Human Rights Mainstreaming as a Strategy for Institutional Power

This essay is a comment on the proposal by human rights activists and lawyers, made in various international and domestic contexts, for "mainstreaming" human rights into an aspect of the regular business of (international) governance. The comment draws on an overview of the matter by Christopher McCrudden and my own writings on human rights and the "fragmentation" of international law.[1] It also draws on experience accumulated in the context of two consultant studies carried out recently by the Erik Castrén Institute at the University of Helsinki.[2] The main point will be that "mainstreaming" should be understood as a project for seizing institutional power that is profoundly ambiguous in its effects. There is no reason to be either "for" or "against" mainstreaming without a clear sense of what priorities it is intended or likely to support and what foreseeable effect it might have on the allocation of resources among human groups.

The Modesty of Postmodern Human Rights

The call for mainstreaming human rights in the regular business of government has come about as a reaction to a certain failure of the "rule of law." The story is well known. As postliberal ideas of economic and technological progress permeated the ethos of the welfare state, the ideology of the rule of law—general and uniform rules—no longer seemed an adequate instrument of regulation of increasingly idiosyncratic situations. Instead, flexible standards and guidelines were needed that would allow the solution of what were seen as "management problems" by best available scientific and technical expertise.[3] Although the problem of "deformalization" and "bureaucratization" have been known since Max Weber's discussion of law in the conditions of industrial modernity, there was little awareness of its international significance until the 1960s or 1970s. Today, however, debates about informal international "governance" have raised concerns about the fate of the rule of law as power in international institutions is increasingly wielded by expert regimes and networks looking for "optimal" outcomes that tend to be situation-specific. Such concerns are often expressed under the theme of "constitutionalization" of international institutions. This is not the place to examine the direction or ideological underpinnings of that debate.[4]

Human rights, too, arose to counteract the transfer of political power to "regulators" and managers, scientific and economic experts, and professional negotiators.[5] International treaties, for instance, today often come about as flexible "frameworks" that provide procedures for further negotiation or the application of standards of reasonableness, proportionality, and cost-effectiveness. What such treaties will mean

in practice—when it counts—will be decided by the relevant treaty-institution, often a technical or economic expert body, by reference to calculations about the just "balance" or recourse to "best" practice and with the view to an "optimal" outcome. But the consequent need to take account of "all the relevant factors" will inevitably fail to articulate stable commitments or expectations.[6] This will affect all the groups targeted by a particular form of governance, but it will be especially significant for the most vulnerable groups, those whose interests are not well (if at all) represented in the expert bodies to whose discretion the law refers. This will trigger novel claims for absolute, nonnegotiable rules to limit bureaucratic discretion.

The emergence of human rights law (as well as the recent "fight against impunity") gives expression to the search for absolutes in a world whose complexity has created the danger of unfettered relativism and bureaucratic abuse. The language of "rights" contrasts with that of "management" and suggests that there must be some limit to the weighing of costs and benefits—that some requirements are so self-evidently "good" (or some forms of behavior so intrinsically "evil") that they should leave no room to instrumental calculations.[7] Through a language of rights one is able to say, for example, that "indigenous groups should not be forced to leave their homes only because it might be socially useful to set up an industrial area where they live. They have "a *right* to stay there," or "the police may not torture crime suspects however efficient that might be in view of the objectives of criminal policy. Torture is just plain wrong."[8] Even if it is true that in normal situations, public officials may use discretion when they seek for the most "equitable" or "cost-effective" solution, this must be limited by rules that express particularly important values.[9] This is what it means to claim that the "natural place [of rights] must be outside politics, yet constraining politics."[10]

As soon as rights are conceived in this way, they begin to seem extremely valuable. To dress a claim (for resources, for example, or for inviolability, immunity, concern, and so on) in the form of a "right" is to put it in the strongest available terms, even as an administrative veto. It would thus seem very important to know what rights there actually are. But how does one go about determining this? The old rhetoric of "natural rights" suggests that a list of such rights does exist somewhere but provides no access to it that would be independent from taking a stand on issues of political philosophy that have been disputed in the West for the better part of the past two thousand years.[11] It is hard not to dismiss natural law as premodern myth. Moreover, natural rights have frankly undemocratic implications, suggesting as they do that human communities are bound by values that precede them. It depends on political theology.[12]

