



# Architectures of intergenerational justice: Human dignity, international law, and duties to future generations

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## Architectures of intergenerational justice: Human dignity, international law, and duties to future generations

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### ABSTRACT

This article draws attention to the constitutive requirements of intergenerational justice and exposes the limitations of regulative arguments based on international human rights law. Intergenerational justice demands constraining the regulative freedom of the international community, and it is tempting to assume that adequate constraints are already contained within existing treaties including international human rights treaties. In fact, intergenerational justice demands bespoke constitutional norms at the international level, and it demands entrenching constitutional norms. International human rights law per se implies neither of these constitutive propositions and both are problematic in light of the present structure of international law. Nevertheless, a combination of arguments concerning intergenerational justice and the systemic implications of human dignity yield a more constitutive account of human rights and therefore an internal critique of the overall architecture of international law.

### Introduction

The inadequacy of public international law with regards to global problems lies in the constitutive norms of international law itself. This becomes apparent whenever the basic commitments of international law have been brought to bear on questions of profound global risk. For example, the International Court of Justice has concluded that it could be permissible to use nuclear weapons under prevailing international legal rules (International Court of Justice 1996). We might accept the legal coherence of this conclusion but question the intelligibility of the international legal system as a whole if it permits any such ruling. No legal system should threaten the continued existence of the society it is intended to serve.

This is the starting point of an internal critique of international law intended to highlight the significance of constitutive norms in international law when theorizing about intergenerational justice. Application, and extension, of existing human rights commitments take us part way towards an adequate conceptualization of the requirements of intergenerational justice, and it will be my concern to chart a number of important applications of human rights to the problem. But without working through the constitutional implications of such

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interpretations—including reduction in the regulative freedom of states—we are abandoning a genuinely legal contribution to intergenerational justice in favor of faith in states and their self-interest.

More fully, the problem of intergenerational justice is here treated as closely related to human rights (“The Ambiguous Significance of Human Rights”) but ultimately a legal problem of good constitutional ordering (section titled “A Methodology for International Law and Human Rights: Intergenerational Justice and Internal Critique”). The critical assumption here is that if, like any other legal system and any other polity, international law and society project the existence of future generations of which they are the source, then that society must maintain the conditions of those future generations existing (section title “The Argument for Parallelism”). This must also mean prioritizing constitutive rules over regulative rules in the organization of any system seeking to protect future generations (section titled “The Argument for Lexical Priority”). The specific concern thereafter is whether, if accepted, this critical assumption demands “constitutional rigidity” (section titled “The Argument for Constitutional Rigidity”). The notion of constitutional rigidity concerns how difficult it is to change constitutions and the fairness of limiting future choices. Given that the intergenerational case for constitutional rigidity is strong, two questions become relevant: the possible substance of such constitutive norms in light of human dignity’s role as the foundation of human rights (section titled “Systemic Human Dignity”) and the possible systemic ramifications of such an analysis (section titled “Constitutional Implications”). Starting from international law’s social function and rethinking human rights through the lens of human dignity, human rights take on a very different character and yield the strongly constitutive notions of “subsidiarity,” “common heritage,” and “constitutional human rights.”

## **Intergenerational justice and international law: An internal critique**

### ***The ambiguous significance of human rights***

As an internal critique, this is an attempt to draw conclusions predominantly from public international law’s own resources. Two complementary features of international law make this possible. First, international law can be treated as a legal system like other legal systems, that is, a system aspiring to provide social order and continued self-constitution for a society. Second, we can draw out the implications of existing positive norms and principles and highlight the conditions of their realization. For reasons addressed below, I argue for the “lexical priority” of the first, systemic assumption in understanding intergenerational justice. However, an exploration of the critical implications of existing human rights norms first sets the scene for this prioritization.

The international community is governed by universal human rights. These universal human rights have application at both the constitutive and regulative levels of public international law. This distinction refers to the difference between basic (regulative) rules that are direct obligations to act or refrain from acting and (constitutive) rules that govern the creation and application of regulative rules. Constitutive rules, for the purposes of the present context, are general rules of international law that create institutions and govern the creation of laws such that a general, enduring, and coherent body of international regulations can govern all states in the international arena. To say that human rights have application at the

constitutive and regulative levels is, then, to say that human rights are primary obligations demanding action and omissions by states and that they are also principles that inform the shape and function of international institutions and guide the creation of regulations more generally. What specific differences between and functions for human rights can be found at these levels?

First, we can sketch the outline of a regulative understanding of human rights. Human rights are universal standards, and we expect the objects of human rights—civil and political, social and economic goods—to be delivered without discrimination. “Universal” does not mean unchanging and absolute standards (Hiskes 2009). Any legal regime admits some variation on the basis of the principle of “ought implies can.” Therefore, adjudication of human rights permits a “margin of appreciation” allowing variation in interpretation and permits “progressive realization” allowing situation-specific variation in thresholds of achievement (see Twining 2009: 422). Nevertheless, international human rights laws are universal regulations requiring implementation by states in good faith. And delivery of human rights in good faith prohibits partial or token fulfilment of the rights and requires their sustainable delivery into the future.

Second, consider the constitutive in the sense of human rights’ more general function to guide institutional design and to ensure principled coherence in the generation of norms. Abstracting from the specific details of positive international human rights law, their general function as a group of norms is to reorient our regulations towards individual rather than collective interests. This group of norms also has an internal logic that distinguishes this discourse from other discourses. Part of the distinctiveness of international human rights law is its claim to universality based on anthropology. This means, simply, that human rights must be assumed to exist where, and when, humans do and that their function and their authority resides in individuals not in the state. This implies intergenerational justice in its most basic sense, that is, acknowledging that our actions will have impact on the generations of humans that follow us and on generations beyond them. But more importantly the condition of respecting those rights now and in the future is a constitutional system compatible with sustainable delivery of those rights. As such, Article 28 of the Universal Declaration of Human Rights (United Nations General Assembly 1948: 76)—“Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized”—is a regulative expression of a constitutive commitment already latent in international human rights norms. Human rights imply stable and general international legal structures. By inversion, they cannot be of only immediate concern, or local concern, or of merely ethical concern.

