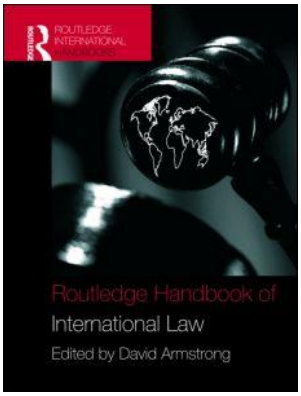

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Attainments, eclipses and disciplinary renewal in international human rights law: a critical overview

Obiora Chinedu Okafor

This chapter provides a critical overview of the contemporary state of the international human rights law discipline. It does so chiefly through the explication of patterns revealed and insights gained by training three kinds of conceptual lens on the texts, discourses, contexts, and praxis of the discipline. These lenses are devoted to the capture and assessment of the attainments that have uplifted the discipline, the eclipses that trouble it, and the bouts of disciplinary renewal that it has experienced from time to time as it struggles with the possibility or otherwise of enduring self-transformation. The chapter maps and examines, albeit in a measured way, the attainments that have advanced the discipline to date; teases out and explicates most of the eclipses (full or partial) that have inhibited the discipline's optimization; explores what is referred to in the paper as the dualistic deep structure of human rights, and the relationship of this deep structure to the characteristics and ultimate utility (or otherwise) of the discipline's constant drive to renew itself. In the end, it is suggested that while human rights' renewal has, of course, always been possible, even the entailed ebb and flow of the zone or band of international human rights protection, the observable expansion and contraction of the borders of the living human rights law, and the mobility of the boundary of protection that human rights offers, does not erase entirely the margin that is too often inhabited by those who have been left in (nay, shifted to) the human rights cold. This is why the discipline is in danger of being unable to achieve real sustained transformation in our time.

Introduction

This chapter provides a critical overview of the contemporary state of the international human rights law discipline. It does so chiefly through the explication of patterns revealed and insights gained by training three kinds of conceptual lens on the texts, discourses, contexts, and praxis of the discipline. These lenses are devoted to the capture and assessment of the *attainments* that have uplifted the discipline, the *eclipses* that trouble it, and the bouts of *disciplinary renewal* that it has experienced from time to time as it struggles with the possibility or otherwise of enduring self-transformation.

In order to develop systematically the main argument that is made in it, the chapter is divided into three main sections. Each section corresponds to one of the three organizing sub-themes of the chapter: that is, attainments, eclipses, and the question of the (im)possibility of disciplinary renewal. These three organizing sub-themes are considered in the chronological order in which they have

been stated here. The second section maps and examines, albeit in a measured way, the attainments that have advanced the discipline to date. In the third section, most of the full or partial eclipses that have inhibited the discipline's optimalization are teased out in an extensive way. The last section concludes the chapter by pondering what is referred to as the dualistic deep structure of the discipline and its relationship to the characteristics, and ultimate utility or otherwise, of the discipline's constant drive to renew.

Due to space constraints, not every important attainment or eclipse could be discussed in this chapter.

Attainments

Up on the "moral plateau"[1]

As praxis, *human rights* have come a very long way from the time when Jeremy Bentham felt able to declare that they were nothing more than "rhetorical nonsense – nonsense upon stilts" (Bowring 1843: 501). Even as late as 1937, the principal international law authors still denied that there were any such thing as international human rights law (Buergenthal 2006: 783–5). Today, despite persisting legitimate doubts about the coherence of the conceptual and practical enterprises that have been spawned by the introduction of this concept into social life (Sen 2004: 316), few, if any, serious commentators can refer so dismissively either to the concept of human rights or to the sub-discipline of international law that is devoted to its study. This is so much so that even its most articulate critics have recognized the dizzying heights which it has attained in our time. For example, Upendra Baxi has gone as far as arguing that as contingent, contradictory and contested as international human rights norms too often are, they "remain perhaps *all that we have* to interrogate the barbarism of power" (Baxi 2006: 4). This, in Balakrishnan Rajagopal's words, means that human rights discourse is now the sole *approved* discourse of resistance (Rajagopal 2003: 165). And if Amartya Sen is right in declaring that human rights are quintessentially ethical articulations (Sen 2004: 321), Makau Mutua's now famous conclusion that these norms now sit on a "moral plateau" is as revealing in this respect (Mutua 2002: 40). So is Louis Henkin's oft cited description of the respectability that international human rights norms have attained in our time in terms of its constitution of "*the* age of rights" (Henkin 1990: 26–9). For a set of ideas, texts and praxis that had endured centuries of excessive discursive skepticism, this ascent to the dizzying heights of widespread rhetorical acclaim is a significant – if in itself insufficient – attainment; not least because of the "rights consciousness" (in the formal sense) that it has helped to highlight and foreground.

