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Charles Beitz' Idea of Human Rights and the Limits of Law

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ABSTRACT

In this contribution, I challenge Charles Beitz' account of international human rights *law* within his practical account of human rights. Throughout his pathbreaking book, Beitz insists that the predominant human rights practices are *political* rather than *legal* at the global level, which has important implications for the structure and content of his account. Yet, the criteria used to reach that conclusion concentrate on issues of effectiveness and compliance. I show that this lens leaves out important aspects of the current legal practice of human rights. More precisely, I argue that that practice's overarching and distinctively legal function of human rights is to facilitate the consideration of supranational decisions and norms by domestic authorities, which requires significant procedural conditions established by states. I illustrate this function by looking at the "follow-up procedure" that states have established (with the support of UN agencies) when a decision from UN treaty bodies is rendered against them. I also explain how this function is shaped by the broader relationship of the state with international law defined by the constitutional order. I finally draw some implications of my critique for the Beitzian model of human rights and its practice-centred methodology.

KEYWORDS

Human rights theory, human rights practice, Charles Beitz, law, UN treaty bodies

1. Introduction

Charles Beitz' *The Idea of Human Rights* (Beitz, 2009) has significantly contributed to defining the course of the debate in the field of human rights theory in the last decade. The distinctive contribution of his monograph is primarily methodological: Beitz proposes to build an account of human rights by looking at the discursive role(s) that these rights operate in what he calls "global political life" (Beitz, 2009, p. 105). This practice-centered methodology stands in sharp contrast with what has been called the "ethical" or "moral" account of human rights (Etninson, 2018). The central tenet of that approach is that human rights are rights that we have just in virtue of being human. An account of that kind would therefore make only limited use of Beitz' practice-centered methodology.

Beitz' account is practice-centered on two levels. Most importantly, it is practice-centered in identifying their function in global politics. To recall, human rights first protect urgent individual interests (e.g. personal security and liberty, adequate nutrition, arbitrary use of state power) against standard threats in the modern world order composed of states. Second, human rights apply in the first instance to institutions of the state. Third, only when the state fails to do so, human rights (their violations) may trigger some form of international concern: "a government's failure to carry out its first-level responsibilities may be a reason for action for appropriately placed and capable "second-order" agents outside the states (...)" (Beitz, 2009, p. 109). These actions are undertaken by a set of second-order agents (states and non-states

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agents) and may take various forms (e.g. accountability, assistance, interference mechanism) that Beitz typifies as “paradigms of implementation” (Beitz, 2009, p. 33).

Second, Beitz’s account is practice-centered with regard to which rights may actually trigger such actions. One may expect that moral reasoning is necessary to explain why only certain rights (their violations) justify such responses in practice. But as Beitz puts it, “it does not seem necessary to identify a list of relatively specific interests or values to serve as the grounds or subject-matters of human rights” (Beitz, 2009, pp. 138-139). In contrast to other contributions such as Griffin (Griffin, 2008), Tasioulas (Tasioulas, 2010) and Forst (Forst, 2010), Beitz resists using an independent moral standpoint at all stages of theory-construction. A practice-centered account suggests that human rights “do not appear as a fundamental moral category (...). Human rights operate at a middle level of practical reasoning, serving to organize these further considerations and bring them to bear on a certain range of choices” (Beitz, 2009, pp. 127-28). One important consequence of Beitz’ account is that human rights give *pro tanto* and not conclusive reasons for action.

In this contribution, I examine and challenge Beitz’ account of international human rights law (hereafter, IHRL). Beitz insists that the predominant human rights practices are *political* rather than *legal* despite the fact that human rights were initially conceived within the “juridical paradigm” (Beitz, 2009, p. 32). Beitz notably concludes that human rights should not necessarily be enacted in state constitutions: “the question of the desirability and importance of constitutional protection can be seen as one of contingent judgment rather than conceptual necessity” (Beitz, 2009, p. 110). This scepticism towards the legal dimension of human rights is puzzling. On the one hand, it remains that IHRL does not benefit from a centralized enforcement mechanism like the ones we find in constitutional systems, let alone a centralized adjudicatory organ. Correlatively, the decisions of global supranational bodies (e.g. UN human rights treaty bodies) have a notoriously low level of state compliance.

On the other hand, one may wonder if the practice of IHRL should be assessed in light of *effectiveness* and *compliance* considerations only. I argue that Beitz’ criterion for marginalizing IHRL from his mapping of relevant practices – the criterion of “mature social practice” – can actually be met if one moves away from effectiveness and compliance considerations. By more closely looking at the norms and practices of UN treaty bodies, I argue that the practice’s overarching norm is not that states have a legal obligation to abide by the bodies’ supranational decisions. Rather, I suggest that an important function of IHRL is to facilitate the consideration of, and the response to, supranational decisions and norms delivered by relevant domestic authorities. I illustrate this function by looking at the “follow-up procedure” that states have established (with the support of UN agencies) when a decision from UN treaty bodies is rendered against them. Whether states *in fine* comply with this decision remains a distinct question. Further, the practice of IHRL cannot be grasped without paying attention to the broader relationship that states entertain with international law, which is principally determined by the state’s constitutional arrangements.

