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1. Introduction

Textbooks tend to depict human rights as safeguards protecting the individual from the excessive use of state authority.[2] Such accounts presuppose, amongst others, a neat opposition of law and politics, and a pre-political character of the law. Drawing both on positive international law and the evolving theoretical inquiry into human rights, this article claims that the fictions of universality and inalienability of human rights collude their exclusionary function. Human rights take part in the formation of a polis by excluding the bare life of the human being from that community, to then re-include it and subject it to regulation. Where re-inclusion does not take place, for one reason or another, the exclusionary function of human rights creates outcasts which have no more, are no more than bare life (refugees being a prominent example). Seen thus, human rights constantly remind us how devoid of protection we are outside the polis. Once re-inclusion has taken place, human rights may work reasonably well as protective devices. Yet, as there is no access right to the polis, there is no right for any human in any situation to have human rights.

Sections 2 and 3 develop two opposed accounts of the relationship between human rights law and politics. In the first account (section 2), the risk of human rights advocacy infusing human rights research with its agenda is considered, depicting one way through which politics may colonise the law. The second account (section 3) draws on contemporary critiques of human rights, which warn of the opposite; namely that human rights law risks colonise politics. As human rights are held to be universal and inalienable, while being positive law, sections 4 and 5 look into the universality and inalienability claims from a positivist perspective, showing that neither of them is tenable. The concept of human rights is overinclusive, as it neglects the contingency of rights on both the limitations of the state and the autonomy of its polity. The structure of international law strangles any transnational politics of human rights, thus confirming that law colonises politics (section 4). Conversely, international law is but the product of political decisions within a polity organised as state, suggesting that politics also colonise law (section 5). Against this background, the idea of a demarcation line between human rights law and state politics appears to be a confusing oversimplification. Section 6 seeks to explain the genesis of the two excesses linked to the concept of human rights by looking at the exclusion of what has been termed "bare life" inherent in it. Finally, Section 7 offers conclusions.

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[2] See, e.g., Malanczuk, who attempts to single out the "essence of the concept" of human rights as follows: "every individual has certain inalienable and legally enforceable rights protecting him or her against state interference and the abuse of power by governments". Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, Routledge, London 1997, p. 209.

2. Human Rights Research and the Politics of Advocacy

In international law, human rights research is entangled in a problematic relationship with human rights advocacy, and, as a consequence, with politics. A good many international lawyers appear to take human rights for granted: as a black box of the common good. Consequently, much human rights writings have been inspired by ideals of proliferation and maximisation of human rights. At times, its agenda is reflective of that pursued by advocacy organisations, although there might be divisions on the appropriate strategy to be pursued. One could describe such writings as promotional human rights research.

Doing promotional human rights research is nice: there is a feeling of belonging to the good guys, working for the good cause. In addition, international lawyers enjoy the privileged status flowing from being so close to the authority of the law, marking them out from human rights researchers belonging to other disciplines. That nice, privileged feeling comes at a price, though. Inevitably, the advocacy agenda conflicts with the established technical modes of identifying and construing international legal obligations, which host a number of mechanisms to minimise rather than maximise state obligations.[3] Put simply, it can be mutually exclusive to be a good international lawyer in the technical sense and a good guy.[4]

Those who resist the promotional temptation, feeling that the professional identity of the international lawyer is different from that of the international human rights advocate, often resort to approaches that may be termed "formalist" or "positivist". This exposes them to the suspicion of advocates: after all, state lawyers fending off human rights claims typically use formalism and positivism. Within academia, formalism seems to produce outcomes prone to exploitation by states with a reductionist agenda. At the end of the day, the work of both promotional and positivist human rights lawyers are easily subjected to one or other form of political hi-jacking – be it by NGOs, or by states. Faced with such choice, it can be suspected that many lawyers prefer to be hijacked by human rights advocacy.

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[3] As international law is to an increasing degree contractually determined, suffice it to recall that the idea of contracting is characterised by economising obligations. Human rights treaties are odd, as their beneficiaries are not contracting parties. Yet this oddity has not led to a specific body of second-order rules in international law on how to deal with human rights obligations. It is regularly assumed that states wish to preserve their sovereignty to the maximum extent in rule-making, which entails a burden of producing counter-arguments by advocates of third party interests as human rights lawyers. A traditional reflection is the doctrine of "*in dubio mitius*", suggesting that interpretation be informed by the assumption that states have implicitly opted for the less onerous reading when consenting to an obligation. This doctrine may well be outdated (see R. Bernhardt, "Interpretation in International Law", in R. Bernhardt (ed.), *Encyclopaedia of Public International Law* (1992) Volume 1 (1992) pp. 1416-26, at 1421), but the argument on its inapplicability must be put forward the human rights lawyer, putting the human rights interest into a disadvantageous position.