Rights consciousness

At the very least, a certain consciousness about the potential utility of much of the formal corpus of international human rights law for the prosecution of their various emancipatory or repressive agendas seems to have emerged among almost all elite classes almost everywhere in the world (Robinson 2003). This exponential rise in the circulation of a relatively elite version of human rights law discourse has led Michael Ignatieff to identify the post-1945 generation as one that currently encounters a significantly heightened "juridical revolution" (Ignatieff 2001: vii). To paraphrase Cassel, many respected scholars have claimed – with some justification – that there has been a *triumph* of rights consciousness; one that has both contributed to and stimulated an explosion in international human rights law (Cassel 2004: paras 40–4).

Standard setting and vindication mechanisms

Most knowledgeable observers of the discipline will easily agree that international

human rights law has achieved considerable, if narrow ranging and insufficient, success in the standard-setting and mechanism-constituting areas. In the last five or six decades, literarily hundreds of human rights documents of varying legal force have been adopted, and scores of institutional mechanisms established (Buergenthal 2006). Before and after the adoption of the Universal Declaration of Human Rights in 1948, the corpus of international human rights law has been immensely expanded in size and range to include a large number of basically global (usually U.N.) human rights treaties and soft law documents. This process has also resulted in the adoption and entry into force of the regional human rights treaties and in the establishment of the corresponding monitoring bodies. The dismantling of the United Nations Commission on Human Rights and its replacement with a new United Nations Human Rights Council is only the latest event in a long list of post-1945 developments in the institutional expansion of the international human rights area (Lauren 2007: 335–43).

Focusing beyond the state

It is indisputable that, after decades of neglect international human rights law is *beginning* to pay significantly more attention to non-state actor human rights violators than it historically did. Although, as we shall see in the third section, this incipient turn away from state centrism has been painfully slow and inadequate (Agbakwa 2003; Baxi 2006), it has been steady nevertheless. This is not, of course, to suggest that international human rights law has in fact captured non-state actor violations in an adequate way, but merely to point out that given the extent of the prior neglect, it is a relatively significant attainment for it to begin to focus on the issue at all.

In a noticeable, if cautious, departure from the historical tendency among the mainstream authors of the sub-discipline to ignore the rampant violations of human rights by non-state actors (such as local "private" actors, multinational corporations and the international financial institutions), the Human Rights Committee has of recent paid some attention to the need for greater scrutiny of the activities of so-called private actors in relation to activities that affect the enjoyment of human rights (Alston 2005b: 769–70). The committee now requires states to ensure as much as they can that these non-state actors do not impair the enjoyment of human rights within their territories.[2] However, as Alston has correctly lamented, nothing in the committee's work has so far suggested that in the absence of effective action by states in the area of reining in these non-state actors, international human rights law imposes *direct* obligations on private actors such as private healthcare providers or multinational corporations. Needless to say therefore, and as significant as they are in relative terms, the attainments of the sub-discipline in this area have not been all that robust.

Correspondence

Critical as he is of the tendency of international human rights law to, in part, encode and reflect global power asymmetries, and to exclude the subordinated from its inner driving rooms, Baxi has correctly recognized that:

> Through myriad struggles and movements throughout the world human rights has become an arena of transformative political practice that disorients, destabilizes, and, at times, even helps destroy deeply unjust concentrations of political, social, economic, and technological power.[3]

How does international human rights law, a law which applies in a largely sheriff-less globe, achieve this mild feat?

As I have argued elsewhere (Okafor 2007), the principal way in which international human rights law has diffused and percolated around the world is through its remarkable

capacity to induce something I have referred to as *correspondence*. This occurs both within and way beyond the compliance-focused radar, so much so that those who train their lenses exclusively on the incidence of state compliance with international human rights law tend to miss far too many of its significant effects. Thus, were one to be largely concerned with the capture and measurement of state compliance, one would be likely to see a far less developed, intricate, and robust picture of the attainments of international human rights law than would be revealed were one to adopt a more holistic focus on the generation of correspondence by international human rights praxis. This is, of course, not an argument against the measurement of state compliance as such. Rather, what is being suggested here is that the state compliance measure too often produces too limited a picture of the actual concrete workings and attainments of international human rights law.

An example of the way in which a broader focus on correspondence tends to produce a more holistic and thus more accurate picture of the operations and effects of international human rights law is the way in which the African human rights system, which is widely regarded in the literature as weak (Steiner and Alston 2000: 920), and with whose views states do not comply that often (Viljoen and Louw 2007), has nevertheless helped induce far stronger *correspondence* within a significant number of African states, especially Nigeria and South Africa (Okafor 2007: 91–154, 155–219). A couple of examples from both countries will serve to concretize and illustrate this point. In Nigeria, a group of ethnic minority rights activists escaped execution at the hands of a military regime in part as a result of the influence of a decision of the African Commission on a local high court judge (Okafor 2007: 98–101). In South Africa, some recent decisions of the Constitutional Court, such as the *Kaunda* and *Bhe* cases have been significantly influenced by the African Charter on Human and Peoples' Rights[4] (Okafor 2007: 157–65). In both examples, the desired effect occurred not because of state compliance as such but more or less in its absence. Yet their impact was most significant in each case. What is more, in regard to both countries, a wealth of similar evidence exists.