My overall objective is therefore to examine if the conclusions drawn with regard to IHRL are warranted by Beitz’ practice-centered methodology. To this end, I start by reconstructing this methodology and by contrasting it with the moral approach. This first step also helps re-assess the divide that has polarized the field of human rights theory in recent years between the “moral” and “political” conceptions. Second, I move to the criterion that Beitz uses to marginalize IHRL as a relevant kind of human rights practice, the one of “mature social practice” (Beitz, 2009, p. 9). I contend that IHRL meets this criterion by looking at the procedural developments within states as to the reception and consideration of supranational norms and decisions and by examining the states’ broader relationship to international law in

their constitutional order. Finally, I draw some implications of my critique for the Beitzian model of human rights and its practice-centered methodology.

2. What is Beitz' methodological project?

The first step of the paper is to better identify the kind of methodological project that Beitz is pursuing in his book. I will be helped here by some recent contributions that have addressed the tension between the moral and the political conception of human rights from a methodological standpoint. This first step is necessary to then test it against the practices of IHRL in the second part of the article.

The motivation for reviewing the methodological project is that the debate between the proponents of the moral and the political conceptions of human rights seems to have somewhat stalled. This deadlock may be explained by the fact that one camp has claimed victory without the opposite side showing any sign of surrender. Indeed, the tenants of the moral conception have argued that the divide is a false one to the extent that the political conception at least *requires* and ultimately *depends* on or even *conflates* into the moral conception (Gilabert, 2012; Liao & Etnison, 2011; Renzo, 2015). If that were true, there would be little sense in re-visiting Beitz' political account from a methodological standpoint. I shall argue, however, that there is still one way to maintain the moral and the political (-Beitzian) approaches as distinct philosophical projects.

To evaluate these criticisms, we need to get a grip on some of the basic propositions that have polarized the debate in the first place and then explain why the moral camp has claimed that the divide between the moral and the political is a false one. The proposition I shall start with is the basic idea that one identifies which human rights exist through the kinds of actions or responses that their violations generate. The first and core step of that approach is inherently *reconstructive*. That is not a particularly controversial claim – it is intuitively clear that in order to understand what human rights are, one should look at the kind of actions, functions and structures these rights (their violations) are embedded in. What is more controversial is to argue that moral reasoning is not necessary to build an account of the practice. Yet, this is what Beitz' presentation of the approach suggests:

The approach I shall explore tries to grasp the concept of a human right by understanding the role this concept plays within the practice. Human rights claims are supposed to be reason-giving for various kinds of political action which are open to a range of agents. We understand the concept of a human right by asking for what kinds of actions, in which kinds of circumstances, human rights claims may be understood to give reasons (Beitz, 2009, pp. 8-9).

In other words, this approach assumes that some rights – or “urgent individual interests” to use Beitz' terminology – will generate certain actions that other rights and interests will not (although they may generate other responses). It may be empirically true that violating the right against torture does not warrant the same response as violating, say, the right to periodic holidays with pay. This assumption then led the moral camp to articulate the critique that the political project ultimately conflates into the moral one. Massimo Renzo puts the point clearly.

assuming that the point of international human rights is to specify when certain responses to state action are warranted, we still need to know why violations of human rights justify such responses, whereas violations of other rights (ordinary moral rights) and other forms of injustice do not (Renzo, 2015, p. 135).

Renzo uses the distinction between human rights and ordinary moral rights to make the point, which is that the political conception requires using first-order moral reasoning at a critical stage of theory (re-)construction. This explanation requires using the kind of first-order moral reasoning that Beitz is precisely not using – one according to which human rights would be “deriving their authority from a single, more basic value or interest such as those of human dignity, personhood, or membership” (Beitz, 2009, p. 128).

How would Beitz and the tenants of the political conception respond to Renzo’s conflation argument? One could say that Renzo’s reconstruction is an over-simplification of Beitz’ practice-centered project. Beitz shows that the prototypical actions that human rights (their violations) justify do not only have to do with the importance or urgency (in moral terms) of the interest but also with some contingent features that are constitutive of the context under scrutiny. In Beitz’ words, “various other considerations such as the likelihood that the threat protected against will actually occur, the feasibility of implementing the protection in typical circumstances, and the likely cost of making the protection effective” (Beitz, 2009, p. 110). In also including the trade-offs that occur in practice in his theory, Beitz further distances himself from the counterfactual examples that Renzo builds.

In my view, this methodological discrepancy explains why, in Beitz’ final framework or model, human rights give *pro tanto* reasons and not conclusive reasons to act. *Pro tanto* reasons can be defeated by competing reasons (among which sovereignty according Beitz has a prominent place). But one cannot establish *a priori* the relative strength of these competing reasons. That is why *pro tanto* reasons are central to Beitz’ final design of the model: “states and non-state agents with the means to act effectively have *pro tanto* reasons to interfere in an individual state to protect human rights in cases in which the state fails through a lack of will to do so” (Beitz, 2009, p. 109).