In the practice of the secular West, however, the determination of what rights there are has been part and parcel of the regular political process in the course of which the beneficiaries of *any* policy (labor policy, welfare policy, criminal policy, environmental policy, and so on) have seemed capable of dressing the benefits they are seeking in terms of their "rights." Hence the bewildering proliferation of rights that has made some rights advocates despair as it has threatened the special dignity and power of rights language.[13] At the same time, absence of a litmus test to distinguish between "genuine" rights and those that reflected just the (egoistic) interests of

the claimants has led to social conflict being increasingly represented as a conflict of rights.[14] To resolve them, legislatures, administrative bodies, and courts have developed complex balancing practices and rights-exceptions schemes that defer to general considerations of administrative policy, public interest, economic efficiency, and so on—precisely the kind of criteria that rights were once introduced to limit.[15] From providing limits to administrative and bureaucratic discretion, rights became dependent on it.

At this point, the push for mainstreaming has emerged as a modest strategy no longer seeking to trump power. "Okay," it suggests, "it may be true that a human rights are only a consideration among others. But at least administrators should pay attention to them in their decision-making." Or, as McCrudden describes the British Race Relations (Amendment) Act 2000, which inspired the his report, any administrative body should, "in carrying out its functions, have due regard to the need to [take rights into account]."[16] This was of course a much more modest strategy than the original claim to endow rights with a "trumping" power. Indeed, perhaps human rights were simply a policy among others (though of course, a particularly important policy) and the real (or reasonable, or realistic) objective was to ensure that due concern was given to them when important decisions were being made.

The Emptiness of Mainstreaming

But what would it mean to "have due regard to human rights"? In order for even the modest policy to work, we should be reasonably able to identify "human rights concerns" in contrast to other kinds of concerns. But this may not at all be possible. Because there are no authoritative lists of prelegislative rights, political actors are always able to dress their claims in rights language. And as every significant rights claim involves the imposition of a burden on some other person, the latter may likewise invoke their preference to be free from such burden in rights terms. Should protesters against genetically manipulated foodstuffs enter the localities in which they are being sold? The protesters invoke their right of freedom of speech—the owners of the locality, their right of ownership. However much a communal policy might be penetrated by a rights ethos, the city officials would receive no significant guidance from it. "Rights," after all, support both sides. They might decide in accordance with their preferences, of course. But was not that precisely what recourse to "rights" was intended to prevent?

One might assume health policy a good target for human rights concerns. But what would this mean? Think, for example, of the decision by the South African Constitutional Court in 2002 according to which South Africa must either require pharmaceutical companies to sell products at determined prices or issue licences for domestic production. Both sides argued on the basis of rights, namely, the "right of pregnant women and their new-born children," on the one side, and the rights of the persons who benefit from the medicines produced through the research activities financed by present drug prices, on the other. We may have sympathy toward the court's final decision. This would not display our commitment to "rights," however, for "rights" support both sides. Instead it merely exhibits our preference for "mothers" instead of "drug-users" in general. As is well-known, the conflict led eventually to a

negotiated settlement within the Cancun TRIPS Council in August 2003, demonstrating how each right was thoroughly negotiable, and negotiated in a thoroughly political process.[17]

Perhaps more familiar is the conflict over freedom rights and security rights that is played out before the whole world under the banner of "fight against terrorism." The problem here is the same as above. In the case concerning the ten-month detention of an Iraqi-British dual citizen, the British court faced with the claim that the detention had been made in violation of the person's human rights responded in the following way:

> The Security Council, charged as it is with primary responsibility for maintaining international peace and security, has itself determined that a multinational force is required. Its objective is to restore such security as will provide effective protection for human rights for those within Iraq. Those who choose to assist the Security Council in that purpose are authorised to take those steps, which include detention, necessary for its achievement.[18]

Even here both sides argue on the basis of rights. Mainstreaming would not advance the assessment of such a situation one bit—that is, it would not do so without a specific political commitment on the decision-maker's part to prefer one type of rights claim to another. At this point, however, "human rights" have completely lost their specificity. If incommunicado detention can be a human rights measure, anything can. Everything will depend on the decision-maker. Which verbal strategy seems useful to justify one's decision?

