example, corporate activity, such constraints may alter the relationship between a business entity and its workers or consumers in a way that increases the fulfillment of those individuals' human rights. Rights protected by such constraints on corporate activity may protect not only the civil and political rights of individuals but also their economic and social rights.

I will briefly mention three examples of the way international law affects private non-state entities in South Africa: 1) the effect on the work of the TRC; 2) the effect on the military strategy of the anti-apartheid movement; and 3) the effect on private corporate activity in South Africa during apartheid.

First, whether non-state actors could be held accountable under international human rights law, and if so whether non-state actors were subject to the same obligations as state actors, was a contentious issue within South Africa during the life of the TRC. That tension within South Africa reflects a tension within international law between the legitimacy of the means used in an armed conflict (jus in bello) and the legitimacy of the ends for which an armed conflict is undertaken (jus ad bellum). Some in South Africa collapsed these two areas of international law and argued that the legitimacy of the fight against apartheid made every act committed in furtherance of that goal legitimate. If the TRC had adopted this position, one direct effect would

---

private corporations accountable for such human rights violations. See In re Holocaust Victim Assets Litigation, 105 F Supp 2d 139 (E D NY 2000) (dismissing claim against German companies for forced and slave labor during World War II at the request of plaintiffs to facilitate settlement recovery); In re Nazi Era Cases Against German Defendants Litigation, 193 FRD 429 (D NJ 2000) (dismissing claim against German companies for forced and slave labor during World War II at the request of plaintiffs to facilitate settlement recovery).

Spring 2001
have been that victims of violent acts committed by the anti-apartheid movement would not have been considered victims of a gross violation of human rights under the TRC legislation, and thus would not be eligible for reparations. The TRC eventually adopted the traditional international law position, noting that while apartheid was a crime against humanity and the fight against it was just, certain acts of the anti-apartheid movement qualified as gross violations of human rights. The effect of this decision is that more individuals qualify as victims under the legislation, thus qualifying for reparations.

Second, the effect of international human rights law on the military strategy of the anti-apartheid movement can be seen by contrasting the official policies of the armed wing of the African National Congress (uMkonto we Sizwe, or "MK") and the armed wing of the Pan-African Congress (the Azanian People's Liberation Army, or "APLA"). The effect of those different policies on human rights beneficiaries is easy to discern. In 1980 the ANC announced that it would abide by the laws of armed conflict as set forth in the Geneva Conventions of 1949. While the MK did engage in acts that violated the laws of armed conflict, they were far fewer in number than those attributed to APLA, which did not recognize the legitimacy of the international law of armed conflict. The PAC and APLA adopted the classical just war position, arguing that they were fighting a just cause, and that any act that furthered that cause was legitimate, even targeting innocent civilians. APLA thus engaged in attacks against innocent civilians and other soft targets.

The third example of international law's effect on non-state activity does not involve a direct constraint on target organizations as illustrated in the influence on MK and APLA. Rather it involves the indirect effect of international law through domestic legislation and private codes of conduct. In the case of South Africa, one can see this impact in the various municipal and state laws in the United States concerning divestment, disinvestment, and procurement, as well as similar policies adopted by US institutional investors. International law plays three critical roles in this context: 1) it provides a yardstick by which municipalities and investors can identify entities against which such sanctions should be targeted (by identifying wrongdoers at the international level); 2) it provides a guide to when such sanctions should be lifted (either because the offensive activity has ended, or other values, such as humanitarian concerns, take precedent); and 3) it provides legitimacy to both domestic governments that impose such sanctions and investors that either lobby for such sanctions or undertake their own sanctions activities.

Corporate codes of conduct were widely used in the United States to affect corporate activity within South Africa and, through such pressure on US corporations, to affect the South African government. The Sullivan Principles\textsuperscript{20} were

\textsuperscript{20} The Sullivan Statement of Principles (fourth amplification) is reproduced at 24 ILM 1496 (1985). Similar principles adopted by the European community may be found at 24 ILM 1474 (1985).
designed to guide investors in judging whether to invest in and support corporations that continued to operate in South Africa. They were inspired by principles of international human rights law, and were incorporated privately into shareholder resolutions and corporate policies, and incorporated into law through domestic legislation in the United States. International human rights norms were thus incorporated as a guide to private conduct through corporate policies, and used as a more formal legal constraint through domestic legislation. While some work has been written on the effectiveness of the Sullivan Principles in providing benefits to human rights beneficiaries in South Africa, little empirical research has been done on the value of such corporate codes of conduct and investor activism on workers and other intended beneficiaries.21