Now, if one looks more closely at Renzo’s argument, one will notice that these contingent features of the world that Beitz is trying to reconstruct are notoriously absent. Renzo builds a hypothetical state, “Tirannia”, a nuclear power state that could deter any interference with its sovereignty while egregiously violating the most basic human rights:

“consider a hypothetical country run a by a tyrannical regime, where fundamental rights such as the right not to be tortured or the right to freely associate are regularly violated” (...). “any interference with its sovereignty, including formal censure and diplomatic sanctions, would be unjustified on the grounds that the risk of a devastating retaliation would be too high” (Renzo, 2015, 137).

Hypothesizing this requires disregarding the contingent features that Beitz precisely aims to carefully reconstruct. Of course, the purpose of hypotheticals is to measure the force of moral intuitions – in this case, to test whether the costs of retaliation from Tirannia would prevent from manifesting international concern. If most states were like Tirannia, Renzo argues, individuals could not be said to have, say, the human right against torture. In my view, Beitz is not interested in that philosophical project and methodology, however familiar it is to moral and political theorists. Imagining Tirannia is a philosophical technique that Beitz would resist precisely because it requires idealizing from the highly contingent and context-specific features of the global human rights practice.

To better explain this point, I want to refer and build upon more recent work in human rights theory and in particular upon Kristen Hessler’s recent distinction between two types of practice-centeredness in human rights theory. Hessler precisely argues that there might be still

(*contra* Renzo) distinct philosophical projects involved that may explain the current deadlock and which can be distinguished by their *kind* and *degree* or practice-sensitivity. I want to then apply these insights to the tension between Renzo and Beitz I discussed above. Hessler's distinction starts as follows:

One form of practice-sensitivity concerns the degree to which theorists take concepts, issues, or problems from the practice of human rights to set the agenda for a theory of human rights. Practice-insensitive approaches, by contrast, frame their agenda largely in terms of existing philosophical problems that are independent of the practice. For a practice-centered approach in this sense, the subject of theoretical analysis would be drawn from current human rights practice (Hessler, 2016, p. 17).

In my view, this first form fits Beitz' project in that the practice of human rights – in particular, its international or transnational dimension – poses a particular problem whose terms are practice-centered. It is conceptual and therefore not practice-*dependent* in that it still generalizes – through the identification of “paradigms of implementation” – from the multitude of actions that human rights ordinarily justify. In that first sense, Beitz is continuing but also diverging from Rawls' project, which was deemed incomplete in limiting the overarching function to human rights to that of limiting state sovereignty (Rawls, 2001). This explains Beitz' attempt to stay as faithful as possible to the practice by reconstructing and abstracting from the various paradigms of implementation that constitute the variety of human rights practices today. That is a methodological commitment makes Beitz' enterprise primarily an enterprise of “grasping”: “to achieve such a grasp we do not suppose that human rights must express or derive from a single basic value or that they constitute a single, fundamental category of moral concern” (Beitz, 2009, p. 12).

The second sense of practice-sensitivity concerns the aims of a theory once the terms of the problem are posed. In Hessler's words,

A second, related sense in which an approach may be more or less practice-centered is in setting the aims of the theory. The primary aim of a practice-centered approach in this sense would be to solve some problem arising within the practice, such as a justificatory question about some aspect of the practice or a problem faced by agents working within the practice (Hessler, 2016, p. 18).

It is crucial to see that the two forms of practice-sensitivity are logically independent. Beitz' is definitely practice-centered in posing the terms of the problem in a strict reconstructive sense: what are the actions that human rights give reasons for? That explains, in my view, his functionalism: “we take the functional role of human rights in international (...) practice as basic: it constrains our conception of human rights from the start” (Beitz, 2009, p. 102). In other words, there is no prior step of framing the issue independently of the current discourse in which human rights are embedded. As Beitz puts it,

This insight, as I have described it, is that we might frame our understanding of the idea of a human right by identifying the roles this idea plays within a discursive practice. We attend to the practical inferences that would be drawn by competent participants in the practice from what they regard as valid claims of human rights (Beitz, 2009, p. 21).

Beitz is also practice-responsive in Hessler's second sense of *addressing* the problem – namely, by identifying the values the practice may be serving. Clearly, the first type of practice-sensitivity is required if one ambitions to apply the second type, but one could also just reconstruct the practice and pursue an alternative philosophical project that would only make use of the reconstruction for an independent end. On Hessler's reading, therefore, the reason why these two forms of practice-centeredness are logically independent is that they each correspond to a distinct philosophical project justifying a distinct methodology. Why would one identify the values the practice serves? In Hessler's view,

a philosophical inquiry might also identify values that the practice serves, while also bringing to light conflicts of values among different agents within the practice, problems or challenges facing certain practitioners, external pressures on the practice as a whole, and forces within the practice that aim to transform (or reform) it (Hessler, 2017, p. 30).

I take this passage as a fair reconstruction of Beitz' project, which also helps explain why the moral conception is independent from, but can be complementary of, the political approach. That is something that Beitz himself acknowledges when he says that “human rights *need not* be interpreted as deriving their authority from a single, more basic value or interest such as those of human dignity, personhood, or membership” (*my emphasis*) (Beitz, 2009, p. 128). To say they “need not” is not to say that they “could not”; it only implies that given Beitz' grasping of the practice, they need not.