This mixture of regulative and constitutive elements of human rights has given rise to a range of putative links between environmental governance and international human rights law: protection of the environment as a human right; existing human rights as the conditions of intergenerational justice; also certain kinds of procedural obligations. As to the latter, locating the authority of human rights in individual humans potentially implies permitting political representation, and legal standing, to those who can speak in the name of those generations, be it ombudsmen or children and young persons (Dias 2000). It is individual humans who have ultimate authority concerning the nature and scope of human rights and our presumption must be that groups of private individuals are at least as eligible as states to articulate rights on the behalf of future generations (Hiskes 2009).

These aspects of international human rights obligations, far-reaching as they are, will be treated as generating more radical conclusions via a different level of internal critique. That is to say, prior even to the constitutive aspects of human rights we should begin with the presupposition of “parallelism” between international and domestic legal systems. An underlying similarity is to be assumed in terms of legal systems *preserving the self-constitution, and therefore basic survival, of those whom they serve*. Clearly the “international community” has distinctive characteristics. It presently resembles the interaction of governments rather than a community with a public authority and a common good. Like a nation-state, however, it has the potential to be the meeting point and coordinator of its subsidiary societies. Public international law should be, I will argue, the society of all societies, a social grouping no less intelligible than any other large collective (no less “artificial” than the state itself) and as such no less in need of a legal system to coordinate its self-constitution (Allott 2002). As will be argued, reduction of international law to contractual agreements between governments not only rejects this parallelism but also, I argue, rejects the intelligibility of law contributing to intergenerational justice at all.

### ***A methodology for international law and human rights: Intergenerational justice and internal critique***

What does an intelligible approach to intergenerational justice demand? Intergenerational justice relates to our responsibility to respect future generations such that we commit no injustice against them either in terms of distributive justice (equitable distribution of goods between generations) or in terms of more basic wrongs (namely, destroying the conditions of their existence or their potential for levels of well-being equivalent to our own). Thus, Principle 2.1 of the New Delhi Declaration on Sustainable Development (International Law Association 2002: 213) holds that the:

principle of equity is central to the attainment of sustainable development. It refers to both inter-generational equity (the right of future generations to enjoy a fair level of the common patrimony) and intra-generational equity (the right of all peoples within the current generation of fair access to the current generation’s entitlement to the Earth’s natural resources).

The possibility of inequity lies in resource depletion and dangerous anthropogenic interference with the environment (Intergovernmental Panel on Climate Change [IPCC] 2007). Inequity lies less clearly, but no less importantly, in the reduction of political, economic, and social opportunities that would flow from irreversible environmental degradation. Accordingly, Principle 2.2 continues:

The present generation has a right to use and enjoy the resources of the Earth but is under an obligation to take into account the long-term impact of its activities and to sustain the resource base and the global environment for the benefit of future generations of humankind. “Benefit” in this context is to be understood in its broadest meaning as including, *inter alia*, economic, environmental, social and intrinsic benefit. (International Law Association 2002: 213)

Those future generations, understood as our direct descendants or as more remote future humanity, can be done distributive wrongs, institutional injustices and be the subject of unfair procedural arrangements (Wallimann-Helmer 2015).

There are a number of *prima facie* arguments for the importance of international law in securing intergenerational justice. First, and most importantly for present purposes, concern

for future generations and intergenerational justice cannot be responded to by way of single norms or instruments. We need the constitutive architecture of international law to make such norms work like genuine legal norms (binding, general, and permitting coherent judicial refinement). Second, in response to uncertainty, anticipation of risk, and equity problems, we need general transnational solutions: voluntaristic (i.e., “soft law”) or regional law solutions will not suffice. Third, we would benefit from dissolution of the nonidentity and nonexistence problems—that is, problems concerning the intelligibility of conceiving the interests of future generations and of forming relationships of obligations with such generations—and it is to be assumed that constitutional, rather than regulative, responses must form part of an answer to this (Gosseries 2008a, 2008b). While we may or may not be able to have contractual or rights-based relationships with members of future generations, we are certainly able and required to include the interests of future generations (whatever their nature and status) within our constitutional designs.

While there are contrasting normative frameworks that can be brought to bear on this problem, we have already identified two approaches internal to international law itself: normative approaches, which are legal and constitutional at the most general level, and normative considerations flowing from human rights law. To these internal routes of analysis we can add a third, less purely internal critique, namely the normative assumptions and resources found in the pragmatic and technocratic practices of international politics and international relations. It is the first of these that I am principally concerned with, though the human rights and the international policy routes will also be drawn upon at points. Accordingly, the methodological approach to intergenerational justice defended here does not involve international constitutional reform on the basis of pragmatic or realist accounts of international law and international relations. Nor is this an (institutional) cosmopolitan analysis depending upon extrinsic moral commitments. My commitment is to import as few extrinsic moral principles as possible given what is already captured in international law and in the “internal morality of law” more generally (i.e., the general resources of law including natural justice and the rule of law).