The conflict between freedom rights and security rights is only one incident in the larger and pervasive set of problems about reconciling individual with collective interests. One example, almost at random, comes from the case law of the European Court of Human Rights, the 1999 case *Chassagnou and Others v. France.* The applicants were small French farm-owners whose lands had been included by communal decrees within the territory of local hunting associations. The farmers opposed hunting on their lands and appealed to Strasbourg for a declaration that the decree authorizing hunting was an interference in their right of property. The court said: "An interference must achieve a 'fair balance' between the demands of the general interest of the community and the requirements of the protection of fundamental rights. . . . There must be a reasonable relationship of proportionality between the means employed and the aim pursued."[19] Here the permissibility of interference in the "fundamental rights" of certain French landowners was conditioned by what the court itself understood as a "fair balance" between the rights and "the demands of the general interest of the community."[20] It is unlikely that the French municipal body had exercised a policy of mainstreaming. But even if it had done so, it would have received no assistance from that policy because—according to the European Court on Human Rights—such policies anyway defer to general interests.

That rights are both unlimited and (thus inevitably) conflictual renders the call for administrative bodies to "take rights into account" empty. If every policy consideration an administrative organ needs to take into account may be framed as a human rights consideration, and if—as human rights organs repeatedly stress—this will

require "striking a balance," then mainstreaming calls upon administrative bodies to do what they would in any case be committed to doing. For "balancing" itself cannot be framed in terms of rights application because its very point is to determine the applicability (and thus the limit) of particular rights in particular circumstances. Or in other words, rights conflicts cannot be resolved by reference to "rights"—only by reference to some policy that enables the determination of the relative power of the conflicting rights. But in such case, mainstreaming has no special meaning whatsoever. It merely calls for reasonable and intelligent adjustment of the conflicting considerations—something that the administrative body was surely expected to do anyway.

Mainstreaming as a Project of Seizing Institutional Power

But if human rights mainstreaming cannot be conceived in terms of advancing some determinate preferences in the bureaucratic governance of modern societies, it does have cultural and institutional effects. It does empower some groups at the cost of other groups. This is brought out in McCrudden's turn to the relationships between what he calls "epistemic communities" and to the way in which mainstreaming "requires considerable cultural change in public bodies."[21] Instead of thinking about mainstreaming as the advancement of *particular* objectives, this invites us to think of it as a strategy for empowering particular types of expertise, systems of knowledge and value, institutional preference and bias. McCrudden puts this in sociological terms as an effort "to ensure that a human rights culture is inculcated in British public authorities."[22] For if we are unable to identify "rights" by analysis of substantive claims, we may be able turn our attention to the cultural preferences of particular groups—groups such as "football fans," "investment bankers," or "left liberals"—and choose from those the one we think most likely to share our preferences. No doubt, the group identified as "human rights experts" might be a good candidate for this purpose.

From this perspective, mainstreaming would signify an effort to empower "human rights experts" in the relevant institution, for instance by directing administrators to be in regular contact with them.[23] How this could be done is discussed at some length in McCrudden's essay. There might be "impact assessments," in which the human rights experts would be appointed to assess the outcomes of administrative policy or participatory systems that provide human rights experts a role in policymaking at different levels of governance. Or there might be commissions or task forces composed of human rights experts or ombudsmen with a supervisory role that other administrative agencies would need to consult regularly in their policymaking activity. These suggestions raise a series of interrelated questions.

One is whether the "epistemic community" of human rights experts can actually be identified with typical preferences. It seems to follow from what was said above that this can be done only with some difficulty. For we now know that *any* group may present itself as a human rights group by articulating its agenda as a human rights agenda. In practice, however, not every group does that. Being associated with human rights may in some contexts be counterproductive owing to the abstraction of such rights or their otherwise negative (left? Western?) connotation. If one is engaged in a negotiation about some aspect of the operation of a new industrial center owned by a transnational company, for example, then making one's claim under labor law may

be a better strategy than making the identical claim in human rights terms. This may be due to the better institutionalization of labor rights, their perceived hardness, or absence of serious controversy about them. On the other hand, a claim traditionally enshrined in some apparently technical area such as procedural law may be enhanced by a human rights association. In a recent article, Carol Harlow, former professor at the London School of Economics and a well-known expert in European Union and administrative law, suggested that "in the present era of human rights supremacy, the best way to constitutionalize due process values or present them as 'universal' is in the guise of human rights."[24] This may not be difficult to recognize as a typical preference of human rights *lawyers* who regularly point to procedural principles such as "due process," inclusion, accountability, and transparency, that are equally arguable in constitutional, administrative, and human rights terms.

