

# INTERNATIONAL PRACTICE OF HUMAN RIGHTS AS LEGAL DEMAND-RIGHTS: A CRITICAL APPROACH

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**Abstract:** Margaret Gilbert's approach to human rights asserts that these are demand-rights, be they moral or legal. As legal demand-rights, human rights result exclusively from an international practice in which states hold a leading position and moral considerations are not of relevance. This paper offers a critique of Gilbert's prominent approach to conceptualising human rights as legal demand-rights. A strongly state-centric approach like this one does not correctly represent the international practice of human rights and may reinforce the dominant role of states vis-à-vis individuals, what contradicts our contemporary understanding of human rights. Moreover, if Gilbert's approach to human rights as legal demand-rights is followed in the way she has proposed, the realisation of these rights could be even more difficult. I suggest that such outcomes can be avoided by accepting the dual (political and moral) nature of human rights.

**Keywords:** Human rights, legal standing to demand, moral rights, international practice, joint commitment, political approach.

**Summary:** 1. INTRODUCTION. 2. HUMAN RIGHTS AS AN INTERNATIONAL PRACTICE. 2.1. Legal demand-rights, joint commitment, and free-standing moral rights. 2.2. International legal human rights and joint commitments. 3. SOME PROBLEMATIC ISSUES. 3.1. Joint commitments: A Limited view of the international human rights practice. 3.2. Reinforcing the dominant role of states. 4. SUGGESTION. 5. CONCLUSION.

## 1. INTRODUCTION

In *Human Rights in Light of the Foregoing*, the last chapter of her book *Rights and Demands: A Foundational Inquiry* (hereinafter *Rights and Demands*), Margaret Gilbert (2018: 338) holds that legal human rights and the corresponding legal standing to demand compliance with them result merely from the international practice led by states. Her view can be included among political approaches to human rights, which assert that the existence and notion of human rights are exclusively connected to current institutional structures, especially within the framework of modern states.<sup>1</sup> Gilbert has previously addressed the topics of rights<sup>2</sup> and human rights,<sup>3</sup> albeit in a very general way. In *Rights and Demands* there is a deeper and more detailed construction, so that can be said that this book contains her most recent and elaborated proposal on this subject, that is part of the broader project she has developed since the publication of *On Social Facts* (1989).

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<sup>1</sup> See, e.g., Besson (2011: 223), Mayr (2012: 73), and Gilbert (2018: 29).

<sup>2</sup> See, e.g., Gilbert, 1999: 143-163; 2012: 301-323; 2014a: 215-256; 2014b: 215-256.

<sup>3</sup> Gilbert, 2010: 1-9.

Gilbert's conception expressly moves away from positions that conceive human rights as rights that we have just because we are human beings, which are labelled as *foundationalist*.<sup>4</sup> She suggests that one can understand human rights as demand-rights that draw on social interaction (Gilbert, 2018: 324, 326-333). For her, human rights can be moral or legal demand-rights, but she focuses exclusively on the latter category. In this sense, she considers that legal human rights exist and that human beings have the legal standing to demand respect for these rights only because states allow it through joint commitments among states (Gilbert, 2018: 332-33). This way of arguing leads to morality playing a secondary role in the international practice of human rights.

Like Gilbert, I think that today the idea of human rights becomes more acceptable and, consequently, more realisable if it is separated from foundationalist conceptions – which often mask metaphysical assumptions – and is connected to social facts, to social interaction. By contrast to Gilbert, I take the view that moral considerations are decisive for the existence of legal human rights and for granting the legal standing to demand respect for them. This paper addresses two problematic issues in Gilbert's state-centric conception of human rights. Firstly, her proposal does not adequately represent the international human rights practice, contrary to what she claims. Secondly, it may reinforce the dominant role of the state vis-à-vis the individual. Both shortcomings are fundamentally generated by diminishing the role of moral considerations in the international human rights practice. After this introduction, the second section of the paper delineates the general framework of Gilbert's understanding of human rights as legal demand-rights. The third section discusses what the problematic issues are and, finally, the fourth section suggests a way of overcoming the shortcomings of Gilbert's approach. For the sake of concision and clarity, this paper mainly considers *Rights and Demands*, albeit it will also refer to other works by Gilbert when necessary.

## **2. HUMAN RIGHTS AS AN INTERNATIONAL PRACTICE**

### **2.1. Legal demand-rights, joint commitment, and free-standing moral rights**

Gilbert develops her idea of human rights within the broader framework of her theory. In *Rights and Demands*, Gilbert analyses the nature of rights and how they are founded. To that end, she considers the well-known four-fold classification of legal advantages proposed by Wesley Hohfeld, who distinguished between privileges or liberties, rights or claim rights, powers, and immunities (Gilbert, 2018: 15-24). She argues that claim rights are rights 'in the strictest sense' (Gilbert, 2018: 24) and have primacy over the other three advantages because they are always present in any situation as they are also used to enforce liberties, powers, and immunities. In other words, the holder of a claim right has the standing to demand respect for liberties, rights in the strictest sense, powers, and immunities. Instead of the term *claim rights* used by Hohfeld, Gilbert prefers to use the label 'demand-rights' (Gilbert, 2018: 61).