Nevertheless, we also need to draw upon the notion of human dignity, which, as a component of contemporary international law, concerns the systemic orientation of the legal system towards certain kinds of anthropological concerns and certain kinds of coherence within legal systems as a whole (Riley 2015). The special status of human dignity as a heuristic, basic norm and as principle gives internal criticism of international law a particular kind of moral force without implying moral commitments extrinsic to the system itself. Put another way, human dignity permits wide changes to be demanded of a system in light of profound social problems because it is a rule of law preserving principle but also one attuned to the basic, presystemic, origins of obligation (Waldron 2008). It is human dignity, in essence, that frames the normative boundaries of international law (Capps 2009). Minimally, it prohibits threats to the existence of international society. Maximally, it is a general principle of obligation and good governance linked to the interests of the human person.

### Three arguments regarding international constitution

#### *The argument for parallelism*

As suggested, there are three ways in which a critique of international law can proceed. By way of constitutional analysis, by way of human rights, and by way of political realism. We

should be aware of the outline of each because they are potentially blurred. Clear separation is also necessary to make an argument for the lexical priority of constitutional arguments over questions of regulation design (see “The Argument for Lexical Priority”) and for making any argument for constitutional rigidity (see “The Argument for Constitutional Rigidity”). First, however, we consider the outlines of an argument for (international constitutional) “parallelism”: a structural and functional parallel between domestic and international constitutions.

In the most general terms, any constitutional analysis concerns the rules and institutional structures that condition social practices including the making and enforcement of legal rules. They are the most important coordinating rules of any society and the place where values are symbolically and institutionally embedded in a society. “Constitutions are where societies establish the values that are to guide political and social intercourse for generations to come, and also where those values are protected by incorporating them as constitutional declarations or rights” (Hiskes 2009: 130). Constitutional analysis is importantly associated with environmental regulation and intergenerational justice because of the general social, indeed global, importance of environmental regulations (the principled need for constitutional measures), and because of the difficulty of regulating a large number of actors who may be state or nonstate actors (the pragmatic or practical need for constitutional measures). As Tim Hayward shows, protection of the environment at the constitutional level can combine these broad principled and pragmatic grounds in different ways:

[Constitutional protection] entrenches a recognition of the importance of environmental protection; [and] it offers the possibility of unifying principles against the vicissitudes of routine politics, while at the same time enhancing the possibilities of democratic participation in environmental decision-making processes. (Hayward 2005: 7)

With these points in mind, we need to ask whether these points about domestic or national constitutional factors can and should find their parallels in an international constitution.

Regarding its constitutional structure, the distinctive characteristic of international law as a system is that it possesses no simple set of “secondary rules” (Hart 2012). It is this, rather than the absence of a single law-making sovereignty, that marks international law as a deviant example of a legal system: a group of regulative norms not obviously governed by a set of constitutive rules. There is no body of basic constitutional rules spelling out the nature of the community it serves or the basic institutional arrangements that constitute the polity. There are certain impermissible acts and obligations of which that cannot be contracted out, but these do not preclude the dissolution of the international legal system itself or the rejection of legal norms by persistent objectors (Reisman 2013). Structurally, public international law has no clear set of rules about precedent, rules providing mechanisms for law reform, or rules recognizably equivalent to a “minimum content of natural law” ensuring international society’s survival (Hart 2012: 112f). Such secondary rules are necessary for building a coherent body of international law. And while there are a number of sources of obligation (treaty, custom, publicists, general principles) serving coordinating functions, being able to generate new norms is not equivalent to a legal system working to foster the self-constitution of a society and its constituent elements.

Note that this rests on an implicit distinction between the general *sources* of international law and its *constitutive norms* (Shecaira 2014). There are several recognized sources of law

allowing the generation of norms, but these are not to be confused with constitutive obligations determining all of the permissible regulative rules generated by the system. Thus, international law gains content predominantly through treaties that are created by, and conditional on, the will of states. This means more or less an unfettered freedom among states to form contractual relations through treaties. This also means international society's legal system is not distinct from its political system and thereby appears to fail to make decisive transition from de facto regulation to de jure normativity.

If this mode of explanation seems unduly reductive with regards to international law and legality—there is, after all, a mass of international laws that successfully guide and coordinate the actions of around 200 states—it is worth bearing in mind that much analysis of the normativity of environmental protection and intergenerational justice gauges the actual and potential value of regulations not on the ends it serves but on the likelihood of state consent (Dias 2000; but see also Koskeniemi 2006 and Monbiot 2015). Judging law, in the first instance, by whether those potentially subject to it *find it convenient* to conform their actions to it would be perverse by normal domestic standards and would yield skepticism about international law as a whole. Such skepticism is partly allayed by the frequency of adherence to international law and the frequent willingness of states to accept the legal consequences of their commitments even when not fully anticipated (von Stein 2012: 477f). Nevertheless, this alone, cannot be treated as an *explanation* of the normativity of international law because it confuses what states are obliged to do (under their explicit legal commitments) and their having a sense of an obligation. States can accept the former and conform their behavior to law while rejecting the latter. And without acceptance of the *obligatory* force of international norms, they cease to be a proper standard of praise or blame for actions.