V. EMPOWERMENT OF RIGHTS HOLDERS AND THE PROVISION OF SOCIAL BENEFITS

The above examples illustrate how international law may provide benefits by increasing good behavior and decreasing bad behavior by actors who have the potential to violate the rights of the intended beneficiaries of international human rights law. In other words, the benefits are indirectly derived from the influence of law on the duty holders. In addition to placing restrictions on the actions of state and non-state actors, international human rights law may also create a more direct impact on its beneficiaries, or rights holders. There are four ways that international human rights law may provide such benefits: 1) providing the power to hold violators accountable for past acts, 2) generating normative and legal arguments for political empowerment and activity, 3) providing legal tools for preventing or curtailing current violations, and 4) facilitating the creation of accountable organizations to meet basic needs and provide social benefits.

The first benefit is the enforceable right on the other side of the duty imposed on perpetrators not to commit gross violations of human rights. It provides human rights beneficiaries with the power to claim accountability against those responsible for the violation of their rights. This right to accountability may take many forms, from criminal punishment (in those legal systems that allow for privately-initiated

Interestingly, the Sullivan Principles do not make any express reference to international law or human rights, although many of the principles reflect developments in international human rights law. The European principles do make a reference to international labor law. See id, Code of Conduct, Art 1(d) (referring to the right to collectively bargain as reflected in “internationally accepted principles.”).

21. The perceived success of the Sullivan Principles spurred numerous similar efforts regarding corporate activity in the Soviet Union (the “Slepack Principles”), China (the “Miller Principles”), and Mexico (the “Maquiladora Standards of Conduct”), and corporate activity with respect to the environment (the “Valdez Principles”).

Spring 2001 73
prosecutions), to civil liability, to apology and reparations. This is the right which, many argue, is taken away when amnesty is granted to a perpetrator. The power to initiate accountability provides a benefit to victims separate from that derived from holding the perpetrator accountable by some other (non-victim-initiated) process. Placing the power of accountability with human rights beneficiaries furthers autonomy, empowerment, and other civil and political rights that contribute to a society's legitimacy domestically and internationally. The participation of victims in the TRC process, in particular in the amnesty hearings, increased the legitimacy of the process in the eyes of the victims, the broader South African society and the international human rights community. In fact, the South African constitutional court upheld the legitimacy of the South African amnesty in part because of the victim-centered nature of the broader TRC process.

The second benefit provides more direct support for political activity and expression than the first. This second benefit comes from the numerous regional and international forums that provide a place in which the voices of human rights beneficiaries may be heard. Facilitating such speech in turn facilitates political, as well as legal, advocacy. In the case of South Africa, numerous institutions within the United Nations (from the General Assembly to the Human Rights Commission to specialized agencies devoted to apartheid), provided forums where the global anti-apartheid movement was able to connect with sympathetic individuals and organizations to sustain and develop its campaign against South Africa. At the height of its activity, the anti-apartheid movement utilized international political and legal institutions. Law, particularly international human rights law, provided the legitimacy for apartheid to be taken up by such political institutions. In the case of violations that have not risen to the same level of global awareness and normative consensus as apartheid, these legal forums provide a vehicle by which such awareness may be developed. Legal norms thus contribute to political empowerment, which in turn may

22. France, for example, allows the victim of a crime to initiate a criminal prosecution. See Richard S. Frase, Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?, 78 Cal L Rev 542, 669 (1990).

23. For example, see the line of cases brought in the United States under the Alien Torts Claims Act, 28 USC § 1350, which provides a civil remedy in US federal courts for violations of international human rights law.


result in new legal developments, from the passage of new laws to the reinterpretation of existing laws.27

The third benefit may come in the form of an international injunction, or through the deterrent effect of holding violators accountable for past violations. There is to date no formal mechanism for an individual to request the equivalent of an international injunction. There are of course mechanisms by which international forces may be mobilized to curtail or prevent ongoing violations—from unilateral to multilateral military operations (such as the recent NATO intervention in Kosovo), to peacekeeping operations (such as that undertaken by the UN in the former Yugoslavia in the 1990s), to monitoring operations (such as that undertaken at times by the Inter-American Commission for Human Rights). The success of these measures varies: the NATO operation viewed by some as too little too late (in part because of the reluctance of the US to commit ground troops), and by some as problematic because of the impact the NATO bombing had on civilians in Kosovo and Serbia;28 the UN peacekeeping operations in the former Yugoslavia were particularly problematic in that they established UN-sponsored safe havens that were then insufficiently protected from the Bosnian Serb military;29 and the Inter-American Commission visit to Argentina in the 1980s had some, albeit limited, success in revealing political prisoners whose existence the government had previously denied.30

While individual complaints and increased public awareness through the media may influence the decision to initiate such mechanisms, none provides a clear mechanism for a victim or individual human rights beneficiary to trigger such a response.