In both states, a process of *transjudicial communication* that was brokered and facilitated by local activist forces (including varying arrays of NGOs, women's groups, activist judges, journalists, and so on) enabled African system norms to percolate (beyond the state compliance radar) into local executive, legislative and judicial decision-making processes in a way that produced a range of impact on state and society alike. Were one to focus on Nigeria's or South Africa's formal and direct compliance with the decisions of the African Commission on Human and Peoples' Rights, one would not tease out as rich and extensive a picture of the attainment of this key institution of international human rights law. The resulting picture would be incomplete, and as such, inaccurate on the whole.

As such, it is only logical to suggest that a full appreciation of international human rights law's attainments is not really possible without the aid of a correspondence-focused set of tools. It is also in this way that both the promise and limits of the sub-discipline can be more accurately mapped and analyzed.

Full and partial eclipses

Origins and development of conceptions of human rights

The historiography of human rights has been a site of intense and continuing contestation. While all too many of the dominant western accounts of the origins of human rights locate its origins *exclusively* within the west (for example, Afshari 2007: 3–4; Donnelly 1995: 246–7; Howard 1993: 315; Ignatieff

2001: 4; Schulz 2003: 43), many critical scholars have, over the years, warned against this tendency to erase the "Third World" from the story of the origins and development of human rights. For instance, Balakrishnan Rajagopal has quite understandably lamented the rather unfortunate fact that the Third World rarely figures in what he has referred to as the mainstream "tellings" of the extant story (Rajagopal 2003: 172). Tiyambe Zeleza has pointed to the conscious or unconscious failure to in part root the international human rights movement and the legal regime it has spawned in the long histories of the struggles of Third World peoples against slavery, colonial despotism, and postcolonial misrule (Zeleza 2004: 3). And Paulin Hountondji has warned against the conflation (by those to whom the Third World's hand in the development of human rights appears invisible) of the question of the *origins of the idea* of human rights with that of the *origins of a particular conception* of human rights (Hountondji 1986).

Against the tendency in mainstream human rights historiography to skip the difficult but imperative prior ethnographic work that needed to be done before any viable conclusions can be drawn as to the historical presence or absence of the idea (as opposed to the narrow liberal western conception) of human rights in at least some Third World societies, some scholars have now demonstrated, conclusively in my view, that at the very least functionally equivalent conceptions of human rights have existed for very long periods of time in many Third World societies (for example, Bell 1996: 650–1; Deng 1990: 288; Quashigah 1999: 43, 66; Wiredu 1990: 257). Thankfully, there seems to be increasing recognition of this position among both historians and historiographers of the discipline (Arat 2006: 419; Lauren 2003).

As importantly, critical Third World approaches to international law (TWAIL) scholars have identified and situated the contrary position – that is, the partial eclipse of Third World agency that is performed whenever its contributions to the origination and development of the human rights idea is deliberately or accidentally denied – as part of a now familiar broader set of discursive techniques through which the Third World is objectified and treated almost exclusively as "a domain or terrain of deployment" of "universal imperatives" that have been constructed elsewhere by supposedly far more advanced minds (Anghie 1996: 331; Mutua 2001: 205; Rajagopal 2003: 171). This points squarely to a serious "lack" in the way the dominant international human rights discourse understands and treats the Third World; one that must be redressed if the discipline is to transcend its many other limitations.

Neglect of pro-human rights Third World cultural norms

Despite the fact that some of the most discerning observers of the discipline have recognized that its attainment of cultural legitimacy within the relevant societies is a necessary precondition for the abridgement of the often wide gap between theory and practice in international human rights law (An-Na'im 1992: 431; Donnelly 1995: 249; Robinson 1993: 632; Zeleza 2004: 13), local culture – especially non-western culture – is all too often constructed within the human rights discourse in purely oppositional terms, as an obstacle to be surmounted and as a huge part of the problem. Rarely is it imagined as an important part of the human rights solution (Nyamu 2000: 392–5). So in this rather simplistic binary typology, human rights norms (which are seen as a fixed already known quantity) are an unalloyed good and local culture (which is seen in a similar monolithic light) is unqualifiedly bad.

