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**"Special Forum: Genocide, War Crimes, and International Justice," *Diplomatic History* 35:5 (November 2011): 749-786**

**Margaret E. McGuinness**, "Peace v. Justice: The Universal Declaration of Human Rights and the Modern Origins of the Debate," 749-768. DOI: 10.1111/j.1467-7709.2011.00982.x. <http://dx.doi.org/10.1111/j.1467-7709.2011.00982.x>

**William A. Schabas**, "International War Crimes Tribunals and the United States," 769-786. DOI: 10.1111/j.1467-7709.2011.00983.x. <http://dx.doi.org/10.1111/j.1467-7709.2011.00983.x>

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## "Human Rights: What is Going on?"

Over the last two decades international relations (IR) scholars, who tend to be political scientists, have developed an impressive body of knowledge on the evolution, institutionalization, and globalization of human rights. They have benefitted, and will continue to benefit, from the detailed and careful historical research of the sort authored by

Margaret McGuinness and William Schabas. But there is the possibility that the IR-based literature might also aid historians as they continue to create an international history of human rights.

There is no quick and dirty synopsis of the current state of the literature in the study of human rights in international relations, but it bears the markings of its disciplinary trials and tribulations. When scholars first began exploring international human rights, realists and others were initially dismissive of the idea that it mattered at all, and then, once they began to take rights seriously, assumed that states were doing all the work. In other words, many international relations scholars had a knee-jerk answer to the question of “who is responsible?” States. The modern international system is organized by, around, and for states, and thus any nontrivial outcome (defined in terms of what concerned states at that moment) can be reduced to the variable of state power. The result of the intellectual hegemony of state interests and power was that scholarship on the debate about human rights tended to be couched in terms of state interests, on the one hand, and norms, principles, and ethics, on the other. Because of these birthmarks, much of the IR literature on human rights tends to focus on a few questions: whether or not states authored or permitted the human rights innovations; whether and how cold, cruel states were rolled by transnational activists championing good norms; and whether the impressive (and growing) mountain of human rights instruments have compelled states to be more responsive to human rights.

The realist hegemony helped to establish the agenda for IR and where human rights might fit in the discipline, and led to the construction of research designs around the power versus norms as explanatory alternatives. In other words, scholars of international human rights were strongly encouraged to cast their research in ways that tended to tip the scales in favor of the realist argument (because states are always involved in some way and state power always matters) and forced to defend a highly stylized and unrealistic view of the role of norms, law, and principles in international relations (in which they were conceived as being nearly outside of politics). Fortunately for the study of international human rights, many scholars slipped out of this theoretical straitjacket and began to offer a more complicated, intricate, and dynamic understanding of the relationship between states and international norms, rules, and law. This body of work was led by those associated with constructivist international relations theory, and their impressive scholarly contributions helped to put this new “ism” on the map and almost on par with the other major theories of international relations. Specifically, constructivists took seriously ideas, norms, law, principles, discourse, and identity, which is to say that they saw international relations as having a social dimension that not only constrained what states did but also constituted what they are, shaped their interests, policies, and ideas of what counts as acceptable and legitimate foreign policy behavior. The study of human rights required a constructivist sensibility, and human rights helped develop constructivist international relations theory.

Although the original research design of states versus norms had an unfortunate effect on how IR scholars posed their inquiries, it did have one virtue: it forced scholars to be very clear about their proposed theory and hypotheses and the evidence they were using in support. Often times IR scholars did primary research, interviewing the makers of history, unearthing original reports and documents, and going through archives, but in many cases they relied on the work of historians, some of whom were centrally concerned with human rights but many of whom treated human rights as something of a sideshow. Whether doing primary or secondary research, IR scholars of human rights were beginning to uncover a very interesting story about evolution and expansion,

one that noted how international law, norms, and principles had different kinds of relationships to states during different historical periods, mainly because both human rights institutionalization and state interests are variables that have a historical dimension.

