

# **Just Criticism?**

## **Human Rights, Inter-State Relations and the Ethics of Finger Pointing**

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*The conditions of what constitutes just criticism of other states' human rights records in international relations are ill understood. This article seeks to contribute to the conceptualization of an ethics of such criticism by drawing on a variety of sources, including inter-personal ethics, just war theory and ethical foreign policy. Contra an ethics of sovereign indifference or an ethics of universalist interference, this article suggests that the most useful approach is to view human rights criticism as embedded in the complex workings of international society. The article, then, looks at some criteria that might help us assess the ethicality of any given criticism from the point of view of the content of such criticism and the position of the state behind it. Finally, it is suggested that we will not make headway until we conceptualize the ethics of human rights criticism as being part of a relational encounter with the state that one purports to criticize. This dialogical conception of human rights criticism allows us to transcend the solipsism and self-referentiality of the ethics of foreign policy to better understand the contextuality of all criticism.*

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*Il existe une mauvaise compréhension des éléments constitutifs d'une critique juste des bilans des États étrangers en matière de droits de la personne dans le cadre des relations internationales. Le présent article vise à contribuer à la conceptualisation d'une éthique relative à ce type de critique en s'appuyant sur différentes notions, dont les principes éthiques interpersonnels, la théorie de la guerre juste et les approches de politique étrangère fondées sur l'éthique. Écartant les approches de l'indifférence souveraine ou de l'ingérence universaliste, nous proposons que l'approche la plus utile est de considérer la critique en matière de droits de la personne comme s'inscrivant dans le fonctionnement complexe de la société internationale. Nous examinons ensuite certains critères pouvant servir à évaluer le caractère éthique d'un type de critique selon le point de vue propre à celui-ci et la position de l'État qui la formule. Enfin, il est suggéré qu'aucun progrès ne sera possible tant que l'on n'aura pas admis le principe selon lequel l'éthique de la critique des droits de la personne s'inscrit dans la dynamique relationnelle avec l'État visé par cette critique. Cette conception dialogique de la critique des droits de la personne nous permet de transcender le solipsisme et l'autoréférentialité de l'éthique de la politique étrangère afin de mieux comprendre le contexte dans lequel s'inscrit toute critique par ailleurs.*

## I. Introduction

In a meandering speech just before the football World Cup in Qatar, the head of FIFA, Gianni Infantino, raged for over an hour about the unfairness of the criticism directed at Qatar for engaging in labour and human rights violations.<sup>1</sup> He deplored, notably, Western double-standards and smugness.<sup>2</sup> The criticism he pointed out failed to recognize progress that had been accomplished and manifested hypocrisy in light of, for example, the migrant crisis at the doors of Europe.<sup>3</sup> Human rights criticism itself – rather than human rights, which almost took second stage – had become the centerpiece in this bizarre diatribe.

It is true that the hosting by Qatar of the cup has attracted considerable human rights criticism, including of violations of the rights of migrant workers and the LGBTQ community.<sup>4</sup> The background to that particular speech was complicated by huge commercial stakes administered by an imperious global organization; an authoritarian host in a position to exact considerable leverage on all participants; and the ambiguous status of sports as both deeply implicated in human rights issues, yet somehow supposedly above the fray of politics. It was overlaid by the oddity that Infantino is himself what might be described as a privileged Westerner. The critique of the critique was, in turn, critiqued as engaging in “misleading” and “absurd” “whataboutism”.<sup>5</sup>

Of course, criticism of states’ human rights record and negative reaction to such criticism is nothing new. States, notably but not only in the Global South, have long complained of such criticism as a form of interference or neo-imperialism. Criticism of a country’s human rights record often attracts fierce pushback.<sup>6</sup> The criticism of China’s human rights record in Xinjiang has led to forceful denials, especially after the decision by the US and several other countries to diplomatically boycott the Beijing Olympics.<sup>7</sup> Turkey has

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<sup>1</sup> *REPLAY - FIFA President Gianni Infantino's Qatar World Cup opening speech in full* | AFP (2022), online (YouTube): < [www.youtube.com](http://www.youtube.com) > [perma.cc/ZD2R-P2VU].

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> Human Rights Watch, *2022 FIFA World Cup in Qatar*, 2022.

<sup>5</sup> Michael Page, "FIFA President's 'I Feel Like a Migrant Worker' Speech Misleading" (last visited 15 March 2023), online: <[www.hrw.org](http://www.hrw.org)> [perma.cc/AUY6-5A5N].

<sup>6</sup> Leslie Vinjamuri, Stephen Hopgood & Jack Snyder, "Human rights backlash" (2017) *Human rights futures* 114–34.

<sup>7</sup> Victor Cha, "The Biden Boycott of the 2022 Beijing Winter Olympics" (last visited 22 October 2024), online: <[csis.org](http://csis.org)> [perma.cc/7UFT-44VT].

been regularly irked by European Union negative assessments of its human rights performance.<sup>8</sup> President Duterte of the Philippines has long been frustrated by unfair criticism of his “war against drugs.”<sup>9</sup> And, perhaps uniquely, Israel has long and bitterly complained of excessive exposure to human rights criticism, going as far as to describe it as an effort at delegitimization of its very statehood and a form of antisemitism.<sup>10</sup> Even South Africa’s judicialized reproach before the International Court of Justice that Israel violated the Genocide Convention has been met with a furious rebuke.<sup>11</sup>

Human rights criticism has become a particularly sensitive spot because of the way some cases, it seems, impugn the very foundations of a state’s sovereignty — both for what it is (a perceived interference in domestic affairs) and for what it claims (a failure by a state to discharge its most basic obligations). It is caught up in increasingly fraught inter-civilizational and geopolitical conversations<sup>12</sup> and what is often perceived as a degree of Western self-righteousness. Although criticism of human rights is clearly preferable to the use of force or coercion in foreign policy, it is not innocuous either. Human rights criticism can delegitimize its target; it can lead to unilateral sanctions; and in some cases, it has led to actual outside interference and intervention.<sup>13</sup> And although words may be cheap, the discussion on human rights frames the position that states find themselves in the international system.

At the same time, even as human rights criticism has been much maligned, it is also one of the few tools available to make any headway by setting benchmarks and forcing states to stick to them through “naming and shaming.” In a context of increased polarization both within and between societies, the inability to hear (and therefore to make any criticism that is not immediately dismissed as an existential attack) destroys the sort of international civic space that has historically undergirded the rise of human

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<sup>8</sup> Sevil Erkuş, “Turkey rejects ‘EU’s unjust criticism’” (19 May 2019), online: <hurriyetdailynews.com> [perma.cc/2TXR-B8TM].

<sup>9</sup> Thomson Reuters, “Duterte minister scoffs at UN desire to investigate drug war in Philippines | CBC News” (11 September 2019), online: (CBC) <cbc.ca> [perma.cc/N334-WFYL].

<sup>10</sup> Josh Kaplan, “Contesting Anti-Semitism: Human Rights, Israel Bashing, and the Making of a Non-Problem” (2010) 83:2 *Anthropological Quarterly* 429–48.

<sup>11</sup> Armani Syed, “How Israel-South Africa Relations Fell Apart Over Gaza” (21 November 2023), online: <time.com> [perma.cc/SDB2-DK35].

<sup>12</sup> *The Clash of Civilizations? The Debate: 20th Anniversary Edition* (Foreign Affairs).

<sup>13</sup> Louis Henkin, “Human rights and state sovereignty” (1995) 25 *Ga J Int’l & Comp L* 31.

rights since the adoption of the *Universal Declaration of Human Rights*. If there is no position from which any state's human rights record can be criticized, then there is not much point to the project of modern international human rights as one that was supposed to provide a common yardstick of achievement anchored in widely shared values.

Notwithstanding, is human rights criticism *fair*? Does criticizing on the grounds of human rights suffice to grant such criticism presumptive legitimacy? How might we go about conceptualizing the nature and incidence of just criticism? In turn, is there some truth to the notion that human rights criticism can be taken too far? For example, is the West overstepping some invisible boundary when it criticizes states in the Global South for their human rights performance the way it does? Has it, maybe, been doing so for a very long time? What of human rights criticism from states in the Global South of Western powers? What makes criticism, particularly of human rights records, possible, and what makes it problematic? Is there ever criticism that it is better to not utter? Should states refrain from human rights criticism of each other entirely and leave that job to the less compromised forces of civil society?<sup>14</sup> Clearly not everything that claims the mantle of human rights is legitimately conducive to them, just as dismissal of any critique seems to defeat the very idea of human rights as grounded in a concern with the rights of all.

In this article, I seek to conceptualize the justness of human rights criticism from the perspective of both human rights and theories of critique. "Just criticism", I suggest, has become a uniquely sensitive question on which the fate of much of the contemporary international human rights regime relies because it ultimately tests the commitment to global human rights norms. A commitment to human rights that shunned criticism entirely (for example, on the grounds of a rigid diplomatic etiquette) would set international society back decades. At the same time, it is worth understanding human rights criticism in its specific, still broadly Westphalian milieu, a milieu that imposes constraints on what kind of criticism can be legitimately uttered and by whom. Such criticism has witnessed many evolutions in recent decades as a result of the rise of human rights in international affairs and the multilateralization and

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<sup>14</sup> As R. J. Vincent put it: "Should we not (...) abandon governments as agencies for the improvement of human rights observance, given that their conception of rights is by definition partial, their action necessarily inconsistent?" (see RJ Vincent, *Human Rights and International Relations* (New York: Cambridge University Press, 1986) at 142).

institutionalization of discussions of human rights, even as much has remained unchanged about the nature of such discussions.<sup>15</sup> These days, it can come from many sources, most notably international and non-governmental organizations, which are certainly very active sources of criticism.<sup>16</sup>

However, I will leave the more general question of human rights criticism aside to focus on one specific case thereof. Namely, the criticism arising *between states*, which is currently raising some of the most pointed questions about human rights in the international system. States are increasingly expected not only to respect rights at home, but to act as good faith promoters of human rights internationally, which includes a role in denouncing and standing up to at least grave human rights violations.<sup>17</sup> In that, at least some states have reprised the “naming and shaming” register of civil society, purportedly as part of efforts at reimagining diplomatic relations. This can make for awkward interrogations given traditional assumptions that states should typically not impugn each others’ domestic records. Even more than human rights criticism emanating from civil society, inter-state meddlesomeness in the name of human rights is a sore point among states because of the way it seems to mix genres: the polite horizontal realm of diplomatic relations on the one hand, and the more critical vertical realm of human rights implementation on the other. As such, human rights criticism makes for a particularly intriguing test case, one that pushes the limits of both human rights and inter-state convention.

Human rights criticism of states by other states has nonetheless attracted, with a few exceptions,<sup>18</sup> remarkably little attention as a distinct question of what might be described as human rights ethics in international relations. I propose to examine this question here, as the title suggests, loosely in the tradition of thinking about the justness of certain behavior in international relations – like “Just War”, only in relation to something

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<sup>15</sup> Philip Alston & Frédéric Mégret, *The United Nations and Human Rights: A Critical Appraisal* (Oxford University Press, 2013).

<sup>16</sup> James C Franklin, “Human Rights Naming and Shaming: International and Domestic Processes” in H Richard Friman, ed, *The Politics of Leverage in International Relations* (London: Palgrave Macmillan UK, 2015) 43.

<sup>17</sup> Sigrun Skogly, *Beyond National Borders: States’ Human Rights Obligations in International Cooperation* (Intersentia nv, 2006).

<sup>18</sup> James Pattison, “The ethics of diplomatic criticism: The Responsibility to Protect, Just War Theory and Presumptive Last Resort” (2015) 21:4 Eur J of Int Relations 935.

seemingly far more innocuous than war and that therefore, as will be seen, raises a qualitatively different set of issues. The point here will not be to explore the substantive justness of any particular critique, but to consider what might be called the ethics of the critical posture – the act by a sovereign of confronting another sovereign and faulting it for conduct that fails its human rights commitments. I ask the question: what would it take for this posture to be just? Moreover, I address that question not merely as an abstraction, but as one embedded in the complex legacies of the international system and as involving a particular praxis of critiquing that is more specific and situated than general theories of either ethics or international justice.

The starting point of the article is that, simply because criticism claims to draw on or promote human rights, does not make it *ipso facto* just (despite a principled claim by cosmopolitans that caring for the human rights of distant others is *a priori* desirable).<sup>19</sup> By the same token, the fact that it is criticism about human rights (and not about some other idiosyncratic preference) should count for something. For example, human rights already structures certain expectations in international relations as being obligations *erga omnes*, owed by all to all, and therefore are naturally part of a common global concern. I argue that the justness of criticism needs to be understood on its own specific terms and involves competing models of the *authority to criticize*. Therefore, rather than justness being evaluated in the absolute, it needs to be analyzed in terms of a “standing to criticize” that incorporates both criteria of just criticism and attention to the modalities of actual criticism.

In the first section, I seek to model how we might broadly understand just criticism by analogy with existing models of thinking about ethics and international relations. I find the existing models are all wanting in at least some respects. Ultimately, they emphasize a tradition of thinking about human rights criticism not only as an issue of foreign policy, but also from the perspective of an international society of states that purports to put human rights at the center of its normative project. In the second section, I adopt a more focused agentic perspective and try to evaluate how criticism might be deemed just depending on the nature of the state and its criticism. However, I also find that approach to be too unilaterally focused on the utterer of the criticism and the ethics of their posture at the cost of deeper

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<sup>19</sup> David P Forsythe, “Human Rights in U.S. Foreign Policy: Retrospect and Prospect” (1990) 105:3 Political Science Quarterly 435.

engagement with the relationality of criticism. Therefore, in the third section, I propose a dialogical model of human rights criticism that foregrounds the specifically and necessarily relational element of all human rights criticism as a condition of its ethicality. The key insight is that the justness of a criticism needs to be appreciated as a function of the relations between the critique and the criticized, and how it contributes to shape that relation.

## II. Modeling Just Criticism

The starting point of human rights criticism is that the common nature of human rights standards, and their embeddedness in binding international legal norms, make human rights *a priori* good candidates for criticism by states of other states' record. Human rights relativize the notion that certain domestic issues are fundamentally part of "target" states' *domaine réservé*. This means that claims about another state's human rights performance cannot, in themselves, be construed as interference in domestic affairs.<sup>20</sup> Indeed, states may well claim, if when they do engage in human rights criticism, that they are bound to engage in such criticism on account of the nature of human rights and states' obligation to promote them. To not do so would be to violate their own obligations to promote and fail in their solidarity with victims of human rights. It would weaken common human rights guarantees.

In that respect, the idea of a human rights oriented foreign policy pushes arguments about an ethical foreign policy even further, both in terms of the foundation of such obligations (the law) and its beneficiaries (persons under the jurisdiction of other states). At the same time, states are notoriously reluctant, as part of international politics, to criticize the record of others.<sup>21</sup> Consequently, states are often faulted for failing to criticize human rights violations or at least not doing enough as a result of the narrow pursuit of their national self-interest. This has sometimes led civil society groups to conduct campaigns to pressure states to do more when it comes to criticism. In a sense, more human rights criticism is always better than less.