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<sup>4</sup> See, e.g., Luban, 2015: 269, 277. These approaches are also called *naturalistic*, *humanist*, *orthodox*, *general*, *moral*, or *philosophical*. See further details in Beitz (2009: 49) and Gilbert (2018: 29).

Demand-rights are present in our daily lives, such as when two people agree to go for a walk in the park. But they have an institutional dimension as well, which means that there can also be institutional demand-rights. A constitutive part of institutions are rights: institutional rights are part of institutions. This is the case, for instance, with respect to religious, sports, and above all legal institutions (Gilbert, 2018: 30). Legal rights are institutional rights, and because of this, they as such lack normativity, as people can always question if they have ‘reason to take account of it in any way’ (Gilbert, 2018: 31). The mere existence of legal rights is not a strong enough argument for their enforcement. Something else is needed to justify the normativity of these rights. According to Gilbert, joint commitments are the source of the normativity of legal rights; they ‘are the inevitable outcome of making the joint commitment’ (Gilbert, 2018: 294). People can go to court to enforce their rights because a joint commitment is in place that empowers them to do so. By virtue of the joint commitment, people in a given society have the right to demand against each other that they respect the legal system in general. This argumentation is called the ‘joint-commitment argument’ (Gilbert, 2018: 240).

*Joint commitment* is a technical term created by Gilbert that has been present throughout her works,<sup>5</sup> playing a significant role in her view of normative and political phenomena as social facts. Joint commitments are formed by ‘two or more people’ (Gilbert, 2018: 31)<sup>6</sup> who decide to act together as a body, as a unity for a common goal. It is a commitment of the will, which implies that the freedom of those who commit is fundamental (Gilbert, 2018: 162-169). People who enter the joint commitment build a normative bond that grants rights and duties to the participants, and each participant can demand from all others that they fulfil their duty, can impose sanctions on them and so on: ‘It is in the context of their *co-authorship* of the joint commitment that each has the *authority* to call each to order’ (Gilbert, 2018: 171).

It is worth noting that Gilbert does not deny that there are also moral demand-rights. What she refuses is the idea of *free-standing moral rights*; that is, moral demand-rights that do not have as their source a joint commitment and are simply based on absolute moral values (Gilbert, 2018: 236, 278, 326). This means that, according to her, there are no demand-rights, whether moral or legal, without appealing to joint commitments.<sup>7</sup> Gilbert’s understanding of legal demand-rights and joint commitments determines to a large extent her approach to human rights. I will proceed to explain how this works.

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<sup>5</sup> Gilbert first referred to the idea of joint commitment in *On Social Facts*, chapter 4. The idea has appeared repeatedly in her writings. See, for instance, Gilbert 1999: 143-163; 2006: chapter 7; 2013: 899-905; 2014: chapter 2.

<sup>6</sup> As claimed by Gilbert, there are also personal commitments. See, for instance, Gilbert, 2014: 31: ‘A personal commitment is a commitment that is brought into existence by one person alone. That person can, further, terminate or rescind it simply by changing his or her mind. A personal decision, for instance, generates a personal commitment’. In other words, personal commitments need just the will of one single individual to exist. I focus exclusively on interpersonal behavior and responsibilities in relation to rights and human rights. Thus, personal commitments do not play a prominent role in this paper.

<sup>7</sup> In the same vein, Gilbert indicates that the foundation of a society and the political obligation to maintain and respect its institutions is based on joint commitments and not on moral arguments. See Gilbert, 2014a: 389-394, 406.

## 2.2. International legal human rights and joint commitments

As noted above, Gilbert argues against the view of free-standing moral rights and, consequently, she also rejects the idea of human rights as free-standing moral rights (Gilbert, 2018: 332-333). Holders of human rights as free-standing moral rights would not have ‘the standing to demand the objects of their rights’ (Gilbert, 2018: 333)<sup>8</sup> because they are not the outcome of a joint commitment. Gilbert certainly accepts that there are other kinds of moral rights, which are based on joint commitments and can be seen as human rights (Gilbert, 2018: 332), although she does not offer an exhaustive presentation of these kinds of rights. However, accepting that moral human rights may exist does not mean affirming that they are the only real human rights. Human rights also exist in the legal realm. Moral human rights as moral considerations can be useful to legitimise legal human rights, but Gilbert does not suggest that this is necessary. Or as she puts it, in line with Buchanan: ‘the law can confer the relevant legal standing on an individual’ (Gilbert, 2018: 334-335), even if there is nothing morally sufficient in the individual to justify it. It seems that moral and legal human rights can exist in total separation from each other. Nevertheless, they have something in common: both types of human rights need joint commitments to justify the standing to the demand of the rightsholder (Gilbert, 2018: 332-333).

