EXPANSIONISM AND THE SOURCES OF INTERNATIONAL HUMAN RIGHTS LAW

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I. INTRODUCTION

The notion of “rights” in international law was first cast to protect States and give the international legal order some plausible theoretical foundations.¹ It is with the positivisation of human rights in the second half of the 20th century and the emergence of what is now called international human rights law (hereafter, “IHRL”)² that the notion of “rights” became primarily associated with the protection of individuals. Interestingly, sources – and thus the question of the techniques whereby norms are ascertained as legal rules – did not prove to be much of an issue in relation to the rights of States.³ In contrast, sources, as they relate to IHRL, are constantly debated. The means by which IHRL norms are identified as international legal rules constitutes a highly contentious question that attracts much attention.

This article discusses the abundant scholarship and practice on the sources of IHRL with a view to showing that legal argumentation on the sources of IHRL is built on the coexistence of exceptionalist claims – whereby sources of IHRL are said to depart from general international law – and generalist claims – whereby sources of IHRL are said to be anchored in general international law. It is argued that this intrinsic ambivalence of the scholarship and practice pertaining to the sources of IHRL is informed by the fundamental expansionist nature of IHRL. The argument is thus made that the constant oscillation between exceptionalism and generalism in the scholarship and practice pertaining to the sources of IHRL can be traced back to the expansionism that lies at the heart of IHRL. Here, the article is an

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² It has been argued that the positivisation of human rights brought an end to the utopia – and the narrative of contestation – of the human rights project. See S. Moyn, The Last Utopia (2012).

³ This can be explained by the fact that the fundamental rights of states performed an ontological and justificatory function for international law as a whole.

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attempt to shed light on the various expansionist uses of the sources of international law.

This article starts by outlining how IHRL scholarship and practice are built on interdependent claims of exceptionalism and generalism and discusses the ambivalence according to which IHRL is meant to be autonomous from general international law, but still part of it (section 1). It proceeds with showing how this ambivalence serves an expansionist project (section 2). This expansionist project is then further examined in relation to the sources of IHRL and the various expansionist uses of sources are discussed (section 3). In a fourth section, the relative successes of such expansionist uses of the sources are mentioned, as well as some of the paradoxes that they bring about (section 4). The article ends with a few concluding remarks (section 5).

A. IHRL’s Ambivalent Narrative: Between Exceptionalism and Generalism

This section argues that IHRL scholarship and practice denote a constant oscillation between exceptionalist and generalist postures. In other words, claims about the autonomy of IHRL from some of the legal categories prescribed by general international law coexist with claims that IHRL remains part of general international law.

Claims of a certain exceptionalism of IHRL abound. In particular, it is regularly contended that IHRL, by virtue of its nature, the non-reciprocal character of the obligations it puts in place, its alleged constitutional nature, or the collective interests it is meant to protect, should be relieved of some of the rigid formal legal categories or modes of legal reasoning prescribed by general international law. Put simply, the contention is that

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