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<sup>20</sup> Thomas Buergenthal, "Domestic Jurisdiction, Intervention, and Human Rights" in Peter G Brown & Douglas MacLean, eds, *Human Rights and US Foreign Policy: Principles and Applications* (Lexington Books, 1979) 111.

<sup>21</sup> Louis Henkin, "International Instruments for the Protection of Human Rights Part One" (1979) 1979 *Acta Juridica* 224 at 231.



On a closely related note, there is some criticism that pulls its punches too much and sounds suspiciously like a copout. This is as it may be, and evidently failing to criticize when one should is just as problematic as criticizing when one should not. In a sense, both are facets of the same challenge. However, in this article, I want to foreground *actual* human rights criticism, rather than human rights criticism as it might have been or should be. In doing so, I hope to emphasize the relational and performative elements of such criticism, rather than merely its ability to respond to a preexisting human rights script. My intuition is that it not only matters that human rights criticism be made, but who it is made by, when, how and why. Claims based on an “obligation to criticize”, in other words, need to be assessed *in situ* and significantly specified to make sense ethically. In particular, the juridical argument from “legal compulsion” must be taken with a grain of salt: a legal mandate to criticize human rights violations is still very abstract and does not relieve its holder from attention to how their standing affects the moral tenor of the criticism, not to mention its impact. In other words, the deontological force of human rights is no substitute, in a world of states, for an ethics of responsibility about how criticism plays out in reality.

On the one hand, to not pay attention to the authority to criticize neglects the extent to which real-world human rights criticism is embedded in the norms of inter-state conduct that have their own ethical dimensions. On the other hand, this inattention to authority minimizes the extent to which credible human rights criticism must itself depend upon a credible ethical posture. For example, it ignores a long tradition of concern that ethical foreign policy will be instrumentalized for imperial purposes, or is fundamentally at odds with the nature of Leviathans.<sup>22</sup> To take an argument by the absurd, human rights criticism by the German Nazi regime not only would have very little impact, but would have no ethical value; a state that constantly criticizes every minute aspect of all other states’ human rights performance would clearly be out of line; and a state that condoned human rights violations by some states, but pilloried those of others, would also have a credibility problem. This is notwithstanding that, in all these cases and all other things being equal, there might indeed be something worth criticizing about other states’ human rights performance.

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<sup>22</sup> Volker Heins & David Chandler, “Ethics and foreign policy: New perspectives on an old problem” in *Rethinking Ethical Foreign Policy* (Routledge, 2006) 3.

In this section, I assume that some familiar communitarian criticisms of an ethical foreign policy can be bracketed, notably, that such a policy insufficiently accounts for the needs of local constituencies. Mere criticism of another state's human rights performance is relatively unlikely to cause some significant national detriment or alarm, but I will at any rate assume that this is a non-issue for the purposes of this argument. Instead of the particular nature of the domestic legitimization of foreign policy, I focus only on what might make criticism just *vis-à-vis* other states. I therefore seek to model just criticism beyond a bare legal-formalist approach by looking at possible analogies for inspiration. I then suggest how we might integrate and transcend those analogies to develop a model of just human rights criticism that is focused on its specific constraints and an understanding of the milieu it operates in. I suggest that neither Just War, ethical foreign policy nor cosmopolitanism provide an entirely compelling account of how we might go about evaluating the justness of human rights criticism, but that an emphasis on the social and interactional dimensions of such criticism gets us closer.

## A. Possible Analogies

What work there has been on the ethics of criticism has typically emerged in the realm of general ethical theory as it applies between human beings, as part of a renewed interest in the problem of blame.<sup>23</sup> This is an interesting meta-debate: specifically, on the ethics of criticizing others' ethics. It involves well thought-out and helpful insights on the tension between ethics and virtue, what ethical critique implies and what its outcomes might be. It has tended to shine light on issues of "standing to blame"<sup>24</sup> and concerns with the moral problem of "grandstanding",<sup>25</sup> "meddlesomeness"<sup>26</sup> and "hypocrisy."<sup>27</sup> Crucially, this frames ethics not only as an abstract standard but as a communicational exercise: what matters is not just what is ethical in the absolute, but the conditions under

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<sup>23</sup> D Justin Coates & Neal A Tognazzini, *Blame: Its Nature and Norms* (OUP USA, 2013).

<sup>24</sup> Patrick Todd, "A Unified Account of the Moral Standing to Blame" (2019) 53:2 *Noûs* 347.

<sup>25</sup> Justin Tosi & Brandon Warmke, *Grandstanding: The Use and Abuse of Moral Talk* (Oxford: Oxford University Press, 2020).

<sup>26</sup> Maria Seim, "The Standing to Blame and Meddling" (2019) 38:2 *Teorema: Revista Internacional de Filosofía* 7.

<sup>27</sup> Kyle G Fritz & Daniel Miller, "Hypocrisy and the Standing to Blame" (2018) 99:1 *Pacific Philosophical Quarterly* 118.

which opinions about the non-ethical character of others' conduct can, and maybe ought to be, conveyed to them.

Even though this work will inform the present article, it is important to relativize its import for our purposes. To transfer these insights to the international realm involves a domestic analogy fallacy: a reduction of the inter-state to the inter-personal. But interstate criticism is not so much accountable to personal conscience as dynamically informed by notions of sovereignty, the pragmatics of foreign policy and a sense of one's geopolitical place in the world. Ignoring that dimension risks problematically depoliticizing international criticism. If anything, interpersonal concerns about standing are magnified in the interstate environment, but they are also shaped by a distinct ethics of responsibility in which the state (particularly the democratic state) is accountable to certain domestic constituencies. Moreover, human rights import a specifically political dimension to criticism since they essentially involve a public performance of compliance with certain common international standards that is not well rendered by the emphasis on private virtue.<sup>28</sup>

A second analogy for thinking about human rights criticism, then, might consist in comparing international critique to the modalities of criticism that normally apply in domestic political settings. For example, the opposition or civil society groups may well (and in fact, often do) criticize a government for failing to uphold human rights. In fact, this is a crucial and often neglected dimension of a culture of human rights that involves criticism from within. The conventions of polite debate within political society certainly have valuable lessons to teach; for example, about proscribing *ad hominem* attacks, not misportraying the other (strawman arguments), or the exclusion of critiques that might appear to be racially or religiously tainted. Political ethics also evince a broader tolerance for the reality of hypocrisy than the interpersonal realm, in that "pious lies" can more readily be justified for "good" political ends.<sup>29</sup>

This framing may be useful to understand human rights criticism that emerges in the most institutionalized international contexts (e.g.: the Human

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<sup>28</sup> In particular, there is a long tradition of thought that sees certain private vices, such as hypocrisy, as less damning in the sort of political context that human rights suggests. On this matter, Judith Shklar points out that "[s]ome personal vices, which may be completely revolting to a free people, must nevertheless, as a matter of principle or prudence, be overlooked." See Judith N Shklar, *Ordinary Vices* (Harvard University Press, 1984) at 2.

<sup>29</sup> David Runciman, *Political Hypocrisy: The Mask of Power, from Hobbes to Orwell and Beyond* (Princeton: Princeton University Press, 2009).

Rights Council, the UN General Assembly, the Council of Europe) and where a certain degree of normalized decorum has emerged, comparable to conditions prevailing domestically. Nonetheless, there are several ways in which the domestic critique of a state's human rights record is an imperfect precedent for what this article contemplates. Criticism from within, even though it may be harshly looked upon, at least is imagined as inhabiting the same (national) moral community bounded by an "agreement to disagree" among its members. It is attacked on its logical and ethical coherence far more than on issues of standing, which are typically conceded from the outset. By contrast, outside criticism in international relations seems almost destined to activate a defensive nationalist reflex. It operates in an international system made of states and from distinct polities that are historically understood as based on incommensurable values. There is, in fact, occasionally something unbearable about outside criticism which, domestically, might seem quite quaint and conventional.

The challenge, then, is to think of just human rights criticism in ways that are specific and indigenous to the ethical universe of the international system. That system maintains such conditions of fundamental alterity between its members that one cannot presume that they will consider external critique to be "authorized." In fact, external human rights critique is relatively easily portrayed (and even disqualified) as misinformed, biased or — in some perverse way — interested. This, in turn, requires a particularly robust framework to account for when such critique might nonetheless be ethical despite all the usual suspicions. The international sphere remains one where issues of jurisdiction, in particular, cannot be taken for granted. The authority to speak to others' human rights record is constantly renegotiated through the politics of legitimacy. Even a purported horizon of international human rights sedimented through international law cannot hide fundamental divergences about their full implications for states. When it comes to specifically international theories of ethics, another analog in dealing with the morality of states' conduct in a particular high stakes realm is just war theory. As a rich and variegated tradition dealing with the ethical manifestations of one of the most central institutions of international relations, just war theory may be seen as providing (at least) a starting register to think about just criticism. There is a genre, by analogy, of

commentary on what might constitute a “just foreign policy.”<sup>30</sup> Some of the distinctions and criteria of Just War are apposite (right authority, right intention, prospect of success) as framing any ethical action internationally, as will emerge later in this article.

Yet, whilst the analogy with Just War thinking may provide a helpful bellwether of just conduct in international relations, it is important to highlight some of its limitations for our purposes. For one thing, Just War thinking targets international behavior (war) that has come to be seen (for the most part) as inherently problematic, so that war can only be countenanced — at best — exceptionally. Although it has historically differed at times, the baseline for much of contemporary thinking about Just War views that it is devastating and wrong and that the aim of ethical thinking is merely to highlight the few cases where it might be less so, against a background of condemnation of resort to force in international relations. This means that some Just War requirements will clearly be inapposite. For example, there is certainly no initial requirement that one must have “Just cause” to criticize in a similar fashion as to what is required in Just War; i.e., that one only engage in human rights criticism to the extent that one has had their human rights record “attacked” as part of a kind of “human rights self-defence”. Human rights criticism does not have to be a response to first criticism — although it can productively be so in some cases — and one can clearly “fire the first shot” of criticism. The same may be true of the requirement of proportionality, which only makes sense as a restriction on how far one can wage something that is otherwise undesirable. And whilst I am interested in criticism by states in this article, I obviously recognize that there is no requirement of “right authority” when it comes to human rights reproach that would limit it to public actors.

Surely then, the baseline is quite different when it comes to mere criticism – or at least, the analogy must be crafted carefully. It is true that human rights criticism is sometimes portrayed in language that is evocative of war’s more bellicose tonalities (a “war of words”, “escalation”, “provocations”, “attack”).<sup>31</sup> Indeed, to make matters more complicated, harsh criticism may be a prelude (or an accompanying motif) in *actual* war

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<sup>30</sup> See, notably, Michael Blake & Michael I Blake, *Justice and Foreign Policy* (Oxford: OUP Oxford, 2013).

<sup>31</sup> “Genocide in Ukraine? The war of words and the politicization of the ‘crime of crimes’”, (20 May 2022), online: *Aspenia Online* <aspensiaonline.it> [perma.cc/SHD8-YRE8]; Maziar Motamedi, “Iran’s Zarif slams Europe and US for human rights scrutiny | Human Rights News | Al Jazeera”, *Aljazeera* (28 September 2020), online: <aljazeera.com> [perma.cc/HZ6S-S9WZ].

as, perhaps, the continuation of political criticism by other means. Nonetheless, a healthy dose of exaggeration is involved in equating the two. Not only is talk relatively cheap by comparison to war – and even plainly preferable to the use of force<sup>32</sup> – but, under liberal conditions implementing shared human rights norms, criticism of other states' performance is *a priori* legitimate and helpful. This is why, within the Just War tradition, perhaps the strand that is most apposite to think of just criticism is not so much war generally, as something akin to humanitarian intervention (i.e.: something that is still war and as such subjected to very cautious scrutiny), but whose fundamental motivation is (in theory) inspired by human rights and altruistic motives.

Indeed, just as war is hostile but genuine humanitarian assistance is *a priori* not, human rights criticism is not necessarily problematic in the way that ordinary meddling in another state's policies is. It is part of the public airing of differences about rights that stands, in theory, to benefit human rights overall. States criticizing each other's rights record might be an opportunity for them to work through complex differences via diplomacy rather than coercion, in a context where "normative criticism and soft power are frequently the most effective methods of change."<sup>33</sup> This frames the *problematique* under a quite distinct light. Rather than operating as an exception to something that is otherwise seen as inherently bad, a theory of "just criticism" should define the parameters of how something that is inherently good might nonetheless occasionally deteriorate into something unethical.

The Just War analogy, then, gets it only half-right. In fact, because human rights criticism is presumptively legitimate where war is presumptively wrong, it gets things almost inversely right. If anything, this suggests that a tradition of thinking about an "ethical foreign policy" is more helpful. That tradition, which has been revived in the last decades when it was put at the centre of labour foreign policy in the UK and since in the context of "normative power Europe", is closely connected to thinking at the intersection of human rights and global justice, as well as ethical questions arising out of the practice of statecraft.<sup>34</sup> The idea of ethical foreign policy

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<sup>32</sup> Pattison, "The ethics of diplomatic criticism", *supra* note 18.

<sup>33</sup> Blake & Blake, *supra* note 30 at 75.

<sup>34</sup> Jamie Gaskarth, "Interpreting Ethical Foreign Policy: Traditions and Dilemmas for Policymakers" (2013) 15:2 The British Journal of Politics & International Relations 192–209.

offers frames of reference that are useful — although, when dealing with human rights, it has tended to be more invested in issues of consistency, genuineness or impact than ethics,<sup>35</sup> perhaps because a human rights foreign policy is equated with an ethical one.<sup>36</sup> Moreover, this tradition is sometimes more focused on the ethics of foreign policy as it applies to a government's relation with its own population, rather than the inter-state ethics that are the object of this article. And skepticism about the very possibility of an ethical foreign policy from states<sup>37</sup> does not get us closer to a fine-grained analysis of what would count as more or less ethical in that context.

## B. Three Models for an Ethics of Criticizing

None of the above analogies fully capture the challenges of the ethics of international human rights criticism because, ultimately, none of them were developed fully with that question in mind. By contrast, in this subsection, I seek to anchor different models of the ethics of criticizing in an understanding of the place of human rights within international relations. I contrast a vision of human rights sovereignty and “keeping to oneself” with an equally influential global cosmopolitan view of human rights criticism that allows, and even encourages, more free-wheeling criticism of all by all. Finding neither of these accounts particularly compelling, I suggest that the better view is to see the ethics of human rights criticism as a function of the particular relations existing within an international society of states and how they should frame human rights criticism.

Rather than start from the universal appeal of human rights, I want to begin with an examination of what might be understood, in the international system, as the virtue of minding one's own business (i.e.: sovereignty). That standpoint captures a historically sedimented and legally consolidated approach to international affairs. Minding one's own business in the interpersonal realm has sometimes been reassessed as a virtue, even in conditions where morality is otherwise understood to be “the business of everyone.”<sup>38</sup> *A fortiori*, it is closely related in the international realm to the notion that sovereignty delineates a space of exclusive power, and possibly a unique moral community, that makes criticism from within more palatable

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<sup>35</sup> Karen E Smith, Margot Light & Ian Nish, *Ethics and Foreign Policy* (Cambridge University Press, 2001).

