Between Sovereign Prudence and Global Jurisprudence: The Evolution of Supranational Courts and Cosmopolitan Norms in Human Rights Discourse and State Practice

ROZPEDOWSKI, JOANNA

Between Sovereign Prudence and Global Jurisprudence: The Evolution of Supranational Courts and Cosmopolitan Norms in Human Rights Discourse and State Practice

Joanna K. Rozpedowski

A Thesis presented for the degree of
Doctor of Philosophy

School of Government and international Affairs
University of Durham

Supervisor
Professor David Held

February 2019

Between Sovereign Prudence and Global Jurisprudence: The Evolution of Supranational Courts and Cosmopolitan Norms in Human Rights Discourse and State Practice

Joanna K. Rozpedowski

Abstract

To the chagrin of many committed realists, states today operate in an indubitably ethical environment influenced by a revival of the cosmopolitan tradition, whose central tenets uphold that: (a) individuals are the fundamental units of moral concern and ought to be regarded as one another's moral equals; (b) whatever rights and privileges states have, they have them only in so far as they thereby serve individual's fundamental interests; (c) states are not under a greater obligation to respect their individual member's fundamental rights than to respect the fundamental rights of foreigners. The appearance on the topographic map of inter-state politics of new actors, institutions, and standards of accountability and layers of governance has resulted in the reframing of the state's own sovereign political authority under the aegis of international law. This has prompted a recognizable shift from realpolitik based in self-serving state interests to humanitarian cosmopolitanism; a turn from the state prerogative of self-defense to the responsibility to prevent and protect; and, most importantly, a repudiation of ethics based on the exploitation and instrumentalization of human subjects and citizens and a reinforcement of concerns over human beings qua persons, who, endowed with inalienable rights that extend beyond the provenance of any one statist regime, give renewed salience to an enlightened cosmopolitan sentiment of thinking nothing human alien. The dissertation will aim to explore the impact and purpose of supranational judicial arbitration and international courts, in particular, the International Court of Justice (ICJ), the European Court of Human Rights (ECtHR), the Inter-American Court of Human Rights (IACHR), and the International Criminal Court (ICC), and their growing relevance in international relations and global governance. The study, rooted in cosmopolitan orientation, will attempt to define emerging accountability frameworks for transnational human rights violations within a predominantly state-centric political paradigm, analyze emerging normative frameworks for transnational human rights obligations, and delineate theoretical, legal and political channels for rethinking the relationship between power, ideas, and international institutions in the areas of global multilateral governance and international humanitarian and human rights law.

Declaration Page

This thesis is the result of my own work. Material from the published or unpublished work of others which is used in the thesis is credited to the author in question in the text.

…02.15.2019…
Signature Date

TABLE OF CONTENTS

Abbreviations

AP1	Additional Protocol 1 of June 8, 1977 to the Geneva Conventions
DRC	Democratic Republic of Congo
ECHR	European Convention of Human Rights (1950)
ECtHR	European Court of Human Rights
GCIV	Fourth Geneva Convention (1949)
IAHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHL	International Humanitarian Law
IHRL	International Human Rights Law
LOAC	Law of Armed Conflict
OAS	Organization of American States
UNSC	United Nations Security Council

To my beloved parents

Anna & Jerzy

INTRODUCTION
TECTONIC PLATES OF GLOBAL JUSTICE

"The limits of my language are the limits of my world."
-Ludwig Wittgenstein

Towards a Cosmopolitan Conception of Law

When in 1948, only three years after the conclusion of the most pernicious conflict of the twentieth century, the framers of the Universal Declaration of Human Rights transcribed the words, "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood,"[1] they could not have known that the wounded, but recalcitrant international state system and the entrenched, but capricious interest-driven political environment would effectively mute their full symbolic and legal weight until the dawn of the new millennium.

Gradually, however, as the importance and condition of sovereignty and territorialization as casus belli in international relations were undermined and diminished by the processes of economic and political globalization, the normative foundation of the legal order has been shifting from state-sovereignty-oriented approaches and its traditional emphasis on security, territory, borders, and statehood, to human-being-oriented approaches that focus on the security of persons and peoples, creating, in an otherwise confrontation-prone socio-political milieu, a space for an enlightened *orbis pacificum*, which holds perpetrators of crimes offensive to human conscience and dignity to the highest possible legal and moral standard encapsulated by the Geneva and Hague Laws and numerous international treaties, statutes, and conventions.

This trend reveals` a novel socio-political experience, which urgently necessitates the establishment and support of enforceable legal frameworks for navigating and coordinating policies and practices that simultaneously (i) instill and maintain respect for essential human rights, and (ii) consolidate and advance a sphere of communal inclusion through legal instruments and a supranational court system in order to maintain the momentum of the cosmopolitan moment in international relations. Since, much of cosmopolitan political theory deals with "ideal" scenarios within which basic moral principles, according to which a just society is to be arranged, operate and are satisfied, its

[1] The Universal Declaration of Human Rights. 1945. Article 1 <http://www.un.org/en/documents/udhr/ >

practical import to existing political and social contexts is limited.[2] Likewise, a difficulty exists in designing institutions that react to the idealistic sensibilities of cosmopolitan orientation and address themselves to the identification, clarification and redress of grievous wrongs. Thus, arises a fundamental question about the relationship between abstract moral standards of cosmopolitanism and cosmopolitanism as an institutional practice.[3]

The primacy of the state as the source of legitimacy and authority in the international system, as the central player in international law and international relations, as the sole author and subject of international law, as the one and only representative of its citizens on the international stage, and lastly, as the only worthwhile unit of analysis in the study of international relations has been tested by key policy challenges ranging from arms trade, terrorism, and international criminal accountability.[4] The sheer intensification of debates concerning the status of universal human rights in the context of the international state system, refugee, immigrant and asylum status of the internally displaced persons and crimes against humanity, alone, have considerably augmented the conceptual and practical fabric of inter-state relations. The Charter of Fundamental Rights, the European Convention of Human Rights, the establishment of the International Criminal Court, the European Court of Justice, and the European Court of Human Rights have collectively inserted into the legal lexicon a new vocabulary and provided a necessary institutional umbrella that has limited the arbitrary state violations of the rights and dignity of persons, irrespective of their existential and (a)political status.

It is now commonly recognized that the "traditional Westphalian conception of international law being state-centered is becoming increasingly insufficient, if not inappropriate, in a global society where non-state actors wield great power"[5], gain from enormous flexibility and boast of substantial and evolving political influence. Therefore,

---

[2] Piernik, Roland and Werner, Wouter. 2010. "Can Cosmopolitanism Survive?" in Roland Piernik and Werner Wouter (eds.) *Cosmopolitanism in Context: Perspectives from International Law and Political Theory*. Cambridge: Cambridge University Press. p. 281.
[3] Ibid., p. 279.
[4] Biersteker, Thomas et al. 2007. International Law and International Relations: Bridging Theory and Practice. New York: Routledge. p. 17.
[5] Creutz, Katja. 2013. "Law versus Codes of Conduct: Between Convergence and Conflict" in Jan Klabbers and Touko Piiparinen (eds) *Normative Pluralism and International Law: Exploring Global Governance.* Cambridge: Cambridge University Press. p. 166.

conceptual understanding and theoretical underpinnings of the system ought not lag behind. Both Koskanniemi and Kennedy argue that subdividing theories of international law into neat dualisms is insufficient to capture the lived complexity of the field and the probematique it is tasked to handle. Rather than offering a resolution to central international legal questions, the field's routine overreliance on doctrine, history, and theory - Kennedy contends - only further reproduces them.[6] Koskanniemi, on the other hand, bewails the narrow focus of the profession on formal and substantive interpretations "without suggesting a plausible account of the relations between them."[7] His *From Apology to Utopia* (1989) is an attempt to redress some of the ills plaguing the field, while *The Gentle Civilizer of Nations* (2001) promises to diagnose the historical, cultural, and attitudinal assumptions that shaped modern international law and in no small measure continue to define it. Koskenniemi also shows the importance of balancing and rebalancing the universal and the particular, the dynamic and the formal approaches to law in order to reflect "social reality" or lived experience.[8] More importantly, international law's most difficult task remains in balancing itself between apology and utopia, Koskenniemi contends, that is between history, which reflects its content, and its optimism in the awesome opportunity to reshape reality along liberal values it commonly espouses.[9]

Diagnosis of the Problem

Since few substantive rules exist to govern behavior of actors, who by definition do not fall under the purview of international law – such as, multinational corporations and organizations, individuals, and other non-state and private entities and actors – a considerable rethinking and retooling of international law as a process and mechanism for governing behavior and streamlining relations must be made. The dissertation sets out to

---

[6] Kennedy, David. 2006. "The Last Treatise: Project and Person. (Reflections on Martti Koskenniemi's *From Apology to Utopia*)" <http://www.law.harvard.edu/faculty/dkennedy/publications/LastTreatise.pdf> p. 9

[7] Koskenniemi, Martti. 1989/2005. *From Apology to Utopia: The Structure of International Legal Argument.* Helsinki: Finnish Lawyers' Publishing Company. Epilogue.

[8] His method is not rigorous, and "it has been set aside in an effort to create intuitively plausible and politically engaged narratives about the emergence and gradual transformation of a profession that plays with the reader's empathy" – Koskenniemi in *The Gentle Civilizer of Nations,* p. 10.

[9] Koskenniemi writes: "International law is a complex set of practices and ideas, as well as interpretations of those practices and ideas" and can't be dissociated from politics … International law is also a terrain of fear and ambition, fantasy and desire, conflict and utopia, and a host of other aspects of the phenomenological lives of its practitioners." In *The Gentle Civilizer of Nations*, p. 7.

diagnose the contemporary international landscape and map out recent developments in international adjudication and contemporary jurisprudence in order to point to significant constraints, lapses, and voids as well as advances already made in some of the more dominant discourses of our time – that is, the human rights discourse and international law's *pro homine* turn.

The following analysis of four main judicial regimes aims to illustrate how international courts construct a more cosmopolitically oriented view of international relations and subtly 'nudge' states into cooperation. In this way, international law is not only, as Goldsmith and Posner in *The Limits of International Law* (2005) argue, endogenous to the state but exogenous in effect and born out of a prior collective will of states to accede to the language and governing principles of international law. By extension, international human rights law - supported by coextensive laws of armed conflict or international humanitarian law - has allowed humanity to assert itself through law, which provides individuals unprecedented access and the vocabulary needed to gain standing in the international arena.

The preceding raises a number of relevant questions upon which the subsequent chapters aim to further reflect. Does cosmopolitanism require legality? What types of laws does the proverbial 'love of humanity' or 'international altruism' - to which cosmopolitan sentiments have been reduced to by their critics - require in arbitrating questions of population displacement, chronic refugeeism, illegal immigration, state surveillance, foreign aid and poverty, humanitarian intervention, protection of civilians against state aggression in times of war and peace? If cosmopolitanism remains at the level of emotion it will be weak enough to be "motivationally reasonable"[10]. What types of institutions and what types of international legal regimes, then, could provide a realistic and consequentialist basis for acting upon and fulfilling cosmopolitan duties?[11] If institutions are capable of (i) "assent without making extraordinary psychological and physical

[10] Posner and Goldsmith contend that any theory that "aims to be realistic and consequentialist … must be motivationally reasonable. It must be capable of assent without making extraordinary psychological or physical or moral demands, and it must set forth plausible mechanisms for achieving these ends." (*The Limits of International Law,* p. 209).

[11] Assuming of course, that the fundamental presupposition behind cosmopolitan orientation – that of, holding every human being's life as equally valuable regardless of standing or nationality – is uncontested.

demands" and (ii) "set forth plausible mechanisms for achieving these ends"[12], should not political theory scholarship reinvest itself anew in ascribing cosmopolitan duties to institutions, particularly, international courts vested with the capacity to provide legal vocabulary for transnational rule and claims-making across borders and irrespective of state preferences and interests? These and similar questions will be further explored in the chapters that follow.

Transnationalism and Cosmopolitan Constitutionalism

At present, three significant contributions to the theorization of cosmopolitan law have to be acknowledged: Neil Walker's *Intimations of Global Law* (2014), Jeremy Waldron's *Partly Laws Common to All Mankind* (2012), and Ruti Teitel's *Humanity's Law* (2011). All three advance a view of law's commitment to universality and globality, while also recognizing the plurality of legal regimes broadly sourced from international and national, civil and common law traditions. Especially contentious cases of (i) whether or not "application of the death penalty to a juvenile constituted 'cruel and unusual punishment' within the meaning of the Eighth Amendment of the US Constitution"[13], (ii) whether executions of foreign nationals on US territory is an abrogation of the Vienna Convention obligations by U.S. courts relying on "procedural default"[14] rule, or (iii) whether extraordinary renditions of foreign criminal or terrorist suspects constitute not only 'cruel and unusual punishment' but violate due process of law, individual constitutional rights, and international human rights, presently call on, both, international and national courts. Stephen Breyer has aptly recognized that courts must become increasingly mindful

[12] Goldsmith, Jack and Eric A. Posner. 2005. *The Limits of International Law.* Oxford: Oxford University Press. p. 210.

[13] Peat, Daniel. 2014."Partly Laws Common to All Mankind": Foreign Law in American Courts by Jeremy Waldron." *The Cambridge Law Journal* 73(3) p. 641.

[14] "Procedural default rule is a procedural concept followed by the U.S. Federal Courts. The procedural default applies in two contexts. Firstly, when a petitioner does not exhaust his/her state remedies because the petitioner fails to fairly present an issue to the state courts, the federal district court must treat the issue as procedurally defaulted. Secondly, the rule provides that federal courts will not review a claim procedurally defaulted under state law when the last state court to review the claim clearly and expressly states that its judgment rests on a procedural bar, and the bar presents an independent and adequate state ground for denying relief." < https://definitions.uslegal.com/p/procedural-default-rule/> In cases where a foreign national is involved, the rule requires that the defendant be given time and opportunity to raise the question of their Vienna Convention rights before the national court proceeds with either formal charges or convictions, thus ascertaining that the national court is not in violation of the Convention and the defendant exhaust all foreseen remedies.

of a multilayered nature of cases the courts are asked to adjudicate on account of "foreign persons and activities, foreign commerce…and foreign threats to national security" posed by an "interdependent world – a world of instant communications and commerce, and shared problems of … security, the environment, health, and trade, all of which ever more pervasively link individuals without regard to national boundaries." [15] The common vernacular needed to address the intricacies and legal conundrums stemming from the above, have led Waldron to posit that in engaging in a work of positive legal translation and

> "by adducing foreign sources, courts are in fact drawing upon a body of extant transnational legal principles, *ius gentium*. These principles are identifiable by a process of induction from the domestic laws of states around the world, and are understood to be a 'set of principles whose authority stemmed from the fact that they had established themselves as a normative consensus on the topics that they addressed among lawmakers, judges and jurists around the world'. These principles … form a non-binding source of law capable of being drawn upon by domestic courts."[16]

Transnational legal consensus so understood ensures that laws are predictable, stable, and reasonably accommodated and harmonized across jurisdictions, and individual claims to adjudication are not only normatively sound but shared across borders. The normative principles of this greatly expanded juridical landscape, Teitel contends, have already been successfully inscribed into three leading regimes of international law: (i) the law of war, (ii) international human rights, and (iii) international criminal justice. All three, are grounded in the protection of humanity at the domestic, regional and international levels, and as such are well equipped to supply a viable answer to the leading challenge of our times: What do we owe each other?

An international consensus on the fundamental rights and entitlements fostered by international judiciaries permits for the solidification of commonly held values, which once congealed into a system of law with predictable outcomes, becomes increasingly intolerant of conceptual fits and anomalies. Same standards and expectations created by the acceptance of common normative foundations across borders, for Waldron, presuppose by

---

[15] Breyer, Stephen 2015. The Court and the World: American Law and the New Global Realities. New York: Vintage Books. p. 4.
[16] Peat. 'Partly Laws Common to All Mankind', p. 641.

extension a minimum commitment to universal authority of *ius gentium* or 'a common law of mankind' from which those norms derive their full legal weight and are assumed to be of an *erga omnes* character. "Global law" so understood, "has no *a priori* territorial limitation and purports to cover all actors and all activities relevant to its remit across the globe."[17]

What is the remit of cosmopolitan law then? Walker in Intimations of Global Law enumerates three criteria according to which law can become global, both, in aspiration and practice. Global law must locate (i) its sources in UN Treaties, Conventions, Statutes, and opinio juris; (ii) it must be global in applicability or have the potential thereof; and (iii) have broad effect on subsidiary mechanisms and processes.[18] Transnational law (Waldron), global law (Walker), or Humanity's law (Teitel)[19] so conceived is first and foremost a "language of accountability"[20] which creates consensus across jurisdictions by deeming certain values as inherent to a well-ordered society and so fundamental to human flourishing as to be non-negotiable and non-qualifiable irrespective of cultural context, disposition, or legal tradition. The emerging transnational legal order aspires thus in the very sources of the law to establish a legal regime, which extends the scope of individual responsibility, challenges traditional limits of legal accountability, casts into doubt unstable binaries and categories between citizens and aliens, combatants and civilians under international law. A regime so conceived treats "legalization as a tool for shaping state behavior" that is in keeping with secular and humanist "just war" tradition, where international criminal justice and supranational adjudicatory norms play a "conspicuous role in foreign affairs"[21] by assisting in deterrence, reconciliation and dispensation of criminal justice.[22] This anthropocentric orientation of law aims to "globalize the regulation of violence"[23] and provide a judicial mechanism to counterbalance a "security system that is increasingly ill adapted"[24] to escalating transnational threats such as poverty, disease,

[17] Walker, Neil. 2014. *Intimations of Global Law.* Cambridge: Cambridge University Press. p. 21.
[18] Ibid., p. 20-24.
[19] Or what I collectively refer to as cosmopolitan law.
[20] Teitel, Ruti. 2011. *Humanity's Law.* Oxford, Oxford University Press. p. 162.
[21] Ibid., p. 75.
[22] Ibid., p. 81.
[23] Ibid., p. 105.
[24] Ibid., p. 120.

environmental degradation, proliferation of nuclear, radiological, chemical and biological weapons, transnational organized crime, terrorism, and inter- and intra-state conflict.

Under the auspices of the cosmopolitan law regime, states have a positive obligation to protect individuals from harm, and the international community has a responsibility to intervene when minimum standards of protection are not met or otherwise abandoned. The cosmopolitan framework takes human security as a "prerequisite for social cooperation, citizen and worker participation and good governance"[25], which offers an "interpretative guidance" in decision making via mobilization of the rules of international humanitarian law that are of a non-derogatory, *erga omnes* character.

With globalization's spectacular undoing of relevant affiliations and loyalties, cosmopolitan law has a potential to offer a more robust protection of rights within and across national borders and compel states to engage in a balancing act of state interests and human security as well as extend recognition and protection of the rights to life, humane treatment, and judicial protection within and across borders. By globalizing the "regulation of violence"[26] novel discursive lenses, legal tools, and judicial mechanisms, which reach beyond the confines of the state, can be invoked and mobilized in order to address the root causes of conflict and resolve problems according to a "fixed scheme above the claims of the parties"[27], thereby extending much needed protections to the most vulnerable. Cosmopolitan law (i) embraces and advocates, therefore, a rethinking of the entrenched notion of state sovereignty as it has historically developed in international relations; (ii) places the human at the center of the moral universe; (iii) treats the individual as the object and subject proper of law and politics; and (iv), seeks to protect fundamental human interests in a world increasingly defined by tensions, transitions, and crises that lie beyond the control of any one statist regime or far exceeds domestic legal mandate and existing remedies.[28]

---

[25] Ibid., p. 156.
[26] Ibid., p. 105.
[27] Ibid., p. 123.
[28] Select sections have been taken from my previously published book review for the American Political Science Association's *Law and Politics Book Review* <http://www.lpbr.net/2014/06/humanitys-law.html>

Dissertation's Remit

The following pages aim to explore the impact and purpose of supranational judicial arbitration and international courts and their growing relevance in international relations and global governance. The study, rooted in cosmopolitan orientation, will attempt to (i) define emerging accountability frameworks for transnational human rights violations within a predominantly state-centric political paradigm, (ii) analyze emerging normative frameworks for transnational human rights obligations, and (iii) delineate theoretical, legal and political channels for rethinking the relationship between power, ideas, and international institutions in the areas of global multilateral governance and international humanitarian and human rights law.

It is important to note that the above trends in legalization or judicilization of politics and humanization of international law are overseen by the burgeoning network of international courts and tribunals, which for Ulfstein, represent "constitutionalization' of international law by its empowerment of the international judiciary"[29], which progressively resembles its domestic counterparts. Further, Ulfstein contends, international courts fulfill or exercise constitutional functions by means of routine interactions with national constitutional organs, and are endowed with the powers of judicial review of other international organizations.[30] Thus obligations *erga omnes* presuppose the existence not only of a minimal consensus on the regulative principles guiding and operationalizing processes and functions of international law, but also, evidence a "constiutionalist paradigm", which once congealed into a "a body of (international) constitutional order … provides some glue to hold actors together, because it sets out common objectives or aspirations, and defines the rules of interaction."[31] Furthermore, democratic constitutional experience suggests that rights and obligations accrue to individuals endowed with full legal personality. Global constitutionalism supports this reading and holds that "the ultimate normative source of international law is … humanity, not sovereignty." [32] Individuals, and those entities endowed with legal personality – including international and

[29] Ulfstein, Geir. 2009. "The International Judiciary" in Klabbers, Jan, Anne Peters and Geir Ulfstein, *The Constitutionalization of International Law.* Oxford: Oxford University Press. p. 141.
[30] Ibid., p. 141.
[31] Peters, Anne. 2009. "Membership in the Global Constitutional Community" in Klabbers, Jan, Anne Peters and Geir Ulfstein, *The Constitutionalization of International Law.* Oxford: Oxford University Press. p. 154.
[32] Ibid., p. 155.

non-governmental organizations – are thus a primary center of legal and moral concern; they are the subjects-proper of law, who possess a right to have rights, actively participate in the process of law-making via proper adjudicatory mechanisms; have the capacity to enforce the law in appropriate forums; are guaranteed individual protection against unjustified encroachments; and, as legal subjects, fall under proscribed modes of individual liability, responsibility, and obligation. Constitutional dimension to international law is also concerned with preventing or limiting the exercise of arbitrary state power and offering means for redressing an inherently unequal balance of power between states and individuals, especially in cases of state immunity, diplomatic protection, or when wide discretionary powers claimed by states in times of national security crises threaten fundamental human rights provisions.

As normative foundations of the global legal order shifted from state-sovereignty to humanity, this "human turn" or, more precisely, this "humanitarian turn" has raised the importance of regional and international judiciaries, such as the International Criminal Court, the International Court of Justice and the European Court of Human Rights, in furthering and advancing the humanity-based scheme of jurisdiction that follows the person. The recognition of human rights- and claims-based approaches by supranational judicial bodies constitutes a leading contemporary discourse that co-evolves alongside such paradigmatic norms as inviolability of state sovereignty, territorial integrity, and superior prerogatives of state security.

Context and Overview

The growth of the international legal norms regime has prompted, in the international political arena, a shift from realpolitik based in self-serving state interests to humanitarian cosmopolitanism; a turn from the state prerogative of self-defense to the responsibility to prevent and protect; and, most importantly, a repudiation of ethics based on the exploitation and instrumentalization of human subjects and citizens and a reinforcement of concerns over human beings qua persons, who, endowed with inalienable rights that extend beyond the provenance of any one statist regime, give renewed salience to an enlightened cosmopolitan sentiment of thinking nothing human alien.

The above does not mean to suggest, however, that cosmopolitanism as an ideal is not hampered in practice. Buchanan, for one, has pointed to the lack of cosmopolitanism's institutional focus, its misconceived penchant for jumping from particularized moral concerns to generalizable principles without concern for the process of their codification and institutionalization. Others allege that the mere existence of a desirable state of affairs does not suggest the existence of an actionable principle. And, even if, a principle can be derived, one ought to be weary of its hidden imperialist underbelly and a capitalist zeal for remaking the world in the image of liberal Western institutional order and particularized ethical codes of behavior, which emanate therefrom. Yet, to give into the arguments posed will inevitably lead to a conceptual paralysis, whereby any and all institutional paradigms rooted in Western political theory and liberal approaches to law and politics will be undercut by questions regarding their loaded origin and historical attributions. For one, it must be assumed that international judicial bodies intent on clarifying and defending international human rights are geographically and ideologically circumscribed, but their admittedly socio-geographic limitations ought not be taken for intellectual ones. While it is true that both cosmopolitanism and international human rights law are Western constructs and the institutions created for their expression are of distinctive liberal origin,[33] it would be a mistake, as will be shown subsequently, to reduce them to a possessive set of tentacles of an inherently exploitative capitalist order.

If, therefore, law is an instrument of social change, then customary international law oriented toward a more humane cosmopolitan order has become an important source of socialization of state and non-state actors actively participating in that order. Humanitarianism in laws of war, transnational protection of human rights based in human dignity necessitating a more robust framework for humanitarian intervention, have acquired a "strong [international] moral backing" and a legal sanction affecting state behavior.[34] The process of socialization has met with considerable attention from constructivists such as Thomas Risse and Kathryn Sikkink, who have identified three types

[33] In *Journeys to the Other Shore,* Roxanne Euben illustrates a dynamic flow and exchange of ideas and dialogical engagement between the Orient and the West dating to the ancient times, and effectively challenges the entrenched presuppositions of a highly divided and antagonistic world order wherein the East is erroneously perceived as being steeped in inflexible and "backward" traditionalism, which continues to this very day to be inherently opposed to the ever progressive system of Western values and mores.
[34] Biersteker, International Law and International Relations, p. 146.

of socialization: (i) "tactical adaptation in the face of pressure (i.e. from human rights activists), (ii) persuasion of state actors as to the moral imperative of the norm; and (iii) institutionalization and habituation."[35] A resulting three-stage "life-cycle" of norms, Finnemore and Sikkink argue, ensures norm internalization/domestication, acceptance and institutionalization, habituation and compliance through: (i) norm emergence facilitated by "'norm entrepreneurs' who focus attention on new norms by creatively 'framing' them within political discourse. (ii) By means of the use of organizational platforms and non-governmental institutions, norms reach a 'tipping point' and 'cascade' down to state parties, who rapidly adopt them. (iii) And "internalization [or] the point at which norms have been accepted so widely as to be taken for granted and as such compliance with them becomes uncontroversial."[36]

A school of thought within the discipline of political science, realism, has vociferously and staunchly argued, however, that international politics is a zero-sum game, which does not abide by the demands or normative constraints of international law and in the Thucydidean spirit compels the 'strong to do what they can and the weak to suffer what they must.' Rather, temporary military alliances and security arrangements[37] formed for the benefit of well-defined state interests are the only politically expeditious means that impact and influence the behavior of states in the international arena. Law among nations, *ius gentium*, is but an "illusion, a sophisticated kind of propaganda – a set of rules that would be swept away whenever the balance of power changed."[38] Likewise, a sophisticated language of rights, "purposefully unenforceable" inhibits attempts of remedying human rights violations, "because countries fundamentally disagree about what the public good requires and how governments should allocate limited resources in order to advance it."[39] Even neo-realists such as E.H. Carr, do not explicitly challenge the above, but merely recognize the co-dependent nature of international law on politics. Politics is a pre-legal arrangement and law, Carr argues, "cannot be understood independently of the political foundation upon which it rests and of the political interests which it serves."[40]

---

[35] Ibid., p. 146.
[36] Ibid., p. 146.
[37] Posner, Eric, A. 2014. *The Twilight of Human Rights*. Oxford: Oxford University Press. p. 70.
[38] Ibid., p. 70.
[39] Ibid., p. 70.
[40] Carr, E.H. 2001/1981 (orig.). *The Twenty Years' Crisis.* New York: Palgrave Macmillan.