No wonder then that there has been such scant mainstream ethnographic research into the nature and properties of the cultural norms that operate within Third World and

other societies; and that systematic knowledge of the positive capacity of some of these norms to modify, shape and advance the enjoyment of human rights is almost entirely lacking in the dominant international human rights discourse (Zeleza 2004: 11). Even more worrisome is the fact that such neglect of the necessity of producing knowledge about the nature and properties of the pro-human rights local cultural norms that exist in many non-Western societies also characterizes the work done and literature produced by all too many of the local human rights NGOs that operate in the Third World (Okafor 2006: 106–11).

This situation is extremely problematic from the point of view of the attempt to ensure widespread respect for human rights. It eclipses in part the sunlight that could help energize the pro-human rights struggle in most of the world's societies. For, if as Ibhawoh has noted, every cultural tradition contains some norms and institutions that are supportive of human rights, as well as some that are antithetical to its enjoyment (Ibhawoh 2000: 859), why has the dominant international human rights discourse concentrated almost all of its energies on the analysis of the negative dimensions of local culture? Why has far more attention not been devoted to the crucial task of "finding the space that local contexts provide" for the advancement of international human rights law (Nyamu 2000: 417)?

Women's rights

Although, as Hilary Charlesworth has noted, the rhetoric of women's rights seems to have achieved widespread formal public legitimacy on the global plane (regardless of what many states and societies actually believe), it is difficult to sound as positive with respect to the concrete practice in this area (Charlesworth 1998: 791). Despite the fact that over 90 percent of the world's countries have ratified the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW),[5] in spite of the rapid and impressive response of the United Nations to the challenge posed to it by women's movements around the world (Charlesworth 1998: 791), the world is still nowhere near putting an end to the more or less undeniable reality in every human society of unjustifiable discrimination against women on the basis of their gender (Apodaca 1998: 139–40). Clearly, this is a disturbing situation.

Yet, even within the international women's movement, Third World women activists and scholars have, while accepting that women everywhere have some common concerns, tended to express a sense of partial eclipse by a dominant western agenda (Nesiah 1993: 199; Oloka-Onyango and Tamale 1995: 701) that too often merely consigns them to the role of paradigm receivers who simply *apply* feminist international human rights theories developed in the west.

Rights of indigenous peoples

Judged from the overall profusion in the production of U.N. treaties and soft law standards in the international human rights area, the U.N.'s failure over the last 12 years or so to adopt even one dedicated treaty in the indigenous rights area (Corntassel 2007: 138; Williams 1990: 696–8) is a profound reflection of the severity of the partial blind spot and sheer lethargy that afflicts international human rights law with respect to the recognition and advancement of the rights of indigenous peoples. Worse still, it was only in June 2006 that the U.N. Human Rights Council adopted the formally non-binding *Declaration on the Rights of Indigenous Peoples*.[6] And although, in its case, it was adopted before the commencement of the U.N. Decade on Indigenous People, the existence of the International Labor Organization's *Indigenous and Tribal Peoples Convention No. 169 of 1989* does not remedy this problem.[7] The fact that it has been ratified by precious few countries (Quane 2005: 655) and is therefore of very limited applicability around the world, suggests this conclusion.

Ethnic minority rights

Despite the relative robustness of the corpus of regional treaty law aimed at the protection of ethnic minorities,[8] and the availability at the global level of Article 27 of the International Covenant on Civil and Political Rights (ICCPR) and of even the common Article 1 of both the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR),[9] the fact that the principal U.N. legal text in the area, the *U.N. Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* is "merely" a soft law document is one good pointer to the relative disfavor and neglect that the protection of ethnic minority rights has suffered in the post-1945 world order.

The other pointer to the relative neglect of ethnic minority rights in the U.N. system is the largely ideological insistence in most of the relevant global and regional treaties (with the notable exception of the *African Charter on Human and Peoples' Rights*)[10] on conceptualizing and crafting what are meant to be ethnic minority rights in terms of the rights of persons belonging to ethnic minorities (Jovanovic 2005: 628–9). This tendency has its roots in the dominance of a particular version of liberal thought in this area; one that has long insisted on the inadmissibility of collective rights (Donnelly 2003: 204–6; Kymlicka 1989; McDonald 1991). Yet, it is becoming clear that certain human rights – such as the right to speak one's minority language – do not make all that much sense when conceived as *individual* rights (Klabbers 2006: 205; Newman 2007: 231–2).

Thus, despite the urgency of instituting effective ethnic minority rights protections around the world as a key way of addressing the injustices that constitute the root causes of many violent and costly civil conflicts, the dominant international human rights discourse has tended to reproduce the disdain for collective rights that flies in the face of the imperative social necessity for the deployment and vindication of such rights.