3. Are Beitz' conclusions about IHRL warranted?

In the last section I articulated two points. First, following Hessler I suggested that Beitz's methodology is practice-centered in two logically independent senses. Second, that the second sense – identifying the values that a practice serves – is a legitimate philosophical enterprise. If that enterprise is philosophically sound, then the first and necessary step is to approach the practice without any pre-determined account of its idea of human rights. Instead, as Beitz puts it, “we treat international human rights as a normative practice to be grasped *sui generis*” (Beitz, 2009, p. 28).

Note, however, that these two points are strictly neutral with regard to whether Beitz' reconstruction of the practice is accurate or not. The two points are strictly about the articulation and justification of his practice-centered methodology. This leads to the preliminary point that there is still a distinction to be made between the moral and the political conceptions. Surely, and again, one could imagine that the practice-centered approach generates an account that happens to match the tenets of moral account. That is a *contingent* outcome. On the Beitzian strict reconstruction of the practice, however, the moral conception happens to be unhelpful.

In this second section of the paper, I challenge Beitz' application of this practice-centered methodology to IHRL specifically. I argue, first, that Beitz' reconstruction of the legal framework and practice of human rights is deficient following the practice-centered approach. More precisely, I scrutinize Beitz's evaluation of IHRL through his overarching criterion of “mature social practice” that he uses to marginalize IHRL in his mapping of human rights practices. Second, I assess whether my critique could change anything to the practical model of human rights of Beitz.

To introduce my critique, I shall again use a few insights from recent research on how human rights theorists – and Beitz in particular – go about delineating and reconstructing human rights

practice. Initially, Beitz' motivation for adopting a practice-centered sensitive approach to human rights has to do with the striking *diversity* of practices associated with human rights. Consequently, one important task is to identify predominant "paradigms of implementation" with a view to offering a comprehensive typology of these practices – something that was missing from the literature in human rights theory. As Beitz puts it, "I have stressed that the available paradigms of implementation, their agents, and their domestic objectives are more diverse than is usually recognized, and that coercive intervention is an exceptional case." (Beitz, 2009, p. 42).

In other words, it is not only that rights differ in their content and scope – this can be easily observed in the text of treaties and conventions. More importantly, Beitz alerts us to the diversity of *agents* acting in the name of human rights and the diversity of *functions* that these agents perform across the national/international divide. Beitz also thinks that this diversity is partly explained by the *emergent* character of the practice: "normative practices can be more or less well established. There can be more or less agreement about the purposes of individual norms and about their application in various circumstances" (Beitz, 2009, p. 42). Note that this further explains why counterfactuals *à la* Renzo are not suited to tracking such a developing and fragmented phenomenon.

It seems that the emerging and diverse character of the practice can also explain why the final Beitzian model of human rights is poor in terms of its normative(-moral) content. As a general matter, the more immature and plural a social phenomenon is, the more fragmented and heterogeneous the search for a stable and uniform pattern – and hence a master point or purpose – will be. Beitz explains that "if the boundaries of the discursive community are indistinct—for example, if there is no authoritative basis for ruling participants in or out—then there may be unavoidable indeterminacy in our understanding of the idea" (Beitz, 2009, p. 10). Otherwise put, it is safe to assume that the diverse and emerging character human rights practice ultimately explains the diverse and emerging character of the practices' agents and functions.

This diversity and emergence in turn complicates the further task of identifying the master point and purpose of the practice. As Schaffer explains in a recent contribution,

a practice may serve several aims or purposes, without a clear hierarchy among them, and participants and observers may often disagree about how to understand the purpose constituting the practice. Beitz (2009, p. 10) stresses how human rights practice sometimes seems to invite deep disagreement over its point and purpose, but he also presents a strong idea of what the point or purpose of that practice is (Schaffer, 2017, p. 35).

This helps see that the Beitzian model of human rights may have to do with a form of epistemic humility on the part of the scholar aiming to reconstruct the practice in a more abstract fashion. In other words, the second form of practice-centeredness – reconstructing the values that a normative practice serves – is limited, precisely, by the diverse and emergent dimensions of that practice.

There is another and less noticed character of Beitz' approach that complicates the matter here, namely its global dimension. Intuitively, normative practices can be diverse and emergent without necessarily being *global*. For example, human rights practices will be diverse and emergent within one state or within one regional order. Human rights may give a government official, a constitutional judge or a human rights activist different reasons for actions, and these actors may perform different embedded functions in the state's legal and political system. However, Beitz's object of analysis is distinctively global – he calls it "global political life".

The global dimension of Beitz' enterprise will only reinforce the difficulty of identifying an overarching and comprehensive point or purpose to the practice. We may think of Beitz' grasping of the practice as an exercise of *zooming out* – the more you zoom out, the more there are states, and the more there are states (and regions), the more there are actors and the more diverse and heterogeneous their practices may be. This global dimension of Beitz complicates the search for a master point of purpose simply because of the number of agents, functions and their underlying (diverging) purposes. There still is an overarching structure – hence the two-level model offered by Beitz – but the zooming out inevitably affects the possibility of finding the purpose or master point of this global practice.