Like scholars such as Beitz and Buchanan,<sup>9</sup> Gilbert advocates a political approach to human rights. Such an approach is *practice-dependent*<sup>10</sup> because it is not primarily built on theory, but on the practice of human rights. For her, the contemporary concept of human rights is mainly the result of international developments (Gilbert, 2018: 338). She thus concentrates on the understanding that human rights are legal demand-rights that form part of an international practice (Gilbert, 2018: 333-336). To assert that human rights are an international practice means that they must be analysed based on the normative reality that occurs in the international sphere. Gilbert follows Beitz stating that this international practice is a social practice, i.e., it is ‘a pattern of normgoverned conduct whose participants understand it to serve certain purposes’ (Gilbert, 2018: 338). In her view, international treaties can be seen as ‘a paradigm case of a joint commitment’ (Gilbert, 2018: 339).

In this spirit, and consistent with the argument that she has previously developed, the source of human rights as legal demand-rights can only be the corresponding joint commitments. If not, the holders of human rights would not have the legal standing to demand the objects of their rights. States are responsible for concluding the corresponding joint commitments (Gilbert, 2018: 337), which they carry out through treaties and other international documents such as declarations and so on: ‘Insofar as the international practice of human rights involves more than “one shot” treaties and declarations, where

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<sup>8</sup> Gilbert does not say it, but her vision also calls into question the theories of authors such as Feinberg (1973: 84-97), Alexy (2004: 15-24), Campbell (2004: 11-30), Tasioulas (2013: 293-314; 2015: 45-76), and Gilbert (2018: 113, 131). These authors, among others, assert that human rights are essentially moral rights that refer to absolute values.

<sup>9</sup> See, e.g., Beitz (2009: 13) and Buchanan (2013: 5-6).

<sup>10</sup> See similar approaches in Luban (2015: 274-277), Beitz (2009: 42-47; 2020: 1-20), and Sangiovanni (2020: 1-16).

the parties' representatives sit down and agree, in one way or another, it could also in principle at least comprise rules, conventions, or customs themselves constituted by joint commitments' (Gilbert, 2018: 339). It should be noted that Gilbert takes a broad view of international human rights practice, so that it is not limited to judicial decisions. International human rights practice encompasses actions and procedures of states' entire institutional framework for entering joint commitments and granting the legal standing to demand. Thus, this is a political conception, as previously stated.

According to Gilbert, citizens allow their states, through a foundational joint commitment, to approve the given international norms on human rights, and states, in turn, adopt the corresponding international norms that are derived from joint commitments between them. Therefore, we are co-creators of those declarations and treaties, i.e., we are co-creators of legal human rights (Gilbert, 2018: 340-341). Nonetheless, it must be noted that her reliance on Beitz leads her to the view that states are 'the central participants in the practice and its principal targets' (Gilbert, 2018: 339) and that they are the principal parties that jointly commit to create legal human rights and to grant the corresponding legal standing to demand. Undoubtedly, the preponderance of states also reinforces the legal character of human rights. It is because of the appropriate joint commitments between states that citizens hold human rights against their own and other signatory states (Gilbert, 2018: 339). Given that background, people are human rights holders because they belong to a concrete political society that has the corresponding joint commitments in place and not for the simple reason that they are human beings or citizens (Gilbert, 2018: 339).<sup>11</sup>

The core point I would like to highlight in this paper is that Gilbert downplays the importance of moral considerations for the existence of legal human rights and the corresponding legal standing to demand respect for them. Both exist, she would say, only because of joint commitments between states. As a result, Gilbert's theory does not adequately represent international human rights practice and tends to reinforce the dominant position of the state relative to individuals. I will argue later (sections 3 and 4) that moral considerations are relevant to our current conception of international human rights and, as such, they are as indispensable as the political procedures performed in the joint commitments by states.

To close this section, may I say that Gilbert most of the time speaks of citizens as holders of human rights, since they are the ones who legally belong to the political community, namely, to the state. However, she also argues that all people who live in a specific territory – citizens and residents – must be holders of these rights and have 'the standing to demand conformity to the practice of human rights' (Gilbert, 2018: 341). For this to happen, a broader joint commitment 'comprising both citizens and other residents as well' (Gilbert, 2018: 341) should be reached. This confirms the political character of her conception since possession and realisation of human rights basically depends on the existing institutional structure. In the next section, I will outline the most important problematic issues of Gilbert's political approach to human rights as legal demand-rights.

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<sup>11</sup> See a similar standpoint in Habermas, 1996: 155-157.