Sexual orientation

There is no doubt that the rights of sexual minorities have been marginalized in international human rights law (Murray and Viljoen 2007; Sanders 1996: 78–87). For one, when they feature at all these rights sit very low on the priority listing of the human rights of the U.N. (Morgan 2000: 208; Sanders 1996: 68). Even U.N. soft law instruments are hard to find in this area (Heinze 2001: 298–300). This is therefore another area of the discipline in which a partial eclipse is detectable.

Mental disability rights

In general, although the regional human rights systems have paid some attention to mental disability rights,[11] hard law texts are all non-existent in this area of international human rights law. The global norms governing this subject matter are to be found in formally non-binding and often generally obscure soft law instruments.[12] In sum, the area is only just beginning to recover from decades of neglect and inattention by international human rights law.

Economic, social, and cultural rights

Despite the contingently useful international rhetoric of rights indivisibility and interdependence (Agbakwa 2002: 178), it is now beyond serious debate that so-called economic, social, and cultural (ESC) rights have been historically marginalized in international human rights law and practice in favor of so-called civil and political rights (Donnelly 1995: 241–5; Oloka-Onyango 1995: 1; Woods 2005: 103–4). In part as a result of their continued marginalization of ESC rights work, the dominant actors within the human rights movement still fail to address or address adequately "the most pressing issues of poverty, inequality, and marginalization

affecting large majorities in most countries" (Jochnick 2004: 90; Khan 2004: 16). Thus, despite their critical relevance to the struggle to uplift the world's impoverished majority (Felice 2003: 2–7), ESC rights have been partially eclipsed over time by, among other factors (Vizard 2005: 4), the relatively disproportionate attention that has been paid in both text and practice to civil and political rights.

Neo-liberal globalization and "trade-related market friendly human rights"

Focused as it has largely been on the advancement of civil and political rights, and as skeptical as it has tended to be of the necessity of the struggle for ESC rights, the capacity of the living international human rights law to defend and protect the rights of the impoverished and socioeconomically marginalized majorities of most countries has, at best, been significantly weakened by the march of a particular (if historically recognizable) form of socioeconomic globalization: neo-liberal globalization. Largely via the operation of market discipline, which operates with little or no coercion and "imbues the individual with particular ways of thinking, knowing, and behaving, thus instilling modes of social consciousness that make social action predictable" (Evans 2005: 1054–5), neo-liberal globalization has authored a so-called "second great transformation" in world conditions and affairs (Howard-Hassmann 2005: 3) in which the validity and applicability of normative and other claims tends to be judged against the normative referent of a set of "liberal freedoms" (Evans 2005: 1057–1062).

This has resulted in the ascendancy (although not exclusive dominance) of a particular conception of international human rights law that is at the very least "friendly" to market discipline (Baxi 2006: 235). In its unfortunate praxis, the resultant trade-related, market friendly (TREMF) human rights paradigm (Baxi 2006: 132) tends to privilege the rights of capital over the rights of impoverished humans; construct the progressive state as one which is much more soft than hard toward global capital; imagine the ideal state as one that is market efficient in suppressing and de-legitimating the human rights-based practices of resistance of those of its own citizens who actively oppose that state's excessive softness toward global capital; and coerces and/or encourages states to free as many spaces for global capital as possible, initially by pursuing the three Ds of contemporary neo-liberal globalization: near relentless deregulation, denationalization, and disinvestment (Baxi 2006: 234–75).

This has led to all too many serious and increasingly well-recognized negative effects (Howard-Hassman 2005: 4–7), including its reproduction within international human rights law.

Global power matrixes and the displacement of alternative human rights narratives

As Jack Donnelly has correctly observed in his recent critique of "arrogant and abusive 'universalism'," the precious few countries of the world which currently hold and exercise the greatest global political, economic, and cultural power too often confuse and conflate the interests of the dominant segments of their societies with universal values (Donnelly 2007: 304–5). When coupled with the vastly disproportionate power which is available to this small group of mostly western actors to project their parochial world views and preferred historical record onto the world stage and construct and normalize them into *the* human rights gold standard which every other society ought to aspire to attain, the material and cultural power of these actors has all too often (although not always) produced a range of negative consequences, especially for the vast majority of the world's peoples who inhabit the Third World. Some of these consequences are discussed later.

One of the most harmful features of this kind of western-style "global dominance is the perpetual rediscovery of its own perceived innocence" (Falk 2000: 87). The myth of western innocence has been so normalized and is so powerful that it is now encoded in the living international law of human rights; that is the law as it is actually concretized and experienced. And so, despite a long history of abuse and exploitation of non-western peoples – from the dispossession of the indigenous peoples of North America, to slavery and anti-black racial abuse, to the atrocities of colonial rule in Afro-Asia, to Hiroshima and Vietnam, to French atrocities in Algeria, to CIA and other government-sanctioned killings in the Third World, to Abu Ghraib and Guantanamo Bay, and so on and so forth (Falk 2000: 87; Woods 2005: 487) – the human rights savior is still almost always understood as western while the human rights savage is almost exclusively constructed as non-western (Mutua 2002: 11–14; Okafor 2001). Needless to say, the construction of this myth of western innocence serves to foreground a narrow and incomplete narrative that backgrounds what ought to be in the foreground of the human rights story, thus displacing alternative human rights narratives.