<sup>36</sup> Forsythe, “Human Rights in U.S. Foreign Policy”, *supra* note 19.

<sup>37</sup> Volker Heins & David Chandler, *supra* note 22.

<sup>38</sup> Linda Radzik, “On the Virtue of Minding Our Own Business” (2012) 46:2 J Value Inquiry 173–82.

than criticism from without. In addition to criticism from within being more palatable, it may also be *a priori* more legitimate. For example, it may be more legitimate because internal criticism is better informed or because the source of the criticism will have to live with the consequences of whatever policies are adopted as a result.

To respect the sovereignty and community of a nation is to respect its self-determination and defer to a nation's modes of governance, at least so long as these do not directly affect one's interests. It is also to respect the fact that, even in an international environment that has increasingly proclaimed the existence of common international standards, each state remains largely in a position to decide how to implement those standards.<sup>39</sup> It does not seek to interfere in the difficult calculations made by each state as it seeks to govern itself – calculations that can be quite complex, especially when it comes to respecting, protecting and guaranteeing the rights of a population. And it also does not displace (from external forces) the kind of domestic and intrinsically valuable correctives that exist to respond to rights violations, nor the agency of those who are affected by rights violations and who often are active in seeking to change conditions on the ground.<sup>40</sup> An "ethics of indifference"<sup>41</sup> might not seem like a very appealing option, but it needs to be contrasted with, what has at times has been, an ethics of unwanted, opportunistic solicitude.

By the same token, surely a model of excluding all criticism from external sources is excessive if one takes the idea of international human rights seriously. An exclusionary model imagines polities as entirely cordoned off from each other and ethically self-reliant. It excludes possibilities for meaningful dialogue even as international dialogue can be productive for rights in conditions of uncertainty about their exact scope and content. And it neglects the complexity of the ties that bind countries and implicate them in a common human rights horizon. This is not to mention that it seeks to muzzle what might be described as, within certain parameters, states' "freedom of expression." A model based on minding one's own business

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<sup>39</sup> On the margin of appreciation as a crucial tool of human rights governance, see Andrew Legg, *The margin of appreciation in international human rights law: deference and proportionality* (OUP Oxford, 2012); Eyal Benvenisti, "Margin of appreciation, consensus, and universal standards" (1998) 31 NYUJ Int'l L & Pol 843.

<sup>40</sup> For an understanding of the concept of "arduous struggle" for freedom by one's own means, see John Stuart Mill, *A Few Words on Non-intervention* (1859).

<sup>41</sup> Hallvard Lillehammer, "The Nature and Ethics of Indifference" (2017) 21:1 J Ethics 17–35.



and reflexively deferring to sovereignty thus runs into strong resistance from human rights. If nothing else, states have *invited* human rights criticism when they became parties to international human rights treaties and cannot thereafter claim that human rights are purely domestic issues. In fact, as argued by Radzik, the ethics of minding one's own business, if they are not to degenerate into callous indifference, must really be only an ethics of "choos[ing] to intervene only at the right time, in the right manner and to the right degree."<sup>42</sup> Recast in this way, then, they frame the deference to other states as merely a presumption rather than an absolute objection. Still, the question is when and to what extent that deference should be overcome.

A radical alternative to the minding-one's-own-business model is a cosmopolitan vision emphasizing the common global interest in human rights. This can build on significant insights about the existence of obligations by each state to distant others, both in political theory/IR but also, increasingly, in positive human rights law.<sup>43</sup> These insights reinforce the case for human rights criticism on two fronts when it comes to the state doing the criticism: at home, by suggesting that investment in human rights abroad is not an unhelpful distraction from domestic issues; and abroad, by stressing that criticism of human rights violations is not gratuitous. This is certainly a popular discursive move among human rights advocates. International lawyers will describe certain norms as being *erga omnes*, namely owed to the international community as a whole.<sup>44</sup> This, then, means that even states bereft of traditional standing can initiate a kind of "*actio popularis*" before international courts, as The Gambia recently did by suing Myanmar for violation of the *Genocide Convention* before the International Court of Justice or as the Nordic states once did before the European Court of Human Rights against Greece's dictatorship.<sup>45</sup> Beyond the specific question of *jus standi*, this also grounds potentially expansive duties to

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<sup>42</sup> Radzik, *supra* note 38.

<sup>43</sup> Margot E Salomon & Ian Seiderman, "Human Rights Norms for a Globalized World: The Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights" (2012) 3:4 Global Policy 458–62.

<sup>44</sup> Karin Oellers-Frahm, "Comment: The erga omnes Applicability of Human Rights" (1992) 30:1 Archiv des Völkerrechts 28.

<sup>45</sup> Marco Longobardo, "The standing of indirectly injured states in the litigation of community interests before the ICJ: Lessons learned and future implications in light of *The Gambia v. Myanmar* and beyond" (2021) 1 International Community Law Review 1.

others under the “obligation to promote” human rights, which is taken by some states as entailing clear obligations beyond their borders.<sup>46</sup>

The international institutionalization of human rights — notably through the United Nations, but also regional groupings such as the Council of Europe, the African Union or the Organization of American States — certainly testifies to an increased openness to this idea. The trampling of human rights in one country — so the idea goes — imperils the entire human rights edifice (and therefore endangers the critiquing state as well), thus alleviating any concern about lack of standing or interference. Indeed, some authors go as far as to suggest a moral obligation for states to be “norm entrepreneurs” (with the obligations extending to the use of criticism) or else risk becoming complicit in the violations they are silent about.<sup>47</sup> At the very least, then, human rights criticism cannot be itself criticized as unlawful or even illegitimate interference in sovereign affairs, since human rights are no longer, under that reasoning, a strictly sovereign issue.

But this argument can be too broad for its own good. The *erga omnes* character of human rights obligations is a broad abstraction in need of refinement. It is one thing for states to invoke the forementioned argument to refute accusations of undue interference in particular cases; but that does not mean that the *erga omnes* character of human rights is the actual motor of criticism or that it provides an irrebuttable defence of the ethics of criticism in every case. Cosmopolitanism could be understood as an invitation for states to constantly criticize each other on every aspect of their human rights record below even a *de minimis* threshold. Such criticism would not only exhaust states politically (the “demandingness objection”);<sup>48</sup> it could clearly cross the line of non-interference in the affairs of other states. It leaves too little space for comity, deference to self-determination and pluralism.

Moreover, in focusing on “human rights” taken in the abstract, the cosmopolitan thesis is insufficiently sensitive to the differences in power and the dynamics between utterer and receiver of human rights criticism. Suggesting that states cannot be faulted for being concerned about the human rights fate of foreign populations cannot provide a blank cheque for any criticism that ignores any framing in terms of opportunity, timing,

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<sup>46</sup> Elena Pribytkova, “What Global Human Rights Obligations Do We Have” (2019) 20 Chi J Int’l L 384.

<sup>47</sup> Pattison, “The ethics of diplomatic criticism”, *supra* note 18.

<sup>48</sup> *Ibid.*

effects, etc. For example, one cannot be oblivious to the extent to which “international community interests” have historically been used to pry open the sovereignty of some states under the banner, for example, of the “standard of civilization.” In that context, one should always be wary of the risk that human rights criticism will have been instrumentalized for geopolitical gains or, in fact, be coextensive with forms of civilizational domination. At the very least, then, human rights criticism should be subjected to a threshold requirement so that only violations of a certain gravity are the object of criticism. It should also be more generally embedded in a theory of human rights ends and means that acknowledges that the road to hell is paved with good intentions.

### C. Towards a *Via Media*: Human Rights Criticism and International Society

At any rate, the preceding two sections leave space to search for a *via media* between sovereign retrenchment and the cosmopolitan interference of all with all. One possibility is to see that human rights not simply as cosmopolitan claims that any state can invoke against another in a sort of human rights free for all, *but as structuring the essence of international communal life*. That is, human rights standards, notwithstanding the fact that their foundation lies in certain conceptions of the inherent worth of human beings, are also vehicles for value claims between states as part of the constitution of international society. This Grotian *via media*, associated with the English school of international relations and R. J. Vincent’s ambition to “work human rights into the cracks of international society,”<sup>49</sup> remains precarious and contested. Clearly, many other values contend for attention in weighing appropriate behavior in international society.

But whether human rights are at the apex of the values of international society or not in some sort of foundational sense, they at least inform productive conversations that states have with each other. They do so in the “solidarist” vein of the English school, in ways that emphasize shared values of human rights, in a sense, always about more than just human rights: as claims about common foundational standards.<sup>50</sup> As Andrew Linklater put it, expanding human rights standards fosters a “radical dialogue between

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<sup>49</sup> Vincent, *supra* note 14.

<sup>50</sup> Andrew Linklater, *The Transformation of Political Community: Ethical Foundations of the Post-Westphalian Era* (Univ of South Carolina Press, 1998) at 173.

diverse societies [that] might yet result in limited progress towards a more solidarist version of international society.”<sup>51</sup> In a context of renewed solidarity about human rights matters, human rights criticism can be the dominant symbolic stake of such international conversations in at least three ways. Firstly, it shapes those conversations in particular iterative fashion, most notably by stressing a sort of mutual solidarity in the promotion and enforcement of human rights norms. Secondly, it can also have performative implications, valuable not just for what it says (“this is a violation of human rights”), but for what it reveals about ongoing relations (“I can describe this as a violation of human rights because...”). Thirdly, as a result of those performative implications, it also has a constitutive role in that it establishes the parameters of international society as a society in the making, constituted in part on a foundation of respect for human rights.

This view of *international* human rights is distinct from mere claims about the universal character of rights or deference to state power. It is rooted in a notion that international human rights norms represent a shared yardstick of international achievement.<sup>52</sup> This means that the performance of each state stands to affect the ability of all others to abide by their obligations; and that human rights create relations between states as much as between states and human beings. However, it is also grounded in a mix of “principle” and “prudence” which constrain human rights criticism.<sup>53</sup> It is, in other words, an *internationalist* view of human rights that sees them as mediated by the normative practices of an international society of states that is not reducible to domestic society or even to mere bilateral relations. The view of human rights as fundamentally an international societal point of cohesion embeds human rights criticism in a vision that avoids the twin extremes of sovereign autarchy and cosmopolitan interference. It emphasizes human rights’ credentials less as resulting from sovereign whim or top-down natural law thinking than as emerging through the dense interaction of states with each other.

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<sup>51</sup> *Ibid.*

<sup>52</sup> Stephen Gardbaum, “Human Rights as International Constitutional Rights” (2008) 19:4 *European Journal of International Law* 749–68.

<sup>53</sup> ANDREW LINKLATER, “Prudence and principle in international society: reflections on Vincent’s approach to human rights” (2011) 87:5 *International Affairs* 1179–91.

As a result, international human rights do not pre-exist the international system, they are constituted by it and in turn constitute it.<sup>54</sup> This view is not incompatible with the contested nature of human rights or a range of claims made about them, but it does presume that such claims are taken seriously by participants in international society as one of the sediments of its existence. It suggests that states may have onerous obligations to criticize — and even to receive criticism gracefully — not merely on account of human rights' cosmopolitan might, but as a result of the specific constraints of "living" in an international society.<sup>55</sup> At the same time, it suggests that human rights criticism cannot totally abstract from the normative pull of international society merely by virtue of being "human rights". Arguably, such a model hews closest to how the international system actually operates as well as providing a framing device for how it should operate.

### III. Possible Criteria of Just Criticism

All the models reviewed in the first section above, however, have limitations. They are either too agentic and ill-suited to the object of human rights criticism, or they are too broad to understand the particular ethical predicament that such criticism raises. As such, they tell us something about the general conditions under which human rights criticism might be deemed just or unjust; but they still under-specify the conditions in which we might judge particular criticism to be just or unjust. It is to this challenge that this section turns, attempting to ground a theory of just criticism of other states' human rights performance in an understanding of both its individual and societal character, focusing on a series of criteria. As per the first section, both inter-personal ethics and just war theory will provide a recognizable grammar, but one that needs to be adapted to the specificities of deploying human rights critique in international society. In this section, I review demands made on both the content and then the authors and the motivation of criticism.

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<sup>54</sup> Erika De Wet, "The International Constitutional Order" (2006) 55:1 *International & Comparative Law Quarterly* 51-76.

<sup>55</sup> Gordon A Christenson, "Kennan and Human Rights" (1986) 8:3 *Hum Rts Q* 345 at 370.

## A. Criteria Related to the Content of the Criticism

### i. *The Value of Truth to Criticism*

One typical gripe about human rights criticism, is that it is simply untrue. There is no genocide in Xinjiang or Gaza; discrimination against Afro-Americans does not make the US structurally racist; Cuba is not systematically violating civil and political rights but upholding economic and social ones; Venezuela is not repressive but merely trying to protect its freedom from imperial encroachment; the occupied West Bank is simply not a situation of Apartheid, etc.<sup>56</sup> Criticism leveled against the truthfulness of critiques can take many forms, including: accusations that they are factually incorrect, mischaracterize the facts normatively or exaggerate the gravity of a situation in some way. Clearly, an insistence that human rights criticism not be made up ranks quite high as a demand of states.

Given the negative incidence of criticism on bilateral relations, one would not want to lobby vague accusations without the ability to back them up, both on political and ethical grounds. The tendency to occasionally, and forcefully, allege that human rights violations have already been proven beyond doubt can be problematic. Manifest falsehoods have sometimes been propagated in ways that harm both foreign relations and the cause of human rights. Additionally, there is concern that human rights are already being impacted in the “post-truth” era.<sup>57</sup> Campaigns to sully the record of other states based on motivations entirely extraneous to the veracity of human rights claims are problematic, both in terms of the ethics of foreign policy and human rights. However, more often than not, the entire question will indeed be what states’ actual motivations are in a context where it can be tempting to simply portray another party criticizing one’s record as ill-

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<sup>56</sup> See e.g. Lindsay Maizland, “China’s Repression of Uyghurs in Xinjiang” (22 September 2022), online: <cfrr.org> [perma.cc/4J9Z-XYHL] [Repression in Xinjiang]; Scott-Jones Gwendolyn et al, “The Traumatic Impact of Structural Racism on African Americans” (2020) 6:5 Del J Pub Health 80, DOI: <10.32481/djph.2020.11.019>; US, Bureau of Democracy, Human Rights and Labor, 2022 *Country Reports on Human Rights Practices: Cuba* (20 March 2023), <state.gov> [perma.cc/CVC7-Y2UE]; *Report of the independent international fact-finding mission on the Bolivarian Republic of Venezuela*, HRC, 57<sup>th</sup> Sess, UN doc A/57/57 (17 September 2024), online (pdf): <ohchr.org> [perma.cc/M9WN-4AUH]; Omar Shakir, “A Threshold Crossed: Israeli Authorities and the Crimes of Apartheid and Persecution” (27 April 2021), online: <hrw.org> [perma.cc/7JDZ-DJXX].

<sup>57</sup> Nicolas Agostini, “Human rights in the post-truth era”, online: *OpenGlobalRights* <openglobalrights.org> [perma.cc/4PDE-AD6B].

intentioned.<sup>58</sup> At any rate, there is a risk that parties, convinced that they are being unfairly targeted by the dubious veracity of accusations lobbed at them, will be led to discount and take genuine and meritorious human rights criticism less seriously. False accusations can also divert attention from genuine human rights causes.