Furthermore, recent debates and scholarly assessments of developments in international law would suggest a weakening of moral boundaries and narrowing of intellectual perspectives interweaved with much skepticism about international law's efficacy and effectiveness. In the *Twilight of Human Rights Law* (2014), Eric Posner argues that

> "There is little evidence that human rights treaties, on the whole, have improved the well-being of people, or even resulted in respect for the rights in those treaties," (…) Human rights law reflects a kind of rule naiveté — the view that the good in every country can be reduced to a set of rules that can then be impartially enforced. Rule naiveté is responsible in part for the proliferation of human rights, which has made meaningful enforcement impossible."[41]

Whereas David Kennedy bewails "sloppy humanitarian arguments" and "overly formal reliance on textual articulations"[42] of the largely non-binding character of international human rights law, which "does more to produce and excuse violations than to prevent and remedy them."[43] It is this lack of coercive and supreme authority with a mandate to sanction misbehavior, oblige respect, and remedy breaches of law in spite of and contrary to national sovereign interest that plague and thereby diminish international law in the eyes of its loyal opposition.

> "Skepticism about international law its existence, nature, efficacy, explanatory value, predictive power, and normative force, all distinct issues despite their frequent conflation into a confused indictment of the entire field is a perennial albatross for international lawyers"[44], David Sloane concludes.

While David Bederman notes that "[n]o other area of law is compelled to justify its very existence, and yet, international law seems condemned to perpetually do so."[45] Thus, international law's burden of proof must address itself to five categories of conventional critiques: (i) "international law is an epiphenomenon" (ii) "it is not…law" (iii) "it does not

---

[41] Posner, The Twilight of Human Rights, p. 7.
[42] Kennedy, David. 2004. *The Dark Sides of Virtue: Reassessing International Humanitarianism.* Princeton and Oxford: Princeton University Press. p. 27.
[43] Ibid., p. 24.
[44] Sloane, Robert D. 2010. "Review of Law as a Vanishing Point: A Philosophical Analysis of International Law by Aaron Fichtelberg". American Journal of International Law, vol. 104.
< http://www.bu.edu/law/workingpapers-archive/documents/sloanefichtelbergrev.pdf> p. 4.
[45] Bederman, David J. 2006. *International Law Frameworks*. New York: Foundation Press. p. 6.

(descriptive realism) or should not (prescriptive realism) influence international politics"; (iv) its universality is in question[46], and (v) "it safely may be ignored in the best social-scientific account of international affairs." [47] The alleged epiphenomenal nature of international law expresses itself through its lack of doctrinal coherence and non-binding character, which deters multilateral cooperation. States, on this reading, act as free agents unconstrained by rules of law, which they themselves create but may refuse to abide by. The toothless nature of law thus defined by realism and structural realism is devoid of meaning and cannot possibly matter in interactions between states; and as such, can be "ignored".

Posner and Goldsmith's *The Limits of International Law* (2005) employs rational choice theory to provide an instrumentalist account of states' reliance and compliance with international law and its lack thereof. States' compliance, the authors argue, is based in interest-maximizing rationality. This means that (i) "nations have no moral obligation to comply with international law"; and (ii) "liberal democratic nations have no duty to engage in the strong cosmopolitan actions so often demanded of them."[48] If international law does not exert a strong enough normative pull, then what reasons do states hold that are sufficiently motivating factors towards compliance?

Goldsmith and Posner regard it as "uncontroversial that state action on the international plane has a large instrumental component."[49] Rational choice theory of their preference holds that "states act rationally to maximize their interests"[50] based on the "perception of the interests of other states and the distribution of state power"[51] and that interest maximization does not preclude negotiation, cooperation, coordination, and cooperation between state parties. International law therefore, rather than being an exogenous force limiting state behavior and compelling states to act contrary to their interests, for Goldsmith and Posner, is endogenous to state interests or is a direct "product

---

[46] Nijman, Janne Elizabeth. 2004. The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law. The Hague: TMC Asser Press. p. 283.
[47] Sloane. 'Review of Law as a Vanishing Point', p. 4
[48] Goldsmith, Jack and Eric A. Posner. 2006. "The New International Law Scholarship." Public Law and Legal Theory Working Paper Series. University of Chicago.
<http://www.law.uchicago.edu/academics/publiclaw/index.html > p. 467.
[49] Ibid., p. 467.
[50] Ibid., p. 467.
[51] Ibid., p. 464.

of state self-interest."[52] States display behavioral regularity and obey international law when by some fortunate happenstance in treaty negotiation there is (i) a coincidence of interests between states; (ii) an agreed upon coordination which minimizes harm and ensures a conflict-free scenario; (iii) reciprocal cooperation for interest-maximization in the longer- as opposed to shorter-term; and (iv) possibility of coercion resulting from asymmetries of power. [53] The parsimonious take on compliance unburdens the law of its normative baggage, which more traditional scholars such as Finnis and Fuller, regard as vital in providing a significant 'pull' or motivation irrespective of external rewards. This leads the authors to conclude that whenever optimal conditions present themselves for states' withdrawal from international law treaties, they may do so without neither (a) suffering 'harm' themselves nor (b) imposing moral damage onto others; for there is no moral obligation to follow international law. A view thus advanced makes international law as a system of law less stable and predictable and disregards the elemental prerequisites and conditions - advanced by Hart, Fuller, or Koskanniemi among others – necessary for it to maintain relative homeostasis and command respect and authority across borders and situations. After all, the law is not an offshoot of caprice or a matter of convenience.

"When international law changes, as it often does", Goldsmith and Posner contend, "it does so because state interests … change due … to changes in technology, or in relative wealth, or in domestic government."[54] This change is "not always smooth" they continue "for the world lacks stable international institutions – legislatures, regulatory agencies, effective courts – to facilitate the change."[55] Here, they are clearly mistaken. According to Karen Alter's recent estimates,

> "There are now at least twenty-four permanent international courts. Eighty percent of operational ICs have a broad compulsory jurisdiction, and 84 percent authorize non-state actors – supranational commissions, prosecutors, and/or private actors – to initiate litigation. These ICs have collectively issued over 37,000 binding rulings in individual contentious cases, 91 percent of which were issued since the fall of the Berlin Wall."[56]

---

[52] Ibid., p. 474.
[53] Ibid., p. 473-474.
[54] Ibid., p. 467.
[55] Ibid., p. 467.
[56] Alter, Karen. 2014. *The New Terrain of International Law: Courts, Politics, Rights*. Princeton and Oxford. Princeton University Press. p. 4.

The problem, therefore, does not inhere in the lack of institutional architecture to govern shifts and transitions in international law, which are few and far between and much less prone to producing shocks to the system, which it can easily absorb – but in the authors' lack of recognition that international law is streamlined through an elaborate network of international institutions and increasingly capable of making demands irrespective of states' day-to-day preferences. Goldsmith and Posner take states to be moody, arbitrary and capricious in their attitudes toward international law; capable of accessions and withdrawals based on "state preferences over international relations and outcomes"[57] and still largely committed to acting upon electorally affirmed inclinations of their democratic publics. The authors neglect, however, a large body of international law that has very little to do with the state as an entity and its interest-driven temperamental nature and much to do with the echelons of power that entity consists of and is subject to international adjudication, reprimand or punishment based on established consensus about rules[58] and normative standards of international conduct. The Hague Conventions of 1907 and the Geneva Conventions of 1949 not only remain largely unchanged since their inception, but in their spirit - through an expended framework of Laws of Armed Conflict (LOAC) - offer a more far-reaching mechanism for criminal accountability for atrocities perpetrated by the heads of states and commanders in the field under the practice of universal jurisdiction. Recent hearings in the Spanish court regarding potential war crimes committed by Bashir Al-Assad in Syria[59]; Zambia's public consultations on the country's membership in the

[57] Goldsmith and Posner. 'The New International Law Scholarship.' p. 467.

[58] According to A.J. Peterson the rules of law are an especially distinct feature of the system as they provide substantive guidance on concerns of international nature. "In both national and international law, rules of law come in three varieties", Peterson shows. They are: "constitutive rules defining actors, things and situations; (ii) regulatory rules specifying the forms of conduct that are preferred, allowed and prohibited; and (iii) consequential rules specifying how violations of regulatory rules or infliction of harms on others will be addressed." (In W. Sandholtz and Christopher Whytock (eds.) *Research Handbook on the Politics of International Law,* p. 457). Goldsmith and Posner maintain, however, that rules of international law are vague and ambiguous and do a poor job in fostering cooperation and coordination. Combined with states' choosy nature, they do little to prop up the image of international law as settled, authoritative, and binding. A question arises whether Goldsmith and Posner take into adequate consideration the serious impact or damage state *caprice qua* rational choice can inflict on the basic operational mechanisms and regulatory standards guiding behavior in the international arena and the systematic work of international courts in articulating, clarifying, resolving disputes, upholding and enforcing laws without regard to state interests or wishes.

[59] *Jurist.* "Spain court begins hearings on Syria war crimes" <http://www.jurist.org/paperchase/2017/04/spain-court-begins-hearings-on-syria-war-crimes.php> Accessed 24 April 2017

International Criminal Court (ICC) to advance justice for victims of atrocities[60]; South Africa's reversal of the withdrawal from the ICC; indictment of a Kosovo citizen for war crimes and "brutal and unlawful killings, inhuman treatment causing immense suffering, application of measures of intimidation and terror, property confiscation, pillaging and stealing of property"[61]; a nineteen year sentence for an international businessman for being an accessory to war crimes, illegal arms trafficking in Liberia and Guinea[62]; recent United States Ambassador's to the United Nations efforts to create framework for responding to human rights violations before they reach the level of conflict though the UN Human Rights Commission and the UN Security Council[63]; the ICC award of collective reparations to the victims of crimes committed by Germain Katanga in the attack on the village of Bogoro in the Democratic Republic of Congo[64]; the March 2017 International Court of Justice initiation of public hearings concerning the Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination in the case of Ukraine v. Russian Federation[65] are only few select instances of the dynamism and normative influence international law exerts on states and non-state intergovernmental entities and judicial organs.

---

[60] Human Rights Watch. "Zambia: Support International Criminal Court: ICC Crucial for Atrocity Victims, Global Justice" < https://www.hrw.org/news/2017/04/10/zambia-support-international-criminal-court > Accessed 24 April 2017

[61] *Washington Post.* "Kosovo citizen indicted for alleged war crimes in 1999" https://www.washingtonpost.com/national/kosovo-citizen-indicted-for-alleged-war-crimes-in-1999/2017/04/20/ab59a1f4-25bf-11e7-928e-3624539060e8_story.html?utm_term=.f7c7371dd4ac Accessed 24 April 2017

[62] *de Rechtspaak.* "19 years prison sentence for illegal arms trafficking and complicity in war crimes in Liberia and Guinea" <https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Gerechtshoven/Gerechtshof-s-Hertogenbosch/Nieuws/Paginas/19-years-prison-sentence-for-illegal-arms-trafficking-and-complicity-in-war-crimes-in-Liberia-and-Guinea.aspx> Accessed 24 April 2017

[63] CNN. "Nikki Haley: An unprecedented step on human rights" <http://edition.cnn.com/2017/04/19/opinions/human-rights-cycle-violence-nikki-haley/index.html > Accessed 24 April 2017

[64] International Criminal Court. "Katanga case: ICC Trial Chamber II awards victims individual and collective reparations" https://www.icc-cpi.int/Pages/item.aspx?name=pr1288 Accessed 24 April 2017

[65] International Court of Justice. "Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (*Ukraine v. Russian Federation*)" <http://webtv.un.org/watch/icj-ukraine-v.-russian-federation/5349310122001#full-text / http://www.icj-cij.org/docket/files/166/19322.pdf> Accessed 24 April 2017

To allege volatility, unpredictability, confusion or uncertainty about international law, therefore, is to misread and severely misrepresent it. Similarly, by equivocating effectiveness of international law with compliance[66] commensurate with state interest makes mockery of the elaborate system of international court proceedings and their domestic instantiations grounded in the appeals to common humanity, dignity, and justice – however, naturalistically inspired. "The validity of a legal order", Beyleveld and Brownsword contend, "has nothing whatsoever to do with its actual effectiveness. Effectiveness, however, has everything to do with the possible existence of a stable positive legal order. Effectiveness is a condition of a stable positivity, not a condition of validity"[67], the authors conclude. Moreover, as Beyleveld and Brownsword argue, "the notion of an international legal order is not parasitic on recognition by sovereign national legal orders." Because, as the authors continue, "international law is not created by national legal orders being willing to act in accordance with rules governing the commerce between nations"[68] or ordering of relations between and among them. Rather, nations are given adequate autonomy to act as they please as long as they do not violate *a priori* agreed to responsibilities under international law. It is legitimate, therefore, under the reciprocal nature of legal ordering, to require or expect states to sacrifice their autonomy in order to fulfill their obligations under previously acceded to norms of international law. For Kelsen, a legal norm "becomes valid before it becomes effective, that is before it is applied and obeyed" and it does not lose its validity "it if it is not wholly effective."[69] It suffices on Kelsen's account that a general legal norm be regarded as valid only and to the extent to which

> "The human behavior that is regulated by it actually conforms with it, at least to some degree. A norm that is not obeyed by anybody anywhere, in other words a

[66] It is also important to note that "enforcement also differs from compliance control. The former is a feature of (international) law and describes how law seeks to ensure compliance with norms by various means and methods. The latter is a construct of international relations theory that aims to shed light on the causes of non-compliance and on the management of such situations within and beyond the law." (J. Brunne "Compliance Control" in G. Ulfstein (ed.). 2007. *Making Treaties Works: Human Rights,Eenvironment and Arms Control.* Cambridge University Press. p. 374)

[67] Beyleveld, Deryck and Roger Brownsword. 1986. *Law as a Moral Judgment.* London: Sweet & Maxwell. p. 163.

[68] Ibid., p. 210.

[69] Ibid., p. 240.

> norm that is not effective at least to some degree, is not regarded as a valid legal norm."[70]

International law in domestic courts is growing and numbers over 1,700 judgments involving nearly 100 countries[71]. In tandem with their international counterparts, domestic courts have been involved in proceedings of international concern adjudicating on matters of war; crimes to diplomatic immunity; war crimes; secession rights; torture; economic, social and cultural rights; human rights and discrimination against women; state immunity; territorial annexations and deployments of foreign troops.[72] And the "emergence of the prohibition of crimes against humanity has been broadly recognized by international courts and tribunals as belonging to *jus cogens*"[73] suggesting a broad consensus on what legal norms presuppose and laws require. International courts also demonstratively and methodically expand the scope of concern to include, in their adjudication proceedings, individual interests and not merely, as Goldsmith and Posner assume for sake of social scientific methodological parsimony, state preferences.

Lastly, Goldsmith and Posner express skepticism about the existence of a neutral international forum where international and human rights law violations might be arbitrated. In their words,

> "There is no neutral international forum; and it is not clear that a neutral international forum is possible, or that the type of forum that might be realistic should have the power to resolve disputes between states, or that states should comply with the decisions of such a forum, or that states should be punished for violating international law that reflects the interests of powerful or that is made by non-democratic nations; and so on."[74]

Short of a World Court called for by a Swiss-initiative and endorsed by prominent human rights lawyers, adequate neutral fora already exist for the resolution of disputes between states and increasingly, as this dissertation emphasizes, between states and individuals. Likewise, the international legal system seems to meet the criteria of adequate generality,

---

[70] Ibid., p. 241.
[71] "International Law in Domestic Courts" Oxford University Press Blog
< https://blog.oup.com/2016/12/international-law-domestic-courts/> Accessed 24 April 2017.
[72] Ibid., < http://opil.ouplaw.com/page/543/Top_10_ILDC_cases
[73] Weatherall, Thomas. 2015. *Jus Cogens: International Law and Social Contract*. Cambridge: Cambridge University Press. p. 221.
[74] Goldsmith and Posner, 'The New International Law Scholarship', p. 480.

stability, impartiality, publicity, equality before the law, conflict resolution, and principles deliberation[75] - requisite for a body of law to preserve and retain its authority – and to infuse the system with relative clarity about expectations and outcomes. The above by Goldsmith and Posner seems to project upon the international plane an outdated pre-World War II international consensus about the glorious achievements, unchecked privileges, and vast prerogatives of states. The authors unduly hover over and gravitate towards the central state system as a determinative factor in the maintenance of coherence and efficacy of international law without paying due diligence to international judicial and non-governmental actors visibly populating the stage.

Moreover, critical accounts of the new paradigm shift in human rights protections through international arbitration persist in falling into the 'World Government' form of reasoning, which mistakenly attributes cosmopolitan sentiments to a strong preference towards some overarching international governance structure marked by legitimacy-negating democratic deficit. They mistakenly assume that the strength of cosmopolitan concern can be surveyed and assessed through proximate causes, such as distribution and level of foreign aid or preferences for humanitarian intervention among democratic publics. While the use of survey methods for assessing how cosmopolitically-minded a population of a given liberal democratic state might be, it is not an appropriate tool for doing so. International law and political theory scholarship is replete with arguments calling for "more" foreign aid, "more" refugee flows, "more" intervention on humanitarian grounds and so on. In a world of limited resources and scarce attention spans, an argument based on quantity as a benchmark for measuring international altruism or progress achieved in the promotion of human rights is a problematic one. Kathryn Sikkink in *Evidence for Hope: Making Human Rights Work in the 21st Century* (2017) has pointed out that measurements of progress achieved in human rights outcomes across the globe suffer from methodological pluralism and lack of rigor, which yield inevitably inconsistent, contradictory or largely inaccurate results. Therefore, as long as multiple ways of measuring compliance exist and evaluative consistency remains elusive, progress *qua*

[75] Buchanan, Allen. 2006. "Democracy and the Commitment to International Law." *Georgia Journal of International Law and Compliance*. 34. p. 305/309.

compliance will be subservient to and conditioned by incommensurate methods chosen to assess it.

When analyzing human rights, one should not merely strive to delineate individual violations or lack of enforcement as proofs of state non-compliance or, better yet, of a weak incentive structure. It is important to remember that international human rights law is only an element, a key element nevertheless, in a vast system of international legal architecture, which coexists with and supplements such branches of law as international humanitarian law or law of armed conflict, the Geneva and Hague Conventions, and numerous treaties, conventions, and statutes making up the United Nations framework for governance. Human rights are neither exhausted by nor exhaustive in and of themselves; they are "not an island entire of itself…[but] a piece of the continent, a part of the main."[76] Every violation of human rights, therefore, "diminishes" humankind, because one is indispensably "involved in mankind".[77]

Dissertation's Focus and Research Questions

In my study, I shall research the changing balance of power between domestic and international actors and legal instruments and the influence of international or supranational courts on state interests and citizen rights by taking into consideration the following five aspects: (i) qualitative changes to state interests in view of supranational judicial arbitration and human rights norms; (ii) individual civil and criminal accountability in the face of human rights violations; (iii) increased mediation of international and inter-state interests via supranational judicial regimes; (iv) increased emphasis on rights to self-determination and belonging; (v) increasing jurisdiction of supranational courts over "acts of state."

The focus of the proposed research project will be on the role that supranational institutions play in promoting international human rights norms and thereby affecting and changing traditional relational dynamics between states and their citizens. The Project on International Courts and Tribunals defines an international court as "(i) a permanent institution, (ii) composed of independent judges (iii) that adjudicates disputes between two

[76] Donne, John. "No Man is an Island" < https://web.cs.dal.ca/~johnston/poetry/island.html>
[77] Ibid.

or more entities, one of which can be a state of international organization. They (iv) work on the basis of predetermined rules of procedure and (v) render decisions that are legally binding."[78] [79]

International courts examined in this dissertation - such as the ICJ, the ECHR, the IACHR, and the ICC - are not only geographically representative in their jurisdictional mandate but constitute paradigmatic examples of the 'constitutionalization' and accompanying 'judicialization' paradigm of politics. Their extensive case law and adjudication of both state-to-state and state to individual cases bring to greater relief the interactions, developments, norm-construction and innovations in international law. It is important to note that international courts selected are not political organizations, however, they inevitably operate in a political environment and are both regional and supranational in character. Mary Volcansek argues, "courts make political decisions regularly, in that they authoritatively allocate values for society."[80] More importantly, "court decisions often create public policy, and judges are not immune to political influences, even if they are only minimally cognizant of the political environment in which their decisions are implemented."[81] Scholars, such as Alter, Teitel and Sikkink, believe that changes in the international system resulting from the end of bipolarism, globalization, and a related democracy deficit are responsible for a resurgence of extraterritorial law and courts that not only fill globalization's accountability deficit, but play a needed representation and reinforcement role in political conflict. In view of the above, supranational judicial institutions examined in the following pages, suggest themselves as important players in the promotion of international law and the underlying normative constellation of humanity-oriented values. They are the authoritative mediators and often the only substantial interpretative sources of international law and a pivotal and vital component of a transnational legal process. Through the courts' complex and highly dynamic institutional interaction with states and individual petitioners, global norms become part and parcel of

[78] Alter, The New Terrain of International Law, p. 70.
[79] This dissertation will refer to international courts (ICs), supranational judicial regimes, and supranational courts interchangeably and will take the above definition as sufficiently explanatory and exhaustively descriptive of the function, role, and composition of the judicial framework under study.
[80] Volanscek, Mary L. *Law Above Nations: Supranational Courts and the Legalization of Politics*. Gainesville: University Press of Florida. p. 10.
[81] Ibid., p. 10.

domestic legal regimes, which ensure future state compliance. In addition to their normative pull, international judicial bodies contribute to the creation of discursive spaces around consequential matters of foreign policy ranging from: (i) Constitutional guarantee protections abroad; (ii) the admissibility of cases brought by foreign litigants under the Vienna Convention in seeking remuneration for human rights violations committed by states; (iii) the constitutionality of Guantanamo Bay cases arbitrated in military tribunals and their repercussions for state secrecy, executive privilege, and presidential wartime authority; to (iv) the growth of an interdependent 'world of laws'[82] and its relation to such transnational problems as environmental risks, financial insecurity, and terrorism.

As a testament to their growing influence, it is important to note that even one of the most insular and traditionally inward-looking courts – The United States Supreme Court – can no longer afford to stand apart and fail to take account of developments in international legal discourse and practice spearheaded by the four prominent institutions under consideration. In *The Court and the World* (2015), Justice Stephen Breyer examined the evolving role of domestic courts under an increasingly transnational judicial system of legal arbitration and noted the increasing blurring or lines between domestic constitutional character and norms and challenges imposed by global politics and international law. Breyer argued that the U.S. Supreme Court could not afford to remain oblivious to developments from abroad and ignorant of the legal traditions and interpretations of foreign judicial bodies on today's most consequential issues. If the Court disregards the global political, social, and economic milieu within which it is inevitably situated and finds itself daily confronted in its case docket, it will risk endangering the prestige and soft power of the rule of law and will render itself immaterial in the transnational legal dialogue. Breyer, however, is not alone in noticing the trends towards greater internationalization of domestic courts. As Schütze observed, "the constitutional response of many national legal orders – in particular: of their Supreme Courts – has, therefore, been to 'open up' to international law"[83], particularly at the level of the European Union.

---

[82] Breyer, The Court and the World.

[83] Schütze, Robert. 2007. "On 'Middle Ground'. The European Community and Public International Law." EUI Working Paper < *http://cadmus.eui.eu/bitstream/handle/1814/6817/LAW-2007-13.pdf;jsessionid=4F8E96B868365EEFCC339BAF59E0074D?sequence=3*>

The proposed project of study intends to generate an inter-continental discussion on the normative dimensions of law and politics and encourage reflection on the impact and purpose of supranational judicial arbitration on state behavior as well as explore how a *pro homine* orientation of international courts is affecting "new kinds of subjectivity international law and politics."[84]

A longstanding puzzle in public international law and international relations theory is why states obey international law. I will seek to further the debate by investigating the following questions: To what extent does the judicial output of supranational courts influence the development of the human rights discourse and compel compliance? Why are supranational courts desirable legal institutional paradigms for the promulgation of international human rights and what makes them legitimate sources of legal authority? What effect do supranational judicial institutions have on state expectations, state conduct, and state-citizen relations? What are the emerging accountability frameworks for transnational human rights violations within a predominantly state-centric political paradigm? What are the emerging normative frameworks for transnational human rights obligations? And lastly, is judicial lawmaking and international litigation a superior alternative to the political process, and why should it be preferred?

In order to provide an answer and with references to relevant case law, I will investigate the contributions of four major supranational institutions, the ICJ, the ECtHR, the IACHR, the ICC to the development of international legal guidelines and their impact on state-to-state and state-to-citizen relations, by focusing on:

(I) The International Court of Justice's:
   a. Clarification of International Humanitarian Law
   b. Humanization of international law though Nicaragua and Nuclear Weapons Advisory Opinion case law
   c. Clarification of law concerning the status of Four 1949 Geneva Conventions and norms of customary law pertaining to non-international armed conflict
   d. Contributions to the distinction between International Humanitarian Law and Human Rights Law
   e. Development of principles of "fundamental considerations of humanity" and "cardinal principles of humanitarian law"

[84] Teitel, Humanity's Law, p. 31.

f. Contributions to international environmental law as part and parcel of human right to health, well-being and security

(II) The European Court of Human Rights':
   a. Contribution to the articulation of individual human rights
   b. Emphasis on domestication of the European Convention of Human Rights and Fundamental Freedoms (ECHR) into the legal code of states
   c. Promotion of individual access to the court and its impact on state-citizen dynamics
   d. Emphasis on states compliance with ECHR and ECtHR guidelines

(III) The Inter-American Court of Human Rights':
   a. Contribution to three accountability models of immunity, state accountability, and individual criminal accountability
   b. Exercise and ramifications of universal jurisdiction
   c. Development of international criminal law with regard to war crimes, genocide, trafficking of humans, drugs, and arms, terrorism, torture, and piracy.