The construction and normalization in international human rights law of this kind of heaven/hell binary (Okafor 2001) and its propagation of the myth of western innocence has fed much life sap into the idea of western (especially U.S.) exceptionalism, thus rendering it much more plausible than it would otherwise seem (Forsythe 2006: 466; Zeleza 2004: 9–10). In its U.S. iteration, this idea has been deployed to justify U.S. self-exclusion (nay, near immunity) from international human rights law. The unfortunate logic here has been that if U.S. behavior is already the gold standard in every human rights area, then why would it need any international standards to shape its behavior? This stance has led to the failure of the U.S. to ratify a number of important international human rights treaties (Ignatieff 2001: 13); its reluctance to apply international human rights law within its domestic legal system (Wu 2006: 140–5), and the rather frequent failure of far too many of its own international human rights advocates to assess the policies of their own government against the same international human rights standards that they deploy in their frequent criticism of Third World governments (Okafor 2001: 576; Tomasevski 2005: 713).

The relentless attempts of the current U.S. administration to exploit the tragic 9/11 events to "eviscerate basic rights" not just within the U.S. but also in its treatment of persons accused of terrorism or captured on the battlefield in Iraq or Afghanistan (Dickinson 2002: 1410; Tolley 2004: 540) and the fact that the U.S. still manages not just to retain its self-image (however diminished) as the "city on the hill" to which all other peoples ought to look for direction, but also continues to shape in a somewhat disproportionate way the human rights behavior of key U.N. committees (Foot 2007: 490), is another example of the negative effects that can be exerted in human rights discourse (and, by implication, in international human rights law) by the tendency of global power matrixes to operate in ways which displace and partially eclipse alternative human rights narratives in favor of the more dominant human rights stories. In this way, a particular preferred human rights picture is constructed and projected; one that inevitably shapes the living international human rights law.

The overall point that is made in this section is not that one wishes that there were no powerful actors in the world. It is not being suggested either that there can ever be a world that is *completely* devoid of power asymmetries. Power asymmetries can be radically reduced but are not likely to ever be totally erased from global social life. For is not power, after all, relational? Does not every actor exercise power in relation to some other actor in some context? Thus, there can be no international human rights praxis that

operates safely beyond the reach of global power. What is being suggested in the preceding paragraphs is that human rights need not be as amenable to global power as it currently is, and that the fact that it is currently so has produced far too many ill effects for all too many of the world's peoples.

"Historical" wrongs

International human rights is, at best, extremely weak at righting so-called historical wrongs (especially those of a material kind) to the reasonable satisfaction of most within the wronged subaltern group.

Massive historical atrocities such as slavery and colonial dispossession/abuse currently go unpunished or not redressed in part because the perpetrators and victims are too easily constructed as long dead, and the current *individual* citizens of the responsible countries are too readily portrayed as innocent of the crimes committed by their ancestors. Yet, almost all of the responsible *states* currently exist intact. Is the real issue not the responsibility of the collectivity (the state) for the acts that it (the state) indisputably authorized, albeit many years before? In any case, do not current citizens of those states enjoy the exponentially compounded material and other benefits (such as centuries of net free labor) extracted through slavery and colonial abuse? Of course, some could deploy more technical international law arguments such as the operation of inter-temporal law in the hope of defeating arguments that suggest that these sorts of historical wrong ought to be righted with the help of international human rights law. But the unmitigated fallacy of the inter-temporal law argument is that it projects onto the colonized Third World peoples an inter-European (and therefore geographically limited) law that they had not accepted and which clearly did not govern their affairs until much *after* the very atrocities complained of had been committed.

The story of the attempt, over the last decade or so to redress more recently inflicted historical wrongs such as land dispossession in Southern Africa further illustrates this weakness of international human rights law at contributing to the righting of so-called historical wrongs. As different as the two societies are today, in both South Africa and Zimbabwe, despite their respective successes at ending the formal political subjugation of the vast majority of their populations by a white settler colonial class, over the periods they have been so freed, there has not been all that much significant change in the racialized structure of ownership of the arable land in those societies.[13] Now, international human rights law is not, of course, chiefly responsible for this scenario. The point that is being made here is that when the living international human rights law has engaged this issue at all – at least as seen from the commentary of scholars (Boyle 2001; Shirley 2004) and the statements of civil society groups (one good example is Human Rights Watch), they have – to some extent quite understandably – focused on lamenting the (corrective) dispossession of those who currently hold the very lands that were dispossessed from the vast black majorities of both of these countries. Worrisomely far less, if anything at all, is said in this literature about the initial dispossession of the black majorities or the critical need to urgently redistribute their lost lands to them, so as to create more equitable, egalitarian, and just societies in these countries

In the end, the point is that it is as if international human rights law can only function well when fundamental historical wrongs have already been addressed and/or are not all that salient anymore. It does not itself show more than an extremely limited capacity to help reconfigure grossly unjust fundamental socioeconomic and political arrangements. Here, the deepest ideological underpinnings and moorings of international human rights law combine with the operation of particular forms of global power to eclipse alternative human rights narratives and practices.