By the same token, in the muddled reality of the international system, there will often be human rights criticism that is partly wrong and at least partly right, especially against the background of persistent debates about standards of proof or even what constitutes “facts.”<sup>59</sup> Requiring full verification and demonstrability from the outset might raise the bar of just criticism too high. States hardly have an unobstructed access to other states to verify allegations of human rights violations. What they may decide that they have, instead, is a solid *prima facie* case that requires the critiqued state to answer for itself. Proof beyond reasonable doubt cannot possibly be the standard for mere criticism. The human rights criticism of another state is only an opening salvo, perhaps an invitation to the other state to defend its own record. In fact, it is through criticism and response to it that the veracity of claims about human rights violations may be ascertained. The fact that it is deemed “untrue” by the state that is being critiqued cannot in and of itself be conclusive of the matter: many states, not liking what they hear, will deny that it has any ground in reality and may, in fact, genuinely not see the value of the reproach. Being required to respond, including by investigating allegations, is one way in which human rights criticism may end up being operative.

Moreover, much human rights criticism is contentious not because the facts are misrepresented or the law misspelt but because there is genuine disagreement about what human rights entail in general and in special circumstances. We do not always have, despite international human rights law’s best efforts, some incontrovertible criterion to distinguish “valid” from “invalid” human rights criticism based on the content of the claims themselves. At the same time, and precisely for this reason, one would not want to deter such debates from taking place or suggest that one thinks less of them as legitimate human rights debates simply because such debates are not always immediately and fully conclusive. It is important, given states’

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<sup>58</sup> Raffi Berg & Anna Holligan, “Israel says South Africa distorting the truth in ICJ genocide case”, online: <bbc.com> [perma.cc/S84P-BD9C].

<sup>59</sup> Frédéric Mégret, “Do facts exist, can they be ‘found,’ and does it matter?” in Sarah Knuckey & Philip Alston, eds, *The Transformation of Human Rights Fact Finding* (2016).

traditional reluctance to criticize each other's record, to not dissuade states from taking their responsibilities seriously in such matters — even if that means discounting some of that criticism eventually because it turns out to be ill-informed. And one should not underestimate the self-regulatory propensities of the system: a state that routinely “makes things up” when it comes to the supposed bad human rights deeds of other states will sooner or later expose itself to being uncovered as such. Still, the chilling costs of requiring only perfectly *a priori* “truthful” human rights criticism, even if we had a readily ascertainable standard to effectively detect it, would be too great.

Relatedly, it is also sometimes asserted that criticism should be not only true but “constructive”. Of course, there is nothing wrong with the idea of constructive criticism and proposing ways in which a particular human rights ill might be remedied.<sup>60</sup> Such constructive criticism expresses the fact that the author of the critique is not only committed to producing some rhetorical effect, perhaps a form of reprehensible moral grandstanding,<sup>61</sup> but is invested in the resolution of the problem. It may be useful in directing criticism away from incendiary diatribes. But there is also a risk that every criticism will be deemed as non-constructive and that “constructive” will be equated with being muted and state-friendly. This is especially apparent in UN circles<sup>62</sup> where “constructive criticism” has become a somewhat coded word by authoritarian states for “soft ball” criticisms that are “frequently interpreted as alibis to resist or even undermine human rights mechanisms.”<sup>63</sup> It may be desirable for criticism to be deemed constructive, but being constructive is too vague to be a necessary dimension of critique's moral acceptability. Occasionally, the truth-value of criticism may simply need to trump the fact that it is not particularly “constructive.”

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<sup>60</sup> *States must be honest about their human rights situations and be willing to accept constructive criticism from others*, Press Release GA/SHC/3400 (1996), online: <press.un.org> [perma.cc/942K-E3FK].

<sup>61</sup> Justin Tosi & Brandon Warmke, “What Is Moral Grandstanding?” in Justin Tosi & Brandon Warmke, eds, *Grandstanding: The Use and Abuse of Moral Talk* (Oxford University Press, 2020) 0.

<sup>62</sup> United Nations, “States must be honest about human rights, accept constructive criticism, Third Committee Told in Rights Debate” (19 March, 2023), online: <press.un.org> [perma.cc/VUW5-KL6H].

<sup>63</sup> Jane K Cowan & Julie Billaud, “Between learning and schooling: the politics of human rights monitoring at the Universal Periodic Review” (2015) 36:6 *Third World Quarterly* 1175.



## ii. *The Uneven Hand of Criticism*

A second way in which human rights criticism has often been dismissed is through accusations that it is not even-handed. States sometimes seem less irked by the substance of human rights criticism addressed to them than a perception that they are being singled out or that they are being implicitly ranked within a sort of international competition for human rights virtue. This is particularly apparent in the case of Israel, where there is a long-standing complaint that a disproportionate amount of criticism being levelled at that country at the expense of much more dire human rights situations elsewhere.<sup>64</sup> This then leads to the suggestion that some states are being particularly “demonized” in ways that impute the motives of those making the criticism. Leaving aside the complex question of whether that is true in any given case, note that bearing a higher share of criticism may paradoxically reflect well on expectations about one’s record. For example, it may reflect the fact that one is a state rather than a non-state actor, endowed with certain privileges, but also thereby unequivocally bound by international human rights instruments; or it may reflect the fact that one is being taken seriously as a democracy and held to account on the basis of democratic standards. Nonetheless, the question is what impact that lack of even-handedness should have on the moral quality of criticism in a context where human rights criticism may be accused of producing certain distributive political outcomes and, to put it simply, of being politicized beyond redemption.

Eric Heinze has devoted significant thinking to this specific, but crucial, dimension of the overall justness of criticism. He argues that, whilst the test of even-handedness should not be hard to meet in conditions where the goal is to “promote broad participation” and a degree of pluralism, “assuring a minimum of credibility and good faith in the use of human rights discourse” requires that one satisfy a test of “non-partisanship.”<sup>65</sup> This means that one should not, as those focusing disproportionately on some perpetrators seem to do, “effectively recapitulate a position within a recognized political, social, or cultural conflict that lies outside the confines of the norm applied.”<sup>66</sup> In other words, the tenor of the criticism should not be so

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<sup>64</sup> Rosa Freedman, “The United Nations Human Rights Council: More of the Same” (2013) 31:2 *Wis Int’l LJ* 208.

<sup>65</sup> Eric Heinze, “Even-handedness and the Politics of Human Rights” (2008) 21 *Harv Hum Rts J* 7 at 31.

<sup>66</sup> *Ibid.*

disproportionate as to put in question whether it is still legitimately about human rights. R. J. Vincent pointed out, for his part, that the point about inconsistency “is not as show-stopping as it first appears, for it assumes a world beyond the state which it is possible to be consistent about.”<sup>67</sup> Given the inequality of human rights situations across the world, and unlike cases that “should be treated unequally”, “there can be no objection in justice to what critics unreasonably call inconsistency.”<sup>68</sup> In fact, “the denial of the possibility of improvement in regard to respect for human rights anywhere on the ground that the same cannot be accomplished everywhere might be called the bloody-minded conservatism of those who would prefer that things did not get better.”<sup>69</sup>

Note that there may be perfectly innocent explanations of the focus on some states at the expense of others. Most states do not have the institutional machinery, energy and will to constantly monitor the human rights performance of all states. Invariably, channels of criticism will track geopolitical proximity, ethnic and religious affinity and overall political positioning. States are not the United Nations nor Amnesty International (neither of which are wholly even handed either), and a requirement that they impart criticism in ways that are perfectly even-handed could amount to stymieing any human rights criticism. More importantly, pointing out criticism’s unequal dimension may be a valid retort from a foreign policy perspective, but it is not a valid reply to its human rights tenor. Israel’s violations of human rights, such as they may be, are not extinguished by virtue of other states doing worse and not being significantly criticized for it, although that is a problem separately. Different states may do different things badly at different times, requiring a constantly adaptive process of critiquing that is difficult to second guess.<sup>70</sup> At least, so long as the uneven handedness does not reach the point where it imputes all right intention (see *infra*), it may be that it is still very much salvageable qua human rights criticism. This is especially the case if there is some normative reason to justify the relative unbalance (for example because Israel is a state, a democracy, an ally, born out of the Holocaust, an occupying power, etc.).

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<sup>67</sup> Vincent, *supra* note 14 at 142.

<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid* at 143.

<sup>70</sup> *Ibid* at 142–43.

A related demand might be that criticism always be impartial — for example, that it should emanate from moral agents that have no “skin in the game.” Under that view, criticism by states that stand to gain from their critiques might be dismissed out of hand as being partial. For example, all Arab states’ criticism of Israel, or all former colonial powers’ criticism of their former colonies (and vice versa), or the West’s criticism of China, or Cuba’s criticism of the US, might seem to all already be saturated with bias. This is because the critiques occur against the background of dense geopolitical interests that makes it very difficult to discern a valid human rights preoccupation or at least genuineness of intention. By contrast, we might decide to invest more worth in criticism that “comes out of nowhere” as it were, outside any lingering neo-colonial or imperial relationship of domination or dependency, for example. The multilateralization of human rights criticism at the Human Rights Council has at least meant that criticism occasionally comes from very distant states who may therefore appear all the more objective.

But demanding this kind of impartiality in moral judgments from states is problematic in several ways. It neglects the fact that some states may be suffering directly from human rights violations at the hands of another state and would thus appear fully entitled to criticize the latter for it (Palestinians are definitely not impartial when it comes to human rights violations in Palestine,<sup>71</sup> but surely this does not disqualify them from critiquing Israel if such criticism is otherwise valid). In fact, it is unrealistic to expect states with little investment in the reality of another state to have any incentive to criticize their human rights record. By necessity, criticism often comes from states that are implicated in actual relations in the same way that we tend to voice moral judgment at the persons we are connected to. Informed human rights criticism may actually require sustained engagement with the critiqued party. And requiring “full objectivity” may trivialize the worth of moral judgments, which may lie precisely in how they require the responsible moral actor to dynamically ascertain their own moral obligations against their own interests.

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<sup>71</sup> Human Rights Watch, “Palestine: Impunity for Arbitrary Arrests, Torture” (30 June 2022), online: <[hrw.org](https://www.hrw.org/)> [perma.cc/SWC6-SSXG].

### iii. *Prospect of Success in Criticism?*

Third, the actual envisaged result of criticism might be included into the equation, with “prospect of success” as a criterion of just criticism. Compared to war, criticism, even harsh criticism, can only cause so much harm; but criticism could still fail or be counter-productive, even when it is true. For example, human rights criticism (whether true or untrue) might feed into processes of polarization and grievance which ultimately do little for human rights — regardless of its intentions.<sup>72</sup> It might even fail to reach the populations that one seeks to support behind the states themselves, and encourage a fortress mentality.<sup>73</sup> The goal of critique, then, should not be a form of “virtue signaling” that simply ameliorates the critic’s moral self-esteem. At the very least, State criticism should not actually make a human rights situation significantly worse in a context where there is evidence that it can occasionally provoke vicious backlashes, including against the very populations one is seeking to protect.<sup>74</sup> States often have little visibility about the consequences of their criticism in the targeted country and thus suffer from a problem of “epistemic access.”<sup>75</sup> Since there is no shortage of alternative sources of human rights criticism (victims, civil society, international organizations), it might be thought that inter-state criticism should be all the more premised on a clear understanding of the specific and, ideally, positive role it may serve.<sup>76</sup>

Having said that, what counts as “success” in the case of criticism may be far less clear than the notion of “success” in war, especially given the absence of a clear signpost such as “victory.” Criticism might provoke a short-term knee jerk reaction by the defending government, which might take out its frustration on the victims of human rights violations. Critiqued states have been known to lash back at dissidents when receiving some

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<sup>72</sup> Blessing-Miles Tendi, “The Origins and Functions of Demonisation Discourses in Britain–Zimbabwe Relations (2000–)” (2014) 40:6 *Journal of Southern African Studies* 1251.

<sup>73</sup> Michael Safi, “Keen to welcome visitors but enraged by western coverage: how Qataris see the World Cup”, *The Guardian* (20 November 2022), online: <theguardian.com> [perma.cc/WFC8-84K5].

<sup>74</sup> Jamie Gruffydd-Jones, “Why Human Rights Criticism Often Backfires” (15 March, 2023), <foreignpolicy.com> [perma.cc/5VGP-ZUSQ].

<sup>75</sup> Amy L McKiernan, “Standing Conditions and Blame” (2016) 32:1 *Southwest Philosophy Review* 145–51.

<sup>76</sup> For example of criticism of US unilateralism in the defence of religious freedom, see Peter G Danchin, “U.S. Unilateralism and the International Protection of Religious Freedom: The Multilateral Alternative” (2002) 41:1 *Colum J Transnat’l L* 33.

foreign criticism. For example, Omar Al Bashir kicked out Western NGOs from Sudan upon being sought by the ICC.<sup>77</sup> It has been argued that human rights criticism of the Chinese Communist Party actually reinforces it,<sup>78</sup> given its ability to manipulate the narrative about such criticism at home.<sup>79</sup> Clearly, any criticism that foreseeably leads to the opposite result of its intention (e.g. the execution of a political prisoner after being warned that this would be a consequence of further “meddling”) cannot simply invoke its truth value or good faith and needs to be accountable for its real world effects.

Criticism could also inflame tensions between countries in ways that might end up having negative ramifications between states and, ultimately, for human rights.<sup>80</sup> Criticism may hit a wall that makes it appear as little more than posturing;<sup>81</sup> even in a context where states are relatively committed to human rights and have proved remarkably impervious to, and defensive, against outside criticism of their human rights performance.<sup>82</sup> The record of human rights criticism in terms of actual political change is, in fact, fairly ambiguous and often related to exogenous factors.<sup>83</sup> Simply claiming that one is “obliged” to denounce certain violations, either by international obligations or domestic constitution, is unlikely to be very compelling if it can be shown that criticism has worsened a situation. When it comes to states, an ethics of conviction cannot replace an ethics of responsibility.

In the long run, requiring “prospect of success” as a criterion of just criticism may nonetheless be too consequentialist a vision and miss the true value of human rights criticism. The impact of human rights criticism should not be assessed in the void, but rather by comparison with situations where no human rights criticism is forthcoming at all. It might be argued that

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<sup>77</sup> Xan Rice & Tania Branigan, “Sudanese president expels aid agencies”, *The Guardian* (5 March 2009), online: <theguardian.com> [perma.cc/EA5L-WUCR].

<sup>78</sup> Jamie J Gruffydd-Jones, *Hostile Forces: How the Chinese Communist Party Resists International Pressure on Human Rights* (Oxford University Press, 2022).

<sup>79</sup> “Analysis | Western nations sanctioned China. Chinese media made the most of the criticism over Xinjiang.”, *Washington Post* (1 April 2021), online: <www.washingtonpost.com> [perma.cc/ND8C-BCVK].

<sup>80</sup> Richard Falk, “Do We Really Want a Second Cold War?”, *Global Justice in the 21st Century* (11 February 2022), online: <richardfalk.org> [perma.cc/T5V5-YXZ5].