Some of the "typical" preferences and biases of human rights experts together with their (predominantly negative) effects have been analyzed by David Kennedy. He suggests that conceptualizing political possibility in a human rights vocabulary may distort or limit the field of political possibility in various ways. For example, it may leave unarticulated concerns that are not easy to articulate in "human rights" terms; it may focus too intensively on governmental behavior, individual entitlements, participation, statehood, and the legal form. It may thus neglect problems of economic distribution or informal patterns of peer control. Human rights may also undermine political representation and the creation of collective utopias. They may highlight the position of lawyers and litigation at the cost of other types of knowledge and practice.[25]

These biases and the associated criticisms are especially relevant with regard to experts who are lawyers by professional training or otherwise oriented in a legalistic manner. But it is not clear that all human rights experts fall under such a label. Many may in fact prefer "soft" or alternative types of procedural or even antiprocedural mechanisms for dealing with rights problems, appeals to an informal sense of charity or compassion; and they may highlight informal citizen activity as the core of their human rights commitment. Such experts would be very sensitive to the kinds of problems Kennedy highlights. They might, for example, not believe that much could be gained by the kinds of procedural reforms Harlow and other lawyers might typically suggest.

Whether any actual human rights policy actually is problematic in the ways pointed out by Kennedy remains to be studied in each case separately. The point made here is only that although in some contexts (in the United Nations or the World Trade Organization, for example) it may be relatively easy to identify those competent to put themselves forward as "human rights experts," the same may not be true in other instances, including those of national or local administrations, or indeed of private organizations or commercial operators. In debates on "corporate social responsibility," for example, the appointed partners from the business community are regularly at loggerheads with experts of nongovernmental organizations. And yet, both speak human rights language—the former often highlighting the importance of a positive business environment for the safeguarding of rights relating to job security and welfare.[26] It is not at all rare for human rights activists to disagree on the right

policy. Like any significant group of political actors, human rights experts are often divided among themselves in such as way that even if we otherwise agreed that "there shall be human rights mainstreaming," we would not necessarily know what this would mean in terms of which groups or which groups' values we ought to advance.

But there is another problem, namely, that even if we know which group we should include and what kinds of language we should learn, it still remains the case that (as Kennedy has also pointed out) this language is insufficiently precise to give much instruction as to what should be done. With the call to advancing, say, due process, transparency, and accountability, not to speak of standards of fairness, reasonableness, and balancing, anything may be attained. Does democracy further a stable environment where rights are routinely respected or undermine it? Experience goes both ways.[27] But the same may be true of more substantive standards. It has recently been argued, for example, that the merger of human rights into international humanitarian law "rather than expanding human protection may serve to undermine it as well as to legitimize violations of the rights of people living under occupation."[28] Again, the question is about the real effects that inserting human rights language in an institutional context achieves. Does it support the kinds of objectives (and people) that its proponents want to support or not? This is a hard question to answer in a general way because a group's position may change: one day one is an occupier, the other day part of an occupied population. In South Africa, much of the struggle against apartheid was waged in human rights terms. As a consequence, strong provisions for protecting human rights were written into the country's constitution. Examined with twenty years' hindsight, one of the most important uses of those provisions has been in support of the property rights of white property-owners. Such problems are about the unforeseen (or foreseen?) consequences that human rights like any other directive languages may have when they are turned into institutional projects; and the banal lesson here is, only, that sometimes the best result—from a human rights perspective—is not to engage the human rights expert but instead a capable economist or engineer.