(IV) The International Criminal Court's:
   a. Contribution to the establishment of the rules of procedure and evidence in international criminal proceedings
   b. Development of international criminal law
   c. Legal innovations concerning (i) gender crimes, (ii) victim's representation in international criminal proceedings, (iii) crimes of aggression; (iv) command responsibility, and (v) individual criminal responsibility.

The proliferation of international courts and concurrent rise in judicialization of politics has left many governments undoubtedly confused about the appropriate relationship between state sovereignty and state responsibility to domesticate international human rights law without subversion of sovereign immunity, and the duty to meaningfully attend to and protect human rights against deliberate violations. The key aspect of the proposed research project rests in the examination of the manifold ways in which state sovereignty must be retooled in relation to and rerouted in the direction of the evolving modes of global supranational institutional governance and the emerging ethical environment brought about by the universalizable content of the human rights discourse. Supranational courts, not states, I shall argue, will play an increasingly significant role in changing the long-standing

dynamics of state-to-state and state-to-citizen relations as "individuals and non-state entities" will not only be "increasingly able to partake in shaping of the international legal order"[85], but form a much more extensive and substantively "thick" legal and political conception of themselves and their "right to have rights"[86] vis-à-vis the state.

Method

In addition to the historical-institutional approach, which I aim to employ in my theoretical framework, the study will also comprise an analysis of the courts' legal output. The court's considerable case law and opinion juris will provide qualitative evidence in support of the dissertation's theoretical arguments embedded in cosmopolitan political philosophy.

Literature on historical-institutional approach emphasizes the method's focus on the role of institutions in shaping political behavior and structuring political outcomes.[87] Institutions are conceived in terms of formal rules and organizations and informal rules and norms.[88] It is the task of the institutionalist framework that I draw on in this dissertation to: (i) "analyze and understand the most basic units and processes and discover the laws that govern them"[89] using evolutive/chronological or historical progression as an analytic tool; (ii) explain real world outcomes rather than posit theoretical assumptions; (iii) examine how institutional structures determine "political incentives and normative values"[90]; (iv) point out how "many of the contemporary implications … of temporal processes are embedded in institutions - whether they be formal rules, policy structures, or norms"[91]; (v) assess how a "well-integrated system … form[s] a mutually reinforcing whole"[92]; (vi) assess how interactions among institutions and institutional orders affect one another and

---

[85] Jacobson, David. 2006. *Rights Across Borders.* Baltimore: Johns Hopkins University Press. p. 3.
[86] Seyla Benhabib and Hannah Arendt have prominently emphasized this phrase in relation to rights-claims by ordinary citizens.
[87] Steinmo, Sven. 2008. "What is Historical Institutionalism?" in *Approaches in the Social Sciences,* Donatella Della Porta and Micheal Keating (eds.).
[88] Streeck, Wolfgang and Kathleen Ann Thalen. 2005. Beyond Continuity: Institutional Change in Advanced Political Economies. p. 229.
[89] Steinmo. 'What is Historical Institutionalism?', p. 154.
[90] Ibid., p. 151.
[91] Thelen, Kathleen. 1999. "Historical Institutionalism in Comparative Politics". *Annual Review of Political Science.* (2), p. 382.
[92] Ibid., p. 382.

"open up possibilities for political change … [as well as] drive institutional evolution"[93]; (vii) emphasize that "institutional arrangements cannot be understood in isolation from the political and social setting in which they are embedded"[94]; and (viii) any changes conceived in the political and social context always, inevitably, "bring new actors into the game, who were able to use existing but previously latent institutions" and their normative regimes, "whose new salience had important implications for political outcomes."[95] Politics is thus seen as a dynamic process enacted on the foundation of deliberation, reason-giving, claims-making, and norm construction, and mediated, as will be shown in this dissertation, through judicial activism.

In order to assess the level of interaction between the state and supranational institutions - in norm construction and political restructuring of relations between states and their citizens, between the cosmopolitan law regimes and their various impacts on state behavior and domestic laws - it will become necessary to engage with the primary source material, i.e. the ICJ, ICC, IACHR, ECtHR cases and legal pronouncements, conventions, and international treaties found in the respective courts' electronic archives. Such an approach will permit making broader generalizations with greater external validity. For the case method's primary mission is to establish whether legal premises constituting an argument and validity for one case, are valid for and applicable to all cases under study. The study of cases or the legal output (*opinio juris*) of the respective judicial regimes under examination will also allow me to assess whether the application of law is consistent with the mandates established by international treaties, laws, and conventions, and gauge their normative and legal effects on citizens and states.

It is also important to note that the discussion of the above listed institutions will proceed genealogically or chronologically in order to show inter- and trans- institutional influences and innovations in the evolution and development of the *pro homine* centered approach to international adjudication.

---

[93] Ibid., p. 383.
[94] Ibid., p. 384.
[95] Ibid., p. 383.

Relevance

The current research intends to fill the gap in contemporary international relations and law theories, which according to legal scholars such as Jenny Martinez and Philip Alston, consistently ignore the "potential for a mutually beneficial and reinforcing relationship between state power and international law"[96] as well as offer theoretical, legal and political channels for rethinking "the relationship between power, ideas, and international institutions."[97] In so doing, my study will aim to point to the increasing relevance and potency of the non-state actors in shaping state behavior as well as delineating the scope of individual and state accountability under international law.

Supra-state legal arbitration is especially visible in the discourses on citizenship, economic migration, and human rights and the ongoing renegotiation of inter- and intra-state relations between citizens and their governments. One of the major issues concerning the practical nature of infusing justice and the rule of law into an anarchic self-help international system, lies in the supranational courts' own institutional skeleton. Presently, the commonly espoused view holds, the world's preeminent "human rights" institutions do not explicitly focus on rule of law and have difficulties convincing states of the benefits of living by the Universal Declaration of Human Rights and Geneva Laws. "The UN Human Rights Council has only a limited capacity-building mandate, the International Criminal Court (ICC) focuses on accountability after atrocities have been committed, and the European Court of Human Rights does not address the absence of fundamental legal or law enforcement institutions within states." [98] While mindful of the inherent operational shortcomings of the courts, the dissertation aims to catalogue the distinct ways in which a major attempt to rethink the supranational legal mandate is not only possible but must be made for the general moral health and political well-being of the global community. The reading of contemporaneous literature on the subject suggests that there now exist multiple legal regimes, jurisdictionally separate but overlapping in intent and design, which like the geological tectonic plates cleave and brush against each other, sharing expertise and

---

[96] Martinez, Jenny S. 2012. *The Slave Trade and the Origins of the International Human Rights Law*. Oxford: Oxford University Press. p. 176.
[97] Ibid., p. 165.
[98] Lagon, Mark. 2012. "Policy Innovation Memorandum No. 26 – A Global Trust for Rule of Law." *Council on Foreign Relations.* [http://www.cfr.org/rule-of-law/global-trust-rule-law/p29170]

precedent, that result in the development of international legal guidelines and jurisprudence that affect the movements of the global community on consequential questions of politics and governance.

The Way Forward

It is the contention of this dissertation that the *l'etat, c'est moi* approach to international relations propounded in Posner and Goldsmith's *The Limits of International Law* (2005) and rephrased in manifold variations across political science and international law literature holds not only an insufficient explanatory value and is inaccurately reflective of the complex and multilayered reality of the transnational and international order, but is long overdue for retirement.

While political theorists have been reluctant to ascribe cosmopolitan duties to institutions, one of the contentions of this dissertation, among others listed in this Introduction, is to show how the work of international judicial organs – the desired but supposedly absent, according to Goldsmith and Posner, neutral fora for resolution of disputes between international actors – advances cosmopolitan ideals through the use of sophisticated international legal mechanisms and the expanded vocabulary of claims making codified in precedent, case law, and opinion juris.

Much of the critique of international adjudication has to do with the legitimacy, and by extension, authority of international law and human rights regimes. Proliferation of international treaties and expansion of the scope, purview, and mandate of international mechanisms and judicial instruments is subject to opposition from states and state actors alike. One of many reasons for the ongoing resentment is the obvious tendency for international law, particularly international human rights doctrines, to "disrupt not just authoritarian governments, conservative religions or traditional family structures in allegedly backwards societies, but also democratic self-rule, welfare state regimes and entrenched constitutional and legal traditions."[99] Another reason has to do with the punitive measures in the form of economic sanctions, diplomatic actions, public impeachments

[99] Schaffer, Karlsson, Johan and Andreas Follesdal and Geir Ulfstein. "International human rights and the challenge of legitimacy" in *International Human Rights and the Challenge of Legitimacy*. Cambridge: Cambridge University Press. p. 2.

through 'naming and shaming' mechanisms, or military interventions, states may impose on one another for abject and systematic failures in meeting international obligations and commitments towards their own citizens.[100] International Courts and accessory tribunals are the most likely and most visible bearers of this brunt of criticism. As standard bearers of international norms, articulators and progenitors of international legality, the Courts face particular operational and legitimacy challenges. Those range from (i) criticisms focusing on ineffectiveness of the Courts to compel compliance with its rulings (as in the case of the International Court of Justice – Chapter 2); (ii) criticisms concerning a too dynamic or too evolutive interpretation of conventions, too expansive interpretation of individual liberties or human rights (as in the case of the European Court of Human Rights – Chapter 3); (iii) criticisms concerning judicial overreach with a deliberate purpose of exceeding mandate and expanding the Court's jurisdiction beyond that foreseen by its founding statutes (as in the case of the Inter-American Court of Human Rights – Chapter 4); and (iv) criticisms aimed at the Courts' partial and political geographic focus as well as ineffectiveness in pursuing international accountability and delivery of speedy convictions (as in the case of the International Criminal Court – Chapter 5). In addition, large international judicial regimes, apart from funding, face operational challenges stemming from their inevitable dependence on states' good faith in domesticating international rulings and 'living' by them. Normatively speaking, however, the language of international law and human rights discourse which pervades every aspect of modern-day policy-making, motivates states and individuals alike to think beyond the confines of their own narrow self-interest and imposes novel duties of care for the other and novel ways of moral reasoning, that cannot be divorced from or operate in an institutional void. International law, contrary to Goldsmith and Posner, creates moral obligations and provides a rudimentary skeleton in support of cosmopolitan trans-governmental and transnational policy-making that is "motivationally reasonable"[101] and is irreducible to mere sentimental "international altruism."[102] One of the

[100] Ibid., p 4.
[101] In *Equality and Partiality* (1991), Nagel shows that in its ideal or pure form political legitimacy rests on the presupposition that the "use of state power should be capable of being *authorized* by each citizen." (p. 8) In the modern day parlance, state violations of human rights enshrined in international conventions, and by extension, state violations of treaties and conventions aimed at the protection of the individual – internalized and authorized by the said self-interested and other-regarding individual - are unlikely to meet with public approval and thus risk putting the state itself in jeopardy with regards to its own legitimacy and authority.
[102] Goldsmith and Posner, Limits of International Law, p. 212.

aims of this dissertation is to accentuate and expand upon this argument further in subsequent chapters.

Over the fifty-year period since their formal institutionalization, the supranational courts have proven to have an important exogenous effect on states and citizen rights in that they consistently (i) augment state interests; (ii) increase the network of state interdependence and institutional interventions in the sovereign affairs of states; (iii) mediate power in international politics through human rights-based norms and collective legal constraints; (iv) increase emphasis on rights (to self-determination, belonging, and citizenship status); (v) increase jurisdiction over the "acts of state."[103] It is an indubitable fact that we are entering an era of the Court, where politics is judicialized and law is humanized.

As such, supranational judicial institutions play an important role in promoting transnational constitutionalization of *pro homine* norms. Critics allege, however, that attempts at setting up a transnational institutional order are inchoate and underdeveloped and faced with a primordial challenge of convincing states that participation in such an order is in their interest. Thus, a vision of cosmopolitan morality stands tete-a-tete with sovereign rationality and absent of a coercive world state, its realization is but a utopian fable manufactured by privileged western intellectual elites. The Marxist critique is especially unforgiving of the cosmopolitan mindset, which retains an utter disregard for the nation-state, the equality of nation-states and people under conditions of global capitalism[104], and offers an inadequate ideological and institutional response to the many socio-economic paradoxes of globalization. While ineffectiveness of international enforcement mechanisms constitutes a serious indictment of the international regime of human rights, the objective of this dissertation is to offer a systematic rejoinder.

The argument for a strong, independent, transnational and supranational judicial order, answers the fears of those, who vehemently argue that a viable cosmopolitan vision must incarnate itself in a world state and thus, by natural extension, possess a monopoly on the means of violence in order to effectively enforce global human and humanitarian norms required for a fully developed and functioning cosmopolitan order. Just as in the

---

[103] Beardsworth, Richard. 2011. *Cosmopolitanism and International Relations Theory*. Cambridge: Polity.
[104] Ibid., p. 141.

sovereign-centric paradigm, states are the natural guarantors and protectors of rights, even if they are their most persistent violators, the world government must therefore model itself on a similar organizing principle and juridico-political skeleton. The dissertation aims to suggest that a state-like paradigm is not a prerequisite to a cosmopolitan orientation as long as supranational judicial institutions based on a commonly accepted set of universal human rights, liberal values emphasizing the rule of law and the trusted authority of the judiciary and a vision of "a common moral community in which the principle of sovereignty is subordinated to that of humanity"[105] can be articulated and enforced by a networked supranational judicial regime. The following promises to show that thanks to Nuremberg, the International Criminal Court, the International Court of Justice, the Inter-American Court of Human Rights, and the European Court of Human Rights, not despite them, human rights and cosmopolitan norms are progressively challenging and modifying the presumably inviolable sovereign rationality and prerogatives of power by expanding the scope of jurisdiction, individual criminal accountability and socio-political rights. In the interest-based calculus, states, as will be argued and illustrated, show a willingness to subordinate themselves to the legal mandates of international conventions and principles rather than work against them in spirit and practice, thus revealing a potential for a mutually beneficial relationship between transnational judicial actors and sovereign states. Such an argument assumes, of course, that the original position of rights-derivation based on membership in a strictly defined political community in accordance with its Westphalian origins, will be upset. Political rights brought into being by the social contract and bequeathed upon citizens as a consequence of the Sovereign's conditional beneficence once uprooted from its 17th century practice, find themselves unrestrained by the mood swings and *raison d'etat* of states and find common genealogy and genetics with the increasingly rights-granting independent supranational judicial regime.

The Human Turn in International Law: The Path Ahead

There are two stories that can be told about the international legal system. One story, contrarian in nature, may focus on the limits of human rights, inadequacy of

[105] Adelman, Sam. 2012. "Cosmopolitan Sovereignty" in *Cosmopolitan Justice and its Discontents*, Cecilia Bailliet and Katja Franko Aas (eds.). New York: Routledge. p. 11.

institutional protections, lack of accountability and criminal liability for abuses and misuses of power. Another story may choose to focus on the socio-pedagogical influence which international judicial bodies have in their construction of the language of accountability, their authoritative allocation of values for society, and their evolving interpretation of international law in the manner that is most advantageous to the human being. The thesis aims to focus on the latter story and argue that opponents of international justice and skeptics of international legal courts and tribunals must demonstrate that the pursuit of justice is an impediment to peace and reconciliation.[106]

In what follows, I examine the conditions that promote and advance the *pro homine* orientation of international law. I begin in Chapter 1 with an overview of leading debates in the field of international relations and law. The discussion focuses on the new frontiers of global justice, the emerging trends and new institutional and legal responses to the neo-liberal and constructivist challenges advanced against the realist and neo-realist international relations theory. The chapter also aims to reflect on the structural designs and normative frameworks for establishing a responsive international and supranational judiciary with cosmopolitan scope of concern. In Chapters 2, 3, 4, and 5 I proceed to inscribe theory into practice by studying chronologically the legal output of the International Court of Justice (Chapter 2), the European Court of Human Rights (Chapter 3), the Inter-American Court of Human Rights (Chapter 4), and the International Criminal Court (Chapter 5). The case law and opinion juris under consideration in each jurisdiction aims to shed light on the transnational constructivist work of the courts and their iterant articulation and promotion of norms and standards reflective of the 'human turn' argument advanced in this dissertation. In Chapter 6, I take account of the challenges and limitations faced by international arbitration mechanisms and their impact on global governance, state behavior and state-citizen relations. The concluding section maintains that despite many notable conceptual and practical shortcomings outlined in the dissertation, international courts have proved to be innovative and evolutive trailblazers in the field of international law and that cosmopolitan norms carefully nurtured and proffered by them, have ensured that international law is humanized as politics is judicialized.

---

[106] Both, Karen Alter and Anne Peters have advanced a similar challenge.

CHAPTER I

COSMOPOLITANISM IN INTERNATIONAL LAW AND POLITICS

Introduction

A remarkable transformation in the experience of being human, writes Steven Pinker in *The Better Angels of Our Nature* (2011), is underway. Modernity, with its infusion of individualism, cosmopolitanism, reason and science has replaced tribalism and orthodox traditionalism, which left a legacy of crime, genocide and war. The preceding two thousand years of recorded history, which Pinker invokes, show evidence of crucifixions, mutilations, beheadings, exterminations, wife-beatings and child abuse. One look at Rwanda, Bosnia, Syria, Egypt, and Europe of the 20th and 21st centuries brings a distinctively human and therefore an exceptionally violent history of the species to its full, often lamentable, actualization. It is not an accident that the great mind of the French Enlightenment thought, Blaise Pascal, simultaneously condemned and sympathized with the human lot:

> "What a chimera then is men! What a novelty, what a monster, what a chaos, what a contradiction, what a prodigy! Judge of all things, feeble earthworm, repository of truth, sewer of uncertainty and error, the glory and the scum of the universe."[107]

In the *Man Who Laughs,* Victor Hugo, on the other hand, warned his character Homo the wolf of the precariousness of the human condition, counseling him to: "Above all things, do not degenerate into a man,"[108]

Like the writings of Darwin and Hobbes, who pondered deeply the underlying causes of man's enfeebled and reprobate nature, Pinker's ambitious study merits attention of social scientists and scholars of international politics as it meticulously documents evidence of a decline in brutal practices that defined inter-personal and inter-state relations of the last two millennia. Historically, (i) tribal warfare was nine times as deadly as war and genocide in the 20th century, (ii) the murder rate in medieval Europe was more than thirty times what it is today, (iii) slavery, sadistic punishments, and frivolous executions were unexceptionable features of life for millennia before their sudden abolishment, (iv) wars between developed countries have vanished, (v) rape, battering, hate crimes, deadly

---

[107] Blaise Pascal quoted in Pinker, Steven. 2011. *The Better Angels of Our Nature.* New York. Viking Penguin Press.

[108] Hugo, Victor. 1888. *The Works of Victor Hugo: The Man Who Laughs.* New York: The Athenaeum Society. p. 2.

riots, child abuse, cruelty to animals are substantially down.[109] If human nature has not substantially changed, Pinker wonders, how can we account for the considerable decline of violence? Delving deeply into the "inner demons" that incline human beings toward sadism and tribalism and the "better angels" that drive them away, Pinker is able to suggest that the institution and spread of (i) government; (ii) literacy; (iii) trade, and (iv) cosmopolitanism, have gradually and decisively tempered antagonistic impulses and brutal inclinations that plagued human civilizations. It is the last of the variables, which Pinker identifies, cosmopolitanism, that is of interest and great import to the following study.

Cosmopolitan, as a moral construct and a normative ideal inaugurated by the Stoics in the Hellenistic era, proposes that: (i) every human being possesses an intrinsic worth and moral entitlement to human rights, merely by being human. (ii) This moral worth and entitlement must be recognized and respected by others. And finally, (iii) the state, as the primary reference point for human identity and political personality, must be seen to exist for the sake of the individual being and not vice versa.[110] Today the very same cosmopolitan sentiments underpin the theory and doctrine of International Law[111] or what

---

[109] Pinker, Steven. 2011. *The Better Angels of Our Nature*. New York. Viking Penguin Press.

[110] It might be worth reflecting here on Martin Heidegger's idea of the "standing-reserve." According to the philosopher, the citizen is to be treated instrumentally, as a means to an end, a "standing-reserve" ready to take up arms and shed blood in the name of the state's short and long-term objectives.

[111] 1945, Charter of the United Nations • 1945, Statute of the International Court of Justice •1961, Vienna Convention on Diplomatic Relations •1969, Vienna Convention on the Law of Treaties INTERNATIONAL LAW AND THE USE OF FORCE • 1842 The Caroline Case 1990, Authorizing the Gulf Law: SC Resolution 678 • 1991, The "Cease-Fire Resolution": SC Resolution 687 • 1996, ICJ Advisory Opinion on the Legality of Nuclear Weapons • 2001, Self-Defense and Afghanistan: SC Resolution 1368 • 2002, Resolution Preceding the Invasion of Iraq: SC Resolution 1441 • 2002 UK Explanation of Its Vote on SC Resolution 1441. ARMS CONTROL • 1968, Treaty on the Non-Proliferation of Nuclear Weapons • 1972, Treaty Between the USA and the USSR on the Limitation of Anti-Ballistic Missile Systems • 1972, Biological Weapons Convention • 1993, Chemical Weapons Convention • 1996, Comprehensive Nuclear Test-Ban Treaty INTERNATIONAL CRIMINAL LAW • 1948, Convention on the Prevention and Punishment of the Crime of Genocide • 1984, Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment • 1998, The Rome Statute of the International Criminal Court • 2001, Establishing the Counter-Terrorism Committee: SC Resolution 1373. INTERNATIONAL HUMAN RIGHTS LAW • 1948, Universal Declaration of Human Rights • 1951 Convention Relating to the Status of Refugees • 1965, International Convention on the Elimination of All forms of Racial Discrimination • 1966, International Covenant in Civil and Political Rights • 1979 Convention on the Elimination of All Forms of Discrimination Against Women • 1989, Convention on the Rights of the Child INTERNATIONAL HUMANITARIAN LAW • 1949, Geneva Convention Relative to the Treatment of Prisoners of War • 1977, Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts INTERNATIONAL LAW AND THE ENVIRONMENT • 1989, Basel Convention on the Control of Trans- boundary Movements of Hazardous Wastes and Their Disposal • 1991, UN Framework Convention on Climate Change • 1997, Kyoto Protocol to the UN Framework Convention on Climate Change • 2002, Cartagena Protocol on Biosafety THE GLOBAL COMMONS • 1959, The Antarctic Treaty

one author calls "humanity's law" [112] and are increasingly invoked, readopted, and reinstituted in the vast case law of international tribunals, supranational courts, and the evolving articulations and iterations of transnational jurisprudence.

It should be noted that the rise of international and supranational judicial regimes oriented toward active promotion of cosmopolitan normativity is a novel and unprecedented development in International Relations theory, political thought, and practice of international law. When in 1948, only three years after the conclusion of the most pernicious conflict of the twentieth century, the framers of the Universal Declaration of Human Rights transcribed the words, "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood,"[113] they could not have known that the wounded but recalcitrant international state system, and the entrenched but capricious interest-driven political environment would effectively mute their full symbolic, cosmopolitan, and legal weight until the dawn of the new millennium. Gradually, however, as the importance and condition of sovereignty and territorialization as *casus belli* in international relations were undermined and diminished by the processes of economic and political globalization, the normative foundations of the legal order have begun to shift from state-sovereignty-oriented approaches and its traditional emphasis on security, territory, borders, and statehood, to human-being-oriented approaches[114] that focus on the security of persons and peoples, creating, in an otherwise confrontation-prone socio-political milieu, a space for an enlightened *orbis pacificum*, which holds perpetrators of crimes offensive to human conscience and dignity to the highest possible legal and moral standard.

Contemporary scholars of international law discourse contend that it is increasingly difficult to "miss the (implicit) connection between the said emerging jurisprudence and the ongoing process of 'globalization of law' driven by a variety of international courts and court-like bodies in fields as diverse as international trade, international law of the sea,

---

• 1967, Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space • 1982, Third UN Convention on the Law of the Sea.

[112] See Ruti Teitel *Humanity's Law*. 2011. Oxford: Oxford University Press.

[113] The UN Declaration of Human Rights, Article 1 <http://www.un.org/en/documents/udhr/>

[114] Teitel, Humanity's Law.

international criminal justice, and of course international human rights."[115] Permeating the relocation of authority from state bureaucracies to supranational judiciaries is a characteristic ethic of humanitarianism, which is distinct from previous spurs of selfless humanitarian compassion in that it is for the first time (i) institutionalized, (ii) organized, and (iii) part of governance. The international community, according to Michael Barnett, has come to increasingly recognize acts of violence as "causeways for benevolence"[116], thus treating massacres, international and civil wars, war crimes, crimes against humanity, and war-induced famines as "calls to alms."[117] Moreover, advances in military technology and logistics of military strategy, "furthered the desire of the international community to expand the laws of war and provide more protections and relief to civilians."[118]

Yet such beneficent largesse on the part of humanity could not have occurred spontaneously and without a chartered institutional trajectory of law articulation, interpretation, and enforcement. Alongside the first pangs of cosmopolitan enlightenment exemplified by compassionate recognition of human need and suffering across the globe and the growing internationalization and institutionalization of humanitarianism - which provided normative foundations for action - the rise of a supranational legal regime with its novel emphasis on human security and protection of individual human beings has begun to play a decisively transformative role in the discourse and practice of international relations. The Declaration of Human Rights, the Geneva Convention, the International Covenant on Civil and Political Rights, the Covenant on Economic, Social and Cultural Rights are but a few examples of multilateral legal instruments which allow, "humanity to assert itself through law" and seek civil and criminal accountability for overt transgressions of "the universalizable content of the core humanity law norms" [119] through global courts.[120] Naturally, this emerging humanitarian-cosmopolitical turn identified by scholars

---

[115] Pentsagulia, Gaetano. 2009. Minority Rights, Minority Groups and Judicial Discourse in International Law: A Comparative Perspective. Leiden. Martinus Nijhoff Publishers. p. 13.
[116] Barnett, Michael. 2011. *Empire of Humanity: A History of Humanitarianism*. Ithaca. Cornell University Press. p. 23.
[117] Ibid., p. 23
[118] Ibid., Pg. 23.
[119] Teitel, Humanity's Law, p. 7.
[120] An array of international and regional courts and tribunals exists for the purpose of administering justice in accordance with international law, such as: Central American Court of Justice; the Inter-American Court of Human Rights; Court of Justice of the Andean Community; Court of Justice of the EFTA; Benelux Court of Justice; Court of Justice of the EU; the European Court of Human Rights; the International Tribunal for

has amplified the importance of supranational judiciaries, such as the International Criminal Court and the European Court of Human Rights, in "furthering the humanity-based scheme of jurisdiction that follows the person."[121] As "state-sovereignty-oriented approaches have been gradually supplanted by human-oriented approaches," Teitel notes, the evolution of the international and cosmopolitan legal regime, which emphasizes "the primacy of individual responsibility" as well as "protection and preservation of persons and peoples," has come to the fore in both domestic and international political and legal discourse. Concurrently, it is recognized that a more resolute recognition of human rights and cosmopolitan approaches by supranational judicial bodies must therefore co-evolve alongside such paradigmatic and sacrosanct norms as state sovereignty, monopoly on the use of force, and the superior prerogatives of state security. Subjecting "acts of state" to the rule of law and skewing the balance of power in favor of the individual is a symptom of the increasingly rights-oriented cosmopolitan gaze.