The fourth area of benefit is the one that is the least explored by human rights scholars and advocates. It is an area that is discussed more in the context of international development policy and law than international human rights law. We tend not to think of human rights law and institutions as directly providing material

27. For two domestic examples illustrating such synergy between law and politics in the US see generally Richard Kluger, Simple Justice: The History of Brown v Board of Education and Black America’s Struggle for Equality (Knopf 1975) (concerning the intersection of law and politics in the US civil rights movement); Eric K. Yamamoto, Margaret Chon, Carol L. Iwami, Jerry Kang, and Frank H. Wu, eds, Race, Rights and Reparation: The Law of the Japanese American Internment and Redress: A Critical Inquiry (Aspen forthcoming 2001) (concerning the intersection of law and politics in efforts to provide redress to Japanese Americans interned in the US during World War II).


29. The most infamous of these being the safe-haven of Srebenica, in which over 7,000 Bosnian Muslims took refuge and then were killed by the Bosnian Serb military. The ICTY has indicted Radovan Karadzic, Ratko Mladic, and Radislav Krstic for the massacre that occurred in Srebenica. For a list and copy of the indictments, see the ICTY web site at <http://www.un.org/icty/index.htm> (visited Mar 25, 2001).

benefits to human rights beneficiaries—that is, in increasing the acquisition of the material goods necessary to protect and ensure the economic, social, and cultural rights of individuals and groups. Part of the reason for this tendency may be the historical tension at the political level between those who emphasize civil and political rights over those who emphasize economic, social, and cultural rights. This false dichotomy between these two groups of rights is slowly breaking down, at least within the human rights advocacy and scholarly community, as more begin to view these rights as interdependent, rather than in tension with each other. 31

There is a growing need for a more sophisticated development of the jurisprudence of economic, social, and cultural rights. The idea of economic and social rights was delegitimized in part because of the failure of the Soviet communist system, and the association of the idea of socioeconomic rights with a political system of repression and authoritarianism. Ten years after the end of the Cold War some human rights organizations have begun to take up the challenge posed by the idea of economic and social rights, and to give those rights content and meaning within the broader international human rights legal regime. Thus in the last ten years, traditional human rights organizations like Human Rights Watch have begun to focus more consciously on economic, social, and cultural rights. 32

One area where one may look to give content to socioeconomic rights is the emerging jurisprudence of the South African Constitutional Court. The South African Constitution includes within its bill of rights civil and political as well as economic, social, and cultural rights. Thus the South African bill of rights includes a right of access to adequate housing, 33 a right of access to health care services, 34 and a right to a basic education, 35 along with the standard civil and political rights like freedom of expression. 36 The South African Constitutional Court recently issued a decision interpreting the right of access to adequate housing, finding that the state had an obligation to provide relief to families without shelter. 37 The Constitutional Court of South Africa is the most interesting and sophisticated body addressing the content

31. For a brief introduction to the historical tension between civil and political rights and economic, social and cultural rights, as well as a plea for a more holistic approach to the two, see Asbjorn Eide, Catarina Krause, and Allan Rosas, eds, Economic, Social and Cultural Rights: A Textbook (Nijhoff 1995).
32. See Human Rights Watch, World Report 2001, available online at <http://www.hrw.org/wr2k1/intro/intro02.html> (visited Mar 25, 2001) (mentioning the importance of economic, social, and cultural rights, and the relationship between these rights and civil and political rights, but still emphasizing the latter over the former).
34. Id at § 27.
35. Id at § 29.
36. Id at § 16.
of economic and social rights today, and thus may become a useful source of jurisprudence for the international development of economic and social rights.

Another fruitful place one may look to give content and legitimacy to economic and social rights is the field of international development law and policy. International development legal advocacy and scholarship tends to focus on whether, and to what extent, developing states have an international right to development. Students of international development law focus on the obligations of developed states and related financial institutions to provide assistance to the developing states through, among other things, development aid and trade preferences. This is very much a state-centered inquiry—focusing on the actions of developed states vis-a-vis developing states, and the development of a legal theory obligating the former to assist the latter.