Now, one could object that adopting a global standpoint is required by the very objective of building a theory. Theories are meant to encompass as many instances of a phenomenon as possible. Beitz' adoption of a global standpoint therefore should, on this view, be part of the enterprise of capturing a novel phenomenon – an embedded one. As the final model should be universally applicable, it is imperative to cover the phenomenon as comprehensively as possible. It would be scientifically improper to omit particular instances or patterns for the comfort of theory construction. Beitz therefore proceeds on the assumption that we should start our investigation with a form of deliberate *naïveté* by framing the practice “as it presents itself”:

The guiding ambition is to frame a reasonably clear and realistic conception of the practice as it presents itself in the range of sources materials at hand. These include the major international texts and the reporting and monitoring mechanisms established by them; observations of critical public discourse, particularly when it occurs in practical contexts involving justification and appraisal ... (...) (Beitz, 2009, p. 103).

This helps see that Beitz' approach aims to stay initially neutral with respect to the various kinds of practices at hand. Using the terminology of social epistemology, one could say that Beitz aims to be an *impartial observer* of the practice and that requires looking at *all* these practice types. However, the next step of theory-construction – one for which the observer is more active – is to reconstruct the overarching *aim* of the same practice with a view to illuminating most of the established patterns. This step is far more *interpretative* as it requires rationalizing an independently identified set of discursive practices. As Beitz explains, “what is needed is a facially reasonable conception of the practice's aim formulated so as to make sense of as many of the central normative elements as possible within the familiar interpretative constraints of consistency, coherence, and simplicity” (Beitz, 2009, p. 108). Inevitably, this further step requires a fair bit of selection by privileging and rationalizing the most resembling traits across various practice-types. Note, also, that this step requires reconstructing the normative point of the practice. Beitz refers at this point to an article of Aaron James (James, 2005) on Rawlsian constructivism. Beitz and Rawls seem to converge in exercising what James calls “constructive interpretation”, which amounts to offering a “moralized description of our basic structure” (James, 2005, p. 301). Now, as we saw earlier, Beitz would argue that the scope of moralization (the search for a master point of purpose) in the present case is severely limited for reasons that have to do with the practice itself – in particular, its degree of diversity and immaturity.

4. IHRL qua normative practice

In light of Beitzian methodological background set above, I want now to zoom in and focus on IHRL and its associated practices. I shall examine IHRL through the interpretive criteria of *maturity*, *diversity* and *globality* outlined above. As many critics have also pointed out, the

practice of IHRL is not central to Beitz' "grasping" of human rights practices. Although Beitz is keen to notice that the implementation of human rights was initially conceived within a "juridical paradigm" (Beitz, 2009, p. 32), he is equally quick to notice that human rights are today best understood as a *political* rather than *legal* phenomenon. The most important passage in this respect reads as follows:

The most prominent difference is that most international and transnational efforts to promote and defend human rights are more accurately understood as political rather than legal. Neither the charter-based nor the treaty-based components of the UN human rights system have evolved effective mechanisms for the appellate review of findings or for the judicial application of sanctions (Beitz, 2009, p. 40).

It is surprising that the criterion of *effectiveness* becomes relevant for dismissing IHRL among other practice-types. Surely, the explanation for prioritizing political practices has to do, again, with its particularly immature character of IHRL. It is widely acknowledged that the absence of a centralized compulsory adjudicatory organ (e.g. a world court of human rights with compulsory jurisdiction) in IHRL can be taken as pointing to the immature character of the law. Further, if one looks at the individual complaint procedure before UN human rights treaty bodies – the closest existing mechanism to constitutional processes at the global level – one finds diverging compliance results (between 12% et 42%) depending on the body under consideration and the methodology applied (Rodriguez-Bronchu, 2019). Earlier in the book, Beitz also emphasizes the *legal* distribution of responsibilities for human rights violations between the international and the domestic level but quickly re-iterates the point about effectiveness (the lack thereof):

The idea was that individuals should be enabled to seek redress for violations of human rights through their domestic legal systems. But of course the basic problem was the absence of any guarantee that domestic governments left to their own devices would provide effective protection of human rights (Beitz, 2009, p. 23).

On this view, IHRL might not count as a prevalent practice not because of the *kind* of norm (legal) that it is but because of its *degree* of immaturity. But if one looks more precisely at Beitz' definition of a mature social practice, it seems that IHRL does not meet the threshold necessary for such a practice:

The other qualification is that the practice of human rights is emergent. It is unlike more settled and longstanding normative practices such as might be found, say, in a mature legal system. In mature social practices, there is fairly wide agreement within the community about the actions that are appropriate in response to failures to adhere to the practice's norms (Beitz, 2009, p. 9).

In other words, on Beitz' view "maturity" has to do with the clarity and agreement on the appropriate response in case of failures to conform to the practice's norm – when the practice's norm is the compliance with human rights norms. In IHRL, however, the question of what the practice's norm is on the one hand, and the question of effective compliance with human rights norms on the other hand, can be strictly distinguished. This is because the practice's norm is not that states have a legal obligation to comply with the decisions of supranational bodies such as UN treaty bodies. Assuming that the practice's norm is bindingness may be appreciated from

a historical, sociological and moral standpoint, far less from a strictly *legal* one. That does not mean that IHRL does not trigger other legal actions. As I illustrate below (in the context of UN treaty bodies), states operate a “follow-up” procedure, which implements the procedural and enabling conditions for various state bodies and ministries to consider and respond to a decision delivered by a UN treaty body.¹ In short, therefore, the legal duty here is not to comply by the decision but to examine and respond to it through distinctively legal procedures. As I later suggest, this potentially leads to re-visiting the practice’s norm for the purpose of building a practice-centered model of IHRL.