This phenomenon has left many governments undoubtedly confused about the appropriate relationship between state sovereignty and state responsibility to domesticate international human rights law without subversion of sovereign immunity, and the duty to meaningfully attend to and protect human rights against deliberate violations. The key challenge before the scholars of international relations, therefore, rests in the examination of the manifold ways in which state sovereignty must be retooled in relation to and rerouted in the direction of the evolving modes of global supranational institutional governance and the emerging ethical environment brought about by the universalizable content of the human rights discourse. Supranational courts, not states, I shall argue, will play a much more active and engaging role in the promotion of cosmopolitan norms regime and thus inevitably change the long-standing dynamics of state-to-state and state-to-citizen relations as "individuals and non-state entities" will not only be "increasingly able to partake in shaping of the international legal order"[122], but as citizens of a cosmopolitically-oriented

---

the Law of the Sea; Eastern Caribbean Supreme Court; Caribbean Court of Justice, ECOWAS Community Court of Justice; COMESA Court of Justice; African Court of Human and People's Rights; East African Court of Justice; International Criminal Tribunal for Rwanda; Special Court for Sierra Leone; Special Tribunal for Lebanon; International Court of Justice; International Criminal Court; Permanent Court of Arbitration; International Criminal Tribunal for the Former Yugoslavia; Extraordinary Chambers in the Courts of Cambodia (Khmer Rouge Tribunal), to name a few.

[121] Teitel, Humanity's Law, p. 7.

[122] Jacobson, David. 2006. *Rights Across Borders.* Baltimore: Johns Hopkins University Press. p. 3.

order will form a much more extensive and substantively "thick" legal and political conception of themselves and their "right to have rights"[123] vis-à-vis the state. Presence of judicial oversight is thus a guarantor of greater accountability of states for their violations of the social contract and misappropriation of their monopolistic claims on power and sovereign prerogative.

In order to bring the above into fruition, I will restrict my study to the investigation of supranational judicial regimes, more precisely, the International Court of Justice (ICJ), the European Court of Human Rights (ECtHR), the International Criminal Court (ICC) and the Inter-American Court of Human Rights (IACHR), and inquire after the following questions: To what extent does the judicial output of the ECtHR, the ICJ, and ICC influence the development of core humanity's law and a broader construction of the cosmopolitan legal norms regime? Why are supranational courts desirable legal institutional paradigms for the promulgation of international human rights and cosmopolitan norm regimes and what makes them legitimate sources of international law and authority? What effect do supranational judicial institutions have on state expectations, state conduct, and state-citizen relations? What are the emerging accountability frameworks for transnational human rights violations? And lastly, what are the emerging normative frameworks for transnational/cosmopolitan human rights obligations? In furnishing viable answers, I will rely on liberal institutional theory and bounded strategic space theory, that is, an institutional and procedural space occupied by actors and processes defining the terms of legal engagement, as well as Seyla Benhabib's jurisgenerative politics, and whenever necessary respond to three conceptually instrumental traditions of (i) realism; (ii) liberal institutionalism; and (iii) constructivism, with which any serious study of cosmopolitan normativity and supranational judicial regimes must directly engage.

The current research intends to fill the gap in contemporary international relations and law theories, which according to legal scholars such as Jenny Martinez and Philip Alston, consistently ignore the "potential for a mutually beneficial and reinforcing

[123] Seila Benhabib and Hannah Arendt have prominently emphasized this phrase in relation to rights-claims by ordinary citizens.

relationship between state power and international law"[124] as well as offer theoretical, legal and political channels for rethinking "the relationship between power, ideas, and international institutions."[125] In so doing, the study aims to point to the increasing relevance and potency of the non-state actors in shaping international human right law and delineating the scope of cosmopolitan normativity.

The Rise of Supranational Legal Regimes

To a significant degree, legislative, legal, and regulatory networks, Anne-Marie Slaughter contends in *A New World Order* (2004), already contest the traditional modes of inter-state and interpersonal interactions. Informal networks of regulators, legislators, and judges preside over information exchange, law enforcement, harmonization of policies, procedures, and regulations, enhancing both the constitutional dialogue and human rights law, while settling transnational disputes and providing the necessary checks and balances in a world of increasingly disaggregated modes of being and feeling a citizen in the face of multifaceted challenges of global inequality[126] that often undermine the aforementioned Arendtian dictum of the "right to have rights." A shift towards "judicial agency" that is seen in a "dense web of legal rights mediated by judicial and administrative bodies" allows supranational courts to function both within and across state borders,[127] albeit, with explicit sanction and mandate of the state. Since the 1920's, there has been a considerable movement and a growing demand among jurists, notes Edwin Borchard in "The Access of Individuals to International Courts", that non-citizen aliens and individual citizens be given a privilege of suing States before an International Court.[128] Functionally, a prolonged gestation period only recently has been able to provide individual litigants with the means of access and the legal vocabulary necessary to effectively challenge legislative and executive authority of the state in the supranational courts of law.

This changing balance of power between domestic and international actors and

---

[124] Martinez, Jenny S. 2012. *The Slave Trade and the Origins of the International Human Rights Law*. Oxford: Oxford University Press. p. 176.
[125] Ibid., p. 165.
[126] Slaughter, Anne-Marie. 2004. *A New World Order*. Princeton: Princeton University Press.
[127] Jacobson, David. 2003. "Courts Across Borders: The Implications of Judicial Agency for Human Rights and Democracy." *Human Rights Quarterly* 25 (2003). p. 74.
[128] Borchard, Edwin, M. The Access of Individuals to International Courts. *The American Journal of International Law.* Vol. 24, No. 2 (Apr., 1930), pp. 359-365.

legal instruments has a significant impact on the state and results in notable tensions between (i) personal responsibility to abide by international human rights norms and cosmopolitan institutional regimes and the privileges of sovereign immunity of heads of state implicated in the transgression of human rights norms; (ii) between state prerogatives informed by enlightened self-interest and those of human security protected by international conventions and treaties; (iii) between state sovereignty and immunity from prosecution and the evolution and assertion of universal jurisdiction, human rights law, and humanitarian law.[129] Not only is there now, as Garret Wallace Brown argues, an "array of cosmopolitan norms that structure our lives together" and which the international community must recognize as a political fact, but also "our reality is becoming thoroughly cosmopolitan," which, as Ulrich Beck would have it, "disguises the growing unreality of the national gaze." This dawning reality, argues Benhabib, finds the modern state system "caught between sovereignty and hospitality, between the prerogative to choose to be a party to cosmopolitan norms and human rights treaties, and the obligation to extend recognition of these human rights to all."[130] International relations, in theory and practice, have reorganized itself along (i) greater recognition of the importance of humanitarian law; (ii) the withdrawal of legitimacy from military and authoritarian regimes; (iii) support for democratization; (iv) greater emphasis on human rights; (v) the idea that state security should be based on human security; (vi) greater international involvement in conflict resolution; and (vii) peace building and post-conflict reconstruction.

The institutionalization of cosmopolitanism and cosmopolitan *pro homine*[131] legal regime based on humanitarian principles or humanity's law has historically been prompted, according to Ulrich Beck, by "two competing and conflicting principles: supranationalism and intergovernmentalism."[132] Nowhere is this more visible than in the case of the Europe Union. The technocratic integration mechanism of the European Coal and Steel Community and the subsequent establishment of the European Commission, the Council of Ministers, the European Court of Justice and the European Parliament, the customs union, and a common internal market resulted in a "cosmopolitan moment" for the

[129] Beardsworth, Richard. 2011. *Cosmopolitanism and International Relations Theory*. Cambridge: Polity.
[130] Benhabib, Seyla. 2008. "Just Membership in a Global Community." *Macalester Civic Forum.* p. 445.
[131] A legal term, which in its literal translation from Latin denotes - "for the human"; "in favor of the human".
[132] Beck, Ulrich and Edgar Grande. 2007. *Cosmopolitan Europe.* Cambridge: Polity Press. p. 20.

continent's states historically driven by narrow economic self-interest, egoism, and asymmetries of power and influence.[133] It is revealing to note that European cosmopolitanism has been shaped "from above rather than from below, technocratically rather than democratically" with an emphasis on supranational institutions rather than actors from civil society.[134] Current trends, I argue, show that (i) international human rights law; (ii) interactions between the citizen and the supranational court; (iii) emergence of generalizable human interests and articulation of public standards[135] and (iv) the emergence of humanity-based scheme of jurisdiction that follows the norm and the person[136] inserts into the cosmopolitan equation the missing civil-social component. It is increasingly and most noticeably the transnational legal regime with its highly evolved and complex supranational institutional system that is capable of influencing and prompting qualitative changes in state-citizen interests and inter-state responsibilities.

Collectively, scholars agree, that sufficient evidence exists to "assume that globalization has created new types of cosmopolitan political spaces which clearly transcend the national boundaries and integrate national, inter-, trans- and supranational actors, organizations, networks, institutions and norms."[137] Inadvertently, the emergence of cosmopolitan political spaces "creates new types of conflicts and cleavages"[138] that often issue from an unexamined adherence to the "outdated national constellation"[139] and antagonistic principles. Evolution of political reality must, however, be met with a re-invention of terminology and the removal of artificial boundaries between national and international politics and it is the supranational court system that can play a decisive role in the process. It is the view of scholars of politics, that cosmopolitanism (as a theory and a practice) occupies a place in the critical discourse of globalization and constitutes a disciplinary paradigm shift in political science equal to that of former Behavioral revolution, that is best equipped to address, re-shape, re-define economic, political and cultural boundaries that have become increasingly ambiguous, incongruent, and

---

[133] Ibid., p. 20.
[134] Ibid., p. 20.
[135] Benhabib, Seyla. 2007. "Twilight of Sovereignty or the Emergence of Cosmopolitan Norms? Rethinking Citizenship in Volatile Times. *Citizenship Studies* 11(1). p. 22.
[136] Teitel, Humanity's Law.
[137] Grande, Edgar. 2006. "Cosmopolitan political science." *The British Journal of Sociology* 57(1). p. 106.
[138] Ibid., p. 106.
[139] Ibid., p. 106.

contingent. Here, supranational courts reveal themselves as progenitors of post-national citizenship and novel forms of cosmopolitan ethos and agency, which redefine territorial notions of jurisdiction, enhance popular sovereignty, and battle against the fervor of realism and anti-cosmopolitanism.

The Project of Popular Sovereignty

The above trends reveal, I want to note, a novel socio-political experience, which urgently necessitates the establishment and support of enforceable legal frameworks for navigating and coordinating policies and practices that simultaneously (i) instill and maintain respect for essential human rights, and (ii) consolidate and advance a sphere of communal inclusion through legal instruments and a supranational court system in order to maintain the momentum of the cosmopolitan moment in international relations.

The sheer intensification of debates concerning the status of universal human rights in the context of the international state system, refugee, immigrant and asylum status of the internally displaced persons and crimes against humanity, alone, have considerably augmented the conceptual and practical fabric of inter-state relations. The Charter of Fundamental Rights, the European Convention of Human Rights, the establishment of the International Criminal Court, the European Court of Justice, and the European Court of Human Rights have collectively inserted into the legal lexicon a new vocabulary and provided a necessary institutional umbrella that has limited arbitrary state violations of the rights and dignity of persons, irrespective of their existential and (a)political status. The emergence of, what Benhabib terms, the "cosmopolitan norms regime" has resulted in the enhancement of "the project of popular sovereignty" (to be discussed later), "while prying open the black box of state sovereignty."[140]

To illustrate, however, just how domesticated the cosmopolitan gaze has become in international politics, it may prove instrumental to briefly focus on the European Court of Human Rights. Over the fifty-year period since its formal institutionalization, this supranational judicial body (and others like it in theory and design) has proven to have an important exogenous effect on states and citizen rights in that they consistently (i) augment

[140] Benhabib, Seyla. 2009. "Claiming Rights across Borders: International Human Rights and Democratic Sovereignty." *American Political Science Review*, (November).

state interests; (ii) increase the network of state interdependence and institutional interventions in the sovereign affairs of states; (iii) mediate power in international politics through human rights-based norms and collective legal constraints; (iv) increase emphasis on rights (to self-determination, belonging, and citizenship status); (v) increase jurisdiction over the "acts of state."[141] In view of the above, the persistent question in the international law literature is that of compliance. Why do nations, despite noticeable infringements in their autonomous decision and policy-making, obey international law? In *The New Sovereignty* (1998), Abram Chayes contends that compliance results from a dynamics "iterative process of discourse among the parties, the treaty organizations, and the wider public"[142] rather than threats of punitive sanctions or reputational costs associated with outright defiance of treaty regimes. Thomas Franck in *Fairness in International Law and Institutions* (1998) suggests that the perceived fairness of international procedures themselves persuades states to obey otherwise "powerless rules".[143] It is the in-built legitimacy and distributive justice of international law principles that not only ensure state conformity, but further their internalization by domestic legal systems. Two intellectual traditions, realism and utilitarianism, have begged to differ. Any law, which cannot be enforced due to an effective institutional deficit for making, applying and upholding law, is not really law. Further, any rational state unit will obey law "only if it is in their interest to do so; they will disregard law or obligation if the advantages of violation outweigh the advantages of observance."[144]

In view of the above, supranational judicial institutions suggest themselves as important players in the promotion of international law and the underlying normative constellation of humanity-oriented values as well as increased judicialization of international politics. They are the authoritative mediators and often the only substantial interpretative sources of international law and a pivotal and vital component of a transnational legal process. Through the courts' complex and highly dynamic institutional interaction with states and individual petitioners, global norms become part and parcel of

---

[141] Beardsworth, Cosmopolitanism and International Relations Theory.
[142] Abram Chayes and Antonia Handler Chayes. 1998. *The New Sovereignty Compliance with International Regulatory Agreements*. Cambridge: Cambridge University Press. p. 25.
[143] Franck, Thomas, M. 1998. *Fairness in International Law and Institutions.* Oxford: Oxford University Press.
[144] Henkin, Louis. 1979. *How Nations Behave.* New York: Columbia University Press. p. 49.

domestic legal regimes, which ensure future state compliance. It is important to note that supranational courts are not political organizations, however, they inevitably operate in a political environment. Mary Volcansek argues that "courts make political decisions regularly, in that they authoritatively allocate values for society." More importantly, "court decisions often create public policy, and judges are not immune to political influences, even if they are only minimally cognizant of the political environment in which their decisions are implemented."[145] Such a paradigm of supra-state legal administration is especially visible in the European discourses on citizenship, economic migration, and human rights and the ongoing renegotiation of inter- and intra-state relations between citizens and their governments.

The juridical revolution in human rights since 1945 and a steady recognition of cosmopolitan norms and orchestration of transnational laws have had a significant, practical impact on states. It is now a common occurrence, Richard Beardsworth observes, that (i) international legal rulings routinely trump domestic legal rulings; (ii) the rules of international declarations, treaties, and legal custom inform the rules of domestic constitutions; (iii) international legal rulings becomes cited precedents in domestic legal cases and judgments; (iv) state leaders are increasingly made individually accountable, through supranational courts, for the government and its use or misuse of power. Ulrich Petersmann notes that national and international courts now claim that:

> "(i) every human being possesses an intrinsic worth and moral entitlement to human rights, merely by being human; (ii) this moral worth and entitlement must be recognized and respected by others; (iii) also the state must be seen to exist for the sake of the individual being, and not vice versa."[146]

To the chagrin of many committed Realists, states today operate in an indubitably ethical environment influenced by a revival of the cosmopolitan tradition, whose central tenets uphold that: (a) individuals are the fundamental units of moral concern and ought to be regarded as one another's moral equals; (b) whatever rights and privileges states have,

---

[145] Volcansek, Mary L. 1997. *Supranational Courts in a Political Context*. Gainesville: University Press of Florida. p. 10.

[146] Petersmann, Ernst-Ulrich. 2011. "Human Rights and International Economic Law." In E.U. Petersmann *International Economic Law in the 21st Century: Constitutional Pluralism and Multilevel Governance of Interdependent Public Goods*. Oxford: Hart Publishing. p. 1.

they have them only in so far as they thereby serve individual's fundamental interests; (c) states are not under a greater obligation to respect their individual member's fundamental rights than to respect the fundamental rights of foreigners.

According to cosmopolitans, individual's basic entitlements are independent of political borders, and states have authority to the extent that they respect and promote those entitlements. There should be no doubt, therefore, as Anthony Arnull contends, that "the notion of the rule of law has come to occupy an important place in the scale of values"[147] and that the Courts have become an indispensable moral and legal voice in ascertaining that Conventions and Treaties propounding respect and adherence to human rights are honored by states and that the laws constitute "an effective guide to action, that they are adequately publicized, reasonably clear and prospective rather than retrospective in effect."[148]

The evolution of the international judicial bodies and cosmopolitical legal norms regime has prompted a recognizable shift from realpolitik based in self-serving state interests to humanitarian cosmopolitanism; a turn from the state prerogative of self-defense to the responsibility to prevent and protect; and, most importantly, a repudiation of ethics based on the exploitation and instrumentalization of human subjects and citizens and a reinforcement of concerns over human beings qua persons, who, endowed with inalienable rights that extend beyond the provenance of any one statist regime, give renewed salience to an enlightened cosmopolitan sentiment of thinking nothing human alien.

Varieties of Cosmopolitan Experience

In the "Principles of Cosmopolitan Order" David Held identifies two accounts of cosmopolitan thought. The first was set out by the Stoics, who were the first to think of themselves as "citizens of the cosmos" thus seeking to "replace the central role of the polis in ancient political thought with that of the cosmos in which humankind might live together in harmony." The moral realm of humanity is therefore owed first and foremost allegiance.[149] Richard Brett in "Did the Stoics Invent Human Rights?" provides an analysis

---

[147] Arnull, Anthony. 2000. *The European Union and its Court of Justice.* Oxford: Oxford University Press.
[148] Ibid.
[149] Held, David. 2005. "Principles of Cosmopolitan Order" in Christopher Bertram et al. (ed.) *The Political Philosophy of Cosmopolitanism.* Cambridge: Cambridge University Press.

of a Stoic notion of community and the position of the much-revered wise citizens to the rest of the human order. Although, his meticulous study of the ancient texts reveals an elitist disconnect between the human horde and the supreme sagacity of the few wise men, the notion of moral advancement and human dignity inaugurated there find their full expression in the life lived in harmony with natural law and rights derived therefrom. The broad extrapolations of the human universal condition imbued with a cosmological perspective initiated by classical Greece and bracketed by Platonists, Aristotelians, and the Stoics, proffered a view of human life as contingent upon two distinct orders: (i) the Order of Nature (cosmos), evidenced in practical activities revolving around the annual cycle of seasons, and the monthly changes of tides; (ii) order of society (polis), evidenced in the administration of cities and collective enterprises ensuing in a politically organized unit, the city-state. The belief that the "structure of Nature reinforces a rational Social Order" led to a manifest presupposition of a link between nature and social artifice, between cosmos and polis and thus to an eventual philosophical fusion of orders into a single unit, cosmopolis.

The eighteenth century witnessed the introduction of the second conception of cosmopolitanism, when the term *weltburger* or world-citizen emanated from and defined the Enlightenment thought. Immanuel Kant's insistence on cosmopolitan right as human capacity to present oneself and be heard within and across political communities, and the imagined *orbis pacificum* uniting European commonwealths under one government laid the foundation for dialogue without constraint. Kant upholds that an ethical and political community can be established and freely entered into by all moral agents. Such an establishment will hold "humanity as an end in itself" and thus mediate between the concept of inner moral duty towards others and the demands of the external public law through the means of a categorical imperative. The imagined Kantian community of free wills promises to culminate in a moral world in which agents, apart from considering their personal values and private projects, remain committed to and respect the moral personality of others, which subsequently leads to a general public morality that adequately advances the values of all. The political agent, on Kantian account, instead of being "enwrapped in itself as if it were the whole world, understands and behaves itself as a mere citizen of the

world"[150] and recognizes the totality and interrelatedness of other human beings, Kant's revered union of wills thus defined and consolidated the parameters of moral order and the cosmopolitan rights and constituted the first modern articulation of the political cosmopolis.

The pacification of violent human tendencies can be attributed to slowly evolving tacit and explicit norms of civilized behavior, standards of empathy and ethics, self-control, cooperation, growing awareness of Jeffersonian "self-evident truths" and the emergence of liberal democracy that embraces and nurtures citizen's impulse towards equal representation and justice.[151] "The rise of cosmopolitanism in the 17th and 18th centuries deserves part of the credit for the Humanitarian Revolution."[152] The age of scientific reason and literary and philosophical enlightenment resulted in humanism and liberalism previously unseen. Even Shakespeare will infer that "people who are different from us in many superficial ways – their gender, their race, their culture – are like us in fundamental ways.[153]

> "Hath not a Jew eyes? Hath not a Jew hands, organs, dimensions, senses, affections, passions? Fed with the same food, hurt with the same weapons, subject to the same diseases, healed by the same means, warmed and cooled by the same winter and summer, as a Christian is? If you prick us, do we not bleed? If you tickle us, do we not laugh? If you poison us, do we not die? And if you wrong us, shall we not revenge?"[154]

And Samuel Johnson will invite his reading audience to

> "Let observation, with extensive view,
> Survey mankind, from China to Peru;
> Remark each anxious toil, each eager strife,
> And watch the busy scenes of crowded life."[155]

Rousseau's romantic predilections urge the "great cosmopolitan souls" to stand as

---

[150] Kant, Immanuel. 1978. *Anthropology from a Pragmatic Point of View*. London. Feffer and Simmons, Inc. p. 128.
[151] Pinker, The Better Angels of Our Nature, p. 180.
[152] Ibid., p. 180.
[153] Ibid., p. 181.
[154] Ibid., p. 181.
[155] Johnson, Samuel. 1840. "The Vanity of Human Wishes" in Arthur Murphy, *The Works of Samuel Johnson, LL.D.* New York: Alexander V. Blake Publisher. p. 548.

"paragons of compassion" to "surmount the imaginary barriers that separate Peoples" and "include the whole human Race in the benevolence." More fundamentally, still, John Finnis in his *Natural Law and Natural Rights* (1980) makes fundamental assertions concerning basic values which social orders deem universally sacrosanct. Thus,

> "All human societies show a concern for the value of human life; in all, self-preservation is generally accepted as a proper motive for action, and in none is the killing of other human beings permitted without some fairly definite justification. All human societies regard the procreation of a new human life as in itself a good thing unless there are special circumstances. No human society fails to restrict sexual activity; in all societies there is some prohibition of incest, some opposition to boundless promiscuity and to rape, some favour for stability and permanence in sexual relations. All human societies display concern for truth, through education of the young in matters not only practical (e.g. avoidance of dangers) but also speculative or theoretical (e.g. religion) …. And all societies display a favour for the values of co-operation, of common over individual good, of obligation between individuals, and of justice within groups. All know friendship. All have some conception of *meum* and *tuum*, title or property, and of reciprocity. All value play, serious and formalized, or relaxed and recreational, All treat the bodies of dead members of the group in some traditional and ritual fashion different from their procedures for rubbish disposal. All display a concern for powers and principles which are to be respected as suprahuman; in one form or another, religion is universal."[156]

Contemporary articulations of cosmopolitan thought, informed by preceding historical evolution of the theory and practice of international politics, focus on eight main principles: (i) equal worth and dignity of human beings; (ii) their active agency; (iii) personal responsibility and accountability; (iv) consent; (v) collective decision-making; (vi) inclusiveness and subsidiarity; (vii) avoidance of serious harm; (viii) sustainability.[157] Noting the alterations in human experience, Martha Nussbaum in "Beyond the Social Contract" calls for an ethic indispensable to sustaining modern global structures and institutions and enabling human capabilities within and across territorial boundaries. Hers is an ethics of care, a social cosmopolitanism that knows of no political boundaries and prescribes to overcomes inhibitive bureaucratic artifices, which call for: (i) promotion of

---

[156] Finnis, John. 1980. *Natural Law and Natural Rights*. Oxford: Clarendon Press. p. 83-84.
[157] Held, 'Principles of Cosmopolitan Order.'

human capabilities domestically and internationally. By capabilities Nussbaum, along with her colleague Amartya Sen, understand life, bodily health, bodily integrity, senses, imagination, thought, emotions, practical reason, affiliation, and concern for other species. (ii) Respect for national sovereignty; (iii) Humanitarian responsibilities of prosperous nations toward poorer nations; (iv) Responsibilities of multinational corporations to promote human capabilities in the regions in which they operate; (v) Designing a fairer economic structure; (vi) Cultivation of thin, decentralized, and forceful global public sphere; (vii) Institutional focus on the lives of the disadvantaged; (viii) Care for the ill and the elderly; (ix) Institutional and individual responsibility for education and empowerment.

On the ethical skeleton proposed by Nussbaum's, Seyla Benhabib builds a doctrine of transnational law. In *Another Cosmopolitanism* (2006), Benhabib inquires after the ontological status of cosmopolitan norms in a post-metaphysical universe, and their authority in a universe not backed up by a sovereign with the power of enforcement. Although, Benhabib does not hide her predilection for Kantian ethics, the formal construct underlying her inquiry can no longer be substantiated by recourse to a 17th century rationalization of political order and moral standards of socio-political conduct. For one, the very assumption of a life lived within 'post-metaphysical' structures of governance, rather than guided by intuited *a priori* innate duties vested in universal laws and codes of obliging obedience, both eternal in duration and divine in character, presupposes a re-evaluation of values governed not by an assumption of intelligible teleology and purposiveness of providential linearity of history, but rather a dissociated, contingent, and fragmented unfolding of constructs that come to constitute and define human praxis.

Second, the displacement of identities and allegiances, intensified by migration, war, and economic and environmental uncertainty, problematizes in new ways the conceptions of indivisible sovereignty, first introduced to the political lexicon in 1576 by Jean Bodin in his masterwork, *Les six livres de la Republique*,[158] giving salience to alternative formations not constrained and limited by the exclusive constructs of national socialization. For Benhabib, the societal and political image proposed is that of

"…cosmopolitan norms [that] go beyond liberal international sovereignty by

[158] Bodin viewed sovereignty to be: (i) the essential element of the state, whose (ii) legitimate holder is the king, who (iii) has absolute or indivisible supremacy that is not be shared with others, and whose (iv) power is subject to the laws of God, of nature, and of nations.