<sup>81</sup> Mary Hawkesworth, “Ideological Immunity: The Soviet Response to Human Rights Criticism” (1980) 2 *Universal Hum Rts* 67.

<sup>82</sup> Jasper Krommendijk, “Between Pretence and Practice: The Dutch Response to Recommendations of International Human Rights Bodies” (2016) *Netherlands Yearbook of International Law* 2015 421.

<sup>83</sup> James C Franklin, “Shame on You: The Impact of Human Rights Criticism on Political Repression in Latin America” (2008) 52:1 *International Studies Quarterly* 187.

silence is also the surest way in which human rights violations are tolerated and even perpetrated. Alternatively, it is at least very difficult to know what the actual impact of criticism will be compared to staying numb. One cannot possibly ask for perfect guarantees of success given the fundamental uncertainty of international life. Suggesting that human rights criticism should only go ahead if it is to be “successful” could, again, have a paralyzing effect. Harm caused collaterally by critique (for example the short-term imprisonment of a dissident) might be saved by the doctrine of double effect and the longer-term political ramifications of standing up for rights as the space for denial shrinks and states occasionally evolve towards acknowledging at least some human rights violations. And a state that denounces human rights violations is not necessarily on the hook simply because the target state, out of spite and in further contravention of its own clear obligations, double downs on said violations. After all, causing more of the same harm simply to protest criticism surely reveals a regime’s true colors.

Moreover, and from a normative perspective, the value of moral statements arguably lies not only in their immediate effect, but in their ability to uphold and keep alive moral categories with broader “constitutive” implications for the entire international system. Human rights criticism affects not only the target society; it also tests the human rights willingness and mettle of the society making it, which has implications for the system in which it is uttered. In the best of cases, it keeps a link of solidarity alive between the state making the criticism and the society in the state being critiqued — as well as between societies and populations. Indeed, there is something about the inherent value of moral judgments that makes their actual impact relatively more secondary: a use of force has no value in itself, hence the greater need for it to be justified by success; a moral judgment, by contrast, has value in itself, hence our greater willingness to let it make its way into the world, even when success is far from guaranteed. “Behaving morally” in the long run, by calling out human rights violations, has arguably precedential and example-setting effects that can set a tone far beyond any particular case.

## **B. Criteria Related to the Identity of the State Criticizing**

If all that mattered were the content of criticism, the *locutor* would not matter. All states would be deemed interchangeable: what counts is not who

one is, but merely what one says. But if the actual content of human rights criticism is not always conclusive of its fundamental morality, what criteria related to the identity of state that makes the criticism make it acceptable and even worthwhile? In this section, I seek to adapt some interpersonal ethics and Just War categories to the demands of establishing a “standing to criticize.”

Governments are typically understood to have right authority when it comes to waging war, a particularly dangerous and risky activity that has long militated for some kind of centralized and accountable decision-making process. This is in contrast to private actors, which are not typically considered to have the authority to wage war because they fail to exhibit some of the characteristics that would allow them to legitimately wield legitimate violence. Right authority, however, is likely to work differently when it comes to criticism — where it cannot be assumed that states always, and in all circumstances, have authority merely by virtue of their status.<sup>84</sup> In fact, one view might be that states actually have less authority to critique other states’ human rights record than civil society actors or international organizations, who are less easily suspected of ulterior motives. By contrast, states might be more naturally suspected, in the dense realm of international politics, of pushing hidden agendas and of corrupting every human rights argument they touch.

Nonetheless, it seems hard to deny that states have some authority to criticize other states’ human rights record and even obligations to sometimes exercise that authority given their leverage. Indeed, it does not seem particularly helpful (to the pragmatic purpose of devising an ethical roadmap) for states to entirely exclude that possibility. One absolutist view might be that states should only venture to voice criticism when subject to a “clean hands” requirement (i.e., that they themselves broadly respect human rights). But this seems too onerous. No state in the international system today criticizes any other from a place of wholesome innocence and it is unclear what broadly respecting human rights means. Even states that are routinely praised as being at the apex of human rights compliance under some readings at least, are arguably involved in significant and structural rights violations. Think, for example, of Canada and Australia’s treatment of indigenous peoples; Denmark’s treatment of immigrants; or France’s

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<sup>84</sup> Ori J Herstein, “Justifying standing to give reasons: Hypocrisy, minding your own business, and knowing one’s place” (2019) *Philosophers’ Imprint* (Forthcoming) at 17.

treatment of hijab wearing Muslim women.<sup>85</sup> By contrast, there are many states that are routinely denounced as violating some human rights which, by another measure, are upholding some of them (e.g.: the promotion of the right to health in Cuba, etc.).<sup>86</sup>

A requirement that one must proceed from a place of unmitigated human rights virtue would make any criticism impossible or restrict it to the very few. That is, assuming parties could even agree who those few virtuous states were. At any rate, states' human rights faults, such as they are, may still pale when compared to those they criticize in others. In the interpersonal setting, note that scholars have cautioned against finding that hypocrisy wholly negates the standing to criticize.<sup>87</sup> Human rights criticism is not the criticism of saints but of sinners. The fact that it comes with ulterior motives may be precisely the condition of its possibility (criticism is not merely *gratuitous*), but also the petard on which it may hoist itself. States criticize at their own risk, and it is that risk – a gamble that their authority to criticize exceeds their vulnerability to criticism – that makes criticism normatively salient. To require that a state have purged itself of any ulterior motive before it can venture to criticize others is the surest way to make human rights criticism anemic to the point of inexistence. Rather than a general requirement of “clean hands,” it might be more helpful to think of a requirement of having “clean hands” in relation to the rights violations that one specifically criticizes. For example, hypothetically, a US criticism of a third world country's use of torture against “terrorists” might fail in light of the US's own condoning of torture in similar contexts,<sup>88</sup> not to mention the export of a “War on Terror” model to the Global South; or the criticism that certain countries fail to fulfill certain economic and social rights ought to be

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<sup>85</sup> See e.g. Canada, Truth and Reconciliation Commission of Canada, *Canada's Residential Schools: The History, Part 1 Origins to 1939*, (Final Report), vol 1 (Montreal: McGill-Queen's University Press 2015), online (PDF): <publications.gc.ca > [perma.cc/GPK9-8SPC]; Conor Lennon, “First Person: Aboriginal Australians suffer from ‘violent history’ and ongoing ‘institutional racism’” (21 April 2023), online: <news.un.org> [perma.cc/U7XU-CXEX]; Michelle Pace, “Denmark's immigrants forced out by government policies” (last modified 7 July 2021), online: <chathamhouse.org/2021/06/denmarks-immigrants-forced-out-government-policies> [perma.cc/EB84-GNS5]; Roshan Arah Jahangeer, “In France, abortion rights and hijab bans highlight a double standard on women's rights” (14 March 2024), online: <theconversation.com> [perma.cc/524Z-A45A].

<sup>86</sup> Candace Johnson, “The virtues of repression: politics and health in revolutionary Cuba” (2018) 33:6 Health Policy and Planning 758–59.

<sup>87</sup> Daniela Dover, “The Walk and the Talk” (2019) 128:4 The Philosophical Review 387.

<sup>88</sup> See e.g. OAS, Inter-American Commission on Human Rights, *Towards the Closure of Guantanamo*, OAS/SerL/V/II./Doc 20/15 (3 June 2015) at 50-72.



seen in light of the fact that they are simultaneously subjected to embargoes or even the sustained inequities of the international system that powerful finger-pointing states have themselves posed. States should be mindful of how their criticism may be undermined by their own foreign policy.<sup>89</sup> Specific critiques of hypocrisy are useful, but not when they negate the value of ethical foreign policy focused on human rights altogether.<sup>90</sup> States who accuse others of exactly the sins they are culpable of open themselves to considerable peril in ways that can be brutally productive for human rights.

Yet another approach might be to see the authority to criticize other states' human rights record as, in contradistinction to war, susceptible to degrees. Authority might be earned through a modicum of respect for human rights; or, at least for the human rights that one criticizes another state of not respecting. The standard could be the implementation of good faith efforts to maintain rights at home, however difficult measuring such a performance may be. Under that reading, (hypothetical) criticism by North Korea of another state's respect for civil and political rights is not quite the same thing as similar criticism by Switzerland. This may still be the case despite North Korea potentially making perfectly valid points about the human rights record of other states in the absolute, and even though Switzerland, for its part, could occasionally be missing the mark as it showed when snubbing an ECtHR ruling on climate change.<sup>91</sup> The authority for a state to criticize may be gained or lost over time, in general or in relation to another particular state. This authority should also be especially sensitive to the record of relations that one has to the state one criticizes and the degree to which one is a source of its inability to honor rights. For example, the US might criticize Iraq (in the 90s when under sanctions or in the 00s after the US invasion)<sup>92</sup> for violating human rights, but it would be difficult not to see the ramifications of US foreign policy in some of those same rights violations.

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<sup>89</sup> Richard Perkins & Eric Neumayer, "The organized hypocrisy of ethical foreign policy: Human rights, democracy and Western arms sales" (2010) 41:2 *Geoforum* (Themed Issue: Mobilizing Policy) 247.

<sup>90</sup> Daryl Glaser, "Does hypocrisy matter? The case of US foreign policy" (2006) 32:2 *Review of International Studies* 251.

<sup>91</sup> "Switzerland's parliament defies ECHR and female climate activists" (12 June 2024), online: <[bbc.com/perma.cc/SGE9-CBQL](https://bbc.com/perma.cc/SGE9-CBQL)>.

<sup>92</sup> For the sanctions passed by resolution from the United Nations Security Council in the 1990's, see UNSC, 1990, UN Doc S/PV 2933-UNS(01)/R3 (1990) 2933<sup>rd</sup> Mtg. For a timeline on the Iraq war that started in 2003, see generally: Council on Foreign Relations, "Timeline: The Iraq War" (last visited 16 February 2025), online: <[cfr.org](https://cfr.org)> [[perma.cc/S2U7-VKYU](https://perma.cc/S2U7-VKYU)].

Right authority is often treated as a generic quality. In truth, the very broad brush bequeathed by just war theory (notably, the requirement of publicness) does not necessarily do justice to the fact that, for the purposes of criticism, not all states are alike. This intuition comes from personal ethics, and the well-known psychological phenomenon that one may have objections to criticism not in general, but as coming from certain persons.<sup>93</sup> Equally, when it comes to human rights, “who does the shaming matters.”<sup>94</sup> This argument might be taken too far when considered internationally – for example, if states were to say that they only accepted internal criticism from friends and allies (e.g.: the phenomenon of “horse trading” and “back scratching” at the Human Rights Council). But there is some wisdom to the notion that the acceptability of human rights criticism needs to be fine-tuned to take into account the situationality of all criticism. What matters is not merely what the criticism says (in the sense that not everything that is otherwise true deserves to be said), but who utters it (what has been described as the “positionality of blame”).<sup>95</sup>

For example, some states may be relatively disqualified from making certain forms of bilateral criticism. For obvious reasons, Germany has never been in a great standing to criticize Israel’s human rights record, and groups in Germany that have done so have, all other things being equal, done it from a very precarious position.<sup>96</sup> What German officials might have to say about Israel’s performance in the occupied territories might still be true but, of 200 states, one would not necessarily expect Germany – the State that is responsible for the Holocaust – to be a leader in criticizing Israel. Conversely, it might be of course that, if and when Germany does criticize Israel, this carries particular weight since it suggests that it does so despite the understandable squeamishness it should have about being drawn into that position. Additionally, extremely close alignment with Israel might also

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<sup>93</sup> One may think, for example, that a certain criticism is correct but just not want to hear it from one’s overbearing parents; or one may think that a passer-by who scolds us for doing something badly with our child is meddling, even though we might accept such criticism from a spouse and even though such criticism might, in fact, be correct.

<sup>94</sup> Gruffydd-Jones, *supra* note 74.

<sup>95</sup> Bell Macalester, “The Standing to Blame: A Critique” in D Justin Coates & Neal A Tognazzini, eds, *Blame: Its Nature and Norms* (OUP USA, 2012) 263.

<sup>96</sup> Alexander Sedlmaier, “Boycott Campaigns of the Radical Left in Cold-War West Germany” in David Feldman, ed, *Boycotts Past and Present: From the American Revolution to the Campaign to Boycott Israel* (Palgrave Critical Studies of Antisemitism and Racism (Cham: Springer International Publishing, 2019) 115.

be interpreted as a green light for violations, not to mention an abandonment of post-War German aspirations.

The point at hand is that criticism of Israel from Germany does not have the same value as criticism of Israel from Iran, a state clearly hostile to it.<sup>97</sup> The criticism of friends carries deeper than the criticism of enemies, and carries special responsibilities. It has also been shown that criticism of China's human rights performance is particularly likely to be unproductive when coming from the US, which is perceived as the rival superpower and thus comes with an authority that is questionable.<sup>98</sup> Situated criticism, then, is a call for humility but also to understand how criticism that operates against the background of fraught shared histories will be very hard to disentangle from such legacies.

### C. Criteria Related to Motive

Beyond just authority, a traditional requirement of Just War is that there be just intention. This suggests that one should not simply invoke the right arguments but that these arguments should actually be the ones motivating one's actions. For example, a humanitarian intervention, which is in fact a cover to seize a country's oil fields, is not a humanitarian intervention — even if the case could be made, in the abstract, that it could save civilians (and even if it, in fact, does). Just intention stands to work differently in the context of human rights criticism if the latter is understood to be presumptively desirable (compared to a use of force), since even human rights criticism that is ill-intended (for example, to delegitimize a state) might still be worth being voiced and heard in some circumstances. The denunciation of hypocrisy is a prominent theme in ethics,<sup>99</sup> although its foundation in conceptions of virtue may be an awkward fit in the inter-state context, where actual results may trump concern with motivation.<sup>100</sup> The shrill denunciation of hypocrisy might in the end reveal itself as hypocritical,

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<sup>97</sup> See also Maziar Motamedi, "Iran and Israel: From allies to archenemies, how did they get here?" (Last modified 3 October 2024), online: <aljazeera.com> [perma.cc/DMH6-GE9M].

<sup>98</sup> Jamie J Gruffydd-Jones, "Citizens and Condemnation: Strategic Uses of International Human Rights Pressure in Authoritarian States" (2019) 52:4 *Comparative Political Studies* 579.

<sup>99</sup> Roger Crisp & Christopher Cowton, "Hypocrisy and Moral Seriousness" (1994) 31:4 *American Philosophical Quarterly* 343–49.

