Chapter 1

The Indeterminacy of Human Rights

I. Introduction

It is a matter of acute intellectual irony that, in spite of the widespread endorsement of the idea of human rights in the social and political consciousness of modern society, there is no consensus on the nature and character of its most successful rendition in the form of international human rights law. In this most popular representation, it has inherited unanswered questions concerning the nature of rights; where human rights come from, their place in a democratic society, or indeed the nature or consequences of their legalisation. While political ideology may explain aspects of the differences between those who have thought about the matter, it is also true that the conflation of the many dimensions of the human rights idea has not made the search for a consensus any easier. The metaphysical question of what human rights are may be related to, but is an entirely different inquiry from, the implications of their endorsement in a national constitution or international treaty. However, a worthwhile inquiry into the nature of human rights must, of necessity, respond to both metaphysical and tangible questions concerning the nature of international human rights law, as well as the implications of its social construction as a political or legal objective.

This chapter takes a closer look at the imprecision and uncertainty – the so-called ‘indeterminacy’ – of the nature and scope international human rights, often spoken about by scholars but rarely explored in detail. What

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does indeterminacy mean in relation to international human rights? What is the basis of or explanation for indeterminacy? What are scholars’ and practitioners’ reactions to this phenomenon? And what consequences follow the indeterminacy of international human rights? Above all, can this handicap be remedied, and if so by what theoretical or practical means? The question of indeterminacy in this context is less to do with the philosophical explanations about the nature of rights (albeit related) but more focused on the question of the absence of a guiding strategy for the practice or realisation of international human rights as a matter of law. The chapter will assess the value of such a strategy as well as assessing the structural factors embedded in its provenance (in mainstream international law) that make it difficult to predefine such a strategy. In addition, the chapter analyses the previous scholarly efforts to highlight and resolve this issue.

II. Human Rights and International Law

In international law, the uncertainty and imprecision concerning the nature of human rights is a fairly specific matter of legal inquiry; one that may well raise different issues from those known to the mainstream generally. An inquiry into the legal nature of international human rights not only raises issues concerning the distinctness of human rights as a legal construct, but also poses important questions concerning its relationship with related legal fields and regimes including its significance in domestic law as a largely constitutional norm or indeed as an externally inspired obligation from international treaty law. In this regard, differences between the monist and dualist traditions, as well as the contrasts in emphasis between international law and its sub-system of human rights, for example, may have contributed to inconsistencies and contradictions that obfuscate the character of human rights.

There are unanswered questions in the uncertain relationship between the human rights sub-system and the mainstream international law about how an anti-statist system based on individual rights may co-exist with or indeed form a part of a larger system based on consent and sovereignty. Similarly, the aspirations to universality that underlie human rights law can often seem

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2 For a review of the indeterminacy of international law, see, Martti Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument* (Cambridge 2005).