> envisaging conceptual and juridical space for a domain of rights-relations that would be binding on non-state actors as well as state actors when they come into contact with individuals who are not members of their own polities."[159]

Underlying the debates on human rights is the question of dignity.[160] In Christopher McCrudden's "In Pursuit of Human Dignity: An Introduction to Current Debates" we find the concept interposed among the most prominent political debates. "The power of the concept of human dignity is unquestionable", McCrudden contends, "It appears to present a simple command to all of us: that we (individually and collectively) should value the human person, simply because he or she is human."[161] It is thus the foundation of all human rights and remains a salient feature of the language and theorization of international legal instruments that echo cosmopolitan sentiments of the Stoic and Enlightenment thought. The Charter of Human Rights, reiterated by the Vienna Declaration and Program for Action, underscores that:

> "Human rights and fundamental freedoms are the birthright of all human beings, are inalienable and guaranteed by law. Their protection and promotion are the first responsibility of government. Respect for them is an essential safeguard against an over-might state. Their observance and full exercise are the foundation of freedom, justice and peace."[162]

There exists, therefore, in all procedural legal criteria and principles an "inner morality" of the law, which establishes "a necessary conceptual connection between law and morality"[163] and which revolves around the essential personhood of the human subject.

Legal Cosmopolitanism and Supranational Courts: Individual Access and Accountability

Kathryn Sikkink in *The Justice Cascade* (2011) sets out to expand on the notion of

---

[159] Benhabib, Seyla. 2006. *Another Cosmopolitanism.* Oxford: Oxford University Press. p. 24.
[160] It is important to note that dignity in legal and philosophical language remains a conceptually contested concept. Both, the utilitarian and deontological views compete for recognition and suggest themselves in different periods of the concept's historical evolution.
[161] McCrudden, Christopher. 2013. "In Pursuit of Human Dignity: An Introduction to Current Debates." *Public Law and Legal Theory Research Paper Series.* p. 2.
[162] United Nations Human Rights Office of the High Commissioner, "Vienna Declaration and Programme for Action" <http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx >
[163] Reidy, David. 2007. *On the Philosophy of Law.* Belmont: Thomson Wadsworth. p. 58.

transnational justice and make a case for human rights prosecutions and their role in changing world politics. It is the author's contention that a simple navigation of the map of the world will reveal areas of intense and substantial judicial prosecutions of current and former heads of state, whose decisions while holding political office compromised human life, offended human conscience, and violated fundamental human rights. Sikkink identifies three models of accountability for past human rights violations (i) the immunity or impunity model; (ii) the state accountability model; (iii) the individual criminal accountability model.[164] All three kinds of prosecutions constitute for Skikink an "interrelated, dramatic new trend in world politics."[165] Some of the most visible and resonating cases where the norm of individual accountability was tested included (a) a trial of Argentina's president General Roberto Viola in 1981; (b) indictment of Slobodan Milosevic; (c) indictment of Augusto Pinochet; (d) prosecution of Charles Taylor of Sierra Leone; (e) indictment of president al-Bashir of Sudan. These types of human rights prosecutions, Sikkink argues, result in "improvements in human rights … through a combination of deterrence and socialization"[166] and help articulate norms that are at once powerful and persuasive.

Central to the stepped-up interest in human rights prosecutions is the learned human capacity of having one's conscience offended by the atrocities perpetrated against the human person and her essential human dignity. Torture, murder, and disappearance are collectively deemed as acts of violence that the heads of state are capable of executing against their citizen subjects and foreign nationals, increasingly with less and less impunity. In the words of Jurgen Habermas:

> "History has become mobilized; it is accelerating, even overheating, the new problems are shifting old perspectives and, what is more important, opening up new perspectives for the future [and new] points of view that restore our ability to perceive alternative courses of action."[167]

Not only the "separation of 'rights' from 'belonging' or membership in the state from political membership in the nation"[168] offers a fresh perspective on the political status and

---

[164] Sikkink, Kathryn. 2011. *The Justice Cascade*. New York: W.W. Norton & Co. p. 5-6.
[165] Ibid., p. 5.
[166] Ibid., p. 231.
[167] In Jacobson, Rights Across Borders, p. 107.
[168] Ibid., p. 107.

existential meaning of citizenship, but individual access to protective norms that reach beyond the nexus of territoriality and nationality and encapsulate rights to bodily integrity, life, and freedom from persecution, and rights to peoplehood[169] have come to impose new demands on the international legal jurisprudence and the regime of supranational courts, who are ever more eager and ready to embrace their responsibilities to protect and prevent any violations of the said rights. "We can see legalization as a tool for shaping state behavior"[170] where, according to Teitel, conflict is judicialized and politics are humanized.

In legal theory, rights are seen in the light of interests "protected by law and supported by a legitimate justification (or 'just claim')," [171] which impose a set of obligations or explicit duties upon the state in their recognition and satisfaction. Rights in the context of human rights theory are conceived as: (i) the absence of prohibitions; (ii) direct permissions; (iii) correlates of active and passive duties; (iv) claims; and (v) immunities.[172] It is believed that protection of rights runs parallel to the protection of certain goods, without which the very existence of human beings and their flourishing would be imperiled. Thus, inherent dignity of human-beings, bases of equality and non-discrimination, free choice-making and development, and free association are found to be fundamental elements of the human condition and legitimately entitled to protection.

In the last decade alone, the European Court of Human Rights has gradually increased its case load from 8,400 applications in 1999 to 27,200 applications in 2003, 45,500 applications in 2005, and finally, 57,200 applications in 2009 with some 119,300 applications pending. The forty-six states, which are a signatory of the European Convention of Human Rights and Fundamental Freedoms are affected by the ECtHR's judicial output. Similarly, the widening scope of the International Criminal Court has brought into attention, investigation and judicial arbitration of some 18 cases in 8 situations that encompass crimes against humanity, crimes of aggression, genocides, and war crimes. As of February 2013, one hundred and twenty-two states are a party to the Rome Statute (signed on July 1, 2002) and thus remain under the ICC's direct jurisdiction.

---

[169] Teitel, Humanity's Law, p. 52.
[170] Ibid., p. 35.
[171] Pentassuglia, Minority Rights, Minority Groups and Judicial Discourse in International Law, p. 39.
[172] Ibid., p. 39.

Sovereignty in Question

The growing influence of supranational institutions, naturally, puts state sovereignty in doubt. Sebastian Schmidt claims that the Westphalian system, which gave rise to the concepts of inviolability of state borders and autonomy of territory, is "an ideal type that might never have actually existed"[173]; it ought to be regarded, rather, as a simple and elegant heuristic device for ordering complicated state affairs, whose importance tends to be, both, aggravated and exaggerated by conditions of globalization. Yet, without the Peace of Westphalia's conferral of rights upon states, as if upon individuals, the idea of a community of states, of inter-state order, of normative authority or public morality, and of international law, would be neither theoretically or practically conceivable. It cannot be denied, however, that "the interstate system is challenged by claims of new subjects such as persons and peoples, organized along affiliative ties (such as race, religion, and ethnicity) that extend beyond the state and even beyond nationality."[174]

The two primary sources of international law: treaties and custom, progressively imbue the person with an unprecedented legal power and access to international civil and criminal law institutions and processes, issuing in a true cosmopolitan moment unbound from peculiarities of citizenship status. It is now a habitual behavior of institutions such as the European Court of Human Rights to admit cases and adjudicate on wide-ranging human rights issues that encompass (a) parental and children's rights; (b) reproductive rights; (c) terrorism; (d) violence against women; (e) data protection; (f) gender identity and sexual orientation; (g) expulsions and extraditions; (h) (mental) health and social welfare; (i) hate speech; (j) prisoner's voting rights; (k) taxation and trade unions; (l) forced labor and human trafficking, among many others. Thus case law concerning the most intimate spheres of human existence, such as, children and parent relations, the criminal field, data protection and discrimination matters, health, life, opinions and information, prison, work and business affairs is to a much greater extent that previously allowed, created and re-created by supranational courts who hold considerable influence in projecting their legal and normative authority onto the domestic jurisdictional plane.

---

[173] Schmidt, Sebastian. 2011. "To Order the Minds of Scholars: The Discourse of the Peace of Westphalia in International Relations Literature." *International Studies Quarterly,* 55. p. 602.
[174] Teitel, Humanity's Law, p. 7.

It is therefore no longer surprising but expected that the global spheres of governance grow more responsive to the complexities and difficulties of human existence. In *Divided Nations* (2013), Ian Goldin calls for more resilient global institutions that would be capable of facing collective action problems and proactively addressing the new challenges of conflict resolution, questions of war and peace, environmental equilibrium, and social and economic stability in the twenty-first century. Pandemics, cybercrime, global terrorism, migration, and environmental degradation require collective management and uniform application of laws that affect, at bottom, the well-being, security, and flourishing of a human person. Top-down decision-making that is exclusionary of a large number of parties involved, Golding contends, is no longer sustainable. Not only must governments do what they promise, but also reform rather than proliferate, large global bureaucracies (such as the IMF, the G8, the World Bank, the UN), in order to avert and prevent devastation, human tragedy and suffering. In the absence of meaningful reform at the domestic level, citizens can now take their governments to court and challenge the legal and constitutional bases for negligent and otherwise preventable injuries to a person's and citizen's human welfare and dignity.

The New Frontier: Neo-liberal and Constructivist Challenges to the Realist International Relations Theory and New Institutional and Legal Responses

According to Richard Beardsworth, as processes of globalization deepen, so does humanity's understanding of the relationship between ethics and law. This means, "that the relations between morality and politics grow in intricacy, the more socially dense international relations become"[175] and the more urgent the emphasis on normative and sociological, as opposed to, merely material and empirical explanations of the political reality become. Because the international regime, according to Stephen Krasner is composed of "a set of implicit and explicit principles norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations."[176] The last five decades have seen an increased emphasis on an emergent international norm, the human rights regime and the underpinning recognition of human

[175] Beardsworth, Cosmopolitanism and International Relations Theory, p. 3.
[176] Krasner, Steven. 1983. *International Regimes.* Ithaca: Cornell University Press. p. 2.

dignity. In *The Crisis of the European Union: A Response* (2012), Jurgen Habermas argues for a conceptual connection between human rights and human dignity, asserting that it is human dignity that constitutes the moral source of human rights and thus provides a necessary connecting tissue between rational morality and positive law. Because human rights as opposed to moral rights, cannot exist in an institutional vacuum; vigorous institutionalization and validation of human rights through the instruments of international law has constituted the requisite first step in the aftermath of the Second World War.

The evolving global consciousness has given a profound momentum to various projects of popular sovereignty, by which human beings became the subjects rather than mere objects of the law. There is now a significant consensus on the role of agents in the legal process. Weinstock, for one, argues that persons "should be the authors of the laws that apply to them rather than puppets of forces playing themselves out behind their backs."[177] Popular sovereignty is therefore an indispensable process whereby the citizens themselves are legislators participating in the law- and norm-enacting procedures, either directly or through their representatives. State sovereignty, steeped in the devolving Realist tradition, on the other hand, presumes that the state, alone, comprises of capabilities necessary for protecting the citizens' freedom and security and for realizing political goals. Cosmopolitan norms, however, "challenge the prerogative of the state to be the highest authority dispensing justice over all that is living and dead within certain territorial boundaries."[178] Habermas claims that the surrender of state sovereignty may be necessary in order to facilitate supranational cooperation and problem-solving, but should not imply automatic disenfranchisement, as democratic procedures upheld by nation states and their role as constitutional guarantors of law and freedom remain nevertheless intact. Rather than presupposing obliteration of state jurisdiction and conceptual incompatibility between the state and popular sovereignty vis-à-vis the dawning reality of the global human rights norms regime, Simon Caney argues for "revised statism" which aims to prompt states to act and serve the ends of global justice to a much greater extent that they presently do. In order to ensure broader and deeper state involvement in the promotion of justice and cosmopolitan normativity, Caney makes six state-capacity building suggestions: (i) voting

[177] Weinstock, Daniel. ed. 2005. *Global Justice, Global Institutions*. Calgary: Calgary University Press. p. x.
[178] Benhabib, 'Twilight of Sovereignty or the Emergence of Cosmopolitan Norms?', p. 22.

rights egalitarianism in international organizations; (ii) increased representation of impoverished states in inter- and supra-national institutions; (iii) increased financial support for members of international institutions; (iv) transparency in the decision making process; (v) accountability of international institutions before other international institutions; (vi) accountability of international institutions to independent experts.[179]

"In an unstable and insecure world", Teitel contends, "the law of humanity – a framework that spans the law of war, international human rights law, and international criminal justice – reshapes the discourse in international relations"[180] and impacts its practice. Further,

> "Courts, tribunals, other international bodies, and political actors draw from the various elements of the framework, in assessing the rights and wrongs of conflict determining whether and how to intervene, and imposing accountability and responsibility on both state and non-state actors."[181]

It is not an accident, therefore, that the emergent and highly contested concept of "A Responsibility to Protect" calls on states and lawmakers to undergo a conceptual and linguistic shift from the "right to intervene" (or the "the right to humanitarian intervention") in matters of security and human rights violations, such as, genocide, ethnic cleansing, war crimes, and crimes against humanity to the reformulation and re-thinking of rights in terms of responsibilities (to protect and prevent). The independent International Commission on Intervention and State Sovereignty established by the Canadian Government in September 2000 has articulated the fundamental premise of this international legal doctrine (not yet a legal norm) - it reads –

> "Sovereign states have a responsibility to protect their own citizens from avoidable catastrophe – from mass murder and rape, from starvation – but when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states. There must be no more Rwandas."[182]

---

[179] Caney, Simon. 2005. "Cosmopolitanism, Democracy and Distributive Justice" in Weinstock, Daniel. (ed.) 2005. *Global Justice, Global Institutions*. Calgary: Calgary University Press. p. 52-56.
[180] Teitel, Humanity's Law, p. 4.
[181] Ibid., p. 4.
[182] International Development Research Center. 2001. "The Responsibility to Protect". Report of the International Commission on Intervention and State Sovereignty. p. 5.

In the context of the above, it should be asked whether we ought to think of humanitarian interventions and human rights declarations as unacceptable assaults on state sovereignty and state security? Literature shows that "external military intervention for human rights protection purposes has been controversial both when it has happened – as in Somalia, Bosnia, Kosovo – and when it has failed to happen, as in Rwanda."[183] Two contentions have thus been actively vying for preeminence in the international relations literature on the subject: (i) the new international activism with regard to the protection of human rights and prevention of harm is a result of the long overdue internationalization of the human conscience; and contra premise, it is asserted that, (ii) unsanctioned intervention on human rights grounds is a serious and alarming breach of an international state order premised on the sanctity of state sovereignty and inviolability of territory. The state justifiably worries that invocation of a binding international doctrine may issue in (a) coercive interventions and (b) legally questionable interventions, that rely on (c) misuse or misreading of precedent. "Because state sovereignty remains a peremptory norm, it follows", Roach reminds us, "that nonintervention remains the standard by which to evaluate the legitimacy of intervention, in particular the costs and consequences of suspending this norm."[184]

Such an understanding of international political and legal order is deeply steeped in the realist tradition, notably articulated by Hans Morgenthau in his *Politics Among Nations: The Struggle for Power and Peace* (1948), which continues to uphold as sacrosanct five constants: (i) The domain of the political is structured through the equilibriums and disequilibria of power in an otherwise (ii) anarchic international state system; (iii) the primacy of order makes morality, law, and justice of secondary concern; (iv) moralization of politics can lead to an escalation rather than reduction of violence; (v) political virtue consists in prudence or the "ability to separate the achievable from the desirable."[185] Contrary to the realist norm, (neo)liberal assumptions tend not to take the sovereign individual and the nation-state and its interests as their 'referent object of power', according to Agamben, but consider instead 'species life' as such, or as "that which is at

[183] Ibid., p. vii.
[184] Roach, Steven. 2005. "Decisionism and Humanitarian Intervention: Reinterpreting Carl Schmitt and the Global Political Order. *Alternatives*. 30. 446.
[185] Beardsworth, Cosmopolitanism and International Relations Theory, p. 55-56.

stake in a society's political strategies."[186] Global governance premised on the principles of liberal universalism, "goes to war in the name of life"[187] to preserve the self-evident truths of natural equality of persons, their 'inalienable rights' of life, liberty and happiness. Teitel argues that the "expanded humanitarian legal regime" which privileges the person "reflects the reframing of the meaning of security and of the rule of law in global politics."

A number of important developments in the American (American Revolution. U.S. Constitution) and European (Declaration of the Rights of Man and Citizen, the Eichmann Trial, Institution of the European Union) history and the Anglo-American political philosophy have respectively set, engaged dialogically and challenged the basic presuppositions of realist thought. The assumption that individuals are rational and fully capable of understanding their interests and should therefore be regarded as sources and subjects of moral concern, effectively aimed to mitigate the force of unmatched state power over the individual and guarantee space for the development of certain inalienable rights, in the domestic realm and under a system of democracy. The political theorist John Locke argued, contrary to Thomas Hobbes, that free citizens could join together to form governments that would protect them from anarchy and thus live peacefully without resort to authoritarianism. Since the political world is defined by contingency, a one-dimensional understanding of politics offered by realism is myopic, liberals argue. Various conditions exist in international politics that create incentives not merely for conflict but also cooperation, not merely for interests defined in terms of power, but for an overlapping consensus on the normative contours of the world order. Liberals point out that shared norms and values can provide a powerful incentive to cooperate, which, in turn, proves an asset in preserving security. Failure to cooperate increases the probability of existential insecurity. Monitoring mechanisms and a logic of reciprocity can ensure continued cooperation and reduce motivations to cheat or undermine states' collective interests issuing in Kantian 'perpetual peace", which declares an "end to all hostilities" and posits the moral practical reason's "irresistible veto: there shall be no war."[188]

---

[186] Agamben, Giorgio. 1998. *Homo Sacer: Sovereing Power and Bare Life.* Stanford: Stanford University. p. 10.

[187] Dillon, Michael and Julian Reid. 2009. *The Liberal Way of War: Killing to Make Life Live.* London and New York: Routledge. p. 107.

[188] Kant, Immanuel. 1991."Toward Perpetual Peace". In *Kant: Political Writings*, ed. H.S. Reiss. Cambridge: Cambridge University Press. p. 174.

Bohman claims that one of the main insights of Kant's "Toward Perpetual Peace" is that public sphere, defined as self-directing and autonomous citizens in conjunction with voluntary associations and nongovernmental organization, "are making the emergence of an international institutional framework inevitable."[189] Under conditions of pluralism, diverse public spheres are engaged in the process of trying to "understand and recognize one another and to peaceably work out solutions to their conflicts."[190] After all, according to complex interdependence theory, political actors are concerned with much more than state security and state survival thus giving rise to a web of relationships that welcome open collaboration for mutual material gain (i.e. money, territory, weaponry). Hedley Bull in *The Anarchical Society: A Study of World Politics* (1977), has made the contention that the international system has always reflected, in one respect or another at different historical moments, three traditions that mitigated against the system's precarious survival: (i) the Hobbesian, (ii) the Kantian, and (iii) the Grotian traditions. "The element of war and struggle for power among states, the element of transnational solidarity and conflict, cutting across the divisions among states, and the element of cooperation and regulated intercourse among states"[191] has demarcated and continues to characterize the different historical phases of the state system.

For constructivism, the realist and liberal approaches to international relations are essentially similar in that each sees material factors as driving forces in international politics. Although, the importance of material factors cannot be denied, their effects cannot be determined without first assessing how and to what end they are being used. Constructivism, therefore, seeks to investigate the purpose of the distribution of military and economic power and how states articulate and define it. Constructivist approaches focus on (i) interests; (ii) identities; and (iii) norms when attempting to make sense of the political realm and its pathologies. According to Alexander Wendt, "a fundamental principle of constructivist social theory is that people act toward objects, including other actors, on the basis of meanings that the objects have for them."[192] It is therefore

---

[189] Bohman, James and Matthias Lutz-Bachmann. 1997. *Perpetual Peace: Essays on Kant's Cosmopolitan Ideal.* Cambridge: The MIT Press. p. 197.
[190] Ibid., p. 197.
[191] Bull, Hedley. 1977. *The Anarchical Society: A Study of World Politics.* London: The Macmillan Press. p. 39.
[192] Wendt, Alexander. 1992. "Anarchy is What States make of it." *International Organization* 46(2). p. 396.

appropriate to connect, as most international relations theories do, actors' interests to their behavior. However, constructivism rejects a reductivist notion of linking interests to behavior. Rather, for constructivists, interests must be understood in terms of collective social constructs or meanings and normative estimations that groups assign to societal goals. Only the salience of the idea of European integration could, thus, redefine economic and political relations of political actors after World War II and make friends and cooperative agents of historical enemies.

With regard to identities, constructivist theory holds that perceptions of actors invested in the political realm define, both, (i) who the actors are, and (ii) what are their roles. The theory asserts that identities are not static but fluid and subject to change over time. To ignore the role of identity is to neglect important sources of change. Therefore, in order to understand the evolving regime of norms in the international realm, it is important to first take into consideration the identity setting legacy of the Treaty of Westphalia and its definition of the "sovereign state system" as opposed to local, tribal, or imperial systems. With the repeated assertion of the doctrine of noninterference in the internal affairs of sovereign states, the imperial systems fell into disrepute. However, the constructivist view maintains that in circumstances of abject violations of human rights the international rules of behavior mandate a change in identity of the state itself, making sovereignty and presupposed inviolability of territory, as a doctrine and a principle, invalid and obsolete in the face of atrocities. Lastly, Constructivism sees norms defined as "collective expectations for the proper behavior of actors"[193] as instruments that assist states in defining their interests, especially in times of normative paradigm shifts. Although, the 1789 Declaration of the Rights of Men and Citizen was able to eloquently articulate a conceptual commitment to human and citizen rights, only the horrors of World War II genocide prompted states to embrace and elevate human rights to an international norm and endow it with legal force. Norms are therefore essential in defining an overlapping normative consensus and influencing state behavior.

Liberal theorists recognize constructivism's import to international relations in that its theoretical framework provides necessary conceptual tools for supporting the liberal arguments about the possibility of cooperation in an anarchic, self-help system and in

[193] Katzenstein, Peter J. 1996. *The Culture of National Security.* New York: Columbia University Press. p. 5.

repealing the realist view that power, alone, is an exhaustive explanation of state behavior in international politics.

"It is now widely accepted" writes Seyla Benhabib in "Claiming Rights across Borders" that "since the Universal Declaration of Human Rights, we have entered a phase in the evolution of global civil society that is characterized by a transition from international to cosmopolitan norms of justice." [194] As a result, "commitments to territoriality, national politics, deference to executive power and resistance to international law"[195] can no longer be unilaterally maintained by discrete nation-states. "Internationally, there is growing multiplication of multilateral international treaties … and the growing number of cross-border actors of different kinds" that leads to "growing legal density," which "promotes, reinforces, and facilitates the phenomenon of agency." [196] Still, democratic sovereignties ignore the fact that international human rights can empower citizens … by creating new vocabularies for claims making and by opening new channels for mobilization for civil society actors who join networks of rights activism.[197] It is at this juncture that the importance of supranational legal regimes has much to add to the debate and, ultimately, the practice of international human rights.

Patterns of transnational migration under globalization have not only steadily eroded "the traditional basis of the nation-state membership, namely citizenship" but reinvested the logic or rights due to human beings by virtue of their humanity increasingly on the basis of "residency, not citizen status."[198] Further, as "transnational migration breaks down the citizen-alien distinction[199]" the state increasingly seeks juridical validation of its position vis-à-vis non-citizens' human rights claims in the supranational legal and conventional instruments furnished by the international human rights law regimes, such as the European Convention of Human Rights and supranational courts, such as, the European Court of Justice or the European Court of Human Rights. As boundaries of nation-states become more fluid and permeable, and civil and political attachments of its citizen-aliens

[194] Benhabib, Seyla. 2009. "Claiming Rights across Borders: International Human Rights and Democratic Sovereignty." *American Political Science Review*, (November). p. 5.
[195] Ibid., p. 2.
[196] Jacobson, Rights across Borders: Immigration and the Decline of Citizenship, p. 81.
[197] Benhabib. 'Claiming Rights across Borders', p. 6.
[198] Jacobson, Rights across Borders: Immigration and the Decline of Citizenship.
[199] Ibid., p. 9.

anemic and atrophied, globalizing forces impinge upon the state to seek remedies for its domestic ills in the global legal sphere and its institutional order. But, can there be political orders beyond the nation state that can resolve the tension between human rights and democracy, address concerns of displacement, or ensure citizens' political representation? The answer to this question is a cautious and judicious yes.

In addition to judicial regimes, the growing influence of Non-Governmental Organizations (Human Rights Watch, Amnesty International) and the media as "agents in the international decision-making process" [200] propel states toward action without necessarily eclipsing their political relevance as agents wielding considerable material and legal power in the domestic and international realm. It is, nonetheless, possible to increasingly see state sovereignty as either (i) an anachronism or (ii) as a projection of the political to the global level.[201] Attempts at regionalism or regional integration recognize the need to pool state sovereignty in order to achieve deeper cooperation.[202] Pooling and delegation of sovereignty is recognized as a way to create "credible commitments."[203] Integration as a "formal merger of two or more previously independent units into a single larger unit, with some type of common government"[204] may be a response to the growing perception of sovereignty as an outdated and old-fashioned instrument of power politics. The emergence of supranational courts suggests a multilevel political and legal order that is enhanced by regionalism (under the umbrella of which a formal transfer of institutions to supranational level occurs)[205] and which allows for sharing of (i) jurisdictional power, (ii) greater responsiveness, (iii) monitoring of laws, and (iv) resolution of conflicts above the nation-state. Daniele Archibugi states that a "fiercely competitive international regime"[206] has not only limited but also eroded sovereignty of states. "New information and communication technologies" Archibugi acknowledges "have made the various

---

[200] Roach. 'Decisionism and Humanitarian Intervention', p. 455.
[201] Ibid., p. 456.
[202] Habermas, Jurgen. 2012. *The Crisis of the European Union: A Response.* Cambridge: Polity Press.
[203] Moravcsik, Andrew. 1991. "Negotiating the Single European Act: National interests and conventional statecraft in the European Community', *International Organization.* 45(1), pp.19-56.
[204] Deutsch, Karl, et al. 1957. *Political Community and the North Atlantic Area: International Organization in the Light of Historical Experience*. Princeton: Princeton University Press. p. 5-6.
[205] Balibar, Etienne. 2004. *We, the People of Europe?* Princeton: Princeton University Press.
[206] Archibugi, Daniele. 1998. "Principles of cosmopolitan democracy." in Daniele Archibugi, David Held and Martin Köhler, eds, *Re-imagining Political Community*. Cambridge: Polity Press. p. 204.

national communities increasingly interdependent."[207] Structural changes in political decision-making with regard to nuclear energy or environmentalism that affect economic, political, and social life of other states mean that "few decisions made in one state are autonomous from those made in others."[208] It is acknowledged that "globalization is establishing new opening for non-state actors … pressuring the state, transgressing the authority of the state over its citizens, and thereby eroding the boundaries of jurisdiction defined by the Westphalian interstate system."[209]

Schmidt, as stated earlier, argues that overt reliance of international relations scholars on "a linear, one-dimensional axis defined by a 'Westphalian order' on one end and a globalized interdependent world order on the other" leads to "oversimplification of the changes associated with globalization."[210] Thus, for the sake of empirical and theoretical clarity, Schmidt contends, the discipline would benefit from abandoning the Westphalia concept altogether, as it is but an ideal-type that might never have existed in actuality and has been greatly exaggerated by globalization scholars who employ it. Yet, scholars who insist on this conceptualization, recognize that state is negotiating its sovereign status when it confronts exogenous forces that increasingly affect its behavior and determine its policy outcomes.