### 3. SOME PROBLEMATIC ISSUES

Prior to my critique, I would like to draw attention to three practical consequences of Gilbert's state-centric view of human rights as legal demand-rights. The first and most evident consequence is that Gilbert lifts the metaphysical veil with which many human rights theories are covered, assigning human beings the primary function in the creation and realisation of these rights. This is a positive thing, because even though we can commit the worst abuses against human beings, it is always encouraging to know that what happens to human rights is the exclusive result of our action. Thus, the transparency of a position that makes the content of the concept dependent on human beings is one of its central benefits.

The second consequence is that Gilbert's position is in line with international human rights law, which expressly assigns the role of addressees of these rights to states and, more specifically, requires them to design national legal frameworks that enable the realisation of human rights that they have approved at the international level. By way of example, the preamble of the Universal Declaration of Human Rights (henceforth UDHR) states that human rights 'should be protected by the rule of law' and that states have to implement 'progressive measures, national and international' to secure the universal and effective recognition and observance of human rights.<sup>12</sup> This should be highlighted as a third crucial result, as she manages to circumvent, to a certain extent, one of the weakest aspects of international law: the lack of institutions with coercive powers. In practical terms, it is necessary and desirable that states be 'the central participants' and 'the principal targets' (Gilbert, 2018: 338) of human rights. State's action is a guarantee for realising human rights.

All the same, careful consideration of Gilbert's approach shows that there are some problematic points that run counter to the contemporary international practice of human rights and, most of all, could make it even more difficult to implement them. The following pages set out two of these problematic points and their most emblematic practical consequence which concern the role of states.

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<sup>12</sup> Similar examples include the International Covenant on Economic, Social and Cultural Rights (henceforth ICESCR), art. 2(1): 'Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures'; the International Covenant on Civil and Political Rights (henceforth ICCPR), art. 2(2): 'Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant'; the Vienna Declaration and Programme of Action (henceforth VDP), para. 15: 'There is a need for States and international organizations, in cooperation with non-governmental organizations, to create favourable conditions at the national, regional and international levels to ensure the full and effective enjoyment of human rights. States should eliminate all violations of human rights and their causes, as well as obstacles to the enjoyment of these rights'.

### 3. 1. Joint commitments: A Limited view of the international human rights practice

Some scholars<sup>13</sup> hold that states are crucial to the realisation of human rights. As we saw above, Gilbert follows this path and agrees with Beitz in his view that states have a fundamental function in the international practice of human rights. Nevertheless, whilst states are crucial for realising human rights, this does not in any way support the view that legal human rights and the corresponding legal standing to demand are entirely dependent upon joint commitments by states. The fact is that the international practice, i.e., treaties, declarations, and other types of international human rights norms to which Gilbert constantly refers, asserts the opposite of what she claims. The UDHR, the ICESCR, and the ICCPR, for instance, hold that states *recognise* human rights, which means that these rights exist even before the UDHR and any other legal document that refers to them.<sup>14</sup> If we are more accurate and consider the question about the source of human rights, we find that the preambles of the ICESCR and the ICCPR state that human rights ‘derive from the inherent dignity of the human person’. At the same time, the preamble of the VDPA – one of the most influential declarations on human rights – recognises and affirms ‘that all human rights derive from the dignity and worth inherent in the human person’.

At first glance, these three texts would be good examples of what Gilbert has in mind when she mentions agreements that ‘would be seen to be a paradigm case of a joint commitment’ (Gilbert, 2018: 339) due to the broad support they receive from the international community.<sup>15</sup> Despite this, the paragraphs cited above back the opposite position that Gilbert has tried to sustain throughout *Rights and Demands*. Contrary to Gilbert’s argument, the two international treaties and the VDPA maintain that human rights are fundamentally rights whose existence does not depend on the will of states. What is

<sup>13</sup> See, e.g., Arendt, (1968: chapter 9), Alexy (1998: 254-258), Martin (2013: 8), and Donnelly (2013: 32-33).

<sup>14</sup> UDHR, preamble: ‘[r]ecognizing and affirming that all human rights derive from the dignity and worth inherent in the human person’; ICESCR, preamble: ‘[c]onsidering that, in accordance with the principles proclaimed in the Charter of the United Nations, 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’; ICCPR, preamble: ‘[c]onsidering that, in accordance with the principles proclaimed in the Charter of the United Nations, 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’. I mention these three documents because they are part of the International Charter of Human Rights, but there are other international documents that refers to the same idea. See, for instance, Convention on the Elimination of All Forms of Discrimination against Women, preamble: ‘[n]oting that the Universal Declaration of Human Rights affirms [...] that all human beings are born free and equal in dignity and rights’; International Convention on the Elimination of All Forms of Racial Discrimination, preamble: ‘[c]onsidering that the Universal Declaration of Human Rights proclaims that all human beings are born free and equal in dignity and rights’; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, preamble: ‘[r]ecognizing that those rights derive from the inherent dignity of the human person’; African Charter on Human and Peoples’ Rights, preamble: ‘[r]ecognizing on the one hand, that fundamental human rights stem from the attributes of human beings’; American Convention on Human Rights, preamble: ‘[r]ecognizing that the essential rights of man are not derived from one’s being a national of a certain state, but are based upon attributes of the human personality’.