And then there is the question of indeterminacy. Even as most people would agree that the realization of any significant system of rights depends on the creation of "security and welfare," they would be completely divided as to what is meant by such expressions. For some, "security" would mean the protection of ownership rights, the stability of a country's investment system, say, while for others, it should mean the maintenance of basic social welfare services or traditional patterns of religious hierarchy. That the "welfare" or "security" of one may be attainable only by encroaching on the "welfare" or "security" of another is a simply a truism. But it is one that fundamentally complicates the assessment of any policy in rights terms. *Whose* rights do we have in mind? As part of their human rights agenda, operations under European Security and Defense policy have inserted in their guidelines "ensuring freedom of expression." But, as Tiina Pajuste asks rhetorically, does this mean in view of the positive action that operations should undertake? How far does the duty to inform the local population actually go?[29] It is not that this could not be answered—but the considerations that go toward producing such an answer cannot be separated from the regular considerations of security of the operation, the needs of the local population,

the demands of the EU institutions, and so on—considerations that a professionally conducted operation should anyway take into account.

Eradication of poverty, too, is undoubtedly a widely agreed objective and a criterion to judge a regime. But how to attain this? Through restructuring under the World Bank or nationalizing key industries and regulating foreign trade in view of domestic concerns? Should one integrate in a global economy or refrain from integration and create industries for import substitution? These are precisely the kinds of problems that any serious development policy is bound to confront and in regard to which filtering it through a "human rights based approach" is likely to render little administrative direction. What is needed is the establishment of priorities, as Samuli Seppänen points out, and "under the human rights-based approach it is not easy to establish a priority of rights: human rights law does not recognize a rights hierarchy. . . . If the human rights-based approach does not resolve the issue, prioritization is carried out under other development policies."[30]

A further series of questions concerns the stability of human rights preferences over time and especially the integration of other types of expertise into it. The more human rights experts participate in administrative management, the more they will encounter the difficulty of identifying special outcomes that would emerge from or accord with their self-description as "human rights professionals." The emptiness of rights in view of the choices one needs to make in order to decide rights conflicts or, for example, to attribute resources between groups of rights claimants, will push human rights experts to participate in increasingly detailed and technical analyses of economic efficiency, security, administrative appropriateness, and social causality relating to the alternative patterns of distribution. But this means that the more human rights professionals carry out their activity in a professionally competent way, making arguments and taking positions that seem plausible also from the perspective of the other experts around the negotiating table, the more what they do will come to resemble the activity of those other experts—economic experts, security experts, administrative coordinators, and so on. In the end the question will emerge, whether there is (or *can be*) any distinct commitment to *human rights* that would not be a commitment to a particular theory of economic development, security, or administrative appropriateness. If the answer to the question is no, then what reason is there to think that the preferences or biases of the experts would not, in time, turn to resemble or be indistinguishable from the biases and preferences of economic experts, security experts, or the typical leanings of administrative routine? The paradox appears to be that a human rights preference may stay stable only as long as it does not take seriously the other kinds of preferences represented in the context of professional interaction. But this kind of closing off of the mind from other types of expertise is not likely to enhance the effectiveness or prestige of the human rights actor. It will continue to keep the human rights expert distant from the operative center of the institution where that expert is regarded as administratively autistic.

The Virtues of Utopia and Critique

The preceding considerations, random and tentative as they are, suggest some skepticism about the virtues of human rights mainstreaming as a general, abstract project

of administrative empowerment. It comes with risks: to empower human rights preferences may be to end up supporting the *wrong* preferences. Because one is not an expert in, say, technology or economics, one may not have been able to grasp the real consequences of one's preferred policy. Instead, reliance on rights translates into dogmatic recourse to past institutional experience, ignoring the particularities of the situation where one is acting. This is rights as ideology. Down the road from highly commendable abstract preferences to their application in situations where resources are scarce, choices have to be made and the consequences of those choices are only barely visible, and human rights must become some other technical idiom that allows one to see what is practically significant and to choose between incompatible goods. Even when there is no doubt about the valuable nature of what it is one tries to achieve (''freedom,'' for example, or ''security'' or ''privacy''), this usually suggests very little by way of the details of the reform on which, in the end, everything will depend. To the contrary, repeated use of unobjectionable but open-ended language at the cost of situation-specific analysis may raise the question of the professionalism or bona fides of the speaker. And yet the alternative seems to lie with the choice of another (technical) idiom altogether, together with its attendant bias and structure of authority. No doubt, there is a mid-way where human rights might exist as an awareness or a sensibility that does not become an epistemological obstacle to professionalism—perhaps in the way of Max Weber's ethics of responsibility: the ''slow, strong drilling through hard boards, with a combination of passion and a sense of judgment.''[31] To get there, however, is not to travel outside politics, a place where rights pretend to exist. It is, as Weber of course wanted to say, to travel to the core of politics itself, beyond the repetitive certainties of any technical vocabulary, including the rights idiom.