[4] In early 2002, the then Danish Centre for Human Rights was threatened by a government-imposed merger with other research institutions, compromising its independence as a National Human Rights Institution. The ensuing debate brought out the tension between the promotion of human rights and research of such rights. Adversaries of the Centre claimed that it constantly interfered into Danish politics with human rights arguments. Friends of the Centre were disappointed that its lawyers did not reject the harsh Danish Aliens' legislation launched concurrently as incompatible with Denmark's international human rights obligations, and suspected that this reflected a political compromise with the government. Both criticisms were misguided in substance. Adversaries forgot – perhaps on purpose – that the usage of human rights arguments in the political domain does not necessarily politicise human rights in their totality. The Centre's friends mistook the promotional agenda to be an apolitical one. Yet, as the 2002 amendments to the Aliens Act were smartly crafted in the legal-technical sense, the Centre's lawyers were unable to reject them outright without swapping their role with that of advocates. Both adversaries and friends failed to understand the divisive lines between law and politics. Yet, it should be acknowledged that human rights institutions carrying out both research and promotion would typically be exposed to tensions of the kind described here.

Worse still, the promotional straitjacket of much human rights research in the legal field also fetters inquiries into the theoretical core of human rights. It seems that the black box of common good must not be opened, because this would expose a flank to those resisting the idea of human rights.[5] What does it mean that human rights are "universal" and "inalienable"; how can they be beyond politics in a secular world? Indeed, I would argue, it is precisely the fact that many writings in human rights law omit these and related foundational questions that makes their arguments imprecise, and their work as well as that of their advocacy friends vulnerable. If it is correct that human rights have largely become a matter of "strategic research" or "applied research", we should remind ourselves that the discipline of international human rights law has not done its homework in basic research.

In practice, two standard attempts to bypass the black box have gained currency. One equals human rights to basic or constitutional rights, the other posits them as an emerging constitution of a cosmopolitan world order in the making. If human rights are distinct in that they belong to every human being, regardless of belonging, neither attempt can succeed. Basic and constitutional rights can be grounded on a social contractarian account of the nation state; their limits are largely concurrent with its personal, territorial and jurisdictional delimitations.[6] However, the idea of universality implied in human rights might be at loggerheads with that of a personally circumscribed contractual base. Theoretically, the contract metaphor underlying much of contemporary constitutional thinking stops making sense when *everyone* is a contract party by nature.[7] The cosmopolitarian explanation fails to convince in international law, as long as states remain its *ultimate* power holders, legislators and implementing agents.[8] If anything, refugees remain the primary test case for the universality of human rights, as writers from Hannah Arendt[9] to Giorgio Agamben[10] have pointed out. With millions of displaced persons being clearly beyond any meaningful form of civic membership whatsoever[11], bare empiry would suggest the cosmopolitan argument to be idealist excess.

Regardless of personal convictions, human rights lawyers are expected to "function" in the reality of international law and therefore work in the mainstream positivist tradition. Intuitively, they know that arguing the universality and inalienability of human rights as legal rights is at odds with the underlying premises of this tradition. As there is little to be gained

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[5] "Analyses of the foundations and scope of international human rights law frequently lapse into heroic or mystical language; it is almost as if this branch of international law were both too valuable and too fragile to sustain critique." Hilary Charlesworth, "What are 'Women's International Human Rights'?", in R. Cook (ed.) *Human Rights of Women: National and International Perspectives*, University of Pennsylvania Press, Philadelphia 1994, p. 58, at 59.

[6] See section 3 below.

[7] Indeed, social contractarianism collapses visibly into natural law thinking at this point.

[8] It is problematic to assume that the functioning of any cosmopolis would be largely analogous to that of a nation-state, which lives precisely off its delimitation. There are good reasons for the Kantian tradition preferring a federalist account to a world-statist.

[9] Arendt famously devoted a chapter to the tension between conceptions of human rights and the reality of refugeehood in Hannah Arendt, *The Origins of Totalitarianism*, Harcourt Brace, San Diego, 1951.

[10] See section 6 below.

[11] It must be recalled that the right to asylum, if its existence can be shown at all, remains incomplete, as long as states remain free to control the immigration of asylum seekers, and hence the exercise of the right to non-refoulement. See G. Noll, *Negotiating Asylum. The EU acquis, Extraterritorial Protection and the Common Market of Deflection,* Martinus Nijhoff Publishers, The Hague 2002, pp. 357-62 (on the construction of the right to asylum in Article 14 of the Universal Declaration of Human Rights) and pp. 476-49 (on the impossibility to mount conclusive discrimination arguments against the imposition of visa requirements affecting asylum seekers).

by alienating your advocacy friends, foundational questions remain taboo. Crafting a legal theory of human rights would risk to either pull the positivist leg under advocates, or that positing universality and inalienability. Or, indeed, both. The pragmatic alternative is to bypass the challenge by a metaphysics of convenience (expressed in statements as "I *believe* in human rights"), or by delegating it to moral philosophers, political theorists and social scientists.