<sup>15</sup> The ICESCR and the ICCPR have been ratified by 173 states and 171 states, respectively; as for the VDPA, 171 states have adopted it by consensus.

more, they uphold that the human rights outlined in the above-mentioned treaties and declarations drew on one of the most important moral value of contemporary societies: human dignity. In the context of the above-mentioned texts, states do not determine whether there are human rights. Contrary to what Gilbert thinks, it does not follow from the fact that human rights are an international practice of states that legal human rights and the legal standing to demand their enforcement are, plainly and simply, the outcome of a political process. As Gilabert puts it, ‘that we have to “recognize” humans’ dignity and their rights is incompatible with assuming that the utterances of the Declaration simply create them’ (Gilabert, 2018: 41). It would certainly be absurd to deny that human rights treaties and declarations have a conventional nature. But one must hold in mind that the purpose of the agreement on which these texts are based is not to create human rights, but to express the willingness of states to accept that such rights already exist – even before they recognise them. And both the pre-existence of human rights and their recognition by states do have an impact on the granting of the legal standing to demand that they are respected.

In this sense, the Inter-American Court of Human Rights has held ‘that human rights are inherent attributes of human dignity’, and the ‘first obligation assumed by the States Parties [...] is “to respect the rights and freedoms” recognized by the Convention’ (I/A Court H.R., Case of Velásquez Rodríguez v. Honduras. Merits. Judgment of July 29, 1988: para. 165). A similar criterion is to be found in some advisory opinions of this court. For instance: ‘The protection of human rights, particularly the civil and political rights set forth in the Convention, is in effect based on the affirmation of the existence of certain inviolable attributes of the individual that cannot be legitimately restricted through the exercise of governmental power’ (I/A Court H.R., advisory opinion OC-6/86 of May 9, 1986: para. 21); ‘the Inter-American system has established that from the rights recognised to human beings derive their essential character. Therefore, these rights “are not derived from one’s being a national of a certain state, but are based upon attributes of the human personality”’. The existence of the rights recognised in the Convention corresponds to the very nature of human beings as subjects of rights’ (I/A Court H.R., advisory opinion OC-22/16 of February 26, 2016: para. 108).<sup>16</sup> This is an international practice of human rights that has been accepted and applied by member states of the Organisation of American States. This shows at least that Gilbert’ point of view is not as unanimous as she thinks.

Gilbert could simply reply that even if human rights exist irrespective of states’ will, only the joint commitment of states grounds the legal standing to demand that these rights be respected. Behind such an assertion lies a false dilemma fallacy regarding what the political reality of human rights is. It is true that the formal political process – such as joint commitments between states – is essential for individuals to have the legal standing to demand, but this does not mean that such a process is sufficient. Politics, law, and morality are social realities that are interconnected and complement each other when arguing in the normative sphere (Nino, 1994: 79-83). Moral argumentation constantly appears in the political-legal discourse to provide legitimacy and justification. In the human rights

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<sup>16</sup> Regarding the advisory opinion OC-22/16, see also paragraphs 46, 48, and 109.



realm, states assume – by means of international practice reflected in declarations, treaties, judicial decisions of international courts, etc. – that the rights that have been recognised are morally sound. And it is this moral relevance that justifies individuals having the faculty to demand that political institutions respect their human rights.

Take, for instance, the ICESCR and the human rights to work (art. 6.1), to social security (art. 9), to health (art. 12), and to education (art. 13) contained therein. The ICESCR does no more than recognise that we are dealing with situations which are extremely valuable for human life. If we dispense with such situations, there is a risk that our lives will be profoundly damaged. It is precisely this what makes these rights morally valuable, and this in turn leads to the demand for the support of political institutions to protect them. The legal standing to demand the protection of our human rights does not solely depend on the formal joint commitments of states, but also on moral considerations that justify the granting of such legal standing to demand. Thus, the status of the human in moral terms is present in international human rights practice (Luban, 2015: 269; Gilibert, 2018: 43). The explanations of social reality can rarely be made from a single perspective, and this is what happens in the specific case of the legal standing to demand respect for human rights: it is the convergence of moral considerations and the political process of joint commitments by states that gives rise to its existence. This would dissolve the false dilemma fallacy into which some strong supporters of Gilbert's ideas might lapse.