The very interesting and lively contributions by McGuinness and Schabas are highly welcome contributions to the study of international human rights in general and the more specific areas of the legalization of human rights and the criminalization of certain kinds of violations by states. Because I have not done research on these areas (or, for that matter, on human rights), I will leave it to others to speak to the originality of their claims. As a student of international norms, though, I was struck by one shared narrative: after years of being ignored and domesticated by the most powerful states in the world, international human rights took on a life of its own. This is clearest in the case of McGuinness's article. McGuinness emphasizes how the most powerful states favored order over justice, and how their voices mattered the most, but then ends her article by asserting that the Universal Declaration of Human Rights has "influenced the very structure of the international system and the states that are members of the system" (768). Leaving aside whether this very strong claim can be defended, it suggests a curious twist in the story: a text that was imprinted by states has now imprinted states and the international structure. Schabas's contribution to the legalization and criminalization of war crimes also contains a similar narrative in which 'norms bite states': the victors debate the terms of postwar justice, international lawyers try to use precedent to justify their careful movement into new legal territory, and the creation of new legal and political instruments creates a new normative framework that impinges on the interests of the most powerful states in the system. Importantly, then, both McGuinnesses and Schabas's arguments suggest an interesting causal reversal, something of a normative jujitsu, in the relationship between state power and international human rights norms.

Let us assume that their broad characterization of the institutionalization of international human rights is correct. We need to understand how this happened. This is where constructivist scholarship might be helpful, and several contributions might be particularly useful. Perhaps most important is the "life cycle" framework developed by Martha Finnemore and Kathryn Sikkink, which explores different stages in the institutionalization of any norm, progressing from emergence to cascade to internalization.<sup>1</sup> What is particularly useful is that they make several moves that, I imagine, many historians will find congenial. They explore how norms develop, diffuse, and become taken for granted. Following the norms, then, means following anyone and everyone who might have been involved in their creation (including states and nonstate actors), how these ideas become institutionalized formally and informally, in treaties and soft law, and how norms become accepted to the point that even those who object to them have little choice but to take them into account. Their framework also allows for the possibility that norms that might be used by states to accessorize their interests might, later on, be uncomfortable constraints and perhaps even part of their identity. In other words, norms can have both constraining and constituting effects. Kathryn Sikkink's most recent book, *The Justice Cascade*, provides an even more detailed exploration of this phenomenon, with the important addition of examining its effects on fundamental questions of peace and justice.<sup>2</sup>

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<sup>1</sup> "International Norm Dynamics and Political Change," *International Organization*, 52, 1998, 887-917.

<sup>2</sup> Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (NY: Norton, 2011).

Constructivist-influenced scholars also have raised questions regarding which norms are selected, and why, and how the meaning of these norms might change over time. Norms come from somewhere. Sometimes they come from states, but even states don't have the ability to make them up as they go along and expect that others will accept them. In other words, states are drawing from local, national, and global cultures. In my own work on the emergence of international humanitarianism, I have been less interested in whether humanitarianism has become institutionalized and more interested in the debates over its meaning. Toward that end, I drew from evolutionary theory and the role of environmental selection mechanisms that might favor one meaning over another – but this is not necessarily or directly a meaning that aligns perfectly with the existing interests of the most powerful states.<sup>3</sup> In short, constructivist scholars have been interested in normative change in ways that might be of interest to historians.

There is now a field of human rights that is truly interdisciplinary, drawing on the talents and insights of those from history, sociology, anthropology, cultural studies, and political science, to name the central disciplines. IR's study of human rights has benefitted mightily from the scholarship of historians, and it will continue to do so. There is, I am suggesting, the possibility that IR theorists might return the favor.

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<sup>3</sup> “Evolution without Progress? Humanitarianism in a World of Hurt,” *International Organization*, 63, 2009, 621-663. Also see my *Empire of Humanity: A History of Humanitarianism* (Ithaca: Cornell University Press, 2011).