Under conditions of interdependence, effective governance, according to Held, requires sustained cooperation between national, regional and global institutions. Since, in the field of international relations there is no enforcement of global rules, the only level at which enforcement is effectively appropriated and demarcated is that of the state. "Not until national sovereignty is ceded to supranational authority" Beardsworth argues, "will there be a systematic change in power relations."[211] On questions of global concern, such as, climate change, denuclearization, or financial regulation, the state remains the only effective agent of change and enforcement and wields a significant monopoly on power. Roach argues that the "fundamental conditions of the modified Westphalian System in the

---

[207] Ibid., p. 204.
[208] Ibid., p. 204.
[209] Mittleman, James. 2001. *Capturing Globalization.* New York: Routledge. p. 10.
[210] Schmidt, Sebastian. 2011. "To Order the Minds of Scholars: The Discourse of the Peace of Westphalia in International Relations Literature." *International Studies Quarterly,* 55. p. 603.
[211] Beardsworth, Cosmopolitanism and International Relations Theory, p. 233.

post-War era show little sign of radical change."[212] It is still the case that "extra-legal (economic, strategic, and political) factors related to national interest continue to inform crucial decisions."[213] Patrick Hayden in *Cosmopolitan Global Politics* (2005) contends however, that the focus on the state as the only effective agent of change underestimates the role of transnational civil society and the establishment of formal relations between states in the form of G20 or global network activism that resulted in the (i) Ottawa Convention or the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, or (ii) sanctions against South Africa aimed at eliminating the apartheid system of institutionalized racism.[214] However, as long as international commitments remain voluntary and lack appropriate punitive and enforcement mechanisms, authoritarian regimes and cynical interest-maximizing democracies may refuse to play by the rules of the international community.

In sum, three possible solutions to the question of whether states can afford to remain the leading actors in the international system suggest themselves. Approaching the sovereignty debate from the perspective of the Realist tradition would result in reasserting state autonomy in the face of transnational treaties and processes of globalization. Realists refuse to see qualitative changes in the operation of sovereign states and continue to contend that states still remain the locus of considerable power in the international system. International organizations, treaties, and international covenants do not undermine external sovereignty of states as long as states remain actively involved in their creation, rationalization, and operationalization. The Universalist tradition, to the contrary, contends that globalization undermines the future of sovereignty by extending the power of international organizations and their concerted efforts to make rules that increasingly reflect the moral pulse of the global civil society. External sovereignty is compromised as "International Organizations and Non-Governmental Organizations, and other representatives of global society begin to replace states as the legitimate representatives of the global citizenry."[215] Lastly, the Internationalist school of thought argues that conditions

---

[212] Roach, Steven. 2009. *Governance, Order, and the International Criminal Court.* Oxford: Oxford University Press. p. 2.
[213] Ibid.
[214] Hayden, Patrick. 2005. *Cosmopolitan Global Politics*. New York: Routledge.
[215] Barkin, Samuel. 2006. *International Organization: Theories and Institutions*. New York: Palgrave Macmillan Press. p. 9.

of globalization are eroding internal sovereignty of states, or the autonomy of states to make domestic decisions. The growth in supranational organizations consistently increases state involvement in collective decision and rulemaking. However, the state remains the central organizing principle and a vocal unitary actor and participant in world politics.

The Specter of Realism and the Pursuit of Cosmopolitan Justice

The structural pathologies in the international state system have mandated the use and abuse of a range of theoretical and practical tools for their mitigation. If, as the realist international relations theory asserts, sovereign states are motivated by the propelling force of obtaining, maintaining and expanding power in their interactions with other like entities, then the anarchic, self-help state system will be characterized by discord and a Hobbesian state of nature populated by selfish, self-centered, amoral, diffident, and competitive state entities operating under conditions of scarcity, fear, and danger of violent attack and who, as rational agents, will opt to remain under constant preparation and readiness for war. Since, as the Realist tradition contends, power is the only logical pursuit of states, the Marxist school insists that an inextricable relation exists between economics and politics in the domestic and international realm. Economics, therefore, constitutes the backbone of power and influences state behavior. For the Postmodern stream of though, power is defined not in terms of its imposition or repression, but through the processes of normalization, forms of knowledge, institutions, technologies and practices generally falling under the rubric of the art of government, which develop elements constitutive of individuals' lives in such a way as to foster and prolong the strength of the state.

Thucydides in his *History of the Peloponnesian War* has originally formulated the theoretical roots of the Realist school in International Relations. Because conflict is a consequence of an ambiguous set of unpredictable circumstances and of the inherently uncertain structure of relations between states characterized by plural interests, its understanding and pre-emption for the sake of prevention, remains the only worthwhile preoccupation of the realist political theory. It is not an accident that the empirical reality of world politics has preoccupied, in addition to Thucydides and Hobbes, also Aristotle, Machiavelli, Spinoza, Hegel, Weber, and Nietzsche, who expounded on the major tenets of the school of Realism. Thus, whether it be classical Realism of Edward Carr, Hans

Morgenthau, Reinhold Niebuhr or George Kennan; the structural Realism of Kenneth Waltz; the hard Realism of John Mearshimer; or the neo-Realism of Stephen Krasner and Robert Jervis, the school can be collectively identified as posing significant challenges to liberal universalism, intent on promoting inter-state cooperation, being open to cosmopolitan ethic, and raising questions with regard to global justice and governance.

Beardworth argues that there are five major constants within Realist analysis that problematize political organization along the lines advocated by the above stated theories of liberalism and cosmopolitanism. (i) With regard to political organization, "questions of order precede those of justice."[216] Order *qua* power and security is the necessary precondition of law. In *Paradise and Power* (2003), Robert Kagan points out that normative and legal contours of European integration have been the result of the post-World War II distribution of power, or more precisely, the centralization of power in the United States' hands, which ensured relative freedom from existential insecurity and systemic uncertainty on the European continent. Thus, (ii) "Power is the irreducible trait of politics"[217] as long as it remains central to the behavior of states. For Machiavelli and Nietzsche, power is the end of political action, which has its roots in human psychology. "The liberal desire to reduce power to law misunderstands, therefore, the enduring structures of political behavior."[218] (iii) International liberalism and cosmopolitanism commit a 'legalistic fallacy' in claiming that "power can be subordinated to morality and law."[219]

The liberal attempt to project the principles of morality and legality onto the international realm, Realism argues, makes a category error. Under no circumstances, it is alleged by the Realist school, should relations between states be thought of as if they were relations between individuals within states. Neither should states be given anthropomorphic characteristics and be regarded as individuals acting on a wider moral scale. To use the domestic analogy in support of the liberal-cosmopolitan agenda would be to commit a legalistic-moralistic fallacy and lead to and unwelcomed (iv) 'moralization of

[216] Beardsworth, Cosmopolitanism and International Relations Theory, p. 49.
[217] Ibid., p. 50.
[218] Ibid., p. 50.
[219] Ibid., p. 51.

politics.'[220] The liberal refusal to see violence as necessary and often justified in the international theatre and its intent on seeking peace through law, Realists allege, may result in the increase rather than mitigation of violence. Since, as Realism contends, there are no moral limits constraining the liberal pursuit of justice as the moral end of politics achieved through law, the end so conceived may give rise to justified acts of violence in the name of peace and justice. It is not the virtue of justice, but that of (v) political prudence, according to the Realist tradition, that ought to set the tone for inter-state relations and separate the "achievable from the desirable" and choose "the lesser bad or the least worst."[221] In *Between War and Politics* (2007) Patricia Owens makes the Realist argument poignant by arguing that (i) high moral theory is dangerous for foreign policy, that (ii) if the end of political action lies outside of politics, violence becomes justified, and (iii) such justification can only result in the escalation not reduction of violence. Thus, ethics is incommensurate with the requirements of state sovereignty and international politics,[222] especially in instances where humanitarian intervention and state-building initiatives are assisted by coercive imposition of values, resulting not only in the much-abhorred moralization of politics but in value imperialism or imperialist modes of domination.

Under conditions of increasing interdependence, states routinely invoke legal precedent and make normative declarations in order to give the otherwise anarchic international system a semblance of structure and order. Advocates of global justice contend that social rules and legal arrangements have "great moral significance" which should not be underestimated as "decisions about their specific design have a tremendous impact on human lives,"[223] international bargaining, regulation of markets, and trade, labor, and monetary arrangements. States, therefore, can no longer afford to remain outside of the moral and legal deliberations on equity and justice, but must, in the context of the human rights regime, increasingly assume the role of "moral agents." Because power has military, biological, legal, economic, ideological, and political manifestations, wielders of power must carefully reflect on the legitimacy and moral consequences of its use, as

---

[220] Morgenthau, Hans. 1948. *Politics Among Nations: The Struggle for Power and Peace.* New York: Alfred A. Knopf Press.
[221] Beardsworth, Cosmopolitanism and International Relations Theory, p. 56.
[222] Zolo, Danilo. 1997. *Cosmopolis: Prospects for the World Government.* Cambridge. Wiley Press.
[223] Pogge, Thomas. 2005. *Global Institutions and Responsibility.* Malden: Blackwell Publishing. p. 1.

"consistent legitimate behavior is important to the very maintenance of power in a highly integrated system."[224] The new social environment calls for political action not only in the name of interests defined as power, but in the name of duty and responsibility. And since state interests change in interaction with other interests, states Alexander Wendt in *Social Theory of International Relations* (1999), to preclude ethical assessments of market forces, institutional arrangements, militarization or conflict from the realm of the political is increasingly untenable under conditions of globalization.

To challenge the Realist disposition, defenders of global justice, defined as "a duty to provide all human beings, as far as possible, with the opportunity to lead a self-fulfilling life"[225] advocate a "moral assessment and reform of global institutions"[226] in the face of "corruptness of human nature and its manifestation as a state of war in international relations"[227] that leads to further "unjust, foreseeable, and systematic inequalities."[228] This has significant consequences for the understanding of power. David Held in "Principles of Global Order" argues that under conditions of increasing independence, power is "likely to gravitate upwards and become more ideational and principled"[229] among those who seek global leadership. Moreover, legitimacy of power depends progressively on the "relation between actors, no longer on the difference between them."[230] Thus, power defined in terms of interests is subject to internalization in relations between states and mediation and modification of national interests in view of other states' competing interests. Power by any one autonomous and sovereign state, alone, can no longer trump the changing nature of interests and the growing expectations of conduct in international politics. The (i) qualitative changes to state interest under supranational cosmopolitan norm regimes; (ii) increasing network of state interdependence and institutional interventions in the sovereign affairs of states; (iii) increased mediation of international and inter-state power by cosmopolitan norms and collective legal constraints; (iv) increased emphasis on rights (to

---

[224] Beardsworth, Cosmopolitanism and International Relations Theory, p. 86.
[225] Ibid., p. 113.
[226] Pogge, Global Institutions and Responsibility, p. 1.
[227] Kokaz, Nancy. 2005. "Institutions for Global Justice." In David Weinstock *Global Justice, Global Institutions*. Calgary: University of Calgary Press. p. 88.
[228] Chung, 2005. p. 333.
[229] Held, David. 2005. "Principles of Cosmopolitan Order." In Christopher Bertram et al. (ed.) *The Political Philosophy of Cosmopolitanism.* Cambridge: Cambridge University Press. p. 12.
[230] Ibid., p.11.

self-determination, belonging, and citizenship status); (v) increasing jurisdiction of supranational courts over "acts of state" best illustrate the emerging global consensus on global governance and claims of justice.

The effect of international law on state behavior since the conclusion of the Nuremberg Trials has conceptually delimited but not eliminated the states' appeal to sovereignty and compelled them, in turn, to internalize international norms in order to avoid being held legally and criminally liable for crimes against humanity. In addition, Articles 1-14 of the Rome Statute of the International Criminal Court imply that state leaders cannot be protected by the immunity of their state sovereignty, and under the principle of universal jurisdiction can be prosecuted for criminal acts against humanity anywhere in the world. Government leaders must now make an argument for prudent or imprudent state action in the court of public opinion and in the context of international law. According to Habermas in *Between Facts and Norms* (1996), the emphasis on juridification of international relations avoids unnecessary moralization of politics feared by Realists. After all, theorists of global justice argue, all nation-states that cooperate with international institutions and defer to international codes of conduct, acknowledge the general principles of the dignity of life that inhere in the freedom of expression or freedom from bodily harm, and must rightfully stand by them in times of crisis. The intertwining of power and justice is the only coherent response to the Realist critique of social justice and cosmopolitan ethic in an interdependent world. Unlike the strictly hierarchical and vertical domestic legal systems, international law permits for both vertical and horizontal diffusion of norms and gradual voluntary state ascension to treaty obligations thus leaving room for the exercise of state sovereignty and sovereign equality protected by Articles 2(7) and 2(1) of the UN Charter. Civilized nations recognize, however, that sovereignty must frequently defer to peremptory norms deriving their normative force from customary international law, the precedent-setting opinion juris, jus cogens, and obligations *erga omnes* which may very well constrain the capacity of states to amend international law by treaty, impulse or caprice.

The second major critique of global justice is foregrounded in Marxist thought, which holds that (i) the discourse of globalization is nothing but the ideology of capitalism

gone global.[231] Globalization is a fundamentally economic process, which veils capital accumulation under "a universalist discourse of global interdependence between nations, people, and citizens."[232] (iii) The growing separation between the economy and polity, between the winners and the disinherited poor in the global arena leads to upheavals of violence. (iv) The regulatory global governance fails to provide an analysis of the global economic system as a whole and relies heavily on abstract ethical principles rather than political transformation. Further, (v) its disregard of the nation-state and its focus on moral equivalence of people render global institutions practically ineffective.[233] According to Thomas Pogge in "Assisting the Global Poor" the existing order is premised on a 'skewed global economic order,' which allows the powerful and wealthy states to take advantage of enfeebled societies with impunity.

In response to the above Marxist critique, David Held in *Global Covenant* (2004) writes:

> "While the values of social democracy – the rule of law, political equality, democratic politics, social justice, social solidarity and economic efficiency – are of enduring significance, the key challenge today is to elaborate their meaning, and to re-examine the conditions for their entrenchment, against the background of the changing global constellation of politics and economics." [234]

Global justice, on the above account, according to Held, will require the incremental integration of emerging economies into the world economy assisted by responsive policy framework that guides poorer countries in the process of adjustment to the demands and momentum of open markets. 'Global social democracy', Held suggests, is an appropriate paradigm for balancing efficiency demanded by global economic forces and equity for all countries called for by global justice. The marriage of classical liberal thought, which insists on viewing international trade as not beholden to the logic of a zero-sum game, with the normative principles of global social democracy, which sees (a) regulation of global movements of capital, (b) inclusion of poor and disenfranchised economies into the global

---

[231] Kolakowski, 1976; McLellan 2007

[232] Cohen, Mitchell. 2008. "Rooted Cosmopolitanism: Thoughts on the Left, Nationalism and Multiculturalism. "*Dissent*. p. 115.

[233] (Risse, 2005; Bearsdworth, 2011).

[234] Held, David. 2004. *Global Covenant.* Cambridge: Polity Press. p. 16.

market, (c) economic regulatory bodies and (d) the mitigation of inequity and inequality, will constitute the sine qua non for the achievement of global justice.

The postmodern/poststructuralist critique of global justice attempts to promote "non-normative understandings of justice, and to anticipate a political agency outside the terms of modern subjectivity and rationalism."[235] In a contingent, plural, dissymmetrical, uncertain, and hierarchical global world, postmodernism for thinkers such as Agamben, is the only appropriate form of critical thought. The Agambian critique posits that modern politics has depoliticized the victims of global economic systems and regimes of power, reducing them to 'bare life.' The 1789 Declaration of the Rights of Man and the Citizen turned individuals into "free and conscious political subjects"[236] only to call this political existence into question in times of exceptional emergencies or 'state[s] of exception' that effectively suspend all law. Thus, for Agamben, humanitarian intervention works on the principle of 'bare life,' which effectively strips rights-bearing individuals of their human rights as citizen rights, and instruments of global justice are deeply complicit in this practice.

> "Object of the cosmopolitan conscience of humanity, the people of the Third World have become 'the exception of the world'. In their misery and exclusion, they are turned into depoliticized objects of the global liberal gaze and governance."[237]

Moreover, postmodernism claims, the liberal subject "died with the divinity that endowed it in the sense that hardly anyone seriously believes in this subject's 'rights and reason' but one is nevertheless ritually compelled to invoke them since they remain the burnt-out horizon of the modern."[238] On the postmodern account, the discourse of global justice objectifies and disempowers, giving rise to a legal subject incapable of effectively contesting power and countenancing the permissive and penetrating forces of global capitalist order, leaving the subject vulnerable to technologies of power and resigned to human compassion.

---

[235] Beardsworth, Cosmopolitanism and International Relations Theory, p.172.
[236] Agamben, Homo Sacer, p.128.
[237] Ibid., p. 179.
[238] Dillon, Michael and Julian Reid. 2009. *The Liberal Way of War: Killing to Make Life Live.* London and New York: Routledge. p. 45.

Contra the postmodernist critique, global justice reinvests itself with substantive purpose if it can secure legal entitlements to political subjects at the international and local levels of governance. Only the regime of rights is able to empower sovereign subjects to lay claim to entitlements requisite for the maintenance of life. And "the risk of depolitization must be addressed though a multilevel structure of governance, not against it."[239] In the name of social and global justice, the responsibility to protect the vulnerable can negotiate "between state sovereignty and the sovereignty of the divinity of the person,"[240] neither dispossessing persons of their legal-political status nor sacrificing their interests for the interests of the state. However, in the name of justice, the responsibility to protect must be followed by a concordant responsibility to rebuild.

The neoliberal institutionalism literature notes that the proliferation of international institutions has went in tandem with increasingly complex trans-border developments that do not and cannot afford to fall under the jurisdiction or unilateral action of any one statist regime but require a concerted effort. Therefore, international institutions, thanks to their rising prominence, have "an important role to play in facilitating cross-border cooperation"[241] on issues of concern to the global community. Robert Keohane in *After Hegemony: Cooperation and Discord in the World of Political Economy* (2005) and Stephen Krasner in *International Regimes* (1983) respectively agree that increased globalization not only requires common solutions to questions of environmental deterioration or international banking or regulation of international trade but augments the constitutive structure of politics which must make room for intergovernmental, non-governmental, and supranational bodies.

The concern with failures, a lack of accountability and a democratic deficit of international organizations are issues of great concern to theorists working in the tradition of global democracy. David Held in *Democracy and the Global Order* (1995) attempts to locate solutions to the above in the democratically accountable structures of the state system, which can find global expression. "Institutional mechanisms such as directly elected global (or regional) parliaments, population-based voting, and global (or regional)

---

[239] Beardsworth, Cosmopolitanism and International Relations Theory, p. 210.
[240] Bellamy, A. "The responsibility to protect and the problem of military intervention." *International Affairs,* 84(4). p. 629.
[241] Kokaz, 'Institutions for Global Justice', p. 67.

referendums"[242] could potentially ameliorate the underlying weaknesses of the present-day international organizations and ensure their decision-making capacity. The civic conception of global justice opposes strict statism by arguing that a mature understanding of globalization and international justice presupposes that states abandon isolation and "enter cooperative practices that go beyond the mere maintenance of the society of peoples."[243] The thought of John Rawls encapsulated in the *Law of Peoples* (1993), provides the theoretical scaffolding for the proponents of institutionalized cooperation for the purposes of pursuing justice.

By way of eight principles of the *Law of Peoples*, Rawls offers a basic substantive regulatory mechanism that ought to assist the international society in articulating and deferring to the principles of justice. Rawls suggests:

> "(i) Peoples are free and independent, and their freedom and independence is to be respected by other peoples. (ii) Peoples are to observe treaties and undertakings. (iii) Peoples are equal and are parties to the agreements that bind them. (iv) Peoples are to observe a duty of nonintervention. (v) Peoples have the right to self-defense but no right to instigate war for reasons other than self-defense. (vi) Peoples are to honor human rights. (vii) Peoples are to observe certain specified restrictions in the conduct of war. (viii) Peoples have a duty to assist other peoples living under unfavorable conditions that prevent their having a just or decent political and social regime."[244]

In defining the principles of justice, the veil of ignorance holds absolutely, for only that justice is just, which is also blind. In addition, organizations cognizant of the above stated principles, "are mutually beneficial and are open to [well-ordered] peoples free to make use of them on their own initiative."[245]

According to Nancy Kokaz, three assumptions can be derived from Rawls' contention: (i) the goal of international institutions should lie in the facilitation of people's pursuit of their considered mutual advantage; (ii) consent must be the key criterion that legitimizes and justifies international institutions; (iii) participation in global associations

---

[242] Held, David. 1995. *Democracy and the Global Order.* Stanford: Stanford University Press. p. 49.
[243] Kokaz, 'Institutions for Global Justice', p. 70.
[244] Rawls, John. Rawls, John. 1993. *The Law of Peoples.* Cambridge: Harvard University Press. p. 37.
[245] Rawls, John. 1999. *A Theory of Justice.* Cambridge: Harvard University Press. p. 43.

must be voluntary.[246] In addition, Brian Barry argues in "Humanity and Justice in Global Perspective" that a principle of justice to upheld by institutional arrangements must be based on reciprocity, which ensures that "all parties stand prospectively to benefit" from the arrangement.[247] Michael Walzer in *Spheres of Justice* (1984) alleges, however, that conditions of the global order cannot accommodate the principles of justice as stated, due to: (i) a lack of common meanings of justice that are culturally bound by a defined political community; (ii) a lack of overlapping consensus on the global standard of justice. In this context, (iii) enforcement of duties of global justice would not be democratic, but tyrannical.

The debate in international law concerning the delivery of justice and its effectiveness in taming hegemonic power of states is represented by two schools of thought: (i) positivism, and (ii) realism.

Positivism regards the State as "a metaphysical reality with a value and significance of its own", which, as a sovereign entity is endowed with authority and its own peculiar will.[248] International law is therefore a set of rules which various "State-wills have accepted by a process of voluntary self-restriction, or auto-limitation."[249] The ascendency of positivism, it is argued, "swept away normative theories which inhibited the exercise of state power in the early twentieth century."[250] Law became a justification for power and propagation of historical fictions, which preserved what has been achieved through its inordinate use. The League of Nations created in the aftermath of World War I has attempted to restore the normative structure for the worlds order only to be inhibited, in the process, by the realist school of thought articulated by E.H. Carr and Hans Morgenthau (overviewed earlier). The Cold War reality and the struggle for power unrestrained by any legal principles, further relegated international law norms to an inferior position. Postcolonialism, emergence of the human rights, and the environmental movement, and the creation of the United Nations are cited as factors that have accelerated the diminution

---

[246] Kokaz, 'Institutions for Global Justice', p. 73.
[247] Barry, Brian. 2008. "Humanity and Justice in Global Perspective" in Thomas Pogge *Global Justice: Seminal Essays.* Paragon Books. p. 233.
[248] Starke, J.G. 1963. *An Introduction to International Law*. London: Butterworths. p. 22.
[249] Ibid., p. 23.
[250] Sornarajan, M. 1997. "Power and Justice in International Law." *Singapore Journal of International & Comparative Law*, 1. p. 32.

of state power and led to the establishment of the rule of law in the international system. In response, "international lawyers located within the hegemonic powers themselves have realized the need to limit power by recognizing the competing interests of fairness and justice"[251] resolved to rescue law from the "merchants of power."[252]

Designs of Power: Supranational Courts and Cosmopolitan Norms

Since the success of a domestic legal system is often measured by the extent of its constraint on the state and protection of individuals against state power, international law scholars have likewise been concerned with the articulation and advancement of a compelling normative order, which could regulate and constrain behavior of states in the international system. It is alleged that "not only have international lawyers not completed the task of demonstrating that international law is really law, as the dominant historical theme in European and American international law has been the shaping of international law itself as an instrument which purveys and justifies the use of the power of states rather than as a restraint upon it."[253] The Yale-New Haven School of law, for instance, has been accused of articulating goals which prima facie inclined toward advancement of the international community's normative regime, but which in reality single-mindedly reflected the foreign policy objectives of the United States. In some quarters, disparaging questioning of international law's value was based on "a generally held view that the rules of international law are designed only to maintain peace", a view which was propelled by universal ignorance of the "vast number of rules" which have historically received little publicity vis-à-vis their "high policy" variants.[254]

The confrontation between power and justice as the central theme in international law, at present, opens before the international relations scholars new possibilities for understanding both justice and power in terms of international law, and offers opportunities for correcting the "perceived discrepancy between entitlement and benefits."[255] Since power is inherent in justice, as Thrasymachus reminds his audience in Plato's *Republic*,

---

[251] Ibid., p. 34.
[252] Ibid., p. 35.
[253] Sornarajan, 'Power and Justice in International Law', p. 29.
[254] Starke, An Introduction to International Law, p. 14.
[255] Welch, D.A. 1993. *Justice and the Genesis of War.* Cambridge: Cambridge University Press. p. 19.

the countervailing regime of norms for the establishment of global justice attempts to article appeals to reason as opposed to military might, as the only logical practice in world politics. Some argue that the "pervasiveness of power indicates that it is to the good of the whole international community that the power-based system of international law should be replaced by an international order,"[256] for power can be "effectively exercised only if it has legitimacy within the normative framework."[257] Yet can principles of universal law be created without participation and input of all states?