Peremptory norms, also known as *ius cogens*, could be an example of what has been said so far. The main feature of peremptory norms is that they cannot be modified by states, so that a 'treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law' (Vienna Convention on the Law of Treaties: art. 53). Although legal scholars profusely discuss which norms have the status of *ius cogens*, such a status is doubtless given by the international practice to some human rights: prohibition of torture, genocide, crimes against humanity, racial discrimination, slavery, and the right to self-determination. These norms result in *erga omnes* obligations that constrain every state, independently of any prior commitment, ratification, or voluntary recognition. States cannot get into any joint commitment against these norms since they are not allowed to decide whether to follow them or not. Although only some human rights are peremptory norms, this also would confirm that moral considerations limit the will of states while deciding to grant the respective legal standing to demand respect for such rights. Discussions around what norms qualify as *ius cogens* are certainly extensive and complex, but they would also offer a reasonable path to explore the ways in which morality relates to joint commitments regarding human rights. Unfortunately, such a task exceeds the scope of this paper.<sup>17</sup>

In sum, while joint commitments by states are necessary to have legal human rights and legal standing to demand respect for human rights, this political process alone is not enough. Moral considerations also play a key role in international human rights practice to both enter treaties and declarations and grant a legal standing to demand.

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<sup>17</sup> For further details, see O'Connell (2011: 78-98), (Šturma 2015, pp. 11-21), United Nations (2019: 13-16), and Murphy (2020: 68-86).

### 3.2. Reinforcing the dominant role of states

Gilbert admits that states are responsible for human rights violations. However, what she emphasises throughout her work is the role state have in creating and granting the legal standing to demand. This way of thinking has a practical consequence that could have a profound negative effect on our political life. Her state-centric conception tends to reinforce the dominant position of states vis-à-vis the individuals.

The fact is that states are in a dual position concerning human rights: they are currently the most important institutions for ensuring respect for human rights – as already noted –, but they are also undeniably the principal violators of human rights. Unfortunately, the large institutional apparatus available to states has not only been used to protect the interests of individuals but also to harm them in the most essential aspects of human existence: life, health, freedom of expression, etc.<sup>18</sup> One of the most horrible experiences that confirms this has been the Nazi regime, and there have been, and there are many others: Lenin and Stalin installed deliberately a regime of terror in the Soviet Union. Today Venezuela – among many other states – is following their path: ‘From 1 January 2014 to 15 July 2020, the non-governmental organisation (NGO) Foro Penal registered 3,479 cases of politically motivated detention, of which 902 (26 per cent) were selective detentions, with the remainder taking place in the context of protests’ (United Nations, *Report of the Independent International Fact-Finding Mission on the Bolivarian Republic of Venezuela*, 2020: para. 25). Even many states that do not use their institutions to violate human rights of individuals directly present significant problems, as their malfunctioning facilitates or even permits human rights violations, such as Colombia: ‘In 2020, OHCHR registered the killing of 133 human rights defenders [...]. The killings of human rights defenders occurred primarily in areas with insufficient State presence’ (United Nations, *Situation of Human Rights in Colombia*, 2021: para. 21). Other states have efficient institutions but violate human rights of individuals in specific situations. See, for instance, the case of Shamina Begum, who joined ISIS in 2015 and was stripped of her British citizenship by the United Kingdom for security reasons. The fact that she cannot return to the United Kingdom to defend herself judicially<sup>19</sup> clearly violates her human rights to a fair trial and due process, as set out in articles 10 and 11 of the UDHR. These are just a few examples that show how states limit the extent of human rights.

Following Gilbert’s approach, the end result is that states have the final say in deciding which human rights norms will turn into treaties, and thereafter into national law, and which ones will not. In this vein, this approach is problematic because it leads us to the assertion that human rights are legally respected only to the extent to which states accept that such rights must be respected by themselves. This is like allowing criminals to choose whether they want to be governed by law or not. This is inconsistent with the logic of any normative system, in particular any *legal* system. Even more important in the field of human rights is that this way of seeing things contradicts the historical development of

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<sup>18</sup> See, e.g., Donnelly, 2013: 33.

<sup>19</sup> See BBC, 2021.

human rights, which are mainly the result of dramatic social and political confrontations against states that oppress their citizens.<sup>20</sup> In Habermas' words: 'The appeal to human rights feeds off the outrage of the humiliated at the violation of their human dignity' (Habermas, 2010: 466).

Gilbert might retort that individuals are co-creators of law and legal human rights since states create international treaties on human rights, and turn them into legal rights, based on a foundational commitment that authorises them to do so, i.e., citizens authorise states to make these decisions on their behalf. One could then ask whether a foundational joint commitment can really be seen as a very broad power given to the state to decide whether to grant individuals legal standing to demand. From a practical perspective, I do not believe that this first joint commitment should be seen as a blank cheque – a quasi-Hobbesian power – on human rights granted to states. Again, it seems to be a mistake to claim respect for human rights and, at the same time, to allow the perpetrator of violations against them to decide if and to what extent he is obliged to respect such rights. Resorting to the foundational joint commitment is an argumentative device that fits well in Gilbert's proposal but is far away from reality. The history of human rights, once again, speaks against such an argument: it is not a history of agreements between the state and citizens, but of the struggle for their respect. This is the core and original idea of human rights: to limit the power of the state vis-à-vis individuals, and there are strong moral arguments for this.