Further, the absence of bindingness as a matter of international law does not imply that these treaties have no legal effect as a matter of domestic law. This aspect depends on each state’s relationship to international law more broadly construed – an aspect that Beitz does not specifically examine either. This is again a distinctively legal consideration that cannot be tracked down by the Beitzian approach of looking at the practice “as it presents itself”. The upshot here is that when we move away from the premise effectiveness and compliance are the main measures for grasping the practice of IHRL, we can better appreciate that this practice requires the existence and continuation of a number of legal norms and procedures that ultimately fulfil the criterion of mature social practice.

4.1. Beyond effectiveness and compliance

Let me specify the second prong of the argument first. As a general matter, the codification of international human rights treaties and conventions at the global level addresses the question of bindingness of the decisions of supranational bodies in charge of reviewing potential violations when individuals lodge an application (after having exhausted domestic remedies). At the regional level, one example is Article 46 of the European Convention on Human Rights (hereafter, ECHR) requiring that “state parties undertake to abide by the final decision of the Court”. At the global level, however, states are not bound by the decisions of supranational adjudicatory bodies as a matter of international law. UN treaty bodies are particularly illustrative here. Indeed, the International Court of Justice (ICJ) has established a limited obligation to assign “great weight to the interpretation adopted by this independent body that was established specifically to supervise the application”.² As a matter of international law, therefore, the various documents produced by these bodies (General Comments, Recommendations and Views) are not legally binding on states. States do not have a strict obligation to remedy the victim of the violation in question or initiate reforms of their own legislation in order to conform to their international obligations.

Let us now quickly rehearse how Beitz understands UN treaty bodies within his mapping of human rights practices. Interestingly, Beitz views them as potentially exemplifying one paradigm of implementation, namely *accountability*. It is only potential because in Beitz’ view these processes fail to meet the three criteria Beitz takes as necessary to influence the conduct of the accountable:

- (i) A can require B to give an account of its compliance with a set of expectations or standards; (ii) A is empowered to judge whether B has complied with the standards; and, typically, (iii) A may impose sanctions on B (...) (Beitz, 2009, p. 34).

Beitz then quickly moves to the claim that UN treaty bodies fail by the three criteria: states tend to submit their report late and incomplete; the bodies lack enough resources; and the sanction mechanism in case of non-compliance is poor (Beitz, 2009, p. 34). Here again, Beitz’ evaluative framework is informed by effectiveness considerations. As Beitz himself notices, it

is not that these bodies' accountability functions cannot in principle operate; it is that states do not abide by the decisions of these bodies as a matter of fact – a strictly empirical matter. Therefore, one can start to better appreciate the distinctively legal norms and procedures that IHRL has justified establishing that cannot be subsumed under the metric of effectiveness and compliance with the decisions of UN treaty bodies. Surely, this question is also empirical, namely whether this is such a procedure in place – but the notion of compliance (with decisions) is hardly helpful here as the respondent state may ultimately not comply with the supranational decision.

Indeed, it does not follow from the non-binding nature of the decisions of UN treaty bodies that states fail to take the decisions of supranational bodies as a reason for other types of legal action – often with a view to further empowering these bodies or ameliorating the reception of their decisions within the domestic legal order. This particularly concerns the development of what is called “individual complaint procedures” in the context of UN treaty bodies. As of today, only one treaty body (the Committee on Migrant Workers) among nine³ does not yet have such an optional mechanism by which individuals can directly bring evidence of alleged human rights violations. This type of legal and institutional development may not change much to the effectiveness and compliance records of states *in fine* – that is again an empirical matter – but it does alter the assumption that human rights do not give reasons for distinctively legal actions. It is therefore relevant to Beitz' functional approach to human rights practice although it is distinctively legal.

Still in the context of UN treaty bodies, a more specific example of these legal actions is what is commonly called the “follow up procedure” aiming to facilitate the reception and consideration of the treaty bodies' decisions by domestic authorities. Through the support of the Office of the United Nations High Commissioner for Human Rights (hereafter, OHCHR) states are heavily encouraged to establish

a national mechanism for reporting and follow-up” (...) “to coordinate and prepare reports to and engage with international and regional human rights mechanisms (including treaty bodies, the Universal periodic review and special procedures), and to coordinate and track national follow-up and implementation of the treaty obligations and the recommendations emanating from these mechanisms.⁴

On the treaty body's side, this implied designating a “Special Rapporteur on Follow-up” in charge of communicating with the relevant domestic authorities monitoring the state's response to the treaty body's recommendations (Rodriguez-Bronchu, 2019).