3. Critiques of Human Rights

Now, the black box has definitely started to crack open. Theoretical explorations and critiques of human rights readily developed in a variety of disciplines[12], and impact international legal thinking to an increasing degree. An evolving consensus on the frailty of metaphysical justification of human rights and a widespread rejection of natural law positions provided a backdrop for these developments.[13] Scepticism on universalist narratives and misgivings about the liberal subject spread amongst poststructuralists and postmodernists, proliferating onwards into feminist theory, and ultimately transformed into a persistent questioning of human rights as sharing the alleged defects of enlightenment modernism. This debate made its way into international law in the late Eighties, with focal interest being legal indeterminacy and the masquerading of might as right.[14] However, it seemed that the sceptics did not wish to pour out the baby with the bath water, as they readily acknowledged the emancipatory potential of human rights. This merits underscoring, as the critique of human rights should not be confused with those suggestions pushing for their practical relativisation after 11 September 2001.[15]

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[12] I would not pretend to have a grasp of the multifarious attempts to critique and reconstruct human rights. Much of it is located within social and political theory, and based on nation-statist premises (see, e.g. Jürgen Habermas, *Faktizität und Geltung,* Suhrkamp, Frankfurt a.M., 1992, and John Rawls, *The Law of Peoples,* Harvard University Press, Cambridge 1999), but possesses at least an inspirational potential for an international reconceptualisation of rights. Gert Verschraegen has recently brought Niklas Luhmann's systems theory to bear on human rights with much merit: Gert Verschraegen, "*Human Rights and Modern Society: A Sociological Analysis from the Perspective of Systems Theory*" in 29 Journal of Law and Society 258 (2002). A major rethink has been going on within international relations. For a well-argued attacks on the universality of international human rights, see Chris Brown, "Universal Human Rights: A Critique", 1 *The International Journal of Human Rights* 41 (1997), and for a rejoinder to Brown's critique, see Michael Freeman, "Universalism, Communitarianism and Human Rights: A Reply to Chris Brown", 2 *The International Journal of Human Rights* 79 (1998). For a good analysis of how human rights theory has lost focus on the connection between rights and the subjects exercising them, see David Chandler, "Universal Ethics and Elite Politics: The Limits of Normative Human Rights Theory", 5 *The International Journal of Human Rights* 72 (2001).

[13] However, natural law is far from being a deserted position. For a recent example, see Stephen Hall, "The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism", 12 *EJIL* 269 (2001), who criticises the politicisation of human rights and proposes the recovery of a "thin" version of human rights on the basis of natural law, which would guarantee the strengthening of compliance. Ibid, pp. 301-5.

[14] There are historical precursors to that debate. Challenging of universality is a core feature of antiliberal thought in the 1920s, with Carl Schmitt and Leo Strauss as main proponents. Schmitt's dictum "*Wer Menschheit sagt, will betrügen*" ("He, who says mankind, wishes to deceive") finds its contemporary reverbations in the sceptical accounts on human rights as a Trojan horse for Western hegemony. While there are topics common to antiliberals and postmodernists, it should be underscored that both schools of thought diverge in their view on equality.

[15] Most infamous in this respect is the proposal of permitting torture to counter certain security threats, spearheaded by Alan Dershowitz and publicly supported by Richard Posner. Alan M. Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge,* Yale University Press, 2002; Richard Posner, "The Best Offense", *The New Republic Online*, 9 March 2002.

The evolving body of critique targeted various dimension of human rights, some writers being inclined to look at contradictions in practice of states, advocacy organisations and lawyers[16], others embarking on a radical scrutiny of the philosophical premises underlying human rights arguments.[17] Whatever the preference, the relationship between rights and politics is a ground where both theoretical and practical inquiry converge. Let us give three subjectively chosen examples, broadly within the tradition of critical legal thought, and stretching from pragmatism to the history of ideas.

In his reflections on the international legal order and its politics, David Kennedy questioned whether the pre-eminence of what he calls "the human rights movement" has restricted the possibilities of emancipation and legitimised existing power structures by confirming their critique to the language of human rights.[18] He suggests to think pragmatically about human rights, and to assess the benefits of human rights vocabulary against its costs. Kennedy's piece explicitly restricts itself to list "pragmatical worries and polemical charges"[19] raised by human rights, amongst them the foregrounding of participation and procedure at the expense of distribution of resources, its strengthening of the state, its downgrading of the legal profession and its belief that "work to develop law comes to be seen as an emancipatory end in itself, leaving the human rights movement too ready to articulate problems in political terms, and solutions in legal terms".[20] Kennedy's agenda is to push for an increased focus on the distributional outcomes of international governance, including that influenced by the human rights movement. Eventually, this would repoliticise the issues dealt with by it. This runs counter to standard accounts, which frame human rights as something to be isolated from politics.

Martti Koskenniemi has engaged in the debate with two pieces, one describing the effect of human rights on political culture[21], the other equating human rights with love to capture their elusive character, trapped between politics and non-political normativity.[22] In brief, Koskenniemis argument is that the "priority of the right over the good" results in the colonization of political culture by technocratic rights language[23], and that rights are defined in application procedures, which, in turn, cannot be controlled by the very rights they are set