Of course, it can be said that the foundational joint commitment authorises states just to adopt treaties and other international norms when they deem that the political and economic conditions exist to do so. This would serve to confirm that joint commitments by states only enforce the will of citizens, but this does not exclude that moral considerations are always present as arguments that demand and legitimise the existence of legal standing to demand. Here we return to the same point already discussed: moral considerations are part of the explanation why citizens possess the legal standing to demand; joint commitments by states are neither the final nor the only reason.

Perhaps a supporter of Gilbert's theory might argue that human rights movements act in line with Gilbert's proposal when they seek to force states to recognise and respect these rights. However, this view is not in harmony with Gilbert's approach. Joint commitments are commitments of free will, and if social movements force states to recognise human rights, there would be no joint commitment at all, since states would recognise human rights because of the coercion being exerted on it.

Before concluding this section, I would like to add a brief comment. Gilbert asserts that states are 'the principal targets' (Gilbert, 2018: 338) in the international practice of human rights and that individual citizens not only have derivative demand-rights against other signatory states, but also against their own state (Gilbert, 2018: 31). It is as if solely states are responsible for the realisation of human rights. Yet we must recognise

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<sup>20</sup> See, e.g., Felice (1996: 1-8), Zeleza (2007: 475-485), and Lohmann (2015: 375).

that there is a progressive establishment of institutions that try to promote respect for human rights in real life, both in the international and regional spheres. The International Criminal Court, the Inter-American Court of Human Rights, the African Court on Human and Peoples' Rights, and the European Court of Human Rights are some of the official organisations that work to enable the enjoyment and respect of human rights. Some other organisations, such as the Office of the United Nations High Commissioner for Human Rights, monitor the activity of states constantly and help them to improve and promote respect for human rights. Without corresponding action by states, the realisation of human rights cannot be achieved, but this objective, however, cannot be a task exclusive to states, as Gilbert's approach seems to assert. What I want to draw attention to is that, even when she talks about the responsibility of states, she reinforces their dominant position vis-à-vis individuals.

More importantly, the wide margin of freedom that Gilbert leaves to states for celebrating joint commitments can become a very dangerous instrument against individuals. At the end of the day everything related to the granting of the legal standing to demand the respect for human rights would remain in the hands of states. Thus, Gilbert's state-centric conception can lead to practical consequences that reinforce the dominant position of states vis-à-vis the individuals, who are the victims of human rights violations.

#### 4. SUGGESTION

In what follows, I would like to make a brief suggestion to make Gilbert's proposal more suitable regarding the international practice of human rights. I accept Gilbert's anti-metaphysical approach and the value of legal rights for the realisation of human rights; I think it is feasible to base human rights on social interaction – on social facts – that takes place in human rights-based societies. Discourses that start from the idea that we possess human rights by nature, because of God or reason are fictions that try to silence the fact that these are rights that are more fragile than we want them to be. However, as I mentioned before, Gilbert asserts that human rights can be both moral and legal, but these two approaches need not coincide; at the same time, she pays special attention to the political aspect. Thus, according to her, human rights as legal demand-rights and the corresponding legal standing to demand compliance with them can be regarded independently of possible moral considerations.

In contrast to Gilbert, I think that it is necessary to accept that the reality of these rights is inevitably linked to our deepest moral concerns. The satisfaction of our most vital needs and the protection of inalienable interests are at stake here. In other words, we are dealing with our basic understanding of what means to be human being, and this is morally significant. The moral considerations I am mentioning are anti-metaphysical and originate in social reality. The discourse of human rights grounded in political and moral practice as social facts would nourish, strengthen, and enrich the international practice of human rights. Put another way, I am convinced that the international practice of human rights implies a dual nature: political and moral. These two aspects cannot go through different paths, since they are connected to each other in such a way that there is a

constant continuity between them that manifests itself in practice. Consequently, it is most appropriate to propose approaches that combine these two spheres.<sup>21</sup>

In proposing the connection between anti-metaphysical morality and political aspects of human rights, I do not remain on a theoretical level. On the contrary, I believe that there are pragmatic reasons for it, i.e., international human rights practice shows that moral considerations, as well as political processes, have crucial impacts on the realisation of human rights and on the existence of the legal standing to demand. Such reasons are pragmatic since they arise directly from the practice of human rights and not from theory (Luban, 2015: 275).