<sup>100</sup> Daryl Glaser, "Does hypocrisy matter? The case of US foreign policy" (2006) 32:2 *Review of International Studies* 251–68.

or at least as condoning the privilege of those who can relatively afford to be consistent in their criticism of others.<sup>101</sup>

Just intention therefore ought to be seen less as a rigid *a priori* necessary condition than as a requirement whose absence might occasionally disqualify the legitimacy of criticism. Still, many would consider that otherwise true human rights criticism that is not motivated fundamentally by human rights indignation but, for example, seeks to instrumentalize rights to score political points is unhelpful and unethical.<sup>102</sup> States should abstain from otherwise valid human rights criticism which they only engage in for motives extraneous to human rights. This suggests, for example, that one might want to be wary *prima facie* of US accusations of human rights violations in China in a context of increased rivalry, including ideological, economic and military, between both countries.<sup>103</sup> *A fortiori*, criticism that not only evidences wrong intention but is, in fact, motivated by hatred, xenophobia or racism is clearly beyond the pale – although, worryingly, these arguments may also be used to delegitimize otherwise valid human rights criticism. Famously, the distinction between valid human rights criticism of Israel and antisemitism has become a particularly vexed issue.<sup>104</sup> On the one hand, the conflation can be used to disqualify legitimate criticism of Israel; on the other hand, criticism of Israel can also come from antisemites. By contrast, a state that has nothing to gain and much to lose by voicing their criticism cannot be mistaken for trying to score political points – although, whether such a state would have any incentive to profess criticism in the first place is open to doubt.

A requirement of good faith is sometimes suggested to specify the requirement of just intention, understood at least as an alignment with one's stated motivations (this is also broadly consonant with international law). Even as the US and UK governments stigmatized the tyranny of Saddam Hussein, there was little evidence that they took seriously the situation of

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<sup>101</sup> Katharine M Millar, "Limitations of hypocrisy as a strategy of critique in international politics" (2024) 16:3 International Theory 295–320.

<sup>102</sup> Suzanne Dovi, "Making the World Safe for Hypocrisy?" (2001) 34:1 Polity 3–30.

<sup>103</sup> "China calls U.S. a hypocrite over human rights", *Reuters* (12 March 2010), online: <reuters.com> [perma.cc/8BR8-SX7E].

<sup>104</sup> Wilhelm Kempf, "Anti-Semitism and criticism of Israel: Methodology and results of the ASCI survey" (2015) 14:1 Conflict and Communication Online 1–20, online: <researchgate.net> [perma.cc/VFW2-PE94]; Josh Kaplan, "Contesting Anti-Semitism: Human Rights, Israel Bashing, and the Making of a Non-Problem" (2010) 83:2 Anthropological Quarterly 429.

human rights in Iraq in justifying the country's invasion, as evidenced by the considerable impact sanctions had on the Iraqi population.<sup>105</sup> But good faith can appear to be little more than a platitude. In many cases, otherwise unjust criticism may be in good faith. One might honestly believe that China is engaged in atrocious behavior in Xinjiang but still be a smug Westerner unwilling to take the full measure of rights violations at home, or the extent to which criticism of China is inscribed within old and problematic patterns of imperialism, or the complexities of what is actually unfolding in Xinjiang.<sup>106</sup> Conversely, one might engage in criticism in bad faith that is nonetheless, except for that bad faith, just. Just because Venezuela or Cuba may criticize the US's human rights performance in terms of racial discrimination to deflect attention from their own human rights record does not mean that criticism is not valid in and of itself. Good faith is not a sufficient, and perhaps not even a necessary, condition of the validity of criticism, although it may bring something to its legitimacy (one is at least, as the case may be, wrong in good faith).

Overall, requiring just intention can help weed out some of the most blatantly manipulative forms of criticism, but one will still find it hard to impugn criticism merely on the basis that its intention reveals ulterior motives. Moreover, one must recognize that motivation may be mixed, a problem that has long plagued, for example, the evaluation of the justness of particular wars. More often than not, states will have a range of reasons to engage in human rights criticism, some more laudable than others. The promotion of democracy, for example, might be described as both principled and instrumental on the part of the states supporting it.<sup>107</sup> True, criticism might be so self-serving as to fundamentally impoverish its moral quality, impact and ultimately validity. Expunging human rights criticism of all reference to interest, however, might simply be an unhelpful manifestation of moral absolutism. The reality is that states will typically only be moved to expend precious political and diplomatic energy on some human rights issues when they actually do have some kind of political interest to do so.<sup>108</sup> That criticism, then, might both be intrinsically valid and instrumentally

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<sup>105</sup> David Cortright & George A Lopez, "Are Sanctions Just? The Problematic Case of Iraq" (1999) 52:2 *Journal of International Affairs* 735–55.

<sup>106</sup> *Repression in Xinjiang*, supra note 56.

<sup>107</sup> Margot Light, "Exporting democracy" in Karen E Smith & Margot Light, eds, *Ethics and Foreign Policy* (Cambridge, UK: Cambridge University Press, 2001) 75.

<sup>108</sup> Chris Brown, "Ethics, interests and foreign policy" in Karen E Smith & Margot Light, eds, *Ethics and Foreign Policy* (Cambridge, UK: Cambridge University Press, 2001) 15 at 22–23.

helpful to the cause of human rights in the target country, and not much is gained by requiring that criticism only emanate from saints.

#### IV. Criticism as Relation

In the previous section, I have reviewed ways in which one might structure the conversation about just human rights criticism by using a number of criteria that could allow us to evaluate the value of criticism from the perspective of its utterer. Even if that approach is helpful on its own terms, it suffers from one fundamental limitation: the fact that it is largely unilateral. The question it traditionally seeks to address, whether deontological or utilitarian, is: what should one do? A vision of ethics as being, in a sense, “true to oneself” in acting morally is of course significant when it comes to human rights. States insist that they *must* criticize the human rights violation of others because of their own grounding in and commitment to human rights.<sup>109</sup> But this makes short shrift of their own agency and, indeed, of their radical responsibility for the effects of their criticism and, more generally, their standing as members of an international society of states. States’ insistence on the legal obligation to promote human rights neglects the fact that, even independently of its consequences, criticism proceeds from a certain conception of international relations that it further contributes to entrench. Criticism is never innocent of such assumptions and the way they frame ongoing relations.

The typical posture of critique, then, can be seen as focused on what Emmanuel Levinas has described as the ontology of being, one that sees the “other” as an object of universal knowledge rather than an interlocutor.<sup>110</sup> In that respect, subjective ethics are mired in and reproduce a particularly individualist ethical mindset that focuses on abstract moral laws, which are then projected onto sovereigns. This focus on a critique’s author reinforces the sense that criticism is a manifestation of the state’s ontology, and its desire to transform “the other” into “the same” in ways that are both

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<sup>109</sup> “The United States Promotes Accountability for Human Rights Violations and Abuses”, online: *United States Department of State* <state.gov> [web.archive.org/web/20240218011018/https://www.state.gov/the-united-states-promotes-accountability-for-human-rights-violations-and-abuses/].

<sup>110</sup> Emmanuel Levinas, “Is Ontology Fundamental?” (1989) 33:2 *Philosophy Today* 121.

potentially violent and excessively generalizing.<sup>111</sup> Rather than “‘Other’-regarding”, it can appear to “stem from an essentially narcissistic or self-regarding frame of reference.”<sup>112</sup> This approach based on subjectivity imagines the state being critiqued as itself somehow absent from the moral computation to which it is being subjected. The value of criticism is analyzed mostly through either the moral categories of the agent critiquing or those of the system, but there is little space for how criticism is received and how a better understanding of that position might nuance what constitutes its justness. Criticism, however, cannot be merely a hegemonic claim to be “more like us/me.” It must take seriously and proceed from the recognition of the other state as a radical “other”: in our case, the foreign state is not merely a (poor) replica of the state criticizing it but exists, to a large extent, in and for itself — the existence of the “other” then calls into question that of the “same.”<sup>113</sup>

In this section, I suggest that human rights criticism should ultimately be understood as part of relations which are always already mutual, existing and ongoing, and that meaningfully characterize international society.<sup>114</sup> Human rights criticism is relational because of the way relations between states, both prior and posterior, shape what can be said about the human rights performance of another state and why. To take cognizance of this relational nature of criticism is to mind the way in which criticism is made possible by that relation and affected by it. In other words, it is to transcend the validity of the critique or the legitimacy of motives, in ways that enable us to understand how critique constructs a particular kind of inter-subjectivity. That relationality also points to how the self is constituted.<sup>115</sup> To criticize is to engage in a performative exercise in which one constructs oneself in the process of constructing the other. In particular, criticizing sets oneself up as a critique on the basis of a certain self-assessment and an assessment of the relation to that which one criticizes. Moreover, human rights criticism changes the nature of the underlying relation that gives rise to it. This makes sense of both state sovereignty (the other state is an end

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<sup>111</sup> Sébastien Jodoin, “International Law and Alterity: The State and the Other” (2008) 21:1 *Leiden Journal of International Law* 1.

<sup>112</sup> Volker Heins & David Chandler, *supra* note 22 at 13.

<sup>113</sup> Emmanuel Lévinas, *Otherwise Than Being, Or, Beyond Essence* (Duquesne University Press, 1998).

<sup>114</sup> Thaddeus Metz & Sarah Clark Miller, “Relational Ethics” in *International Encyclopedia of Ethics* (John Wiley & Sons, Ltd, 2016) 1.

<sup>115</sup> On the broader notion of the “relational subject”, see Pierpaolo Donati & Margaret S Archer, *The Relational Subject* (Cambridge: Cambridge University Press, 2015).

onto itself) and shared values (human rights implicate both the criticizer and the critiqued in some preexisting and shared lifeworld). It also makes sense of the equality between states as a relational quality, as in the emerging trend towards “relational egalitarianism”<sup>116</sup> and its implications for international relations.<sup>117</sup>

Rather than a purely theoretical, a-historical accounts of the justness of human rights criticism, the point of relational ethics<sup>118</sup> is that criticism is a byproduct of existing, and often problematic, social constellations – even as it can serve to simultaneously problematize such constellations. The emphasis on criticism as the product of relations thus helps to sharpen the stakes of what is involved whilst doing justice to the social embeddedness of all criticism. Criticism emerges from a relation because it presumes a prior obligation: after all, one would not criticize if one did not feel that one could as a result of some pre-existing relation and even out of respect for another state qua state. For example, one would not insist that Al-Qaeda or Daesh respect human rights because they are not extended the basic recognition of statehood or treated as realistic ethical partners; they are not criticized as much as ostracized. Criticism is reserved for subjects who one considers, paradoxically, worthy of criticism. In our case, they are fellow duty-bearers of human rights obligations understood as states who may be failing their human rights obligations but are at least equal bearers of such obligations. Therefore, the question I want to ask is: what does foregrounding the actual relations between states that impart and receive criticism reveal about the ethics of human rights criticism? I suggest that asking this question has consequences in terms of how one might frame criticism as resulting from a form of invitation that involves a type of dialogue and as, ultimately, shedding light on the pluralistic structure of international human rights.

## A. Criticism by Invitation?

A first approximation of what I have in mind is what might be described as criticism by invitation. This emphasizes not so much the self-constituted authority of a state to criticize as the extent to which criticism is objectively

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<sup>116</sup> Kasper Lippert-Rasmussen, *Relational Egalitarianism: Living as Equals* (Cambridge: Cambridge University Press, 2018).

<sup>117</sup> Kevin K W Ip, *Egalitarianism and Global Justice: From a Relational Perspective* (New York: Springer, 2016).

<sup>118</sup> Emilian Kavalski, “Inside/Outside and Around: Complexity and the Relational Ethics of Global Life” (2020) 34:4 *Global Society* 467.



invited, or at least tacitly acquiesced to, by the targeted state. This is an argument that is often made, at least *pro forma*, by international lawyers emphasizing that the criticized state has, if nothing else, ratified the relevant international instruments.<sup>119</sup> For example, commentators have not missed that China, in its candidacy for the Olympics, had conspicuously committed to upholding human rights standards and thus to a degree “brought criticism on itself”.<sup>120</sup> This is a formal argument, but it is also one that seriously considers the moral agency of the critiqued state. The critiquing state might point out that it has no choice but to criticize if it is to take the moral agency of its ‘other’ seriously, above and beyond its own clear obligations.

But states who are thus criticized will argue, not implausibly, that this misstates the framework and that it was never their intention to allow certain forms of unwelcome criticism – and that, surely, they ought to know. Having broadly subscribed to international human rights standards does not mean that one has *ipso facto* agreed to every criticism uttered in their name. This sort of broad formal mandate to criticize may satisfy lawyers, but it does not do justice to the ethical complexities of actual criticism. It is more plausible that criticism is welcomed by part of the population of the host state in ways that hint at its deeper acceptability – just as in the context of war it may be relevant that a part of the other state’s population is calling for intervention.<sup>121</sup> Of course, this transnational allyship should not be assumed too hastily. One cannot claim, merely because one is denouncing behavior that targets civil society, that one has a mandate from that civil society. An example is that many opposition groups have been wary of the support of the US and the potential impression that they are complicit with a foreign power (“with friends like that”).<sup>122</sup> It could also be that those calling for intervention are statistically inconsequential and cannot claim to speak for the population. Groups might be, furthermore,

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<sup>119</sup> “Commission on Human Rights Adopts Resolutions on Situation of Human Rights in Nigeria, Lebanon, Iran, Iraq, Sudan”, (26 April 1999), online: <press.un.org> [perma.cc/ESH5-ZMS6] citing Harold Koh to the effect that “It was not interference with affairs to ask China to obey the same principles as the rest of the world”.

<sup>120</sup> “Will China honour its Olympic promises?” *The Wire* (2006).

<sup>121</sup> Rein Mullerson, *Intervention by invitation* (Routledge, 2019).

<sup>122</sup> Anthony Faiola et al, “Despite setbacks, Venezuela’s opposition wary of U.S. intervention”, *Washington Post* (2 May 2019), online: <washingtonpost.com/world/the\_americas/venezuela-guaido-maduro-live-updates/2019/05/02/556d7244-6c48-11e9-bbe7-1c798fb80536\_story.html>; Abbas Milani, “Common Cause” *Boston Review* (1 January 2009), online: <bostonreview.net> [perma.cc/GJ25-QM6H].

seeking to draw a foreign state into a conflict or be wholly unrepresentative. Such concerns should not be taken lightly. The worst form of critique is that which is disavowed by those it is supposed to benefit.

Having said that, there will also be cases where reasonably legitimate and representative internal appeals to criticism are forthcoming. This is especially the case where there is a mismatch between ruler and ruled: for example, African-Americans have long considered that they could try to seize the attention of international organs to document continued segregation and discrimination; various minorities in China are adamant that they should be able to invite Western criticism of their government; and Palestinians have no qualms about clamoring for international criticism of Israel.<sup>123</sup> One should account for the fact that involved parties may have a fear to speak out, that those reaching out may represent the silent majorities and that expressing solidarity with them may embolden them to come out further. To be seen to merely respond to an invitation to criticize portrays criticism in a very different light.

At any rate, the possibility that criticism is, in fact, invited from within has been seized upon by some defenders of human rights foreign policy who point out, a little idealistically, that when “understood correctly, the politics of human rights has never attempted to influence the situation of human rights in another country from the outside, but has always tried to cooperate with the internal forces of political and social reform.”<sup>124</sup> This does potentially complicate the ethical picture: one is not simply asked to decide whether to speak *about* another state’s human rights record; one is asked *by* a part of that state’s population to do so. This relativizes the accusation that human rights criticism is foreign and hegemonic, since it henceforth derives its legitimacy, in part at least, from an internal source.<sup>125</sup> It also makes criticism seem more like a kind of *noblesse oblige* towards those who seek one’s assistance from within,<sup>126</sup> even as it infuses criticism with a certain

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<sup>123</sup> David Helps, “‘We Charge Genocide’: Revisiting black radicals’ appeals to the world community” (2018) 3:9 *Radical Americas* 2–24.