[16] For a discussion on the excessive ambitions of the human rights movement and a call for a strategic minimalism in framing human rights, see Michael Ignatieff, "Human Rights as Politics and Idolatry" in Amy Gutman (ed). *Human Rights as Politics and Idolatry*, Princeton University Press, Princeton 2001, pp. 3-100.
[17] For an inquiry into human rights from a perspective incorporating postcolonial and feminist argumentation, see Shelley Wright, *International Human Rights, Decolonisation and Globalisation. Becoming Human*, Routledge, London 2001. For an interweaving of empirical data with theoretical argumentation on the bias of contemporary human rights practices, see Upendra Baxi, "Voices of Suffering and the Future of Human Rights", 8 *Transnational Law and Contemporary Problems* 125 (1998).
[18] David Kennedy, "The International Human Rights Movement: Part of the Problem?" 2001 *EHRLR* 245 (2001) [hereinafter Kennedy, *Human Rights Movement*]. The article is the second in a series of three, all of which are seized with the concealment of political choices in an increasingly technocratic perception of international governance in various forays. David Kennedy, "The Forgotten Politics of International Governance", 2001 *EHRLR* 117 (2001); David Kennedy, "The Politics of Invisible College: International Governance and the Politics of Expertise", 2001 *EHRLR* 463 (2001).
[19] Kennedy, *Human Rights Movement,* p. 250.
[20] Kennedy, *Human Rights Movement*, p. 258.
[21] Martti Koskenniemi, "The Effects of Rights on Political Culture", in Philip Alston et al. (eds.), *The EU and Human Rights,* OUP, Oxford 1999, pp. 99-116 [hereinafter Koskenniemi 1999].
[22] Martti Koskenniemi, "Human Rights, Politics and Love", 4 *Mennesker & Rettigheder* 33 (2001) [hereinafter Koskenniemi 2001].
[23] Koskenniemi 1999, p. 99.

to define.[24] He points to four ways in which rights defer to politics in the context of political practice: field constitution (i.e. the characterisation of reality in terms of rights)[25], the indeterminacy of rights language, the fact that rights come with exceptions, and the possibility to formulate opposed interests in the language of rights, sometimes even in terms of the same right.[26] Justification and limitation of rights bring out a "curious paradox"[27]: to the extent rights are assumed as foundational, there can be no perspective from which to justify or examine them. Koskenniemi asserts that rights do not exist outside the structures of political deliberation, and are not a limit, but an effect of politics.[28] This turns the alleged pre-political character of human rights on its head.

He maps five "familiar legal strategies for the management of the tension between human rights and sovereignty": human rights formalism (limiting human rights to a legal-technical exercise, which he charges with instrumentalising human rights as a weapon of the hegemon), human rights fundamentalism (mystifying human rights with essentialist argumentation, thus making them vulnerable to competing essentialisms), human rights scepticism (viewing human rights as an irrationalist strand in liberal theory, yet falling victim to its own extravagant validity claims), cosmopolitan democracy (seeing rights as one aspect of an expanding democratic realm, yet underestimating the role of institutional power and bad faith) and radical democracy. The latter strategy emphasises the role of power in the democratic process, thus moving further than cosmopolitan democracy, and Koskenniemi obviously hosts some sympathy for it. Reflecting on its implications, he suggests that asserting a right will remain an attempt to fulfil the space of the universal: "It is to claim in the name of universality: this belongs not only to me *but to everyone in my position*. Thus, it always implies membership in a community, and having the benefit *because of that membership*".[29] He describes this membership as a horizon that recedes when it is approached.[30]

One of the most elaborate critiques of human rights is developed in Costas Douzinas monograph on "the end of human rights".[31] Douzinas inquires into the reasons for what he describes as a huge gap between theory and practice: the paradox of persisting barbarity at a time where human rights seem to have won the ideological battles of postmodernity.[32] Making human rights legal, the argument goes, strips them of their critical and transformational potential.

Douzinas reaches far beyond the standard fare opposition between natural law and positivism, and brings out how transformations in the idea of nature by the Stoics relate to the decline of human rights as a critical device. While nature was a self-standing, malleable system of practical reasoning in the Attic period, the "Stoic turn" transformed it into a static set of rules. Douzinas links the decline of natural law reasoning to the "deification of the individual" by

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[24] Koskenniemi 2001, p. 35. "Yet rights are not foundational but depend on collective goods that are evaluated independently from the rights through which we look at them." Koskenniemi 1999, p. 105.
[25] For an excellent retracing of the field constitution effectuated by EU institutions through the instrument of human rights, see Päivi Leino, "All Dressed Up and Nowhere to Go: The Debate on the EU Charter of Fundamental Rights", forthcoming in XI *Finnish Yearbook of International Law* (2003).
[26] Koskenniemi 2001, pp. 35-7.
[27] Koskenniemi 1999, p. 105.
[28] Koskenniemi 2001, p. 38.
[29] Koskenniemi 2001, p. 43 (emphasis in the original).
[30] Ibid.
[31] Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century*, Hart, Oxford 2000.
[32] Douzinas, *supra*, p. 2.

Hobbes and liberal thought, leading to the "primacy of right over duty"[33] and the intimate connection of sovereign individual and state sovereign. This introduced the devaluation of human rights: "When they move from their original aim of resistance to oppression and rebellion against domination, to the contemporary end of total definition and organisation of self, community and the world, according to the dictates of endless desire, they become the effect rather than the resistance to nihilism".[34] Ultimately, Douzinas believes that the incorporation of human rights into the end of history, ideology and utopia would "bring human rights to an end" as they lose their utopian end.[35]

In one way or other, all three critiques are seized with the defense of politics, utopia and a rich conversation on the good life against the muting effects of human rights.[36] Against Kennedy, Koskenniemi and Douzinas, it could be argued that human rights, rather than consuming space for political deliberation, also produce such space.[37] After all, "human rights talk" is a political esperanto with all its benefits (transnationalism) and drawbacks (elitism and artificiality). To perform this function, and to create this space, it needs to be coupled to excessive claims about its own capabilities. With Kennedy, Koskenniemi and Douzinas, we could still ask whether it is worth the while, whether the benefits of this excess outweigh the drawbacks of infusing politics with a dose of bad faith, and whether the arena of human rights talk is the most adequate one, given its weak capacity to arrive at binding decisions.