It is arguable that international human rights law provide something close to constitutive international norms. Given the scope of existing human rights law, human rights treaties do appear to be good bases for a more legally and socially coherent international law. The right to life and health alone capture many of the systemic wrongs that might be prohibited if we are concerned with future generations (Fox-Decent 2012). But as Boyle (2012) argues, conceptualization of intergenerational justice through the lens of human rights laws and institutions brings both benefits and problems. The benefits include securing higher standards of environmental protection (human rights concern the range of human interests not only the interests of the natural environment) and a link to enforcement and the rule of law (human rights are already tied to remedies and courts, to the participation of individuals, and to the integration of different fields of law like private law and public law). Their related deficiencies are exposed when we consider climate change, which:

is a global problem. It cannot easily be addressed by the simple process of giving existing human rights law transboundary effect. It affects too many states and much of humanity. Its causes, and those responsible, are too numerous and too widely spread to respond usefully to individual human rights claims. (Boyle 2012: 642)

There are, to put it differently, concerns that international human rights law is too individuating—too focused, procedurally and substantively, on individual interests—to yield systemic and coordinating solutions. The rights to life and health, it might be argued, have far more limited (negative and procedural) meanings in human rights jurisprudence and should not be mistaken for constitutional defenses of life and liberty: that is, as regulations, these responsibilities will be discharged by the state provided there are, respectively, laws in place

criminalizing unlawful killing and laws ensuring justice in access to health care. They are not, conversely, fully constitutional principles that we would expect to have far-reaching impact on our political decision making and institution building or that could be used to modify or create a whole class of regulations. And in essence, the “individualism” of human rights law is seen as a barrier to regulatory reform unless either a hybrid of environmental and human rights norms are created, or existing norms are litigated in such a way as to transcend the systemic deficiencies of “atomizing” human rights law.

One important corrective to that criticism of human rights is offered by Evan Fox-Decent (2012). On his fiduciary account of human rights, they are norms representing the trust placed in the state to protect the interests of citizens: “the basic normative authority of human rights remains traceable to the protection they afford against the threats of domination and instrumentalization engendered within the fiduciary relationship between public institutions and the persons subject to their powers” (Fox-Decent 2012: 258). Accordingly, international law is a problematic case in that it does not follow the model of citizen–state trust that is at the heart of the fiduciary relationship. Moreover, it claims a competing basic principle, namely sovereignty: “global environmental degradation is frequently justified as a consequence, however regrettable, of States exercising legitimate sovereign power in their peoples’ best interests” (Fox-Decent 2012: 260). However, sovereign states voluntarily commit themselves to human rights obligations and, says Fox-Decent, provided that these norms include a human right to a healthy environment, individual states’ fiduciary responsibility to prevent degradation is generalized at the international level:

On the fiduciary theory, sovereign power is constituted and constrained by human rights. So if the right to a healthy environment is a human right, then under the fiduciary theory it is a right that limits intrinsically the claims that can be made on grounds of sovereignty. In the result, recognising the right to a healthy environment as a human right establishes it as a criterion for testing the validity of state action. The defence of sovereign immunity is rendered otiose because the fiduciary framework places squarely at issue the question of whether or not the impugned action is indeed a sovereign act. (Fox-Decent 2012: 260)

There is much to commend Fox-Decent’s analysis and it is precisely those demands for the rule of law, for human rights in general, and for good governance, that Fox-Decent locates in the fiduciary relationship that are, I would argue, already implied by any good constitutional order, including the nascent constitutional order of international law. It is not that we have to slowly soften sovereignty through importing environmental norms into international human rights treaties or that we need to demonstrate that sovereignty includes moral criteria whose violation negates sovereign authority. We simply need to recognize that international law serves a social purpose and that sovereignty is thereby automatically reduced. In the words of Tim Hayward, “sovereignty is not a monolithic *normative* principle [...]. The appropriate view to take is that the state is—both practically and normatively—an important locus of sovereignty not the only one, nevertheless a key one. [...] More constructive and appropriate is to understand its role in relation to other sources of authority” (2005: 191, emphasis in original).

With that overview of an internal critique in mind, we should also consider briefly the pragmatic and political interface between international law and justice. This challenges both of the routes of critique considered so far. Environmental regulations invite a pragmatic mode of analysis (Dias 2000; Hiskes 2005). This investigates a possible equilibrium between existing domestic and international commitments—with domestic regulation preceding

international regulation—and the legal and ideological force of environmental concerns at the domestic level leading to change at the international. “[E]very society anticipates its own future and citizens and is concerned with their welfare. Such a shared anticipation is a considerable foundation for consensus among all cultures on the reality of environmental rights” (Hiskes 2005: 1364). As a general point, this is important and correct. Putting it more structurally, the essence of any national *constitution* is organization towards such a possibility because it is a constitution that seeks collective projection into the future. But here we are already shifting focus away from the normativity of positive international law as a supersocial regulative architecture to *consensus* across individual states. There is a danger in choosing to focus on domestic regulatory frameworks that codify and valorize *existing voluntary practices* (a “bottom-up” conception of legality). We are potentially abandoning (as too politically or conceptually expensive) the “top-down” normativity of international law itself. The significance of this is not that it demonstrates skepticism about the force or the significance of international law but rather that it rejects the argument for parallelism and with it a sense that the international regulations we need can be given coherent, constitutive, underpinnings.

### The argument for lexical priority

I argue here for the lexical priority of such constitutive underpinnings in our analysis. The lexical priority lies in the primacy of constitutive reform over regulative reform and, by extension, looking to international constitutional conditions before we consider the nature and implications of human rights law or the regulative design of environmental norms. Put more strongly, human rights laws despite their universality and moral force were never intended to be constitutive norms; what is needed are more general constitutive norms, paralleling those found in domestic constitutions, that will, in turn, give international law the regulative coherence that it needs. The language of lexical priority was originally intended to be applied to the order of principles that were arguably both constitutive and regulative (Rawls 2009: 38f); here, it is intended to denote a particular ordering between the constitutive and regulative.