To illustrate the state's *legal* actions in that respect, take the example of the Russian Federation – a state that is generally not renowned for its human rights record (to say the least). In a recent article, Koneva interestingly draws attention to Russia's regular efforts to better distribute responsibilities across the various Russian ministries with a view to facilitating the reception and consideration of decisions of UN treaty bodies (Koneva, 2019). This applies in particular to Views, that is, reviews of individual communications that result from the complaint procedure of the bodies. Distinctively legal actions include, for example, the adoption of legislation and directives fixing the legal status of these decisions in the domestic legal order or clarifying the implications of these decisions for the practice of domestic courts – what Van Aleebek and Nollkaemper have termed “enabling legislation” (Van Aleebek & Nollkaemper, 2012, p. 354). It is crucial to note that these actions are undertaken by specialised offices within the relevant ministries (in particular within the Ministry of Foreign Affairs and the Ministry of

Justice) and by courts, not by the government in place. Koneva points to interesting developments in that regard:

In a number of decisions of the Constitutional and Supreme Courts of the Russian Federation, that were confirmed by the lower courts, it was established that the view of the treaty body on the violation by the Russian Federation of the provisions of the relevant international treaty may be the ground for a review of the case, despite the absence of a corresponding provision in the Russian legislation (Koneva, 2019, pp. 6-7).

Again, facilitating and improving the reception and the consideration of UN treaty bodies' decisions by domestic courts is not the same as complying with these decisions. The UN treaty bodies themselves have constantly pointed to Russia's systematic failure to execute the decisions of these bodies. The Russian government in turn has regularly pointed to the "recommendatory nature" of the decision as a justification:

the Committee does not have the functions of a court or a body endowed with quasi-judicial powers, and it is for that reason that its decisions are termed "views" and are of a recommendatory nature. Nonetheless, these views carry great weight and are taken seriously by the Russian authorities, who are unable to ignore them, even where they are at variance with the Russian approach.⁵

What emerges from these insights is a more complex picture of the practice of IHRL than what Beitz assumes. They suggest that the practice's norm is not compliance and effectiveness of the decisions but the reception and consideration (by legal means) by the domestic authorities of these decisions. Legal norms and procedures facilitate this process without however ensuring that domestic authorities will *in fine* conform to the decision. As Van Aleebek and Nollkaemper recall, "the existence of a legally regulated procedure does not necessarily mean that Views are given legal effect" (Van Aleebek & Nollkaemper, 2012, p. 363). I will draw the implications of these insights for the Beitzian model of human rights in the final section of this article.

4.2. IHRL embedded in international law

Let me now turn to the second prong of the argument. So far, I have suggested that one overarching function of IHRL is to facilitate the process of states considering and responding to (but not necessarily abiding by) the decisions of supranational bodies. There is, however, a further aspect to the normativity of IRHL that the Beitzian model focused on effectiveness and compliance blurs, namely that each and every state's relation to IHRL is shaped by each and every state's broader relationship to international law as a whole. This aspect again requires a distinctively legal angle of analysis logically distinct from compliance and effectiveness. As Van Aleebek and Nollkaemper put it, in the context of UN treaty bodies' decisions, "the question of the status in national law should be distinguished from the question of the bindingness of these decisions – that is a question of their international legal status" (Van Aleebek & Nollkaemper, 2012, pp. 357-358).

Indeed, the absence of binding force of UN treaty bodies' decisions at the global level is not the final word as to the actions that pertain to these supranational bodies and their decisions. This issue also depends on the prior and broader issue of whether the state in question generally incorporates international law in its domestic legal order. The diversity of practices among states on this front is therefore not necessarily a sign of immature social practices. Why? Because it is principally decided by the constitutional arrangements of the states themselves. A state autonomously deciding about the status of human rights decisions cannot *prima facie* be taken as an immature social practice. Further, the ratification of a human rights treaty by a

state does not say much about how that same state principally incorporates that same treaty in its domestic legal order. As Beitz repeatedly emphasizes, human rights norms imply a structural division of responsibility between the domestic and the supranational levels. States remain the primary interpreters and the only enforcers of human rights norms. This structural differentiation is also driven by the vastly different constitutional arrangements of each domestic legal order. This differentiation is multi-layered: states are not only free to (constitutionally) determine how they incorporate human rights norms in their constitutions, they are also free to (constitutionally) decide how to implement the decisions and judgments of supranational (commonly called “remedial subsidiarity” (Besson, 2011)). The function of IHRL facilitating the reception and consideration of supranational decisions surveyed above is precisely an illustration of that differentiation.

What are the main legal categories for defining a state’s relationship to international law? In a nutshell, the theory says that states adhere either to *monism* or *dualism*. On the monist view, international norms are directly applicable in the domestic legal order – they are “directly applicable to their legal addressees irrespective of any intermediary role played by municipal laws” (Gaja, 2017, p. 59). In contrast, the dualist view requires these norms to be “domesticated” via the legislature before gaining effect before domestic courts. Dualism, therefore, portrays the domestic legal system as a *self-contained* entity. While these categories provide the overarching structure the state’s relationship to international law, there is abundant empirical research showing that state practices rarely square one or the other category (Nijman & Nollkamper, 2007), which explains the rise of a form of legal pluralism in various states. Pluralism particularly concerns IHRL as a sub-field of international law. Indeed, a dualist state can very well attribute legal value to the interpretation by a treaty body without the state having (yet) incorporated the corresponding treaty in its legal order (or executing the decision in which the interpretation is located). As Van Alebeek and Nollkaemper put the point,

while the dualist nature of a national legal order (..) will undoubtedly influence the extent to which treaty body output plays a role in national court proceedings, these factors do not constitute impediments to attaching interpretative value to the work of the treaty bodies (Van Alebeek & Nollkaemper, 2012, p. 403).