The purpose of this text is not to follow up on that question. Rather, I would like to further pursue the clash between the positivist legal techniques and the foundational assumptions of universality and inalienability attached to the contemporary concept of human rights. It seems to me that this issue, specific to and central for the credibility and consistency of human rights as a project of international law, merits a detailed scrutiny. Douzinas suggests that human rights treaties have brought about "a new type of positive law, the last and most safe haven of a *sui generis* positivism".[38] Let us revert to the mainstream "human rights formalists" working in the tradition of this positivism, and have a closer look at the particular contradictions it hosts.

4. Legal Positivism Cannot Affirm Universality

With "human rights", I mean rights that are owed to a person in a legally binding manner merely by virtue of his or her being human. The absence of further preconditions – as citizenship, location, personal attributes or demeanour – is a core element of human rights as understood in this definition. With the "universality" of human rights, I mean that rights with a concretely identifiable and legally binding normative content, are owed to any human being, regardless of membership, location in the world, personal attributes or demeanour. Hence, universality is already implied in the above definition of human rights.

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[33] Douzinas, *supra* note 31, p. 74.
[34] Douzinas, *supra* note 31, p. 214.
[35] Douzinas, *supra* note 31, p. 380.
[36] For an analogous argument rejecting rigid definitions and analysing human rights as an evaluative term from the vantage point of language philosophy, see Alexander Matthews, "Philosophy and 'Human Rights'", 1 *The International Journal of Human Rights* (1997) pp. 19-30.
[37] For an example, see Klaus Günther, "The Legacies of Injustice and Fear: A European Approach to Human Rights and their Effects on Political Culture", in Philip Alston et al. (eds.), *The EU and Human Rights,* OUP, Oxford 1999, pp.117-44, framing human rights as a process in which a victim of injustice regains voice and control.
[38] Douzinas, *supra* note 31, p. 184.

A positivist understanding of human rights law collides head-on with this notion of universalism. Technically, three interrelated arguments support this contention:

- *Only states are duty-bound under international law*
  International law is a state-centrist norm system. This sets it apart from, say, moral philosophy, which can afford to be anthropocentric. Hence, the philosopher finds no problem in obliging every human being to respect human rights[39], while the positivist international lawyer is limited to states as respondents to human rights norms.[40] This notwithstanding, rights can unfold reflexive obligations on others than state parties, but their existence *de lege* hinges on the mediation of a state.[41]

- *Human rights obligations follow the foundational delimitations of nation states*
  The allocation of human rights obligations is based on the trinity of state-population-territory, and the force of obligation decreases with the distance to each of these determinants. Human rights have less to offer those who are victims of non-state violations.[42] Their scope is limited for non-citizens, and gravely limited for non-denizens[43]. Actions or omissions by a state outside its territory entail responsibility only in exceptional cases.[44] Hence, norms of state responsibility, the territorial, jurisdictional as well as personal delimitations of human rights treaties create white spots in the universe of human rights – spots where no meaningful legal responsibility can be determined[45], and victims remain unprotected. At times, states consciously move persons to such white spots, or consider doing so, to decrease their legal obligations.[46]

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[39] See e.g. Alan Gewirth, who conceptualises human rights as "rights of every human being to the necessary conditions of human action" and states that "they must be respected by every human being". The term "human" in the concept of human rights thus refers both to claimants and respondents. Alan Gewirth, *Human Rights. Essays on Justification and Application*, The University of Chicago Press, Chicago 1982, p. 3.

[40] To borrow further from Gewirth, human rights can be conceptualised as claim-rights, structured as follows: A has a right to X against B by virtue of Y. In international law, the respondent B is perforce a state. Gewirth, *supra* note 39, p. 2.

[41] Take the doctrine of *Drittwirkung* (third party effect) as an example. The human rights norm obliges the state not only to refrain from violating it in its own actions and omissions, but also to see to that such non-state actors for which the state is legally responsible under international law refrain from interfering with the said right. A state may deliver on this specific obligation by domestic legislation. To wit, the individual obligation created by such legislation is no longer in the domain of international law.

[42] See Shelley Wright's comparison of how human rights law captures state violence in the prohibitions of torture, while largely ignoring gendered violence. Wright, *supra* note 17, pp. 172-86.

[43] By way of example, industrialised states show a tendency to reduce health care for rejected asylum seekers to a bare minimum of emergency care.