Beyond disciplinary renewal

In conclusion, it is important to consider, even if briefly, the possibility of international human rights law pushing back against and ameliorating the harmful effects of the full and partial eclipses that are discussed here; thereby strengthening its coherence, legitimacy, and effectiveness. In other words, after taking stock, can the discipline renew itself without repeating the mistakes of the past (Kennedy 2000)? Is this even possible?

A key path to disciplinary renewal that has been suggested by a diverse bunch of some of the most established international human rights scholars of our time is a turn to "cross-cultural dialogue" or some such conversation or communicative praxis (for example, see An-Na'im 1992; An-Na'im and Deng 1990; Baxi 2006: 125–68; de Sousa Santos 1995: 337–53; Donnelly 1995: 250–2; Mutua 2002: 113). The basis of this call for dialogue is the recognition of these scholars of what Mutua has termed the incompleteness of every culture, including the predominantly western cultures from which most of mainstream global human rights proselytism emerges (Mutua 2002: 113). The expressed intention of most of those who have made this call is to encourage the development of what Donnelly has recently referred to as a partial and incomplete but "functional overlapping consensus" around the "relative universality" of the conceptual frameworks that ground international human rights law norms, while avoiding as much as is possible the imperialistic undertones and effects of all too many articulations of the universality of human rights (Donnelly 2007: 289–92).

It is also becoming increasingly recognized that for this cross-cultural dialogue to be as meaningful as it could be, it must include far more than a complex series of bi- and multilateral interstate conversations. As Rajagopal's germinal work has demonstrated, the living international human rights law (as it is experienced by most peoples in the world) is in part written and limited by the resistance and struggles of Third World and other social movements (Rajagopal 2003: 245–71). These social movement struggles have been waged by "protest coalitions" comprised of varying arrays of trade unions, professional associations, women's groups, community and non-governmental organizations, religious leaders, environmentalists, and human rights activists (Zeleza 2004: 1–3), and have sometimes helped produce important, even remarkable, social changes. This is a fact that has not been all that easily received into the routine analytic processes through which stories of the discipline are written. In tending not to take adequate account of these struggles and their effects (Rajagopal 2003: 245–71), international human rights lawyers have too often labored under the mistaken impression that international human rights law is simply what international human rights lawyers make of it (Rajagopal 2006: 1091). Yet, in truth, as Rajagopal has told us, international human rights are what an expanded group of its practitioners (including social movements, the masses, etc.) make of it (Rajagopal 2006: 1091). This is precisely why the suggested cross-cultural dialogue must include and take seriously the popular "human rights talk" of the so-called ordinary citizens of the very cultures that are to participate in the dialogue.

Regardless of the considerable merits of cross-cultural dialogue as a *renewal* strategy in international human rights law, it is doubtful that it is likely to result in an adequate and sustained *transformation* of the discipline – at least not any time soon. Examined closely enough, the historical evidence simply does not support much optimism in that direction. For, although over its relatively long career the international human rights law discipline as we now know it has experienced many bursts of renewal, it has never adequately transformed itself. To put it rather crudely, no matter how far human rights law has expanded its zone of protection, someone has always been left out in the human rights cold. The *American Declaration of Independence* loftily

proclaimed that all humans were born free and should remain so while slavery remained conceptually legitimized in the praxis of the very drafters of that document and went on largely unhindered for over a century afterward (Morgan 1972). Even today, when studied closely it becomes apparent that the living mainstream human rights praxis is still based to a significant extent on the deep conceptual structure of the oppositional competition between the deserving and the undeserving, and the displacement of suffering from the deserving to the undeserving. Landless black Southern Africans must suffer so that their landholding white counterparts can enjoy their economic human rights (Mutua 2002: 142–4). Here, the landless blacks are constructed as undeserving while the landholding whites are positioned as deserving; with the result that the potential white suffering that could result from more deeply egalitarian land reforms are displaced toward the landless blacks. The anticipated suffering of the "deserving" beneficiaries is thus displaced toward the "undeserving" victims.