We might ask from the outset why such an assumption is necessary. It is clear—though perhaps obscured by its political and historical manifestations—that, in any domestic constitutional order, the constitutional arrangements of that state will predate, and thereafter overdetermine, the quantity and quality of regulations that are produced. The constitutional order will shape a priori, through the separation of powers and through other systems of power devolution and accountability, the nature of the regulations that are generated for the polity. The application of this to the international arena clearly rests upon accepting the previous argument for parallelism and is in part a corollary of that argument: Any society, properly so-called, must allow its regulations to be shaped and constrained by constitutive norms governing the shape of the society as a whole. However, this is not merely a corollary because its applicability to intergenerational justice is acute. Environmental regulation has failed, and will continue to fail, as long as international society’s regulative choices are unfettered by constitutional commitments. For instance, questions about whether there should be a “right to a clean environment” (Dias 2000: 6) should be treated as putting the cart before the horse: The answer depends upon what constitutional commitments we have, not whether such a right is consistent with the tenor of existing human rights norms. Indeed, it is not clear in

the absence of the priority of the constitutive whether human rights ought to be given constitutional importance at all or whether like any regulations they can be rejected wholesale as part of law reform practices.

This can be usefully situated in relation to an argument attributed to Simon Caney by Stephen Gardiner (2012). On Gardiner's reading, Caney's prioritization of human rights in our thinking about intergenerational justice commits us to four propositions:

The first is human dignity: human rights are grounded in each person's humanity. The second is universal protection [...]. The third is lexical priority: human rights take general priority over other values, constraining their pursuit. The fourth is that human rights are moral thresholds. They represent levels below which individuals should not be permitted to sink. (Gardiner 2012: 4 footnote removed)

This yields a "master argument" for human rights placing them at the center of any analysis of climate change and environmental regulation. However, for Gardiner:

the master argument for human rights is only one among many possible arguments for the relevance of core values, and alternative arguments are also likely to be plausible. Consider, for example, master arguments for liberty, community, security, and so on. [Also], given this, the master argument for human rights does not by itself establish their special normative relevance. Instead, it is either silent on, or else simply assumes that relevance. (2012: 6 footnote removed)

Gardiner's critique does not, I would respond, acknowledge the specific qualities of human rights. The normative and ideological force of human rights in international discourse, along with their range of regulatory implications, mean that they are much better candidates for centrality in our thinking about *legal regulation* than deeply contested and strongly *political* notions like liberty and security. They are in other words clearly regulative norms and not simply broad principles. Equally, if we are to make an argument for lexical priorities, we are not, as Gardiner wants to express it, making an argument for side constraints and nor are we arguing for values. We are arguing for *the primacy of one set of rules over another* and for the need for those rules to be fulfilled, or those principles to be optimized, before any further regulative decisions can be made. Gardiner's "master argument" critique is misguided because, while it rightly questions hasty invocation of human rights in the context of international constitutional matters, the invocation of human rights might be linked, as it is here, with exploration of the proper constitutive norms of the international arena and therefore coherent generation of regulative norms.

Compare this, in turn, with the inadequacy of confronting the continuation of the international community through sets of regulative rules. This is evidenced in the ongoing negotiations over the content and scope of environmental treaties. This is also clearly at issue in the continued failure to adopt international articles of "State responsibility" (International Law Commission 2001). These are intended to be basic regulations concerning where and how states can be held responsible for wrongful acts. They would form the normative background of more specific regulations concerning transnational problems like climate change and transboundary harm. The fact that the International Law Commission's (ILC) proposals are perpetually in draft form is a reflection of the paradox of international law. Principles of basic liability and basic wrongs are primary candidates for constitutive norms, but, as they are being treated as regulative norms, it is the right of states to reject adoption of such norms. Geoffrey Palmer says of these (with considerable understatement):

While the goals of the ILC and the Experts Group are commendable, neither has been able to establish an effective, working international legal regime that is capable of solving the problem of State responsibility for emitting greenhouse gases. Thus, pollutants continue to be emitted, with no State accountability for transboundary injury to other neighboring States. (1992b: 221)

Note the interplay between human rights, constitutionalism, and other unresolved problems in international law. One area where this has become particularly acute is in understanding human rights, their various “generations,” the status of group rights, the possibility of generating new rights, and so on. Without clear constitutive rules at the international level, it is certainly possible to create new forms or groups of human rights. Debate about rights “inflation” reflects the anxiety that this causes: the anxiety, in part, of cheapening the ideological stock of human rights, and the anxiety, in part, of introducing a form of normative relativity where some sets of norms appear to be “more legal” than others (Weil 1983). Constitutive rules determine the kinds of rights that will be created, while the sources of international law simply entail the production of new instruments replacing the previous ones.

The lexical priority of the constitutive suggests that many of the problems relative to the status of “quasi-constitutional” norms like human rights, and to the relegation of existentially important sustainability problems to a series of private contracts, relates to rejecting the parallelism between national and international legal systems. Assuming the parallelism, we must assume the priority of the constitutive; assuming the priority of the constitutive, we must accept the need for clear rules on state responsibility and for nonrelative normativity in international law. These are not pragmatic, or moral, or even ethico-legal commitments concerning the responsibilities of the international community but rather immanent in the assumption that international law is a legal system.

This takes us towards a different understanding of intergenerational justice that rejects “bottom-up” conceptions of environmental obligations beginning at the domestic level. At the same time, it only takes us part of the way towards an adequate account, because it leaves open the question—common to domestic legal systems—of whether there should be rigidity in those constitutive norms and of what kind.

### **The argument for constitutional rigidity**

The fairness of entrenching constitutional norms and thereby limiting the possibilities of future generations is a common notion from domestic constitutional law. The extent to which this is manifest in existing constitutions varies and depends upon the difficulty of amending provisions (simple majorities, super majorities, or unrevisable) (Gosseries 2014). The actual presence of these structural features will depend upon the antiquity of a constitution. The normative significance of such structures is of continuing concern because, while it is not inconceivable that there are timeless constitutional commitments or principles, there is something potentially disempowering (or even “criminal” as Kant asserts; Gosseries 2014: 528) in reducing a future generations’ choices. This can be expressed in terms of an injustice of asymmetry: We might use our extensive freedom of choice to impose a reduced set of choices on those in the future. As Gosseries puts it, however, this is not a straightforward question of power and justice. The pertinent questions are the following: “[W]hat should we fear more: the non-rigidity of a fair constitution, or the unfairness of a rigid constitution?