Three pragmatic reasons are important here. First, as I have shown above, moral considerations occupy a prominent place in the contemporary international practice of human rights. That is why, for instance, human dignity is one of the essential and cross-cutting moral values in the legal notion of human rights.<sup>22</sup> Exactly the same can be said regarding equality, and it is impossible to envision human rights apart from or in denial of this fundamental moral value.<sup>23</sup> Second, the legal-political process embodied in the joint commitments by states is not sufficient in itself to legitimise and justify the content of these rights nor the possession of the legal standing to demand. This is also a task of morality.<sup>24</sup> For example, the human rights to a fair trial and to health are legitimate and we have the corresponding legal standing to demand compliance with them not just because it is established by certain legal norms that represent joint commitments between states but because there are moral reasons that support them. Third, moral considerations serve as a motivation to support legal norms that attempt to realise respect for human rights. As Gilibert (2018: 43) has argued, morality helps to maintain the stability of the legal regime of human rights. This third reason requires a special attention, as it alludes directly to the realisation of human rights, something to which Gilbert is committed, if I understand her correctly.

Such pragmatic reasons in support of the connection between the political and the moral approach, in the way I suggest in this paper, helps avoiding the negative consequences mentioned in the third section. Firstly, the anti-metaphysical moral considerations are compatible with the idea of joint commitments by states, and it is useful therefore in explaining why legitimacy, the legal standing to demand, and the realisation of human rights are also connected to moral considerations without going against the idea that these rights are outcomes

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<sup>21</sup> See similar approaches in Lohmann (1998: 89-95), Sangiovanni (2017: 191), and Gilibert (2018: 32-37). They certainly have different views on moral in general, but they agree on how decisive moral considerations are in the elaboration of an appropriate conception of human rights.

<sup>22</sup> See footnote 14. The preamble of the UDHR, for instance, is categorical in “affirming that all human rights derive from the dignity and worth inherent in the human person”.

<sup>23</sup> See, e.g., UDHR, preamble and articles 1, 7, 10, 16, 21, 23, 16; ICCPR, preamble and articles 3, 14, 23, 25, 26; ICESCR, preamble and articles 3, 7, 13.

<sup>24</sup> Unlike in nature, where things just *exist*, in the normative realm it is necessary to justify and legitimise why norms regulating the behaviour of agents are created. The main reason is that norms normally seek to regulate freedom, to limit it. In this sense, legal human rights and the legal standing to demand their respect limit the freedom of action of states, which are fundamental actors in socio-political life. Therefore, justification and legitimation are relevant to a theory of the existence of legal human rights.

of social interactions. Secondly, since moral considerations are independent of states and states are in fact bound to them aiming to promote respect for human rights, individuals retain their primary role in the international practice of human rights, which averts the highly undesirable consequence of reinforcing the state's dominant position vis-à-vis individuals.

I am aware that there are other points in Gilbert's approach to human rights that require a more detailed and in-depth analysis, her strong voluntaristic point of view being one of them (Steinfath, 2019: 177-194). However, a detailed analysis of these issues goes beyond the scope of this paper.

## 5. CONCLUSION

Gilbert's political point of view about human rights is a persuasive one. Yet, I have assessed the claim that her proposal contains some problematic issues connected to her conception of human rights as legal demand-rights. First, I have shown that her proposal does not fully coincide with the international human rights practice. The rationale is that this practice does not only focus on joint commitments by states as source of legal human rights and the legal standing to demand compliance with them, but they are also largely determined by moral considerations. Without moral considerations it is impossible to understand the international practice of human rights in its entirety: why they exist, why we have the legal standing to demand respect for these rights, and how it is possible to realise them.

Second, Gilbert's approach could lead to a practical consequence that is very detrimental for individuals. In this regard, this paper has highlighted that the main strength of Gilbert's approach seems to also be its main weakness, namely, the institutional character that prioritises the function of states or the state-centric conception. State institutions are indisputable supports for the realisation of human rights, which are achieved, for instance, through the judiciary and political policies. On the other side of the coin, human rights have as principal goals to reject and limit the exercise of arbitrary state power over individuals and, at the same time, to make states establish minimum conditions for a dignified life within the framework of social justice. Positioning states as the leading participants in human rights matters and allowing the existence of legal human rights and the legal standing to demand to depend entirely on the will of states – not to mention that their enforcement is the exclusive responsibility of states – makes it more complicated to achieve both goals and may leave the individuals defenceless vis-à-vis states. Such a state-centric conception is a dangerous move that can have practical consequences that pose a threat to the very idea of human rights and their realisation.

Such consequences can be overcome by means of an approach that supports the moral and political nature of human rights rooted in social reality. Let me get this straight: I do not deny the strengths of Gilbert's political approach when it comes to understanding the reality of human rights. What I argue is that joint commitments between states can only explain a part of the international practice of human rights, as moral considerations also play a leading role. Both aspects, moral and political, are interconnected and it is a mistake to lessen the importance of any of them. International practice is emphatic on this matter and there are pragmatic reasons to accept it.

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