There is much to be said in favor of human rights—including human rights experts—staying *outside regular administrative procedures*, as critics and watchdogs, flagging the interests of those who are not regularly represented. This would protect those experts from the need to make the kinds of mundane choices that administrators have to make on a routine basis and that always seem to call for a downsizing of one's preferences into pragmatic rules of thumb and ad hoc accommodations. Human rights arose from revolution, not from a call for mainstreaming. One cannot be a revolutionary and participate in the regular management of things without some cost to both of these projects. The more ''revolutionary'' one is, the more difficult it is to occupy those administrative positions in which the main lines of policy are being set. The more influential one is as an administrative or regulatory agent, the less ''revolutionary'' one's policies can be. There is nothing in this dilemma that is specific to rights. It concerns political action and strategy, requiring—as all politics does—a continuously critical and self-critical sensibility that moves between commitment to the idioms in which one has been trained and an ability to not let that commitment block one's view of the consequences of one's action, ''including consequences to [the actors'] inner being, to which they will fall helpless victims if they remain blind to them.''[32]

NOTES

1. J. Christopher McCrudden, "Mainstreaming and Human Rights," in *Human Rights in the Community: Rights as Agents for Change*, ed. Colin Harvey (Hart, 2005).

2. See Samuli Seppänen, *Possibilities and Challenges of the Human-Rights Based Approach to Development* (Helsinki, Erik Castrén Institute, 2005), and Tiina Pajuste, *Mainstreaming Human Rights in the Context of the European Security and Defence Policy* (Helsinki: Erik Castrén Institute, 2008).

3. For the narrative about the demise of legal formalism in postliberal society, see, e.g., Roberto Mangabeira Unger, *Law in Modern Society: Toward a Criticism of Modern Society* (New York: Free Press, 1976), esp. 192–223.

4. On that debate, see, for example, Neil Walker, "Taking Constitutionalism beyond the State," *Political Studies* 56, no. 3 (2008): 519–43; Rosie Cooney and Andrew T. F. Lang, "Taking Uncertainty Seriously: Adaptive Governance and International Trade," *European Journal of International Law* 18, no. 3 (2007): 523–51; Monica Garcia-Salmones, "Taking Uncertainty Seriously: Adaptive Governance and International Trade: A Reply to Rosie Cooney and Andrew Lang," *European Journal of International Law* 20, no. 1 (2009): 167–86; and the response by Cooney and Lang, "Taking Uncertainty Seriously: Adaptive Governance and International Trade: A Rejoinder to Monica Garcia-Salmones," *European Journal of International Law* 20, no. 1 (2009): 187–92.

5. It is a paradox that the dangers of deformalization have been frequently discussed by scholars of the political left who have thus been drawn to support legal formality and the ideas of the rule of law against what they have often interpreted as the "Weimar experience" of the dissolution of law by an antiformal legal theory supporting a corporatist takeover of the state and, ultimately, fascism. The account by Roberto Unger in *Law and Modern Society* belongs to that tradition. For a general discussion, see William E. Scheuerman, *Between the Norm and the Exception: The Frankfurt School and the Rule of Law* (Cambridge: MIT Press, 1995), or Roger Cotterell, *Law's Community: Legal Theory in Sociological Perspective* (Oxford: Clarendon Press, 1995), esp. 160–77. The presumed linkage of legal antiformalism and fascism is also debated in the essays in Christopher Joerges and Navraj Ghaleigh, eds., *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and its Legal Traditions* (Oxford: Hart, 2003).

6. For one standard critique of deformalization and proceduralization of the law, see Jean-Marc Ferry, *De la civilisation* (Paris: Cerf, 2001), 129–41.