[And] would the fact for a constituent assembly of knowing that a constitution *will be rigid* tend to lead to the adoption of a fairer constitution?” (2014: 533, emphasis in original).

We should consider the teleological, rights-based, and procedural defensibility of such constitutional arrangements. I submit that if we want the best fit with the concerns relevant to intergenerational justice—particularly international cooperation to deliver future generations’ interests—then we should accept some kinds of constitutional rigidity on the basis of rights arguments. The first justification is procedural. That relates to preserving a just basic structure over time as an end in itself. Rapid constitutional change is undesirable, and the stability of expectations that comes from continuing constitutional arrangements ensures better regulation between contracting parties. Procedural limits on how international law can be changed in the future (by special majorities for instance) appears to threaten the autonomy of future generations but is also intended to benefit them. That is, like proceduralist conceptions of ethics, there must be constitutive limits to what can be decided within decision-making processes however rational or democratic. That will involve preventing the decision makers from changing the conditions that constitute the process itself. So while the merit of the proceduralist approach is that we want a stability of expectations and structuring conditions in order to make decisions defensible and enduring, we will also find it difficult to defend, *on consistent proceduralist grounds*, any ultimate denial of the capacity of rational decision makers to change the conditions under which they make decisions.

The second is an argument from teleology. If our end is some form of equality between generations, this may either involve minimizing harm or maximizing opportunities for future generations (sufficientarianism *versus* just savings). Calculation of the implications of equality is, either way, problematic: There is an inevitable imbalance of power between younger and older generations and the material interest of future generations will change depending upon our actions. Attempting to limit the constitutional aspects of international law is a move towards limiting the possible regulative environment and therefore limiting certain elements of uncertainty about the future. Thus, the merit of constitutional rigidity is that variables, including the accessibility and distribution of scarce resources, cease to be a variable. So a teleological approach has the benefit of demanding exactly the core end defended via the argument for parallelism, namely the end of the continued survival of international society. However it also introduces the problems faced by consequentialist positions, namely the uncertainty of the precise ends to be pursued. The nonidentity and nonexistence problem have bite here (Smolkin 1999) as do more general questions about the calculation of risk and harm.

Finally, a rights-based argument would assume through linking claims and duties that we can respect agency or protect interests. Intergenerational justice can be assumed to be best understood as a defense of the rights of those future individuals, and specifically their rights as protections of individually justified interests (Cruft 2010). The basic interests of human beings in the future, whatever their specific character, are unlikely to change qualitatively. On this point, Palombella should be quoted at length:

The subject we are analysing, i.e. justice towards future generations, presupposes [...] that there will be future generations; therefore it deals neither with the opportunity nor with the possibility that such generations do not come into existence, an issue that has caused, in turn, further controversies. Since there will be in any case persons belonging to future generations, the threats posed by the impoverishment of basic and human resources to their survival relate to goods that, despite their planetary nature and evident “public” character, are intimately related to

individuals as direct interests. The fact that for both logical, justice, universalisation reasons, individuals' rights to a worth-living planet simultaneously concern also each other member of mankind does not exclude their nature as individual rights: this simply depends on the fact that they are human rights, i.e. rights that in legal documents, in the common conception and in moral theories, are attributed by definition to all those who bear the characteristics assumed as identifying a "human being." (2007: 16)

The strength of this assumption is a link with the regulative and constitutive universality already ascribed to human rights as well as the assumption that international law is the proper medium for confronting intergenerational justice problems. And binding the future to benefit the future need not imply any paradoxical invocation of nonexistent peoples. This is, after all, what constitutions are intended to do.

The appropriate question for constitutional design is how we take into account that future regulative choices will be limited, and that this in turn will create less dynamism in the system. At one level this is immediately attractive in international law where rapid legal change is a reflection of the limited practical consequences of instruments adopted. Conversely, we might ask whether it is guaranteed that adopting rigid or entrenched rules will necessarily mean better regulative arrangements. The responsiveness to immediate problems that is allowed by constitutional flexibility has less likelihood of directing us towards dangerous outcomes. Such entrenchment could, in other words, be an instance of intergenerational injustice if it left future generations worse off in terms of their responsiveness to problems they face. Nevertheless, with a focus on interests, we can defend a range of rights at a constitutional level. And responding to the charge of the possibility of injustice we can now draw upon the conclusion of the three foregoing arguments. *In terms of the continued existence of an international society and in terms of respect for individual rights, constitutional rigidity must displace complete regulative freedom and shape our regulative design.*

## Human dignity and architectures of justice

### *Systemic human dignity*

With these arguments in place, we can use human dignity, in conjunction with human rights, to generate constitutive norms for international law. Put in these broad terms, this is a theme shared by a range of otherwise very different theorists (compare Capps 2009 and Reisman 2013). Human dignity allows us to investigate the more general principles of which human rights are the regulative manifestation. In addition to this, the foregoing defense of constitutional rigidity makes the presumption that any decisions at this constitutive level must be informed by the possibility that constitutive norms will be binding on generations to come.