The point is not, of course, that in the process of its renewal, international human rights law cannot find some middle ground or accommodation with respect to each of these cases. What is being suggested is that even such an accommodation is unlikely to escape the deep conceptual structure that the discipline has exhibited over its career. For some displacement of suffering from those who are viewed as deserving toward those who have been forced into the strait-jacket reserved for the undeserving will still occur. The accommodation will most likely only reduce the *extent* of this displacement of suffering. And so, the zone or band of international human rights protection may ebb and flow, may expand or contract, but this mobility of the boundary of protection does not erase entirely the margin that is inhabited by those who have been left in (nay, shifted to) the human rights cold. What occurs instead is a shifting of coordinates, an adjustment in the conceptual or even concrete location of the zone of protection, in order to capture or release another who has been either "mainstreamed" or "othered."

Such then is the nature of the duality of the deep structure of human rights law – be it international or local – that it is driven, to a significant extent, by the construction of boundaries and binaries (such as the worthy and the unworthy) that allow it to displace and shift suffering from one to its "other" without fundamentally *transforming* (as opposed to renewing) the nature of suffering in that context, the nature of local or global social life, or itself as a local or global discipline.

Notes

1 I owe this term to Makau Mutua's fecund imagination. See Mutua 2002: 40.
2 See *General Comment No.31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, adopted March 29. 2004, Human Rights Commission, 80th Session, 2187th Meeting, 8 U.N. Doc. CCPR/C/74/CRP.4/Rev.6 (2004).
3 See Baxi 2006: 4.
4 Supra note 10.
5 Supra note 4.
6 Human Rights Council Res. 2006/2.
7 72 ILO Official Bulletin 59.
8 See the following: *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Conference on Security and Co-operation in Europe*, adopted 29th June 1990 and reproduced in (1990) 11 *Human Rights Law Journal* 232; Recommendation 1134 on the rights of minorities, EUR. Parl. Ass., 42d Sess., 2d part (1990); the Council of Europe *Framework Convention for the Protection of National Minorities*, C.E.T.S. No. 157, reprinted in 34 I.L.M. 351 (1995), adopted February 1, 1995.
9 Supra note 6.
10 Supra note 10.
11 See *Aerts vs. Belgium*, App. No. 25357/94, Eur. Ct. H.R. (1998); *Keenan vs. United Kingdom*, App. No. 27229/95, Eur. Ct. H.R. (2001); *Varbanov vs. Bulgaria*, App. No. 31365/96, Eur. Ct. H.R. (2000); *Autism-Europe vs. France*, European Committee of Social Rights, Complaint No. 13/2002, Decision on the Merits transmitted to the Committee of

Ministers on 22 May 2003; *Rosario Congo vs. Ecuador*, Case No. 11.427, Inter-Am. C.H.R., Report No. 63/99, OEA/Ser.L/V/II.102, doc. 6 rev. (1998); *Purohit and Moore vs. Gambia*, African Commission on Human and Peoples' Rights, Communication No. 241/2001 (2003).

12 See the following: World Programme of Action concerning Disabled Persons, G.A. Res. 37/51, U.N. GAOR, 37th Sess., Supp. No. 51, U.N. Doc. A/37/51 (1982), adopted December 3, 1982; Declaration of Caracas for the Restructuring of Psychiatric Care in Latin America, adopted November 14, 1990 at the Regional Conference on the Restructuring of Psychiatric Care in Latin America, convened by PAHO/WHO; Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care (MI Principles), G.A. Res. 46/119, U.N. GAOR, U.N. Doc. A/RES/46/119 (1991), adopted December 17, 1991; Standard Rules on the Equalization of Opportunities for Persons with Disabilities, A/RES/48/96, 85th plenary meeting, adopted December 20, 1993; Council of Europe's Recommendation 1235 (1994) on Psychiatry, EUR. Parl. Ass. 10th Sitting, Rec. No. 1235, adopted April 12, 1994; Human Rights and Recommendation Rec (2004) 10 on the Protection of the Human Rights and Dignity of Persons with Mental Disorder, Comm. Of Ministers, 896th Meeting, Rec. No. (2004) 10, adopted September 22, 2004); and Montreal Declaration on Intellectual Disability, adopted October 6, 2004.

13 As at 2005 only about 3% of commercial farmland in South Africa was redistributed between 1994 and 2004. Some 60,000 commercial farmers (mainly white farmers making up about 5% of the total population) own between 67–87% of the total area (Moyo 2004: 7; Wisborg and Rohde 2005: 400–10). In pre-redistribution Zimbabwe, approximately 4500 white commercial farmers (0.03% of the population) controlled 31% of the country's land under freehold tenure, or about 42% of the agricultural land, while 1.2 million black families in Zimbabwe subsisted on 41% of the country's area of 39,007,600 hectares (Moyo 2004: 9). While changes have since occurred to this landholding structure, it has not changed all that significantly.