> "Unlike power centered theories of positivism which require determinacy in the rules, justice centered notions recognize that since norms are based on values there cannot be determinacy in all of these norms, some of which are accepted by all states as fundamental having greater validity and force as *ius cogens* principles."[258]

The literature recognizes that in order to effectively curb the power of the hegemonic state and infuse the political order with normative principles and recognition of international law, issues of high concern for the states must be imbued with a semblance of legal regularity and conceptual orderliness. The minimum principles advocated are: (i) outlawing of the use of force; (ii) centralization of the collective use of force; (iii) outlawing of unilateral economic sanctions.[259]

However, effective and foundation-focused theorizing about international justice in the context of "international courts and tribunals often must take the theories of international relations as a point of departure."[260] International courts have been thought of as distinctive and particular types of institutions, which, unlike their domestic counterparts, are (i) relatively young, (ii) bounded by strategic goals and jurisdictional space; (iii) defined by forward looking, prospective jurisprudential approach; (iv) vested with the responsibility of solving disputes across borders; (v) less rigid.[261]

The foundation for theorizing the design, objective, and effectiveness of international courts has been suggested by Martin Shapiro in "Courts: A Comparative and

---

[256] Sornarajan, 'Power and Justice in International Law', p. 38.
[257] Foot, Rosemary. 1995. *The Practice of Power: US Relations with China since 1949.* Oxford: Oxford University Press.
[258] Charney, J.I. 1993. "Universal International Law". *American Journal of International Law,* 87. p. 56.
[259] Caron, David. 2007. "Towards A Political Theory of International Courts and Tribunals." *Berkley Journal of International Law,* 24.
[260] Ibid., p. 405.
[261] Ibid.

Political Analysis". For Shapiro, the prototypical court would consist of "(1) an independent judge applying (2) preexisting legal norms after (3) adversary proceedings in order to achieve (4) a dichotomous decision in which one of the parties was assigned the legal wrong and the other found wrong."[262] Functionally, the court is to achieve, (i) conflict resolution; (ii) norms regime enforcement; (iii) lawmaking. The institutionalist approach further insists that international courts are not merely expected to resolve disputes through application of law, but in so doing, increase their own credibility.[263] The theory of rational design, additionally argues, that international courts should be thought of as rational actors weighting competing claims and opting for the most favorable solution to the arising legal conflicts vis-à-vis international treaties or leading conventions.[264]

The leading impetus for the creation of international tribunals and courts is to (i) hold criminals accountable; and (ii) bring a measure of restorative justice. But, the "decisions to take the route of creating an international criminal tribunal or court is more than simply the accountability of the accused," [265] it is also about bringing to light competing narratives of power (as in the Nuremberg Trials, the Yugoslav Tribunal and Rwanda Criminal Tribunal), remedy the reluctance of state factions to pursue and persecute transgressors of the law, and make the international community, collectively, more responsive to the subversion of the law. International courts and tribunals are, therefore, "highly structured spaces of contestation. They are not designed, for example, to promote cooperation or facilitate discussion."[266] Their design aims at presentation of arguments in light of international law. In light of notable developments in international law, significant weaknesses remain and must be contended with, they are: (i) concerns with lack of legal clarity; (ii) political rather than legal intent of human rights declarations; (iii) conflicts of law; and (iv) international law as self-imposed law.[267]

A theory of bounded strategic space propounded by Caron, suggests that there are

---

[262] Shapiro, Martin and Alec Stone Sweet. 2002. *On Law, Politics, and Judicialization.* Oxford: Oxford University Press. p. 13.
[263] Hopmann, Terrence. 1998. *The Negotiation Process and the Resolution of International Conflict*. Columbia: University of South Carolina Press. p. 221.
[264] Koremenos, Barbara et al. 2004. "International organization, the rational design of international institutions." *International Organziations,* 55: 766-67.
[265] Caron, David. 2007. "Towards A Political Theory of International Courts and Tribunals." *Berkley Journal of International Law,* 24. p. 409.
[266] Ibid., p. 410.
[267] Navari, Cornelia. 2000. Internaitonalism and the State in the Twentieth Century. London. Routledge.

at least five actors, or positions, that influence the structure and operation of international judiciary bodies and contribute to the courts' dynamism in the twenty-first century. "The five groups of actors" Caron writes, "are each defined by a specific and distinct institutional position with each position being identified by a particular logic. In other words, 'where one stands' – a diplomatic adage goes – 'depends on where one sits.'[268] Any supranational judicial entity must therefore take note of: (i) The parties that are present before the institution. "The logic of the parties to a dispute is defined as one seeking maximal attainment of their interests in the resolution of the dispute."[269] (ii) The adjudicators or the panel of judges that carry out the institutional functions of the court. "A dominant logic, applicable more clearly among international commercial arbitrators, is one of self-interest where the adjudicator seeks to be retained as an adjudicator again either on an ad hoc basis or within an institution"[270] (iii) The community, which funds the operations of the institution. "The logic of the community is *a priori* concerned with the interests of the community in the resolution of the identified disputes, and not necessarily the interests of the particular parties or the outcomes of particular disputes. The community in this sense may view particular parties with distrust."[271] (iv) The secretariat, assists in the adjudication and performs clerical tasks. "The logic of the members of the secretariat is to seek the continuation of the position enjoyed or the occupying of a similar or better position."[272] (v) The other interested parties, which consist of states or other actors. "The logic of the other interested parties is to represent and further the interest that justifies their participation."[273] The five above-mentioned actors are not and need not be always present under the institutional design of international judiciary bodies. Yet increasingly, the movement away from ad hoc arbitration toward a creation of stable institutions for international or regional legal conflict resolution, must take under account the layered interests and rationales guiding the parties to the procedure.

The role of states in legitimizing the operations of international and regional courts, such as the International Criminal Court or the European Court of Human Rights, has a

[268] Ibid., p. 413.
[269] Ibid., p. 413.
[270] Ibid., p. 413.
[271] Ibid., p. 415.
[272] Ibid., p. 415.
[273] Caron, 'Towards A Political Theory of International Courts and Tribunals', p. 417.

significant impact on the emerging system of international justice. For the normative reform of international law and institution of condition for the pursuit of amiable goals of global justice to come to fruition, in the long-term, states must first, "relinquish any claims to the right to use force in their international relations," [274] which in turn will give rise to what Fransceschet calls 'juridical pacifism'. Second, through collective enforcement mechanism, attain a degree of 'ethical' disposition within state units to distinguish between interests and values. Significant common agreement already exists among national constitutions, Teitel in *Humanity's Law* (2011) argues, where "conformity with international conventions demonstrates a consensus on basic human rights, as well as on the protection of decency and integrity" [275] that whenever abrogated or egregiously violated, offend the conscience of humanity.

International judicial bodies in their efforts of serving the ends of global justice will have to contend with inherent paradoxes of the international state system, which is characterized by (i) the state's insistence upon sovereignty, supremacy, and independence; (ii) conflicts between convergent and divergent national interests; (iii) chasm between domestic and international concerns; (iv) unwillingness of states to accord to international organizations independent decision-making powers or judicial enforcement; (v) presence of discrepant human motivations and an fundamental rift between humanitarianism and egoism.[276] The courts can succeed in bridging this ostensibly irrevocable reality of the international system, Paul Berman suggests, by acknowledging the legal pluralism to which divergent state interests give rise, and rather than seeking to eliminate them, (i) "create spaces that preserve productive interaction among multiple, overlapping legal systems;"[277] (ii) develop procedural mechanisms, institutions, and practices that aim to manage pluralism; and (iii) infuse into the legal-institutional realm jurisprudential practices that are both cosmopolitan and pluralist.[278] The ensuing cosmopolitan pluralism will permit courts to ameliorate the effects of state dissent or voluntary opt-out by maintaining institutional

[274] Franceschet, Antonio. 2009. "Four Cosmopolitan Projects: The International Criminal Court in Context" in Steven Roach *Governance, Order, and the International Criminal Court.* Oxford: Oxford University Press. p. 187.
[275] Teitel, Humanity's Law, p. 190.
[276] Bennet, LeRoy. 1995. *International Organizations: Principles and Issues.* New Jersey: Prentice Hall. p. 4-7.
[277] Berman, Paul. 2012. *Global Legal Pluralism.* Cambridge: Cambridge University Press. p. 10.
[278] Ibid., p. 10.

openness to a variety of normative clams. In so doing, the judges will see themselves "as part of an interlocking network of domestic, transnational, and international norms" and be better placed to develop "jurisprudence that reflects this cosmopolitan pluralist reality."[279] International treaties and agreements articulating the evolving regime of international norms may provide relevant guidance in judicial attempts at articulating hybrid judicial rules that "may not [necessarily] correspond to any particular national regime,"[280] but which may meet, as a result, with a more widespread application. In delivering justice, courts would be advised to take norms of behaviors promulgated by non-governmental entities, community customs and affiliations into consideration in order to resolve potential conflicts of law and practice and reduce possibilities for the abject evasion of or noncompliance with the law.

One of the major issues concerning the practical nature of infusing justice and the rule of law into an anarchic self-help international system, lies in the Courts' own institutional skeleton. Presently, there is a perception that the world's preeminent "human rights" institutions do not explicitly focus on the rule of law and have difficulties convincing states of the benefits of living by the Universal Declaration of Human Rights. "The UN Human Rights Council has only a limited capacity-building mandate, the International Criminal Court (ICC) focuses on accountability after atrocities have been committed, and the European Court of Human Rights does not address the absence of fundamental legal or law enforcement institutions within states."[281] Yet, in recent years, a normative tipping point has been reached in the area of criminal and civil accountability issuing in a justice cascade for human rights violations, whereby "a critical mass of actors has adopted a norm or practice, creating a strong momentum for change."[282] Sikkink points to three ideas underpinning the justice norm as (i) pertaining to basic human rights violations, i.e. summary executions, torture, and disappearance, which are no longer deemed as legitimate acts of state, but as crimes committed by individuals, who (ii) should be prosecuted, under conditions of (iii) fairness in a public trial.[283] Given the changing

---

[279] Ibid. p. 262.
[280] Ibid., p. 262.
[281] Lagon, Mark. 2012. "Policy Innovation Memorandum No. 26 – A Global Trust for Rule of Law." *Council on Foreign Relations*. [http://www.cfr.org/rule-of-law/global-trust-rule-law/p29170]
[282] Sikkink, The Justice Cascade, p. 12.
[283] Ibid., p. 13.

nature of individual criminal accountability and ethical standards of global justice, thus, a major attempt to rethink the supranational legal mandate and its *pro homine* orientation must be made in the subsequent pages. The dissertation seeks to reveal a potential for inter-institutional and trans-jurisdictional dialogue and point to the possibility of an emergent cosmopolitan constitutional dialogue, which takes *ius gentium* and obligations *erga omnes* as points of departure.

In sum, by focusing on the normative[284] dimension of law and politics, I shall trace the impact and purpose of supranational judicial arbitration and international courts and their growing relevance in international relations and global governance. In so doing, I aim to define emerging accountability frameworks for transnational human rights violations within a predominantly state-centric political paradigm; analyze emerging normative frameworks for transnational human rights obligations; and delineate theoretical, legal, and political channels for rethinking the relationship between power, ideas, and international institutions in the areas of global multilateral governance, international humanitarian and human rights law and state security at a time when international institutional architecture and global governance and cooperation mechanisms result in stasis or gridlock[285]. The dissertation also aims to challenge the subjective notion of international law, according to which, states remain the only validators, interpreters, and enforcers of the law to which they have *a priori* consented.

[284] By stressing the normative work of Courts, I differ with scholars who suggest that "Courts … are and should remain limited players in a norm-based constitutional order. Norms often do not implicate an independent and judicially enforceable legal claim. And the more society depends on courts to check norm breaching by political actors, the more fragile norms of the judiciary may become. Ultimately, it is extra-judicial institutions that sustain or erode the norm-based features of ... democracy." This dissertation argues the contrary. (Renan, Daphna, Presidential Norms and Article II (February 1, 2018).
Harvard Law Review (June 2018); Harvard Public Law Working Paper No. 18-16. Available at SSRN: https://ssrn.com/abstract=3123780)

[285] Hale, Thomas, David Held, Kevin Young. 2013. *Gridlock: Why Global Cooperation is Failing When We Need It Most.* Cambridge: Polity Press.

CHAPTER II

THE INTERNATIONAL COURT OF JUSTICE AND THE SPECTER OF HUMAN RIGHTS

Introduction

The chapter aims to research the increasing activism of supranational courts in international human rights law discourse; in particular, the focus will be on the growing relevance and weight of the International Court of Justice (ICJ) in the sphere of international human rights. The following five general elements will ground the study: (i) access to the Court; (ii) case-law affecting the development of human rights jurisprudence; (iii) impact on inter-state behavior and inter-state relations; (iv) impact on other supranational and domestic courts, in particular, the International Criminal Court; (v) the ICJ's relation to other regional human rights bodies, commissions, and treaty monitoring bodies. With the assistance of the judicial output of the Court, the chapter will aim to explore whether the ICJ can be seen as a break away from traditional international law discourse and a promising institutional paradigm for the protection of human rights. It should be noted, however, that the ICJ will not be portrayed or regarded as the only body of legal administration capable of dealing with human rights questions, but, as Marie-Anne Slaughter noted in "The Real New World Order",[286] an institutional paradigm that is networked with other like supranational bodies and which operates as a connective tissue that aims to guarantee a comprehensive protection of the rights of states and, increasingly, those of individuals. As such, the Court operates in a hybrid institutional environment that is defined by the preponderance of legal questions pertaining to individual criminal accountability for human rights violations, such as the International Criminal Court and ad hoc and special tribunals. In operating on its mandate, the Court, like its similarly oriented institutional siblings, is well attuned to the situational and highly consequential impact of its adjudication. Thus, (i) whether human rights prosecutions are associated with improvements in human rights through deterrence and socialization; (ii) whether human rights prosecutions lead to deterrence across borders; and (iii) whether arbitration of human rights-sensitive questions during civil and internal wars exacerbate human rights practices, are pertinent normative and empirical considerations of the international community,

[286] Slaughter, Anne- Marie. 1997. "The Real New World Order", *Foreign Affairs* <http://www.foreignaffairs.com/articles/53399/anne-marie-slaughter/the-real-new-world-order> Accessed 20 June 2014

which the Court must routinely consider in its pursuit of international justice. The present study will be oriented towards suggesting possible answers to the above.

A. Focus

A considerable amount of literature exists on the institutional function of the ICJ, its jurisdictional mandate as well as the scope and breadth of its caseload. While some scholars set the ICJ in a historical perspective and develop a generalized body of knowledge regarding the past trajectory of the Court's activism, others declare the ICJ to be but a minor player in the furtherance of human rights. Significant division exists with regard to the ICJ's instrumental rather than intrinsic value to human rights. Therefore, to better understand the polarized debate about the Court, the following study will seek to place the ICJ in a nexus of supranational judicial bodies, who in a methodical fashion clarify international law with regard to particular disputes and controversies between states, including trans-border pollution, nuclear proliferation or the use of force, and thereby inevitably affect the development of human rights. It shall be the working argument of this thesis that in its capacity as the world's court, the ICJ has a potential of creating an institutional context for the protection of human rights, give "substance to form, serve as an engine articulating norms and values that raise moral consciousness, assist in the creation of dialogue, and foster argumentation"[287] through its judgments and advisory opinions on contentious legal questions.

The current study will focus on three major themes of the ICJ jurisprudence (i) the coining of fundamental principles of international human rights law with especial emphasis on interpretation of the prohibition of genocide, (ii) the clarification of the concept of state and individual responsibility for internationally recognized crimes; (iii) pronouncements on state and peoples right to independence and self-determination which affect national security and human wellbeing. It should be noted that the Court has also shown itself actively engaged with matters of criminal responsibility and the environment. Despite a significant proliferation of international criminal tribunals, KJ Keith argues, "criminal justice matters do in fact arise before the International Court as well as before national courts. That array of tribunals plainly does not have exclusive or even primary jurisdiction

[287] Volcansek, Mary L. 2005.*Courts Crossing Borders.* Durham: Carolina Academic Press. p. 116.

over international criminal justice matters" and the "historical record shows an international law origin for some criminal law—piracy, war crimes and slave trading — and more recently matters such as the trafficking of humans, drugs and arms, counterfeiting, obscene publications, terrorism, torture, attacks on aircraft and shipping, money laundering and transnational crimes more generally."[288] Thus, in matters of (i) national criminal jurisdiction and immunities from that jurisdiction; (ii) principles of individual criminal liability and the related responsibility of states; (iii) matters of evidence and proof; and (iv) the interaction between the Court and national criminal courts and administrations, the ICJ reveals itself as key institutional arbitrator with a potential of influencing or altering, altogether, state behavior. Likewise, the ICJ's interest in trans-boundary disputes of environmental nature contribute considerably to the clarification and development of international environmental law by expounding the content of environmental impact assessments and sustainable development that significantly impact on human, group and minority rights claims and raise "the importance of the need to ensure environmental protection of shared natural resources while allowing for sustainable economic development."[289] Up to date, the literature on the subject has neglected to link human rights pronouncements of supranational judicial institutions to state behavior and the trajectory of international relations. The following study aims to remedy this omission.

For the purposes of the chapter, the ICJ pronouncements and case-law will be subjected to broader discussion whenever applicable and relevant. To fill a vacuum in the development of theory around human rights, international politics and supranational adjudication, of which the ICJ is a singularly noteworthy exponent, liberal institutionalism and constructivism shall be the leading theoretical frameworks.

B. Theory

Constructivism

According to Alexander Wendt, "a fundamental principle of constructivist social theory is that people act toward objects, including other actors, on the basis of meanings

---

[288] Keith, K.J. 2010. "The International Court of Justice and Criminal Justice" *ICLQ* 59(4). p. 896.
[289] *Argentina v. Uruguay* [2006] ICJ Provisional Measures Order <http://www.icj-cij.org/docket/files/135/11235.pdf>

that the objects have for them"[290] are understood in terms of collective social constructs or meanings, ideas and normative estimations that groups assign to societal goals. The theory focuses thus on (i) interests; (ii) identities; and (iii) norms when attempting to make sense of the legal and political realm and its pathologies. Thus, the salience of an idea and a normative vision, i.e. human rights, can redefine economic and political relations and delineate the scope of action. Thus, to understand the evolving regime of norms in international law and politics it is important to consider the identity-setting legacy of historical events. For both law and politics, the 1648 Treaty of Westphalia and its definition of the "sovereign state system", as opposed to local, tribal, or imperial systems, inaugurated a novel reality, whereby with the repeated assertion of the doctrine of noninterference in the internal affairs of sovereign states, the imperial systems fell into disrepute giving birth to contentious politics surrounding matters of legal jurisdiction. The constructivist view maintains that in circumstances of abject violations of law and human rights the international rules of behavior mandate a change in identity of the state itself, making sovereignty and presupposed inviolability of territory, as a doctrine and a principle, invalid and obsolete in the face of atrocities. Lastly, Constructivism sees norms defined as "collective expectations for the proper behavior of actors"[291] as instruments that assist states in defining their interests, especially in times of normative paradigm shifts. Although, the 1789 Declaration of the Rights of Men and Citizen was able to eloquently articulate a conceptual commitment to human and citizen rights, only the horrors of World War II and the genocidal tendencies of military regimes, prompted states to embrace and elevate human rights to an international norm and endow it with legal force. Norms are therefore essential in defining an overlapping consensus and influencing state behavior and are consequential to understanding the rationale behind the supranational legal order represented by international courts.

Liberalism and Supranationalism

Liberal theorists recognize constructivism's import to politics and international law in that its theoretical framework provides necessary conceptual tools for supporting liberal

[290] Wendt, Alexander. 1992. "Anarchy is What States make of it", *IO*, p. 396.
[291] Katzenstein, Peter. 1996. *The Culture of National Security.* New York: Columbia University Press. p. 5.

arguments about the possibility of cooperation in an anarchic, self-help state system and in repealing the realist view that power, alone, is an exhaustive explanation of state behavior in international politics. "It is now widely accepted" Seyla Benhabib argues that "since the Universal Declaration of Human Rights, we have entered a phase in the evolution of global civil society that is characterized by a transition from international to cosmopolitan norms of justice."[292] As a result, "commitments to territoriality, national politics, deference to executive power and resistance to international law"[293] can no longer be unilaterally maintained by discrete nation-states. "Internationally, there is growing multiplication of multilateral international treaties … and the growing number of cross-border actors of different kinds" that leads to "growing legal density," which "promotes, reinforces, and facilitates the phenomenon of agency."[294] Still, democratic sovereignties often ignore the fact that international human rights can empower citizens by creating new vocabularies for claims making and by opening new channels for mobilization for civil society actors who join networks of rights activism.[295] As boundaries of nation-states become more fluid and permeable, and civil and political attachments of its citizen-aliens atrophied, globalizing forces impinge upon the state to seek remedies for its domestic ills in the global legal sphere and its institutional order. In return, international judicial entities promise to increase cooperation among states, by: (i) structuring choices; (ii) defining identities and roles; (iii) providing incentives, and (iv) distributing power.

The Court Crossing Borders

It has been noted that the operations of law take place in a "field of pain and death", that "legal interpretative acts signal and occasion the imposition of violence upon others."[296] In the domestic legal milieu, a judge "articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life."[297]

---

[292] Benhabib, Seyla. 2009. "Claiming Rights Across Borders", *APSR*, p. 5.
[293] Ibid. p. 2.
[294] Jacobson, David. 1996. *Rights across Borders: Immigration and the Decline of Citizenship*. Baltimore: Johns Hopkins University Press. p. 81.
[295] Benhabib, 'Claiming Rights Across Borders', p. 6.
[296] Cover, Robert. 2008. "Law as an Instrument of Social Change – or of Repression' in Robert Hyman Jr et al. eds. *Jurisprudence, Classical and Contemporary: From Natural Law to Postmodernism* (American Casebook Series). p. 890.
[297] Ibid.

The inherently punitive character of domestic legal system makes victimization an inevitable outcome of adjudicatory disputes. Sentencing and punishment occur in the presence of and sometimes in spite of individual rights adroitly balanced against community interests. Sentencing and punishment signal that the elemental, necessary and sufficient instrument of legal machinery has been attained – justice – be it procedural, distributive, or restorative in kind. All provide for some systemic corrective of an imbalance of wrongs done and harms incurred. All stand for a restoration of a modicum of fairness in the appropriation of goods, which democratic societies define, defend and cherish as rights. All aim to grant an apology to victims and the indirectly defiled social order even in the absence of remorse on the part of the wrongdoer. Often, redress for the crimes inflicted can only come by means of a common legal lexicon of gestures and judicial rituals collectively mobilized to mend what has been broken.

In contrast to their domestic cousins, international[298] courts appear to operate in a more sterile legal environment. As an adjudicatory body of the last instance, they offer, however, a fecund ground for arbitrating disputes between state parties frequently responsible for the perpetrations of crimes against humanity and human dignity and restoring order in the international state system. The International Court of Justice (ICJ) is one such instance of a positive duty the international community holds in the settlement of disputes destructive to peaceful coexistence. Mitchell and Powell note a significant proliferation of international courts, "growing from only a handful of courts a century ago, to over 100 judicial or quasi-judicial bodies today" and operating at the "regional and global levels and cover[ing] a wide variety of issues such as territorial disputes, human rights, the law of the sea, trade, investments, and the use of military force."[299] Thus, instead of viewing international courts solely as a threat to their sovereignty, powerful countries increasingly regard them as vital tools for adding legitimacy to their interactions and entrenching norms they support.[300] The following discussion aims to trace the institutional trajectory of the ICJ, its legal mandate, and impact on state behavior via relevant case law.

---

[298] The chapter will treat international and supranational (courts) interchangeably and assign the same meaning to both.

[299] Mitchell, Sarah and Justyna Powell. 2011. *Domestic Law Goes Global.* Cambridge: Cambridge University Press. p.12.

[300] Martinez, Jenny S. 2012. *The Slave Trade and the Origins of International Human Rights Law*. Oxford: Oxford University Press. p. 170.

In so doing, the following discussion intends to show how the ICJ's development of international human rights law with respect to peace and security and civilian protection augment state interests and result in a symbiotic relationship between three relevant stakeholders: states, citizens, and supranational judicial regimes.

The International Court of Justice: A Brief Introduction

The International Court of Justice, according to Article 92 of the United Nations Charter, is "the principal judicial organ" of the Organization, which serves as a standing mechanism for Article 34 provisions of the Charter, the peaceful settlement of disputes between States. The Court, "as the guardian of legality for the international community as a whole, both within and without the United Nations"[301], is a successor to the Permanent Court of International Justice created in 1920 with an aim of providing "a reasonably comprehensive system serving the international community"[302] and "preventing outbreaks of violence by enabling easily accessible methods of dispute settlement in the context of a legal and organizational framework."[303] According to Shaw, the ICJ is a "continuation of the Permanent Court, with virtually the same statute and jurisdiction"[304] Thus, "no disputes can be the subject of a decision of the Court unless the State parties to it have consented to the Court's jurisdiction over that specific dispute, or over a class of disputes"[305] and access to the Court is available to all members of the United Nations. The Court is empowered by Article 38 of the UN Charter to "decide, in accordance with international law, such disputes as are submitted to it"[306] as well as issue advisory opinions to organs and specialized agencies of the United Nations at the request of the Security Council or the General Assembly.

[301] Lachs, Judge. 2008. "The Lockerbie Case" in Malcolm Shaw, *International Law.* Cambridge: Cambridge University Press. p. 1065.
[302] Shaw, Malcolm. 2008. *International Law.* Cambridge: Cambridge University Press. p. 1058.
[303] Ibid.
[304] Ibid.
[305] Evans, Malcolm. 2003. *International Law.* Oxford: Oxford University Press. p. 586.
[306] UN Charter < http://www.un.org/en/documents/charter/chapter6.shtml> Accessed 3 July 2017

The jurisdiction[307] of the Court is limited to its capacity to decide disputes between states, and give advisory opinions when requested by qualified entities.[308] Under Article 36(1) of its Statute, the Court has jurisdiction "in all cases referred to it by state parties, and regarding all matters specially provided for in the UN Charter on in treaties or conventions in force."[309] The Court cannot exercise jurisdiction over a state without its consent and where a legal contention is nonexistent or in the absence of treaties' "compromissory clauses"[310] providing for ICJ's jurisdiction. In the event of a dispute, Article 36(6) entitles the Court to decide its own jurisdiction. The optimal clause of Article 36(2) grants the ICJ jurisdictional competence in all legal disputes concerning: (i) the interpretation of a treaty; (ii) any question of international law; (iii) the existence of any fact which, if established, would constitute a breach of an international obligation; (iv) the nature or extent of the reparation to be made for the breach of an international obligation.[311] The essential function and task of the Court, as a judicial and not a political organ of the UN, therefore, is "to respond on the basis of international law, to the particular legal dispute brought before it"[312], interpret and apply the law, and be mindful of the context in which the decision is rendered. The ICJ's judgment, once given, under Article 60, is final and without appeal[313], although appeal for revision of a judgment can be made on the basis of the discovery of a previously unknown fact, whose nature may be a decisive factor in the case.