[44] See the case of *Banković and Others* before the European Court of Human Rights (hereinafter ECtHR), where the Court ruled an application by civilian victims of the 1999 NATO aerial attack on the Belgrade TV and radio station to be inadmissible, due to it being outside the jurisdiction of the respondent state parties. The case can be read as a subordination of the right to life as a human right to rules of international law delimiting jurisdictional responsibility of a state. Given that the Federal Republic of Yugoslavia was willing to protect the life and health of Banković and the other claimants., but lacked effective military means to do so, the alleged violation is hardly attributable to them even under the most extensive doctrine of *Drittwirkung*. *Banković and Others v Belgium and Others*, ECtHR, Decision of 12 December 2001, Appl. No. 52207/99.

[45] Kosovo has delivered an illustrative example. For an elaboration of lacunae in the human rights framework, see Nuala Mole, "Who Guards the Guards – the Rule of Law in Kosovo", [2001] *EHRLR* 281.

[46] Guantanamo Bay is perhaps the best known recent example of how persons where moved out of the legal protection owed under norms governing occupation, without moving them into the scope of US constitutional and human rights protection. Another one is the idea presented in early 2003 by the UK and seconded by the Danish and Dutch governments to remove arriving asylum seekers to "transit processing zones" and "zones of

- *Human rights disintegrate into a diversity of singular state obligations*
  States choose to ratify or not to ratify treaties, they enter reservations at times, protest reservations on occasions, allow or deny monitoring, accept or reject decisions by monitoring bodies. The ensuing body of norms is highly diverse and split up into particularised sets of obligation for each state. It forces us into the specifics of treaty law (and the odd customary law argument, although the potential for dissent on genesis and interpretation of such norms dissuades most positivists). The universe of human rights, and its credibility as an umbrella concept in the legal sense, is broken up into a multitude of singular legal obligations. We are left with a host of questions stemming from the law of state responsibility and the law of treaties. Is an alleged violation attributable to a state? Is that state bound by a pertinent human rights obligation? How is that obligation to be interpreted and applied *in casu*?

Hence, positivists cannot affirm that human rights belong to everybody regardless of belonging, merely on account of being human.[47] At any point in time and space, there will be individuals who are denied pertinent human rights, given that they cannot be identified as human rights obligations incumbent on a state in a position to control their implementation.

Here, a divide in the use of language emerges. Different from philosophers, international relationists or human rights advocates, positivist international lawyers cannot speak of a singular "body of human rights" in good faith. If we are true to the methodological tools of legal positivism, "human rights" is but a term of convenience, a conceptual exaggeration that will disintegrate into casuistically determined legal relationships under rigorous scrutiny. As other disciplines are not necessarily fettered by state-centrism and its consequences to the same degree as international law, a generic concept of human rights can very well be designed and make sense in them, as it will do in general, non-scientific parlance. By consequence, international lawyers adapt to a superimposed language which ultimately collides with the dominant methodology used in their profession. This, in turn, creates false expectations and miscommunication, perhaps even a "culture of bad faith".[48]

5. Legal Positivism Cannot Affirm Inalienability

protection" elsewhere to bring them out of the realm of judicial review and fully fledged asylum procedures. To wit, this idea is practiced by Australia since 2001, removing asylum seekers arriving by sea to neighbouring countries within the framework of the so-called Pacific Solution. Again, the wilful diminishment of legal protection can be identified as a core aim. For a legal and theoretical analysis, see G. Noll, "Visions of the Exceptional: Legal and Theoretical Issues Raised by Transit Processing Centres and Protection Zones", forthcoming in 5 *European Journal of Migration and Law* (2003).

[47] At face value, much human rights writings appear to contradict this conclusion. However, authors tend to omit precise definitions of universality or to broadly survey developments towards universality. By way of example, Eibe Riedel has delivered an excellent account of developments in positive law, arguing that most of the norms in the Universal Declaration of Human Rights have acquired the status of customary law. However, he fails to define "universality" and admits the continuing existence of gaps in obligation and implementation. Eibe Riedel, "Universeller Menschenrechtsschutz – Vom Anspruch zur Durchsetzung", in Eibe Riedel, *Die Universalität der Menschenrechte. Philosophische Grundlagen. Nationale Gewährleistungen. Internationale Garantien*, Duncker & Humblot, Berlin 2002, pp. 105-37.

[48] "Finally, a political culture that officially insists that rights are foundational ("inalienable", "basic"), but in practice constantly finds that they are not, becomes a culture of bad faith". Koskenniemi 1999, p 100.

While human rights are generally held to be "inalienable"[49], their unconditional existence as an end cannot be represented in a positivist system.[50] "Inalienability" implies that human rights are not at the disposal of politics. From the perspective of international law, this does not make much sense.

- Technically, human rights norms are hostage of precisely the same mechanisms as other international legal obligations. As any treaty under international law, a human rights treaty is the product of consent among states. States can abstain from becoming a party; parties can alter them or withdraw from them, provided the procedural rules to that effect are duly followed. Should we choose to accord the quality of *ius cogens* to certain human rights norms, this makes change procedurally more demanding, but does not rule it out altogether. In the field of custom, practice can change even to the detriment of human rights, and if *opinio juris* does so, too, any human rights norm can be downgraded or even abolished.