<sup>124</sup> Axel Honneth, “Is Universalism a Moral Trap? The Pressuppositions and Limits of a Politics of Human Rights” in James Bohman & Matthias Lutz-Bachmann, eds, *Perpetual Peace: Essays on Kant’s Cosmopolitan Ideal* (MIT Press, 1997) 155 at 174.

<sup>125</sup> On the complex interaction between local dissidence and outside support during the Cold War, see Bent Boel, “Who Helped the Soviet Bloc Dissidents? Western Subversive Encounters Beyond the Iron Curtain During the Cold War: Narratives, Approaches, Puzzles.” 0:0 *Cold War History* 1–34.

<sup>126</sup> Dan Haggerty, “Speaking for Others: Epistemology and Ethics” (2009) 25 *Social Philosophy Today* 109.

moral urgency: human rights criticism is not gratuitous but always, in a sense, an effort to respond to an earlier call by victims.

Critiquing from a place of transnational solidarity is, to be sure, not the same thing as critiquing from a place of international superiority. It creates a potentially genuine connection with social forces within, rather than speaking for them.<sup>127</sup> It also provides a modicum of protection against the accusation that criticizing a country's human rights record will make things worse, since the mandate comes from the local stakeholders themselves who must know what risks they take. Perhaps just as significantly, speaking in defence of an oppressed group within a state helps problematize what one is criticizing and creates a wedge in excessively unitary nationalist defences that seems to pit country against country. From thereon, for example, the problem is not just one of "China" persecuting "its population", but of "the Chinese Communist Party" persecuting "some Chinese," who vociferously oppose their oppression and have no qualms about calling in outside help. China is, needless to say, vast and multiple — contra efforts by the Chinese government to portray criticism of its record as a form of undifferentiated Sinophobia.<sup>128</sup>

In short, criticism by invitation may attenuate the suspicion of paternalism whilst helping problematize agency and conflict within the target state. Taking "criticism by invitation" seriously and not letting down such demands is an important stake in a relational conception of human rights: one that is, for example, not intimidated by abusive defences of sovereignty — including, as they may more or less cynically rely on, an invocation of "imperialism."<sup>129</sup> Even though such an approach will not avoid questions about who invites and with what authority, it orients thinking in a direction that begins to helpfully move us away from the solipsistic focus on ethical duties of the self or universal mandates. Instead, it urges us to conceive of the justness of criticism as part of a pattern of engagement with others. It can be seen as part of a broader effort to occasionally bypass state-to-state dialogue in order to bring in local actors as a condition of the ethics

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<sup>127</sup> US Secretary of State, Press Release, "Promoting Accountability for Human Rights Abuses Perpetrated by the Governments of Russia and Belarus" (15 March 2022), online: <state.gov> [perma.cc/P74V-7BPJ] (arguing that sanctions are adopted "to demonstrate solidarity with the victims of Russia's repression").

<sup>128</sup> John Fitzgerald, "Mind your tongue" (2019) 2 Australian Strategic Policy Institute at 5–6.

<sup>129</sup> Anjam Sundaram A, 'Opinion | He's a Brutal Dictator, and One of the West's Best Friends' The New York Times (11 April 2023), online: <nytimes.com/2023/04/11/opinion/paul-kagame-rwanda-britain.html>.

of foreign policy.<sup>130</sup> The problem is that local civil society actors will often be ambivalent about external criticism and will not necessarily want to be associated with it, lest they be branded as vehicles for foreign interference, especially in a context where they have increasingly been targeted for their international associations.<sup>131</sup>

## B. Dialogical Human Rights

Much human rights criticism seems to operate from a place of both innocence and superiority, which has tended to be particularly galling to states who find themselves on the receiving end of it. For example, the EU's "self-image" as "a force for goodness in international society" has been described, as "characterised by a curious blindness to its own interests."<sup>132</sup> This leads to the impression that states pointing the finger are grandstanding for their own benefit and engaged in a fundamentally illegitimate exercise. This is the sovereign equivalent of being censorious, self-righteous or sanctimonious in interpersonal relations. It must also be pointed out that human rights criticism is often embedded in evident geopolitics, and that its fluxes largely flow from the North/West to the South/East. This then creates conditions for a broadly "unilateral conversation": one in which the dialogue is really only ever conducted on the terms of the critics, and in which the terms of the response are also pre-determined (how many African NGOs writing reports on European human rights performance, for example?). It fails to question the broader political economy within which human rights criticism is made possible and even in which human rights violations occur.

The resulting inability to respond in kind, the result of ingrained habits and ideological limitations, is deeply dismissive – and even asphyxiating – of the polities that are on the receiving end of criticism. It tends to reproduce stereotypical hierarchies of civilizational merit where those critiquing and those receiving the criticism are part of a well-established script. Under that view, the problematic character of human rights criticism

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<sup>130</sup> Elena Crespo & Daniel R Mahanty, "Give Local Civil Society a Say in U.S. Security Assistance", (9 February 2021), online: Just Security <justsecurity.org> [perma.cc/Z328-BMA4].

<sup>131</sup> Natalya Dzhanpoladova & Claire Bigg, "New Russian Bill Aims To Brand NGOs As 'Foreign Agents'", Radio Free Europe/Radio Liberty (10:17:04Z), online: <rferl.org> [perma.cc/5DPS-TJ48].

<sup>132</sup> Knud Erik Jørgensen & Katie Verlin Laatikainen, *The EU@ the UN: multilateralism in a new key?* (University of Aarhus 2004).

is not the criticism itself, but the fact that it is not based in an ethos of *encounter*. By contrast, the relational character of human rights criticism might be understood as requiring that one always already open oneself up to the possibility of a dialogue about human rights in the process of critiquing. By dialogical criticism, I mean a criticism that does not merely rely on some grand mandate from the international human rights system (as in the purely legal defence of the possibility of criticism), but that is deeply engaged in the sort of relational pattern that criticism requires. An ethos of criticism-as-encounter would also emphasize the importance of the ability of those states critiqued to “speak back.” The “*tu quoque*” retort remains one of the most powerful repartees of the international repertoire. Whilst on some level normatively rather poor (the sins of the other side do not absolve one’s own), it also seems to concede the essential point: that there is indeed a human rights conversation to be had.

In such a manner, a form of “forced dialogue” may occur which, as Thomas Risse argues, “has all the characteristics of a true argumentative exchange” in which “[b]oth sides accept each other as valid interlocutors, try to establish some common definition of the human rights situation, and agree on the norms guiding the situation.”<sup>133</sup> Whereas Risse emphasizes the “self-entrapment” of the state that is being critiqued and which, in retorting, ends up being caught up in the very human rights conversation which it initially rejected, I would stress the degree to which it is the state critiquing that itself engages in a form of “self-entrapment” merely by having had the chutzpah to criticize a fellow sovereign. More importantly, this is why ethical criticism should be fully open to the fact that it invites counter-criticism and should only engage in it in that reciprocal spirit. In that respect, it is criticism that is based on persuasion and empathy rather than either sanctimony or sycophancy. Failure to display such openness will, conversely, reveal one’s ethical “true colors”. States should be attuned to the fact that to criticize is, in the same movement, to expose oneself to criticism. This is true not just tactically, but because to take the standpoint of the criticizer is to problematize one’s own position. This makes sense intuitively in terms of diplomatic relations and, *a contrario*, the typical state of *non-criticism* in which many states traditionally find themselves in relation to each other (not criticizing lest they be criticized). Many states habitually

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<sup>133</sup> Thomas Risse, “‘Let’s argue!’: communicative action in world politics” (2000) 54:1 *International organization* 1 at 32.

exist in relation to others as part of a sort of implicit *omertà*: I will not denounce your human rights violations, if you do not denounce mine.

By contrast, the expectation should be that to fire the opening salvo of criticism is to almost invite criticism of the criticism and counter-criticism. Russia, China, Cuba or Venezuela have increasingly criticized the EU and the US for their own human rights failings, as is evidently their right.<sup>134</sup> Every year, China produces a “Report on human rights violations in the United States.”<sup>135</sup> Whatever one thinks of the content of the accusations that result, it is difficult to doubt that they have their place in an international society that takes human rights, including the many controversies about content they raise, seriously. Counter-criticism may be in bad faith, but its very existence testifies to the possibility of human rights criticism not being unidirectional, and of no state engaging in it from a position of sainthood. Criticism and counter-criticism, then, are better understood as a series of argumentative practices that create common ground, even as they superficially pit states against each other.<sup>136</sup>

Indeed, aside from the substantive rightness of such counter-criticism, its validity lies in the fact that it exists at all and that it inscribes human rights within a horizon of dialogue, even a fraught one. Emphasizing the necessarily dialogical character of human rights criticism (always, in a sense, already a criticism of each other and a conversation about what it means to criticize) undermines the sort of acquired pedestals (“rights respecting states”, “freedom loving”, rights rankings, etc.) from which human rights criticism often proceeds. This suggests that states who do engage in criticism of other’s human rights performance should develop a sort of “thick skin” as opposed to the brittleness much in evidence in some of the traditional critics.<sup>137</sup> This openness, indeed even willingness to be criticized, is the best antidote against charges of hypocrisy: one can at least not be faulted for wanting to have one’s cake and eat it.

This relational take on criticism, then, can shape understandings of the standing to criticize. For example, a state that criticizes another for violating human rights instruments to which it is not itself a party will put itself in an

<sup>134</sup> Harold Hongju Koh, “Restoring America’s Human Rights Reputation” (2007) 40:3 Cornell Int’l LJ 635.

<sup>135</sup> *The Report on Human Rights Violations in the United States in 2021* (The State Council Information Office, 28 February 2022).

<sup>136</sup> Risse, ““Let’s argue!””, *supra* note 133.

<sup>137</sup> Jean Galbraith, “United States Withdraws from the UN Human Rights Council, Shortly After Receiving Criticism About Its Border Policy” (2018) 112:4 The American Journal of International Law 745.

especially weak position. As moral philosophers have suggested, what is wrong about a hypocritical reproach is not that it is untrue or unhelpful, but that it undermines one's "standing to blame."<sup>138</sup> For example, Latin American states will have an easy time discrediting the US and Canada's criticism of their human rights performance at the OAS given that neither has ratified the *Inter-American Convention on Human Rights*.<sup>139</sup> In the same way, the US was in a particularly precarious position normatively when it used its seat on the Security Council to refer the Darfur situation to the International Criminal Court, even as the US is not a party to the ICC.<sup>140</sup> It takes a particular nerve to lecture other states for their failure to abide by certain international standards, even as one refuses even cursory international supervision of one's performance of those same standards (what one author referred to, in relation to human rights, as "aggressive smugness").<sup>141</sup>

One would expect all externally oriented criticism, as a result, to be paired with a hard look at one's own record. Self-criticism signals that the critic does not "exempt himself from criticism [...] by virtue of his critical activity."<sup>142</sup> Colonial legacies and the way they continue to inform the politics of the human rights moment, should incite the West to a certain humility in the process of critiquing, especially in the context of actual post-colonial relations.<sup>143</sup> Belgium's lawsuit before the International Court of Justice against Senegal for its failure to prosecute Hissène Habré, for example, should be seen in view of Belgium's own atrocious historical record in Africa.<sup>144</sup> The same thing can be said of French lecturing about democracy in its former colonies.<sup>145</sup> Ultimately, of course, the critique of hypocrisy can itself be hypocritical and hypocrisy may be relatively menial

<sup>138</sup> Cristina Roadevin, "Hypocritical Blame, Fairness, and Standing" (2018) 49:1–2 *Metaphilosophy* 137.

<sup>139</sup> Francisco J Rivera Juaristi, "US Exceptionalism and the strengthening process of the Inter-American Human Rights System" (2012) 20 *Hum Rts Brief* 19.

<sup>140</sup> Robert Cryer, "Sudan, Resolution 1593, and International Criminal Justice" (2006) 19:1 *Leiden Journal of International Law* 195–222. Also, more generally, Joshua B Bevitz, "Flawed foreign policy: Hypocritical US attitudes toward international criminal forums" (2001) 53 *Hastings LJ* 931.

<sup>141</sup> Bryant G Garth, "Aggressive Smugness: The United States and International Human Rights Law in the USA Faces Social and Scientific Change: Section IV" (1986) 34 *Am J Comp L Supp* 411.

<sup>142</sup> Michael Walzer, "Notes on Self-Criticism" (1987) 54:1 *Social Research* 33.

<sup>143</sup> Colin Samson, *The Colonialism of Human Rights: Ongoing Hypocrisies of Western Liberalism* (Wiley, 2020).

<sup>144</sup> Pierre Hazan, "Hissène Habré, «le petit oiseau sur la branche» et les défis de la justice pénale internationale" (2021) 4:4 *Les Cahiers de la Justice* 665–76.

<sup>145</sup> Georges Tadonki, "Géopolitique de la France vue d'Afrique, un jeu de miroirs" (2017) 52:3 *Outre-Terre* 211–22.

when it is measured against dramatic rights violations.<sup>146</sup> But even if only for instrumental reasons, lecturing from a position of mediocrity and double standards can provoke backlash if not paired with at least a willingness to scrutinize one's own record and see it as implicated by one's very criticism of others.

### C. Human Rights Pluralism

A third way in which human rights criticism might be seen as dialogical is by creating space for diversity within a horizon of pursuing rights in ways that complexify the underlying relation. The framing of human rights criticism needs to make allowance for legitimate differences of view about human rights themselves. Whatever misgivings one has about other states' human rights records should not be such that one can ignore their retort as a manifestation of a different sensitivity of what rights entail. Moreover, that retort should be evaluated partly on its own terms. There is a tendency to sometimes reject any defence by a state of its human rights record in the face of grave allegations as self-serving, nationalistic and blind to the harm it has caused.<sup>147</sup> This may be true in some cases. However, even in bad faith and for their own self-serving reasons, states (or state elites) might still make valid points:<sup>148</sup> simply because Al-Bashir or Museveni's decrying of the Western imperialism of the International Criminal Court is largely self-interested does not mean that the critique of the Court focusing on Africa is not worth considering and does not implicate legitimate concerns about racial discrimination.<sup>149</sup> Invocations of the right to self-determination to protect oneself from human rights criticism ought to be acknowledged as belonging to a sometimes problematic but certainly *prima facie* legitimate human rights repertoire.

If nothing else, pluralism militates for subtlety in the assessment of other states' human rights record. For example, one might acknowledge that China has a Xinjiang or Myanmar a Rohingya problem or Canada an

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<sup>146</sup> Pattison, "The ethics of diplomatic criticism", *supra* note 18.

<sup>147</sup> On the problem of bad faith generally when it comes to responding to human rights criticism, see Sophie Richardson, "'Underestimating Bad Faith'", (9 July 2014), online: *Human Rights Watch* <hrw.org> [perma.cc/4ZB5-UCQH].