The upshot here is that it is particularly difficult to fully reconstruct (using Beitz’ practice-centered approach) the practice of IHRL in isolation from the broader relationship that states entertain with international law in their constitutional order. Beitz’ “grasping” of IHRL remains however insensitive to this underlying legal framework potentially due, again, to its over-emphasis on effectiveness and compliance matters. Surely, as for many (international) laws, states may very well fail to comply with their self-defined rules – but that, again, is not a matter of maturity as defined by Beitz or, if it were, the claim would perhaps require a more elaborate argument as to the immaturity of international law generally, not to the immaturity of IHRL specifically. Finally, the fact that IHRL is part of a constitutionally-defined framework further helps explain why it is difficult to adopt a global lens when one reconstructs IHRL – and even more when one attempt to rationally reconstruct its master point or purpose. Therefore, the global dimension of Beitz’ enterprise only reinforces the difficulty of identifying an overarching point or purpose to the practice – and this equally applies to its legal dimension. Again, the fact that states are the primary interpreters and enforcers of IHRL suggests that each and every state might domestically assign a master purpose to a convention or to a treaty.

All this being said, like the other paradigms of implementation Beitz identifies the legal responses to human rights violations might not be the decisive reason for states to act. The normativity of IHRL I have pointed to only suggests that IHRL gives reasons for some actions,

not that these reasons are sufficient for the state to effectively respond to a violation. This would however fit the generic Beitzian definition of practice defined

not by agreement about the content of the norms or the practical conclusions to which one is committed by accepting them, but rather by acceptance of a distinctive class of norms as sources of reasons—though not necessarily as decisive reasons—for an array of modes of action (Beitz, 2009, p. 9).

5. Conclusion

The goal of the article was to examine and critically appraise the place of IHRL in Beitz' practice-centered account of human rights. This goal first required rehearsing Beitz's methodology and explaining where exactly practices matter in theory-construction. I achieved that step by using recent research in methodology in human rights theory and showed – following Hessler's distinction – that Beitz's approach is practice-centered in two independent senses, namely posing the terms of the issue and addressing it.

I then turned to the criteria Beitz uses to prioritize political practices among other practice-types. One could say that Beitz is just observing the practice “as it presents itself” and from a distinctively global perspective. From that standpoint, other paradigms of implementation might be more salient and therefore theory-relevant than the legal one. I argued that the criterion of effectiveness and the criterion of maturity (used by Beitz to marginalize IHRL) are distinct and that IHRL can be shown to meet the required threshold of the latter.

I finally argued that the practice's norm of IHRL is not that states have a legal obligation to abide by the decisions of supranational bodies. Taking the example of UN treaty bodies, I rather suggested that the functional norm of IHRL is to facilitate the consideration of supranational norms decisions by domestic authorities, in particular relevant ministries and domestic courts. Clearly, more investigation and more ink should be spilled on reconstructing the legal actions that domestic authorities undertake without necessarily complying with the decisions of the bodies. The further factor at play here is that IHRL is embedded in the constitutionally defined reception of international law more broadly that cannot be confined to questions of effectiveness and compliance either. This two-fold critique, of course, does not change Beitz' claims about effectiveness and compliance.

My critique also aims to have explanatory value for why it might be particularly difficult to identify the master point or purpose of IHRL but on different grounds. If the legally defined function of IHRL is to facilitate the consideration of (and the response to) supranational norms and decisions through the medium of constitutional law, that function is likely to affect the formation of a master point or purpose in a structural (and not fully contingent) manner. Here again, one needs to grasp distinctively legal elements in order to explain how these processes unfold.

Notes

¹ Until today, six out of eight bodies have developed a formal follow-up procedure: Human Rights Committee (HRC); Committee on Elimination of the Racial Discrimination (CERD); Committee against Torture (CAT); Committee on the Elimination of Discrimination against Women (CEDAW); Committee on Enforced Disappearances (CED); Committee on the Rights of the Persons with Disabilities (CRPD).

² Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010, p. 639. Available at: <<https://www.icj-cij.org/en/case/103>> (last accessed October 8, 2019).

³ The 8 bodies are Human Rights Committee (HRC); Committee on Elimination of the Racial Discrimination (CERD); Committee against Torture (CAT); Committee on the Elimination of Discrimination against Women

(CEDAW); Committee on the Rights of the Persons with Disabilities (CRPD); Committee on Enforced Disappearances (CED); Committee on Economic, Social and Cultural Rights (CESCR); and Committee on the Rights of the Child (CRC).

⁴ See in particular: Office of the UN High Commissioner for Human Rights (OHCHR). National mechanisms for reporting and follow-up. A Practical Guide to Effective State Engagement with International Human Rights Mechanisms. New York and Geneva, 2016. HR/PUB/16/1. Available at :

<https://www.ohchr.org/Documents/Publications/HR_PUB_16_1_NMRF_PracticalGuide.pdf> (last accessed October 8, 2019).

⁵ Sixth periodic reports of the Russian Federation, 20 December 2007, UN Doc. CCPR/C/RUS/6, p. 7.

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All errors contained in this article remain mine alone.

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