- Legal human rights obligations are derived from the will representation of a particular political community organised in a nation-state with delimited territory.[51] As long as the social-contractarian paradigm is hinged on the idea of the state and replicates all its limitations, there are no cogent reasons to grant rights to non-contractarians "outside" the state. This would explain why Serbian civilians remain unprotected under Belgium's ECHR obligations[52] (in spite of the wording in Article 1 ECHR, which refrains from an explicit territorial confinement of ECHR rights), and it would also explain why refugees, asylum seekers and undocumented migrants find themselves at the verges of, or even outside, the human rights universe.

The technical and the social-contractarian aspects are but two sides of the same coin, both illustrating various dimensions in the political contingency of human rights. A good positivist has to acknowledge that human rights are created by states, and the very same states can alter and abolish them as well. Admittedly, the increasing density in the mesh of human rights obligations makes their alteration or abolishment a complex matter. Yet, provided the political stakes are high enough, there is no absolute impediment for a state determined to liberate itself from its human rights obligations *de lege*.[53]

If we coalesce the state-centric features of international law with the political contingency of human rights, we are left with a paradox. The effective implementation of human rights presupposes functioning and powerful political communities in control of their territory and

[49] The preamble of the 1948 Universal Declaration of Human Rights suggests that the "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world". Universal Declaration of Human Rights (1948), GA Res. 217 A (III).
[50] In his seminal study on the conception of violence, Benjamin opposes positivism with natural law and describes the former as "blind for the unconditionality of ends" ("*blind für die Unbedingtheit der Zwecke*"). Walter Benjamin, *Zur Kritik der Gewalt und andere Aufsätze*, Suhrkamp, Frankfurt 1965, p. 32.
[51] This opens up a vista towards a communitarian argument: "Rights have no separate ontological status; they are a by-product of a particular kind of society... To overemphasize rights in isolation from their social context is counterproductive, potentially undermining the very factors which create the context in which rights are respected". Brown, *supra* note 12, pp. 58-9.
[52] See the case of *Banković and Others* before the ECtHR, *supra* note 44.
[53] In recent years, certain Western governments have indeed publicly discussed the possibility to pull out of core human rights obligations to accommodate counterterrorist agendas. Most notably, the UK has at times questioned its commitment under the ECHR.

population[54], yet the content of human rights cannot be insulated from manipulation by the politics of such communities.

6. Human Rights Beyond the Polis?

This has brought us to a point where no comfortable conclusions await us. As the suffocating embrace of human rights formalists by human rights advocates illustrates, politics colonise human rights in a number of ways. Conversely, as the critiques of human rights remind us, human rights colonise politics.

We are left with the question whether the political space of human rights can be decoupled at all from a specific state community, so as to be truly "human". Are there human rights beyond the polis? And beyond the contract? Apparently, the "white spots" on the map of human rights are beyond the legitimate reach of the polis: "The lack of an autonomous human subject means that human rights advocates' aspirations for a better and more just society must necessarily focus on a beneficent agency, external to the political sphere, to achieve positive ends. There may be a duty to act to fulfil human rights needs but there is no politically accountable institution that can be relied upon."[55] In the following attempt to inquire into the question of polis and contract, I would like to focus on human rights as access rights, as devices for inclusion.

Gert Verschraegen has recently attempted to develop a sociological theory of human rights based on Niklas Luhmann's systems theory.[56] According to Verschraegen's reading of Luhmann, human rights have emerged together with, and are necessary for, the formation of a functionally differentiated society. This society is characterised by the existence of several subsystems – e.g. economy, politics, law, science – which are diverging, yet interdependent spheres of meaning, each hosting its own symbolically generalised medium of communication (e.g. money, power, legality, truth). Notably, these media of communication are not necessarily confined by state borders. Functional differentiation allows society to master an increasing degree of complexity. Human rights regulate the participation of individuals within societal subsystems in a number of ways.

In premodern society, individuals could be wholly included in systems for economy, religion, politics or science. This is no longer possible. In functionally differentiated societies, an individual can engage in different subsystems, yet will not live in them. Fundamental freedoms ensure that the individual is first wholly excluded from society as an individual, allowing him or her to re-enter into sub-systems under specified conditions set up by those (e.g. to possess resources when entering the economy). Any inclusion will only be partial, and life will be characterised by multiple engagements. "By encouraging the individual to participate freely in different function systems and by preventing one subsystem or social group to completely control him or her, human rights strengthen and protect the high degree of individual mobility and communicative openness upon which modern society is built."[57] Additionally, equality rights secure that individuals have access to subsystems regardless of

[54] Gewirth states that the "primary justification of governments is that they serve to secure these rights". Gewirth, *supra* note 39, p. 3.
[55] Chandler, *supra* note 12, p. 84.
[56] Verschraegen, *supra* note 12.
[57] Verschraegen, *supra* note 12, p. 270, with a reference to Luhmann.

social position.[58] Yet, human rights also protect society as a whole and its subsystems from regress, that is, in Luhmann's terminology, "de-differentiation".