<sup>148</sup> Stanley Cohen, "Government Responses to Human Rights Reports: Claims, Denials, and Counterclaims" (1996) 18:3 *Hum Rts* Q 517 at 19.

<sup>149</sup> Frédéric Mégret, "Justice pénale internationale et colonialisme: au-delà des évidences" Google Scholar (2014) *Etudes Internationales*.



indigenous problem, even as one is wary of the label genocide in the particular circumstances; one might acknowledge that France has a problem of systemic racism even as one resists a kind of one-size-fits-all model of anti-racism emerging from the US; one might criticize poverty in the US, even as one acknowledges that it is the result of a particular vision of economic liberties that is not beyond the human rights canon.<sup>150</sup> This is evidently delicate terrain and the effort to understand a foreign state's defence of itself might, on some level, degenerate into self-defeating relativism, with every state to be judged by its own standards. Human rights relativism remains an influential critique, but it has never achieved much success within the international human rights movement because of suspicions about the self-serving nature of such claims and the potential that they would fundamentally edulcorate human rights principles.<sup>151</sup>

Pluralism, however, refers less to an attempt to water down human rights than to understand them in context. It underlines the extent to which, even as denunciation of violations is the preferred mode in many human rights circles, much of human rights is also occupied by lasting controversies: not just about rights' foundation and nature, but also about their particular content and how they are to translate in concrete circumstances.<sup>152</sup> Precisely because it is not mere relativism, pluralism may also militate for strong criticism in areas where there is little agreement when it comes to human rights. The authority of states to criticize others' human rights record is, all other things being equal, stronger when confronted with, say, massacres of the civilian population than the complex regulation of free speech. Developing a sense of where one is treading and keeping one's greatest sense of human rights outrage for when it is most deserved will maintain the currency of critique over time and limit concerns about interference. There is a difference between criticism and hegemony.

Realizing the situated character of many understandings about rights, then, can facilitate an approach that is more self-aware of the provenance of one's own criticism. There is an evident idiosyncrasy to the kind human rights violations, for example, that the US has been keen on monitoring in

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<sup>150</sup> Andreas Follesdal, "Appreciating the Margin of Appreciation" in Adam Etinson, ed, *Human Rights: Moral or Political?* (Oxford University Press, 2018).

<sup>151</sup> Vincent, *supra* note 14 at 55.

<sup>152</sup> Frédéric Mégret, "International Human Rights and Global Legal Pluralism: A Research Agenda" in René Provost & Colleen Sheppard, eds, *Dialogues on Human Rights and Legal Pluralism Ius Gentium: Comparative Perspectives on Law and Justice* (Dordrecht: Springer Netherlands, 2013) 69.

recent years, such as a heavy emphasis on “freedom” or “unalienable” rights.<sup>153</sup> This can lead to unhelpful oppositions between “free” and “unfree” states that cement a particular liberal understanding of rights and largely bypass important theoretical debates about what constitutes freedom. Another area where this is visible is in the US promotion of religious freedom. At times, the promotion of religious freedom borders on fundamentally manipulating rights discourse<sup>154</sup> or, at the very least, ignores fundamental but legitimate differences of view about its scope.<sup>155</sup> Much countercriticism in the Global South, by contrast, has been based not simply on defensive denials of human rights violations, but on a reframing of what human rights promotion means, which needs to be engaged on its own terms. For example, an argument by Cuba that it provides free health care can certainly be countered by pointing out that this does not justify jailing dissidents; but nor can it be discounted as a *bona fide* human rights argument in a context where economic and social rights are internationally guaranteed.

Therefore, criticism of other states’ human rights record ought to internalize the degree of disagreement there is about human rights and about the scope and gravity of particular human rights violations. International human rights standards themselves include a hefty degree of pluralism, as shown in the European “margin of appreciation”.<sup>156</sup> States criticizing the performance of others should *a fortiori* (since they operate on a horizontal state-to-state level from which authority is less incontrovertibly derived) internalize that dimension and be mindful of the risk of projecting their own particular interpretation of human rights onto others. Human rights criticism is not helped by stereotypical dichotomies between “rights respecting states” and “spoilers”; the better understanding is that all states violate at least some human rights on an occasional basis, if not most of the

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<sup>153</sup> Jeremy Bigwood, “Freedom House: The Language of Hubris” (2012) 45:3 *NACLA Report on the Americas* 63; Jayne Huckerby & Sarah Knuckey, “Appropriation and the rewriting of rights” (2023) 21:1 *International Journal of Constitutional Law* 243.

<sup>154</sup> Jeffrey Haynes, “Trump and the Politics of International Religious Freedom” (2020) 11:8 *Religions* 385.

<sup>155</sup> Stephan A Kent, “The French and German Versus American Debate Over ‘New Religions’, Scientology, and Human Rights” (2001) 6:1 *Marburg Journal of Religion* 1.

<sup>156</sup> Frédéric Mégret, “International Human Rights and Global Legal Pluralism: A Research Agenda” in René Provost & Colleen Sheppard, eds, *Dialogues on Human Rights and Legal Pluralism Ius Gentium: Comparative Perspectives on Law and Justice* (Dordrecht: Springer Netherlands, 2013) 69.

time, and that all criticism occurs within a community of sinners rather than saints.

Indeed, it is a familiar motif of human rights criticism from abroad that, even when it is otherwise accepted in principle, human rights criticism is often faulted for its lack of appreciation of the nuances of local circumstances.<sup>157</sup> In other words, external human rights criticism can never entirely shed its perspectival subjectivity. Seen from outside, an issue may seem relatively simple; seen from up close, it may reveal a far more complicated picture – especially when one considers the enduring political nature of the problems that are at the root of human rights violations. An emphasis on bare human rights violations, then, might give way to a more variegated appreciation of causes, cultural implications and protracted domestic struggles. It might lead to a renewed appreciation of the complexity of states' human rights work beyond merely "denouncing" human rights violations, as well as the contribution of the many domestic social forces vying to dominate national human rights agendas.

A more contextual emphasis on human rights violations might also better connect to the reality that human rights "performance" is always nested within collective efforts of self-determination, complex arbitrages and information that can only be guessed at from the outside. The massive torture or arbitrary imprisonment of a group may be a particularly clear-cut violation of human rights. But the scope of other violations (e.g.: freedom of expression, freedom of religion, etc.) may be less easily ascertainable from the outside and thus less amenable to trenchant external criticism. What counts as "violations" may reflect deep divergences in terms of underlying values that are better addressed as such. It may also reflect the sheer challenge of producing a culture of rights and the smugness that comes with denouncing violations without having to carry the weight of their correction.

Finally, the need for a pluralist understanding of human rights criticism reflects the importance of deferring to the complex calculations that a people make, *in situ* and *in concreto*, about their collective rights fate in a context of oftentimes tragic human rights choices (for example, given limited means, should one foreground a general vaccination campaign for the many or

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<sup>157</sup> For a typical pushback from states to criticism of their human rights performance in the UN context, see UN, "Reports on Human Rights Situation in Cuba, Rwanda, Sudan Presented in Third Committee", (27 November 1995), online: *United Nations, General Assembly* <press.un.org> [perma.cc/HP7D-8N7K].

high-tech therapy for the few?). In that context, the sovereignty of the “other” state commands itself to the critic, not just as a reflex deference to rules of international law or as a fetishization of form, but because sovereignty is itself a precondition of human rights and a key locus of their implementation via the right to self-determination.<sup>158</sup> That deferral, by the same token, must itself be concretized and not simply rely on generalities: for example, one should defer to self-determination, but only if self-determination is indeed involved and not the very denial of it by a sovereign purporting to interpret rights restrictively.<sup>159</sup>

## V. Conclusion: Criticism as Humility?

During his press conference in Qatar, Infantino notoriously declared: “I am European. For what we have been doing for 3,000 years around the world, we should be apologizing for the next 3,000 years before giving moral lessons.”<sup>160</sup> Was this provocative hyperbole or a welcome show of humility from the oddest of representatives? In this article, I have suggested that such a statement is ultimately unhelpful in its breadth (claiming to reject all criticism), but what makes it uncomfortable to hear is also that it happens to capture a kernel of truth. Human rights criticism of Qatar cannot be “saved” merely on account that it happens to be true or be based on human rights law. It must also be acknowledged as emerging from certain constituencies (notably Western states), directed at other constituencies (a member of the Arab world striving for modernity even as it engages in problematic labour practices), and embedded in a particular arc of history and power relations. That is what makes it both just and unjust at the same time and requires a reckoning with the moral responsibilities that come from human rights criticism. To critique is, or ought to be, paradoxically to make oneself vulnerable to the criticism by acknowledging the sort of power dynamics within which one’s criticism exists.

The appropriate response to that realization, however, should not be to silence criticism, but to better understand it. Human rights criticism imposes costs on the recipient but also on the *locutor* of criticism. If nothing else, human rights criticism is imparted and generally rebutted on human rights

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<sup>158</sup> Brad R Roth, “The Enduring Significance of State Sovereignty Commentary” (2004) 56:5 Fla L Rev 1017.

<sup>159</sup> Jodoin, “International Law and Alterity”, *supra* note 111.

<sup>160</sup> *Supra* note 1 at 00h:10m:34s.

grounds (most states typically do not claim that they *did* violate human rights). Weirdly, this is testimony to the centrality and resilience of human rights norms and their ability, through criticism about their implementation, to sustain particular forms of international relations between states who are surprisingly mindful of their respective human rights obligations. In this article, I have sought to give meaning to what just criticism of other states' human rights record might involve. I suggested ways to frame criticism theoretically, but also concrete ways of understanding how criticism unfolds in the world in ways that are situated and bounded by some of the normative constraints of the international system. As should be clear, criticism is not so much something that "occurs" on the basis of an already fully constituted international system, as something that constantly "constitutes" an international system that is defined both by politics and ethics when it comes to human rights.

Rather than a merely systemic view of just criticism focused on global justice, I have suggested taking the perspective of each state called upon to evaluate another's human rights performance; and rather than a mere agentic take on the act of giving criticism, I have suggested a more relational and embedded perspective that takes into account the origin, destination and nature of the critique. Focusing on *relations* of criticism helps problematize not only human rights violations (as in the conventional human rights analysis) but also the relations that give rise to the possibility of critique. An international society that encourages states to criticize, but also emphasizes dialogue and introspection, is an international society that strikes a balance between the claims of solidarism (the need to criticize what deserves to be criticized) and pluralism (the need to evaluate human rights records from a culturally, politically and economically sensitive perspective). It is a society that does not forsake the importance of sovereignty even as it takes the importance of human rights seriously. Such a society points at ways in which human rights criticism might be exactly the opposite of smugness — a form, in fact, of humility.

Although I focused on the act of giving criticism in this article, there is of course something to be said for the corresponding and possibly neglected art of *receiving* human rights criticism. No state likes to be criticized for failing to uphold human rights, especially in a context where that ability is increasingly held up as a criterion of good statehood. The fact that criticism is perceived as being offensive, however, is evidently not conclusive of its veracity or, indeed, of its moral justifiability. If anything, the painfulness of

human rights criticism may be a sign that it reaches deep, because it makes a valid point. Moreover, the notion that human rights criticism affects the very dignity of the state is surely excessively strident. States should not only have “thick skin” but ideally display a certain graciousness under (well informed) criticism, which will reflect well on their human rights commitment even as it may allow them to deflect part of the criticism. This sort of graciousness is also a recognition that human rights criticism, at least in its best and most respectful form, involves foreign states “sticking their neck out” for the fate of distant populations, a manifestation of empathy that can be a welcome change in historical patterns of international relations. Of course, this only reinforces the case that, in turn, the initial salvo of criticism must make itself ethically worthy of critiquing.

I focused this article on the more traditional, bilateral forms of criticism of other states’ human rights record. I was thus not particularly interested in criticism that emerges in more institutionalized and regulated contexts. It should be said, however, that such institutionalized environments have done much to channel, as well as generalize, meaningful human rights criticism by creating the right conditions for it to proceed apace. From the General Assembly’s early alarm at Apartheid in South Africa to the Human Rights Council’s Universal Periodic Review (UPR), the United Nations framework has long proved a site hospitable to strong criticism that is nonetheless mediated by the strictures of institutionalized multilateralism. In a regional context, the Council of Europe, the Organization of American States, or the African Union have all in their different ways become fora where grave concerns about human rights developments in one state member can be deliberated in an organized and orderly setting.<sup>161</sup> Moreover, structured forms of dialogue about human rights between civilizational groupings such as the EU-China Human Rights Dialogue<sup>162</sup> or the EU-Iran Dialogue<sup>163</sup> better approximate the sort of conditions wherein just criticism

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<sup>161</sup> Pilar Elizalde, *Human rights promotion, contestation, and politicisation in international human rights institutions: a study of the Universal Periodic Review 2008-2016* (PhD Thesis, London School of Economics and Political Science, 2020).

<sup>162</sup> Max Roger Taylor, “Inside the EU-China Human Rights Dialogue: assessing the practical delivery of the EU’s normative power in a hostile environment” (2022) 44:3 *Journal of European Integration* 365.

<sup>163</sup> Matthias V Struwe, “The policy of ‘critical dialogue’: an analysis of European human rights policy towards Iran from 1992 to 1997” (1998), online: <durham-repository.worktribe.com> [perma.cc/E7RU-4FEM].

can emerge, that is criticism as a function of a deep reckoning with the “other.”

In terms of institutional design, such settings maximize many of the virtues that I have argued are a hallmark of meaningful human rights criticism: equality, vulnerability, openness, reciprocity, transparency, etc. They come closer to a Habermasian “ideal speech situation” than the rough and tumble of ordinary international relations.<sup>164</sup> They also stress an indispensable element of all sound human rights criticism, namely, *community*. Human rights criticism, for all its failings and abuses, only makes sense and is at its best when it expresses a fundamental underlying sense of a community of belonging and aspiration. That community is both the global community of humankind and the international community of states. The ability to both impart and take criticism concerning one’s human rights record is a test, in fact, of the solidity of the ties of the international community. The more criticism is unevenly dispensed and stridently rejected, the more community frays; the more criticism is thoughtfully imparted and intelligently received, the more community gains. Multilaterally situated criticism will not, nor should it, always displace bilateral criticism – but the former is certainly an interesting way of modelling the latter.

Finally, it is worth stressing that on a deeper level, human rights criticism originating from outside a polity has, under the right conditions a specific *human rights* role to play: as a performance of cosmopolitan solidarity that is deeply consonant with the best understandings of the human rights ethos; as a mirror held up from outside that can reveal blemishes that are difficult to see from inside; and as a place of encounter and continued dialogue between states about their common project to promote human rights for themselves, but also for each other.<sup>165</sup> As such, human rights criticism is also part of the ongoing global constitution of human rights themselves.

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<sup>164</sup> Touko Piiparinen, “Communication, reflexivity and harm principle: what might an ideal speech situation look like in responsibility to protect?” DOL.org (Crossref) (2020) 16:1 *Journal of Global Ethics* 26–44.

<sup>165</sup> Frédéric Mégret, “Overturning of *Roe v Wade*: Time to Rethink US Engagement With International Human Rights Law?” (8 July 2022), online: <[connectblog.com](https://connectblog.com)> [perma.cc/338B-B4HH].