7. The latter question has emerged with great force in the debates about the permissibility of torture in the "fight against terrorism." The stakes are well laid out in Jeremy Waldron, "Torture and Positive Law: Jurisprudence for the White House," *Columbia Law Review* 105, no. 6 (2005): 1681–750.

8. Human rights emerged, in the familiar image of Anglo-American jurisprudence, as trump cards in the hands of rights-holders; their point was to override considerations of economic efficiency or administrative policy. For the classic exposition, see Ronald Dworkin, "Rights as Trumps," in *Theories of Rights*, ed. Jeremy Waldron (New York: Oxford University Press, 1984), and Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977).

9. The effort to "take rights seriously," writes one liberal reformer, "is therefore anti-consequentialist in the sense that it regards the protection of rights as placing constraints on efforts to maximise the achievement of even the most worthy goals." Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations of International Law* (New York: Oxford University Press, 2004), 75.

10. Basak Çali and Saladin Meckled-Garcia, "Human Rights Legalized," in *The Legalization of Human Rights: Multidisciplinary Perspectives on Human Rights and Human Rights Law*, ed. Meckled-Garcia and Çali (New York: Routledge, 2006), 4.

11. For the origin of (subjective) rights language in early canon law, see Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law, 1150–1625* (Grand Rapids, Mich.: Eerdmans, 1997), 97–103. For their use in sixteenth-century Scholasticism, see Annabel Brett, *Liberty, Right, and Nature: Individual Rights in Later Scholastic Thought* (Cambridge: Cambridge University Press, 1997).

12. As of course Carl Schmitt well knew. See Carl Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* (Berlin: Duncker & Humblot, 1950).

13. See Carl Wellman, *The Proliferation of Rights* (Boulder, Colo.: Westview, 1999).

14. For this, see my "The Effect of Rights in Political Culture," in *The European Union and Human Rights*, ed. Philip Alston (New York: Oxford University Press, 1999), 99–116.

15. For all this, the best source still is Duncan Kennedy, *A Critique of Adjudication (Fin-de-Siècle)* (Cambridge, Mass.: Harvard University Press, 1997), esp. 97–130, 315–38.

16. McCrudden, "Mainstreaming," 19.

17. The pharmaceutical companies have consistently—and probably not wrongly—argued that effective public health programs require strict protection of intellectual property to medicine. In this regard the TRIPS agreement contributes to the availability of medicines. See Haochen Sun, "The Road to Doha and Beyond: Some Reflections on the TRIPS Agreement and Public Health," in *European Journal of International Law* 15, no. 1 (2004): 123–145.

18. *R. (Al-Jedda) v. Secretary of State for Defence*, Judgment of August 12, 2005, High Court of Justice (Queens Bench Division), para. 104.

19. *Chassagnou et al. v. France*, Judgment of April 29, 1999, European Court of Human Rights, para. 75.

20. Ibid.

21. McCrudden, "Mainstreaming," 24–25.

22. Ibid., 10.

23. In her study on mainstreaming human rights in European Security and defense policy, Pajuste observed that human rights experts clearly preferred integrating them as part of the operations to merely educating the regular administrators in human rights issues, and that this depended on a fear that the latter would apply those rights in a biased way. Pajuste, *Mainstreaming Human Rights,* 94n463.

24. Carol Harlow, "Global Administrative Law: The Quest for Principles and Values," *European Journal of International Law* 17, no. 1 (2006): 206.

25. See especially David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton, N.J.: Princeton University Press, 2004), 3–35.

26. For example, see Merja Pentikäinen, *Yritystoiminta ja ihmisoikeudet (Business Activities and Human Rights)* (Helsinki: Erik Castrén Institute, 2009).

27. See Amy Chua, *World on Fire: How Exporting Free Market Democracy Breeds Ethnic Hatred and Global Instability* (New York: Doubleday, 2003).

28. Aeyal M. Gross, "Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation?," *European Journal of International Law* 18, no. 1 (2007): 4–5.

29. Pajuste, *Mainstreaming Human Rights,* 96.

30. Seppänen, *Possibilities and Challenges*, 97.

31. Max Weber, "The Profession and Vocation of Politics," in *Political Writings*, ed. Peter Lassmann and Ronald Spiers (Cambridge: Cambridge University Press, 1994), 369.

32. Ibid., 367.