Based on Verschraegen's development of Luhmann's theory, one could characterise human rights as access rights. They host a negative component, fending off intrusions into indivdiual freedom of choice and halting the appropriation of individuals by societal subsystems. This creates preconditions for multiple accesses. Moreover, they host a positive component, securing equality and non-discrimination in access to subsystems, governed only by the specific access criteria of that subsystem rather than functionally irrelevant factors attached to the individual's social position. To my mind, there is much merit in this attempt to track the dynamics between exclusion and inclusion hosted in the conception of human rights. Indeed, human rights do exclude individuals from societal organisation first: anyone will enjoy a "fundamental freedom" from total and exclusive inclusion by one single subsystem. However, who will protect the individual beyond this freedom in a pre-inclusionary situation? Effective protection is premised on some form of inclusion. Otherwise put, the protective function human rights are embedded into societal subsystems as, for example, law. Those denied access to that subsystem[59], are denied the protective dimension of human rights. To them, human rights are but radical exclusion, and translate into insupportable freedom.[60] Put in system-theoretical terms, one could claim that human rights place human beings in the environment, and not in the system.

Another aspect of this account of human rights merits our attention. Different from standard liberal-individualist accounts, Luhmannian human rights set societal organisation prior to the modern individual. Their function is to secure autopoiesis through individual participation in functional differentiated societies, and any creation of individual dignity, autonomy or rights is derived from it. This seems to fall in line with the misgivings of critical legal theorists, who suspect human rights for being affirmative of existing power structures.[61] Faced with the question of what the polis of human rights is, a Luhmannian account would point to the functional systems, while the positivist points to the state. Quite clearly, both accounts rest on a logic of exclusion.

Although stemming from starkly different paradigms, the system theoretical account of exclusion through human rights goes well together with Giorgio Agamben's biopolitical conception of human rights. Agamben distinguishes bare life – *zoē* – from political life – *bios* – in his attempts to explain the ordering of societies:

> Declarations of rights represent the originary figure of the inscription of natural life in the juridico-political order of the nation-state. The same bare life that in the *ancien régime* was politically neutral and belonged to God as creaturely life and in the classical world was (at least apparently) clearly distinguished as *zoē*

[58] Verschraegen, *supra* note 12, p. 278.
[59] Again, the "unlawful combatants" at Guantanamo Bay could serve as an example.
[60] German holds the term "*vogelfrei*" for this state, which is characterised by being completely stripped of legal or other protection. It is congruent with Agamben's Homo Sacer – a man who can be killed, yet not sacrificed. See Giorgio Agamben, *Homo Sacer. Sovereign Power and Bare Life*, Stanford University Press, Stanford 1998, p. 71-4.
[61] The linkage between systems theory and postmodern thought (which is a source of inspiration for critical legal theory) is particularly striking in the conceptualisation of exclusion. See Wilhelm Rasch, "The Limit of Modernity: Luhmann and Lyotard on Exclusion", in W. Rasch and C. Wolfe (eds.), *Observing Complexity, Systems Theory and Postmodernity*, University of Minnesota Press, Minneapolis 2000, pp. 199-214.

> from political life (*bios*) now fully enters into the structure of the state and even becomes the earthly foundation of the state's legitimacy and sovereignty.[62]

Seen in such manner, the nation state appropriates birth, and, with it, natural life:

> The fiction implicit here is that *birth* immediately becomes *nation* such that there can be no interval of separation [*scarto*] between the two terms. Rights are attributed to man (or originate in him) solely to the extent that man is the immediately vanishing ground (who must never come to light as such) of the citizen.[63]

Where a human being emerges merely as a human being, he or she is characterised by exclusion. Following Agamben, the refugee brings out the radical crisis in the concept of human rights, [64] included solely by means of exclusion. As bare life is appropriated by politics at the moment of birth through inclusion into the nation, human rights cannot be apolitical. The critiques of human rights exposed in Section 3 above, a system-theoretical account and Agambens reconstruction overlap in their affirmation of the polis and membership as central elements, thus making universality and inalienability contingent on other factors than being human.

7. Conclusion

The fictions of universality and inalienability collude an exclusionary aspect of human rights. It can be laid bare by applying a positivist method, and its logic explored with either a system-theoretical or an Agambenite approach. Human rights take part in the formation of a polis by excluding the bare life of the human being from that community, to then re-include it and subject it to its regulation. Where re-inclusion does not take place, for one reason or another, the exclusionary function of human rights creates outcasts which have no more, are no more than bare life (refugees being a prominent example). Seen thus, human rights constantly remind us how devoid of protection we are outside the polis. At least conceptually, human rights work reasonably well as protective devices once re-inclusion has taken place. Yet, as there is no access right to a polis, there is no right for any human in any situation to have human rights.[65]

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[62] Agamben, *supra* note 60, p. 127.
[63] Agamben, *supra* note 60, p. 128.
[64] Agamben, *supra* note 60, p. 134.
[65] To be sure, this is no candidate for a quick legislative fix to be pursued by lawyers, advocates or others. "Just because on can observe the excluded as excluded does not mean that the excluded can now be painlessly included, for this logical observation also operates by way of exclusion and can only see a former exclusion, a 'latency', by way of new exclusion. Try as we might, we have not developed alternative logics, ones that could promise exclusion-free inclusion. Thus, *remediating* the effects of the process of exclusion can only happen by *replicating* the effects of the process of exclusion." Rasch, *supra* note 61, pp. 203-4 (emphasis in the original).

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