International development law, like the interpretation of the South African Constitution's economic and social rights, generally focuses on the assertion of individual and collective rights against states. Law's influence and utility extends beyond the identification and interpretation of rights, and beyond litigation-type advocacy. I have discussed elsewhere the use of transactional law in addressing the day to day needs of the poor in the United States. A similar analysis might be applicable to efforts to further the lives of human rights beneficiaries at a more global level. International law, and law in general, can provide a powerful tool to individuals and communities struggling to create viable and accountable political, economic, social, and cultural institutions. Scholarly literature has paid little attention to the role of international law in facilitating these institution-building functions, and more particularly on analyzing the extent to which such institutions contribute to the fulfillment of human rights. International legal scholars tend to focus on the administrative law of international organizations, and the instrumental role of law in creating institutions generally, rather than the role of international law in creating specific institutions designed to fulfill economic and social rights.

A question worth asking from an advocacy point of view is whether international transactional law provides a means by which the rights of human rights beneficiaries may be furthered. Let me illustrate this with two brief examples. The first concerns poverty advocacy within the United States. Poverty advocacy in the United States for many years focused on establishing the rights of poor people under the US Constitution, particularly under the due process and equal protection clauses. The focus was on individual rights—arguing for the recognition of such rights by the

---


40. For further discussion of this type of advocacy in the US, see id.
courts, and then using the recognition of those rights to litigate substantive claims against the state or to argue for legislative reform. Without diminishing the importance of those efforts, a growing number of poverty advocates also began emphasizing the importance of building community institutions to provide a place for poor people to assert their collective identity and will, and to fulfill some of the needs of that population. Such efforts focus more on the delivery of services and material benefits to the poor than on the establishment of constitutionally-recognized rights.

Another example which suggests that transactional law may be useful in furthering human rights involves the dynamics of opposition activities within repressive societies. In Poland under communism, for example, opposition organizations created alternative community structures—in effect an alternative society—as a means of combating the government. Thus the Solidarity movement created alternative newspapers, schools, and other institutions that paralleled the "official" institutions. Rather than relying solely upon an assertion against the government for relief, these advocates worked to create an alternative society that both supported and sustained their activities, and provided an alternative, more democratic, model for society. I am unaware of anyone undertaking comprehensive scholarly analysis of these alternative institutions—really a form of state-building, but at the community level and in this case in defiance of the state—and their effectiveness in providing the benefits promised by international human rights law.

My speculation here is that international human rights advocates may profit by supplementing their strategic focus on the recognition, interpretation, and enforcement of rights with a focus on creating the power and space at the local level for individuals to create and implement collectively a vision of society. This is not to suggest that a focus on rights is not important—in fact the individual autonomy rights of freedom of association and freedom of expression are crucial to such community-building. My point is that there may be some interesting ways that international transactional law can be used to further the recognition and fulfillment of international human rights law. In particular, if our concern is about the daily lives of human rights beneficiaries, we should be as concerned with reducing the incidence of official torture as on creating institutions that provide food, housing, and a forum for cultural expression.

41. One of the most well known and successful models of such community development internationally is the Grameen Bank, which works with poor communities in Bangladesh to create microcredit and other needed services. See <http://www.grameen-info.org/> (visited Mar 25, 2001). Similar programs have succeeded in other developing countries, including Kenya, Tanzania, Uganda, and Mexico. For a brief description of these programs, including the Grameen Bank, see Jameel Jaffer, Microfinance and the Mechanics of Solidarity Lending: Improving Access to Credit through Innovations in Contract Structure, 9 J Transnatl L & Pol 183 (1999).

42. See, for example, Adam Michnik, Letters from Prison and Other Essays (California 1985).
VI. Conclusion

The four effects of international human rights law briefly discussed above do not capture all of the benefits international law provides to the oppressed of the world. They are the effects that are most apparent, and thus most easily illustrated, in the case of South Africa. In addition to illustrating some of the benefits provided by international human rights law, the South African example also provides suggestions for additional areas of research and advocacy for international human rights scholars and advocates.

There are two points that I think provide the most interesting possibilities for future study. They both involve the increased legitimacy and increasingly sophisticated development of economic, social, and cultural rights at the international level. First, the growing international recognition of the holistic nature of rights (rejecting the traditional division between civil and political, and economic, social, and cultural rights) is in part responsible for the incorporation of a broad range of rights into the South African Constitution. The interpretation of these rights by the South African Constitutional Court may in turn provide us with a sophisticated jurisprudence to develop a theory and practice of international economic and social rights. Second, international human rights legal scholars and advocates may benefit from increased attention to the transactional tools provided by both private and public international law. International business transactions and international development studies may provide some beneficial lessons and tools for international human rights advocacy and scholarship. In light of the increasing concern with the fulfillment of economic and social rights within the human rights field, a transactional focus by both human rights scholars and advocates might lead to additional benefits for the oppressed of the world.