How human dignity functions as a foundational principle varies depending upon our perspective and is likely to yield tensions however it is approached. For instance, the New Haven policy school takes human dignity to be the goal of international practice and the principle from which all other subsidiary regulations and goals flow (Reisman 2013). It is a principle, yielding more concrete principles for managing international legal and political activity. But it is also an end-state or goal with human dignity being the condition that would be achieved if there were good governance and respect for human rights. Different tensions can be found in the work of Paulo Carozza. At one level, human dignity is closely linked to

the *ius gentium* or the shared, transnational body of law that exists across well-regulated polities (Carozza 2008). On the other hand, for Carozza, human dignity and human rights are intimately linked to the principle of subsidiarity: the interpretation and implementation of norms at the lowest level possible (Carozza 2003). The interaction of subsidiarity and human dignity in international law bears closer attention.

Subsidiarity might be thought to have two aspects. A pragmatic aspect concerning the state's delegation of power to the lowest level possible and a second, normative aspect justifying that delegation in the value and autonomy of individuals. Thus, Carozza quotes Pius XI on the pragmatic value of subsidiarity:

The supreme authority of the State ought, therefore, to let subordinate groups handle matters and concerns of lesser importance, which would otherwise dissipate its efforts greatly. Thereby the State will more freely, powerfully, and effectively do all those things that belong to it alone because it alone can do them: directing, watching, urging, restraining, as occasion requires and necessity demands. (Carozza 2003: 41)

But this is augmented by an individual-centered normative justification:

Its basis is personalistic, rather than contractual or utilitarian. [...] That is, its first foundation is a conviction that each human individual is endowed with an inherent and inalienable worth, or dignity, and thus that the value of the individual human person is ontologically and morally prior to the state or other social groupings. Because of this value, all other forms of society, from the family to the state and the international order, ought ultimately to be at the service of the human person. Their end must be the flourishing of the individual. (Carozza 2003: 42, footnotes removed)

Carozza's defense of micro, rather than macro, normativity sits in tension with universalizing aspects of this discourse but also represents a legitimate interpretation of human dignity as demanding dissolution of power to its smallest units, up to and including the individual as the source of political power. How then, can human dignity be useful in identifying constitutive norms?

First, human dignity allows us to treat international law as the law of societies not just states (*subsidiarity as an implication of human dignity*). Human dignity speaks to the importance of the rule of law and something like Kant's conception of "innate right": the basic formal equality of individuals, and the need for this to take legal form (Kant 1996: 30). But this need not be read as a cosmopolitan argument. On the contrary, the key here is Carozza's subsidiarity argument: Authority should be located at the lowest possible levels given the importance of respecting autonomy and self-constitution. This should be read in the context of a wider point about respecting the practical reason of groups and individuals at various levels of social structure; by extension dignity allows us to treat individual and group rights as equally human rights. The argument from subsidiarity points not to a cultural relativist acceptance of cultural values that trump the universalism of human rights but a universalism that accepts that its origins lie in the individual and not in the state.

Second, human dignity allows us to treat international law as a constitutional order (*common heritage as an implication of human dignity*). When we treat human dignity as related to a *ius commune* (an international common law) we have not only moved away from international law as temporary arrangement of regulations but have moved towards understanding them as a coherent body of norms that preserves aspects of international society's past as well as respecting what states will for the future. The common heritage concerns a basic

awareness of the temporality of international society (it must have a past as well as a future in order to be a society) but also that human dignity in its systemic form demands acknowledgment of the tributaries of normativity that have led to the formation of the present international community (Hunter 2013: 130f). This has a direct implication of demanding greater attention to the precedent of international law but also a stronger sense of the concrete coordinates—in space and time—of law even at an international level.

Finally, despite a range of philosophical and legal uncertainties about human rights, some must be considered of constitutional importance and constitutive of any international society (*direct constitutionalism of basic human rights as an implication of human dignity*). Human dignity forces our attention towards the underlying anthropological concerns that animate and give moral unity to human rights as a group. After all, appeal to the human (and the human person) stress the natural background of these norms. This is not to produce a simple defense of human vulnerability, or human agency, as generative of human rights. Rather, it is to stress the admixture of these anthropological concerns across all of the rights we consider basic (freedom from degradation to freedom to engage in self-constitution through work and education). As such entrenchment should encompass basic rights respecting bodily vulnerability and competent social action through action and work. These are what have been called the “Schillerean” rights—food, drink, and shelter—along with those social rights—to work and education—that cover the minimal normative implications of human rights and human dignity taken together (Rosen 2012). While it might be a matter of debate which group of human rights are sufficiently basic to be constitutionalized (Philips 2014), there is no doubt that human dignity as a principle demands the constitutionalization of those human rights that *either* protect our basic embodiment and vulnerability as human beings *or* protect our distinctive capacities and potentialities as autonomous agents.

### Constitutional implications

Assuming that rules concerning subsidiarity, constitutional human rights, and common heritage are the correct kinds of rules to entrench in international law, what character would such a system have? The first thing to note is that this has not moved far from the normal characterization of law’s basic coordinates: people, territory, and laws. We have a basic concern for people qua people (human rights), for the structure of laws (subsidiarity), and for a construal of territory (through the more demanding, less dominion-laden, notion of common heritage). And, in line with our assumption of parallelism, this only mirrors the minimum conditions for being a legal system properly so called: having a stable set of secondary norms, serving a society, and projecting into the future. This has not yet said anything about legislative practices or legislative institutions at the international level. And indeed, as this is intended to be an internal critique, it would overstretch methodological commitments to supplement the analysis with major institutional reforms at this point, albeit some deductions can be made from the foregoing arguments about necessary institutional arrangements. Rather, we can now speculate on those middle-level norms that link our highest constitutional commitments to regulatory regimes. Given that constitutional rigidity forms the background assumptions against which these evaluations are made, it is all the more pressing that these be good principles that prevent legally unjust, or temporally unfair, consequences.

First, the question of *standing* for special representatives of future generations or ombudsmen speaks to all three constitutive norms. Above all, subsidiarity strengthens the assumption that the right to represent future generations cannot be granted to states but should be devolved to local communities and their representatives. By the same token, the common heritage of mankind is not for any particular individual or state to determine. Representatives of those fields of common heritage—the seas, the atmosphere, our cultural heritage—also need standing. The more precise question for national and international institutions is whether these representatives should have a merely advisory or policy-producing role, or rather whether they should also be able to veto policies and legislation.

Second, the issue of *enforcement* crosses the issues of subsidiarity and constitutional human rights. The notion of constitutional human rights means treating certain human rights norms as transcending the domestic and international. In this sense, the stark and unnecessary division between human right laws at the international and domestic levels should be abandoned (albeit tensions will inevitably arise between the two; Benvenisti and Harel 2015). If amongst those norms are the right to life, the right to health, and the other dignity-protecting rights, there should be no barrier to building a transnational jurisprudence of constitutional human rights laws. This flows quite naturally from an understanding of human dignity as both rule of law defending and individual respecting.

Third, certain practices of normative *adjudication and legal argumentation* are at issue here. While a principle like “subsidiarity” has relatively developed judicial functions, judicial development of “common heritage” as a constitutional principle is in need of enrichment. More specifically, there is a problem closely related to the “*lex specialis*” principle. This insists that the relevant applicable field of norms in international litigation are always those most specifically related to the issue at hand: Accordingly, environmental laws would always displace human rights norms in any intergenerational issue given their closer overall relevance to the issue at hand. Put another way, in lieu of a principle of precedent, the norm with the best “surface area fit” to the practice is the one to be applied; human rights laws are, therefore, inapplicable in the context of most environmental questions. Work by Tessa Thorp (2012) has provided the strongest analysis of environmental law and the *lex specialis* principle. She argues:

[I]nternational climate law could benefit if actors in the international climate change debate were to reach consensus on a unified normative system of law. By extension, and in terms of *lex specialis* regimes, such as climate law, it may be advantageous for the Contracting Parties thereto to subscribe to a constitutional instrument setting forth the fundamental principles that constitute, as it were, the foundations on which stand the structure of that special regime. (This is not to say that such a system or instrument does not exist but it does say that there is an undermining of its validity if it has no eventual effect). (Thorp 2012: 11)

This clearly reflects the spirit of the parallel, lexical, and entrenching arguments offered above. But it also reflects the continuing problem of currently existing international law insofar as *lex specialis* would still mean the priority of regulative rules over constitutive ones, environmental regulations over human rights principles, and of both over international constitutional principles. *Lex specialis* potentially inverts the approach defended unless we adopt the three arguments adopted above: an international society with a self-preserving function, requiring constitutive norms and requiring entrenched norms. Those assumptions are

necessary, in short, to prevent intergenerational justice being addressed with countless, temporary regulatory solutions without constitutive coherence relative to an international society.

Fourth, we should consider how *distinctively environmental questions* fit within such an architecture and whether new norms are needed. On the one hand, through commitment to subsidiarity and common heritage we can generate those midlevel principles—polluter pays and precautionary principle respectively—that assist in generating new regulations. On the other hand, we have committed—on the basis of human rights, human dignity, and the continuance of international society—to entrenching higher level principles appropriate for regulating such that harmonization of interests including subsidiarity and respect the local regulative practices of states. Given the tension (though not a contradiction) between these positions, it would be tempting to adopt a procedural approach, including a new dedicated international organization to be able to generate and to adjudicate new norms. In this respect, Palmer’s institutional solution is surely correct in its outline:

A new UN organization called the International Environment Organization could be established [...]. It should look to the procedures of the International Labour Organisation as a model for establishing norms, monitoring compliance and settling disputes. The rest of the international machinery touching on the environment should be restructured to avoid duplication and waste. (1992a: 283)

Fifth and finally, we should return again to the question of *existential threats* to the international society as a whole. Much of the foregoing internal critique of international law flows from the assumption that this system should preclude existential threats to system and society (“parallelism”). This has very wide systemic consequences in terms of the need to create and entrench constitutive norms (“constitutional rigidity”). But by implication, these have had rather narrower consequences in terms of challenging the *lex specialis* principle as the focus of good regulative design. These are, I would argue, necessary conditions for international law to become a system oriented towards its own preservation and the preservation of the society that it serves. It cannot be assumed, of course, that they are sufficient conditions. Transnational political will can be shaped by good international law, but it cannot be wholly determined by it.

## Conclusion

This article has sought, through an internal critique of international law, to show that human rights and human dignity together provide constitutional architecture adequate for acknowledging the demands of intergenerational justice. This has required showing the breadth of constitutional change that is needed in the international arena (up to and including entrenchment of constitutive norms) and has required a reconceptualization and relocation of human rights as constitutional norms related to core anthropological concerns. Reflected through the lens of human dignity, this has yielded core constitutional commitments concerning subsidiarity, basic norms, and common heritage that have a range of normative and institutional ramifications.

Put in other terms, without calling into question the moral and legal force of human rights, this article has sought to turn attention towards the constitutive implications of

intergenerational justice and therefore the regulative limits of human rights. It is clear that extensive, general, reform of international law will be needed to make sense of our duties regarding intergenerational justice. But equally importantly we need to use human dignity to draw out the constitutive implications of international human rights law. Human dignity is our most important guiding principle with regard to intergenerational justice because it implies two equally important structural and legal commitments. It implies enriching the international rule of law and acknowledging the anthropological presuppositions that underpin our most fundamental international obligations.

## Notes on contributor

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