In addition to deciding contentious cases between states, the ICJ under Article 65 of the Statute may give an advisory opinion on any legal question at the request of whatever body may be authorized by the Charter of the United Nations to make such a request. As indicated in The Legality of the Threat or Use of Nuclear Weapons (thereafter Nuclear

---

[307] Jurisdiction is not admissibility. "Admissibility refers to the application of general rules of international law, such as exhaustion of local remedies" (Shaw, p.1071). Jurisdiction in conjunction with admissibility constitutes "the necessary prerequisite to the Court proceeding to address the merits of the case" (Shaw, 1072).
[308] Shaw, International Law, p. 1070.
[309] Ibid., p. 1075.
[310] Bilateral and multilateral treaties contain clauses awarding the ICJ jurisdiction: the 1948 Geneva Convention, 1965 Convention on Investment Disputes, the 1965 International Convention on the Elimination of all Forms of Racial Discrimination and the 1970 Hague Convention on Hijacking (Shaw, p. 1079)
[311] Shaw, International Law, p 1081.
[312] Ibid., p. 1066.
[313] Ibid., p. 1104.

Weapons) opinion, the ICJ's advisory jurisdiction does not aim to settle inter-state disputes, but to "furnish to the requesting organs the elements of law necessary for them in their action."[314] Unlike their contentious counterparts, advisory opinions do not rest on the consent of the parties to the dispute and are not binding upon anyone. Rather, as the Court emphasized in the Reservations to the Genocide Convention, "the object of advisory opinions is to guide the United Nations in respect to its own action"[315] by providing advice on the legal issue comprising the question asked. In addition to the Security Council and the General Assembly, Article 96(2) of the UN Charter grants other specialized organs authorization to seek ICJ opinion. Three conditions enumerated in Nuclear Weapons have been key in the Court's exercise of jurisdiction over an advisory opinion: (i) "the specialized agency in question must be duly authorized by the General Assembly to request the opinion of the Court"; (ii) the opinion request must be on a legal question; (iii) "the question must be one arising within the scope of activities of the requesting agency."[316]

To effectively address the increasing number of applications and play a vital role within the international legal system, the composition of the Court constitutes an important element. The ICJ consists of 15 judges elected by the Security Council and the General Assembly for nine-year terms. Rosalyn Higgins notes that over the past twelve years there has been a significant increase in the number of judges with strong human rights background on the ICJ bench, who provide a "critical mass of persons particularly versed in human rights law"[317] and who have been responsible for thrusting human rights discourse to the "center" as opposed to the "margin" of the Court's work. "Human rights", Higgins notes, "are now routinely addressed in judgments of the Court"[318] and the advisory opinions and interstate cases, which "claim human rights treaty violations inter se", provide a "vehicle for this development within the Court."[319] Thus since the end of World War II, due to the nature of the case load before the ICJ concerning: (i) self-determination; (ii) allegations of genocide; (iii) reservations to human rights treaties; (iv) application of

---

[314] The Legality of the Threat or Use of Nuclear Weapons [1996] ICJ <http://www.icj-cij.org/docket/index.php?sum=498&code=unan&p1=3&p2=4&case=95&k=e1&p3=5>, p. 136.
[315] Shaw, International Law, p. 1110.
[316] Ibid., p. 1112.
[317] Higgins, Rosalyn. 2007. "Human Rights in the International Court of Justice", *LJIL*, p. 746.
[318] Ibid.
[319] Ibid.

human rights treaties to occupied territories,[320] there has been "both a deepening of the substantive law of human rights and a broadening of what is perceived as human rights entitlements."[321] Moreover, the proliferation of judicial organs at the international and regional levels reflects "the increasing scope and utilization of international law … and an increasing sense of the value of resolving disputes by impartial third-party mechanisms."[322] The creation of legal institutions, such as the European Court of Human Rights, the European Court of Justice, the Inter-American Court of Human Rights, to name but a few, has significantly contributed to the development of human rights discourse within the traditional framework of international law, resulting in a focused attention on interrelated treaty interpretation principles and regular cross-referencing of each other's decisions.[323] The contours and character of the human rights movement and of the rules and principles of international human rights law are progressively and "intrinsically linked with international law and international institutions."[324]

Internationalization and Judicialization of Human Rights

Article 1 of the UN Charter sets the promotion and encouragement of "respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion"[325] as the primary purpose of the United Nations. Along with its specialized organs, such as (i) the UN General Assembly, the Economic and Social Council, the Human Rights Council, and a range of committees set up under international conventions, including the Committee Against Torture or the Committee on the Elimination of Discrimination Against Women, as well as (ii) regional regimes on human rights, i.e. the European Convention on Human Rights, the American Convention on Human Rights, or the African Charter, and (iii) the subsequent establishment of international criminal institutions aiming to prosecute those responsible for egregious human rights violations (war crimes and crimes against humanity) such as the International Criminal Tribunal for

[320] Ibid., p. 745.
[321] Ibid.
[322] Shaw, International Law, p 1115.
[323] Ibid., p. 1116.
[324] Zyberi, Gentian. 2007. "The Development and Interpretation of International Human Rights and Humanitarian Law Rules and Principles Through the Case Law of The International Court of Justice" *NQHR* Vol. 25/1. p. 291.
[325] UN Charter, Article 1 < http://www.un.org/en/documents/charter/chapter1.shtml>

Yugoslavia or the International Criminal Court, the protection and promotion of human rights[326] constitute one of the primary responsibilities of the UN, contributing to a notable spread of human rights and liberal constitutions among states. Human rights within states have been protected by what Ignatieff calls "overlapping jurisdictions"[327] overseeing and encouraging state protection of rights and ensuring presence of reliable multilateral and supranational mechanisms should states fail in doing so. Notwithstanding its formal jurisdictional limitations described above, the ICJ, as a judicial arm of the UN and a "Court of sovereign States" in the last twenty years has been regularly seized with cases where questions of international law of human rights have "formed the subject matter of the dispute or have been closely related to it."[328]

While individuals do not have specific duties under international rights treaties nor enjoy access to the ICJ, "gross violations of human rights, nonetheless, entail individual criminal responsibility for internationally recognized crimes such as genocide and crimes against humanity"[329] and relevant instruments, i.e. the International Criminal Court, have to be mobilized to remedy the factual wrong. Since 1991, the content of cases brought before the ICJ concerned large-scale violations of international law of human rights and of international humanitarian law by States and their respondents [330] leading Judge Weeramantry, in The Legality of the Threat or Use of Nuclear Weapons dissenting opinion, to note that:

> "The enormous development in the field of human rights in the post-war years, commencing with the Universal Declaration of Human Rights in 1948, must … impact on assessments of such concepts as 'considerations of humanity' and 'dictates of the public conscience'… Since … internationally accepted human rights norms and standards have become part of common global consciousness today in a manner unknown before World War II, its principles tend to be invoked immediately and automatically whenever a question arises of humanitarian standards."[331]

---

[326] Human rights encompass political, civil, economic, cultural and social rights whose protection is one of the fundamental aims of the UN. ILHR is part of international law aimed at standardization of universal at the service of human dignity, equality, non-discrimination, and human freedom.
[327] Ignatieff, Michael. 2001. *Human Rights as Politics and Idolatry.* Princeton: Princeton University Press. p. 34.
[328] Zyberi, 'The Development and Interpretation of International Human Rights', p. 291.
[329] Ibid., p. 292.
[330] Ibid., p. 118.
[331] The Legality of the Threat or Use of Nuclear Weapons. p. 490.

The ICJ's contribution to the judicialization of human rights discourse has been shaped by the contents of the case law that has come before it, concerning: "(i) the right of peoples to self-determination; (ii) the status and treatment of special UN rapporteurs; (iii) consular relations and diplomatic protection; (iv) the application of the Genocide Convention; (v) the immunity of senior state officials; (vi) the right to asylum; (vii) the application of human rights treaties in territories under occupation."[332] Zyberi claims that by "interpreting and developing rules and principles of human rights" implied by the above, "the Court has contributed to creating more clarity and ultimately to improvement of the human rights protection system."[333] Furthermore, the ICJ, which is "not a human rights court nor is it a final court of criminal appeal" has "rendered a valuable contribution to a better protection of individual rights under the general framework of international law" [334] by: "complementary application of international human rights and humanitarian law", and "by awarding natural and legal persons a right to reparations vis-à-vis the State."[335] The Court's own jurisprudence "established that States have an obligation under international law to respect and to ensure respect for fundamental human rights"[336] and a number of judgments following the *Barcelona Traction* (1970) case upheld the dictum that the duty to respect human rights amount to obligations *erga omnes*[337] and has a 'civilizing effect' upon states. Acts of aggression, genocide, racial discrimination and slavery, the Court opined, are outlawed, as they collectively epitomize egregious crimes against the international community as a whole. It is, therefore, not an accident that the International Law Commission, whose mission involves development and codification of international law identifies closely with the work of the ICJ and considers the definition of aggression; diplomatic protection; formulation of the Nuremberg principles; international criminal jurisdiction and state responsibility[338] as some of the leading issues of contemporary international jurisprudence.

---

[332] Zyberi, 'The Development and Interpretation of International Human Rights', p. 294.
[333] Ibid.
[334] Duxbury, Alison. 2000. "Saving Lives in the International Court of Justice: The Use of Provisional Measures to Protect Human Life, 31 *CWILJ*. p. 141.
[335] Zyberi, 'The Development and Interpretation of International Human Rights', p. 117.
[336] Ibid., p. 118.
[337] Ibid.
[338] Ibid., p. 295.

The ICJ's Contributions to The Evolution of International Human Rights and Humanitarian Law

The International Court of Justice's competency and legitimacy on human rights questions have been duly tested in the advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2004), the *Armed Activities on the Territory of the Congo* (2005) case, the *Paraguay v. United States* (The Breard Case - 1998) and *Germany v. United States* (The La Grand Case - 2001), *East Timor (Portugal v. Australia)* (1995) and some twenty additional cases[339] filed before the Court since 1991.[340] *In toto*, some twenty-three contentious cases involving a total number of twenty-six States consisted of claims based on violations of rules or principles of international law of human rights.[341] Out of these, "ten cases were brought by Serbia and Montenegro against NATO countries; three were brought by the Democratic Republic of the Congo against three neighboring States; and two were brought respectively by Bosnia and Herzegovina and Croatia against former Yugoslavia (Serbia and Montenegro)."[342] In the 2004 advisory opinion on The Wall, the ICJ held that "violations of human rights and humanitarian law norms create an individual right to reparation on the part of the affected individual vis-à-vis the State" [343] and that in situations of armed conflict, the rules of international humanitarian law are applicable. Scholars see this ruling as an unprecedented development in the ICJ's judicial docket, as "the right to reparations for violation of human rights and humanitarian law norms," given the Court's traditional jurisdiction, "had been only acknowledged in respect to States." [344] Formidable, too, is the ICJ's recognition of humanitarian law as comprising a part and parcel of the human rights regime in armed conflicts. "Because correcting international wrongs is important to the United Nations", argues Kerr, "the organization has implemented mechanisms – such as the International Court of Justice and International Tribunals – to facilitate restitution for global

[339] The International Status of South-West Africa Advisory Opinion (1950); *Ethiopia v. South Africa* (1966); *Liberia v South Africa* (1966).
[340] Please see the Appendix for listing of cases.
[341] Zyberi, 'The Development and Interpretation of International Human Rights', p. 119.
[342] Ibid.
[343] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory [2004] ICJ < http://www.icj-cij.org/docket/files/131/1671.pdf>, pp. 151-153.
[344] Zyberi, 'The Development and Interpretation of International Human Rights', p. 119.

atrocities."[345] Since international law requires that reparations and restitutions be made for states' wrongs against other states and increasingly, as this thesis argues, against individuals, the institutional architecture in place and judgements rendered regarding crimes against humanity must endeavor "as far as possible [to] wipe out the consequences of the illegal act."[346]

A. International Human Rights Law v. Humanitarian Law

Literature increasingly situates the ICJ as a legal entity, which makes an important contribution to the clarification of *lex specialis* – the International Humanitarian Law (IHL) – in the context and in view of the developments of International Human Rights Law. "There is a perception that not only do IHL and human rights law share a common underlying philosophy but that human rights norms can compensate for the deficiencies of IHL."[347] Moreover, despite its primarily utilitarian nature, the IHL is "now frequently seen as allied, or even as part of, the developing regime of human rights."[348] For most, humanitarian law is seen as "a species of the broader genus of human rights law" that should not be distinguished from human rights law on the basis of their intrinsic nature, which they share, but on the "context of application of rules designed to protect human beings in different circumstances."[349] Thus, in two instances, (i) The Nicaragua Case, and (ii) The Nuclear Weapons Advisory Opinion, the Court elucidated the status of four 1949 Geneva Conventions (particularly, the two additional protocols of the Geneva Convention relating to the protection of Civilians in Armed Conflict), and the existence of norms in customary international law in non-international armed conflict. Notably, the ICJ advanced far-reaching interpretations of "the Geneva Law, which protects the victims of war and aims to provide safeguards for disabled armed forces personnel and persons not taking part in the hostilities"[350] and developed further the principle of fundamental considerations of

---

[345] Kerr, Christa-Gaye L. 2018. "The United Nations and Reparation for the Trans-Atlantic Slave Trade and Colonialism", *MJIL* 40 < http://www.mjilonline.org/the-united-nations-and-reparations-for-the-trans-atlantic-slave-trade-and-colonialism/>

[346] Ibid.

[347] Gardam, Judith. 1993. "Proportionality and Force in International Law", *AJIL* 87(3). p. 353.

[348] Ibid., p. 352.

[349] Chetail, Vincent. 2003. "The contribution of the International Court of Justice to international humanitarian law", *IRRC* 85(850). p. 241.

[350] Gardam, 'Proportionality and Force in International Law', p 352.

humanity. In the second instance, the ICJ focused on the Hague Law and distinguished between "cardinal principles of humanitarian law'" and the "intrinsically humanitarian character" [351] of IHL as well as extended its humanitarian ideals to combatants. Prioritization of combatants and their protection under the IHL is not unproblematic, however. While, aerial bombardment at high altitudes, for example, may preserve lives of combatants and thus, by extension, guarantee the survival of the state unit, such practice may also increase risk of civilian casualties and cause significant damage to civilian objects.[352] The moral and strategic calculus involved in the decision-making is therefore one of considerable significance, which needs the assistance of clear and explicit international humanitarian law and human rights standards. In preserving the fundamental right to life guaranteed by Article 6 of the Covenant on Civil and Political Rights also enshrined in the fundamental considerations of humanity expressed in the UNDHR, the *lex specialis* principle of proportionality (inscribed in the IHL doctrine) and manifestly defended by the ICJ in the Nuclear Weapons Advisory Opinion, thus simultaneously preserves the dignity of civilian life and the right of persons to have rights, thus bridging the ends of two branches of international law – whose central considerations are dominated by the preservation of shared ethical values and fundamental considerations of humanity.

In the 1986 Military and Paramilitary Activities in and against Nicaragua judgment, the Court considered "many of the rules and principles of international humanitarian law enshrined in the Geneva Conventions of 1949 and their Additional Protocols as part of customary international law, binding upon States regardless of ratification."[353] "States", the ICJ held,

> "are under an obligation to 'respect' the Conventions and even to 'ensure respect' for them, and thus not to encourage persons or groups engaged in the conflict … to act in violation of the provisions of Article 3."[354]

Scholars of international law[355] have long debated whether human rights law ought to be seen in conjunction with humanitarian law norms. The inter-relation between the two

---

[351] Ibid., p. 352.
[352] Ibid.
[353] Military and Paramilitary Activities in and against Nicaragua [1986] ICJ <*http://www.icj-cij.org/docket/index.php?sum=367&p1=3&p2=3&case=70&p3=5*>, p. 23.
[354] Ibid.
[355] See Provost, R., Quentin-Baxter, R., McBride, S.

branches of law has been put under scrutiny by three distinct views: (i) human rights law and humanitarian law are separate and distinct branches of law; (ii) humanitarian law is part of human rights law; and (iii) human rights and humanitarian law are separate but complementary branches of law.[356] The ICJ's rulings suggest that international humanitarian law is being "increasingly perceived as part of human rights law applicable in armed conflict"[357] and the ancillary covenants to which frequent references are made, such as the International Covenant on Civil and Political Rights and Additional Protocols to the Geneva Conventions, reinforce their place in the international human rights law constellation. Presciently, the Geneva Convention IV (GC IV) foresaw that human rights, a doctrine, which at the time of the document's creation in 1949, was "only beginning to take shape, could one day broaden the scope of international humanitarian law and afford protection for all, irrespective of nationality."[358] The GC IV is thus responsible for defining a humanitarian minimum of protection for civilians in a war zone and outlawing the practice of total war. More specifically, its provisions serve to prohibit

> "violence to life and person, in particular, murder of all kinds, mutilation, cruel treatment and torture; taking of hostages; outrages upon personal dignity, in particular humiliating and degrading treatment; the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court…."[359]

Although, significant differences between the two branches of law exist, among them: humanitarian law principles as applicable to States, and human rights formulated with a view to guaranteeing rights accruing to individuals, they are nonetheless complementary legal instruments which share commitment to core aims and values. Thus, both are inadvertently based on "the principles of humanity, respect for human dignity, and special protection for certain categories of persons. Their common aim is to ensure maximum respect for human life and well-being of individuals."[360] In situations of armed conflict human rights and humanitarian law are inextricably bound together and have been

---

[356] Zyberi, 'The Development and Interpretation of International Human Rights', p. 121.
[357] Ibid.
[358] Commentary on the Fourth Geneva Convention, [1958] ICRC,
< https://www.princeton.edu/~achaney/tmve/wiki100k/docs/Fourth_Geneva_Convention.html>, p. 373.
[359] Ibid.
[360] Zyberi, 'The Development and Interpretation of International Human Rights', p. 124.

"applied in a complementary and cumulative manner by the ICJ"[361] in the advisory opinion on The Wall and Armed Activities in the Territory of the Congo.

In its 2004 advisory Opinion on The Wall in the Occupied Palestinian Territory, the ICJ was confronted with the following legal question:

> "What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory …?"[362]

In its response, the Court asserted the Geneva Convention's objective of guaranteeing the protection of civilians in the time of war and noted that protections of human rights, apart from provisions for derogation found in Article 4 of the ICCPR, do not cease in armed conflict.[363] Since the construction of the wall could not be justified by military exigencies or the requirements of national security and public order, the ICJ found that the Israeli authorities violated the right to self-determination of the Palestinian people and breached provisions of international human rights and humanitarian law instruments resulting in: destruction and requisition of properties pertaining to individual or legal persons; restrictions on freedom of movement of inhabitants of the Occupied Territories; demographic changes in the Occupied Palestinian Territory; impediments to the exercise by those concerned of the right to work, to health, to education and to an adequate standard of living.[364] Additionally, self-determination of the Palestinian people, the Court advised, should be seen as an *erga omnes* right under relevant provisions of international humanitarian and human rights law, imposing duties and obligations upon the international community of States to put an end to the "illegal situation resulting from construction of the wall."[365]

Scholars contend that the ICJ's finding "paved the way towards a better protection for individuals under the framework of international law in general and the possibility of awarding reparation directly to the affected natural and legal persons in particular."[366] Those who oppose the ruling maintain that the ICJ should have refused to take up the

---

[361] Ibid., p. 125.
[362] ICJ Advisory Opinion on *The WallI.* p. 1.
[363] Zyberi, 'The Development and Interpretation of International Human Rights', p. 126.
[364] Ibid., p. 127.
[365] Ibid.
[366] Ibid. p. 129.

question and allege serious reasoning flaws in reaching its legal conclusions.[367] In this case, the ICJ held that Israel was under an obligation to "return the land, orchards, olive grove and other immovable property seized form any natural or legal person for purposes of construction of the wall in the OPT."[368] The Court, by mobilizing the human rights provisions of the ICCPR, the ICRC, and ICESCR arsenal[369] acknowledged the right to reparations for natural and legal persons, making it incumbent upon the state of Israel to "make such reparations for violations of its obligations under international human rights and humanitarian law."[370] This case will be returned to in subsequent chapters for the purpose of bringing the ICJ's stance on the question of self-determination of peoples to greater relief.

Similarly, the ICJ's stance in the Armed Activities on the Territory of the Congo merits attention, as the Court's proceedings allude to an unprecedented reinforcement of human rights and state accountability under major international humanitarian law instruments. In the 1999 application to the ICJ, the Democratic Republic of Congo (DRC) alleged that Uganda's acts of aggression on DRC's territory have been in flagrant violation of the UN Charter and the Charter of the Organization of African Unity (OUA) and went against international human rights and humanitarian law principles. In its ruling, the ICJ relying upon corroborating reports from numerous human rights organizations, including the Human Rights Report, the Secretary General reports on the UN Mission on Human Rights and from the Special Rapporteur of the Commission on Human Rights, concluded that Uganda had failed to adequately protect the civilian population and distinguish between combatants and non-combatants in its conduct of military activities in Congo. Moreover, its foreign intervention in the DRC created an atmosphere of terror, which led to "acts of killing, torture and other forms of inhumane treatment of the Congolese population."[371] The ICJ held that in its routine acts or threats of violence, plundering, and looting of natural resources, the Ugandan government and its armed forces failed to uphold

[367] Gross, Aeyal. 2017. The Writing on the Wall: Rethinking the International Law of Occupation. Cambridge: Cambridge University Press. p. 268.
[368] Ibid.
[369] ICCPR (International Covenant on Civil and Political Rights); ICRC (International Committee of the Red Cross); ICESCR (International Covenant on the Economic, Social and Cultural Rights).
[370] Zyberi, 'The Development and Interpretation of International Human Rights', p. 130.
[371] Ibid., p. 134.

basic human rights and humanitarian law provisions and well-established rules of customary law reflected in Article 3 of the Fourth Hague Convention, Article 43 of the Hague Regulations of 1907, Laws and Customs of War on Land of 1907, and Articles 51(2) and 91 of the Additional Protocol I,[372] thus privileging in its construal, international human and humanitarian law principles. The case, as will be shown later, is also significant for distinguishing between the concept of state and individual responsibility and for compelling state compliance with the Court's mandatory jurisdiction and reparations.

The above rulings find precedent in ICJ's earlier opinions and verdicts, such as those rendered in the Tehran Hostages (1980) or the Legal Consequences of the Continued Presence of South Africa in Namibia (1971), where the conduct of states, which consistently violates or denies the fundamental rights of individuals, had been deemed contrary to the principles of the UN Charter. International legal scholars agree that the ICJ's evolution of human rights principles within the international law framework has been gradual, but steady. ICJ's human rights lexicon has been broadened by self-determination questions raised in Western Sahara, East Timor, and Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory; invocation of the 1963 Vienna Convention on Consular Relations, which "create individual rights for natural persons"[373] in La Grand, and Avena and Other Mexican Nationals cases; continued protection of individuals under conditions of armed conflict asserted in Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory and Armed Activities cases, the application of the Articles I and III of the 1948 Genocide Convention in the Application of the Genocide Convention of *Bosnia-Herzegovina v. Serbia-Montenegro* which concerned state responsibility in the face of genocide complicity; clarification of the concept of immunity which is not tantamount to impunity in the Arrest Warrant case of *DRC v. Belgium*, which also established that perpetrators of gross violations of human rights can be held accountable before domestic and international courts.[374] And, although, the Arrest Warrant case limited immunity for high-ranking officials, it nonetheless, clarified the law and allowed for individual criminal liability and

---

[372] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* [2005] ICJ < http://www.icj-cij.org/docket/files/116/10455.pdf>, p. 214.
[373] Zyberi, 'The Development and Interpretation of International Human Rights', p. 299.
[374] Ibid.

prosecution in four situations, such as: (i) the determination that former high-ranking officials can be prosecuted in their own country according to the domestic law (as the international law of immunity is not recognized before a person's national courts); (ii) prosecution before a foreign court can occur if the country waives the high-ranking official's immunity; (iii) once the high-ranking official ceases to be an acting representative of his country (iv) prosecution before an international criminal body, such as the ICC, can occur. Immunities enjoyed by high-ranking officials under international law do not bar criminal prosecution. After all, the ICJ notes, customary international law does not grant immunity to acting high-ranking officials for their "personal benefit but to ensure the effective performance of their functions on behalf of their respective States."[375] The ICJ, too, observes a distinction between immunity and impunity, claiming that:

> "While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law … it cannot exonerate the person to whom it applies from all criminal responsibility."[376]

Collectively, the Court's privileging of the elementary considerations of humanity built a solid foundation for the human rights protection system and contributed "to the creation of worldwide common culture of respect of human rights and human dignity."[377]

The role of customary international law in refining the relationship between the ICJ and States

Article 38 of the Statute of the International Court of Justice identifies three authoritative sources of international law: (i) international conventions and treaties establishing rules expressly recognized by the contesting states; (ii) international custom, as evidence of a general practice accepted as law; (iii) the general principles of law emanating from judicial decisions or *opinio juris*. By general customary international law we understand a set of non-written rules that reflect a pattern of state behavior, which consistently reflects a certain norm and is, therefore, regarded as legally binding upon states, or in the words of Article 38 "should constitute evidence of a general practice

---

[375] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*[2002] ICJ <http://www.icj-cij.org/docket/index.php?pr=552&code=cobe&p1=3&p2=3&p3=6&case=121&k=36>, p. 9.

[376] Ibid.

[377] Zyberi, 'The Development and Interpretation of International Human Rights', p. 302.

accepted as law."[378] Customary rules are reflected in the material facts or the actual behavior of states and the subjective belief that such behavior is law. Custom within contemporary legal systems "is relatively cumbersome and unimportant and often of only nostalgic value"[379], whereas, in international law it is "a dynamic source of law"[380] due to the decentralized institutional nature of the international system. D'Amato deems customary law to be more important than treaties due to its universal application,[381] and De Visscher considers it to be of great value "since it is activated by spontaneous behavior and thus mirrors the contemporary concerns of society"[382], with human rights being one of its preeminent instances. Critics, however, note that it can be "too clumsy and slow-moving to accommodate the evolution of international law"[383], especially in view of the rapid pace of states' activities and differing cultural and political traditions, which collectively diminish the role of custom. For this reason, codification and restatement of customary rules often occurs in treaties, such as the Geneva Convention of 1958, Geneva Convention on the Law of the Sea, the Vienna Convention of 1961, and the Vienna Convention on Diplomatic Relations[384] or General Assembly resolutions.

Both national and international courts play an important role in the application of custom. In the 1950 Asylum Case (*Columbia v. Peru*) the ICJ recognized that for the rule to be declared customary, it must be "in accordance with a constant and uniform usage practiced by the States in question."[385] A degree of uniformity as a *sine qua non* of customary rule's existence has been subsequently restated in the 1951 Anglo-Norwegian Fisheries case. Courts decisions and juristic writings of judges are key in attesting the "jural quality" of custom[386], and *opinio juris* constitutes an "invariable test that a usage or practice has crystalized into custom."[387] In addition to this, a subjective reading of custom, the newness of the situations involved or the lack of contrary rules to be surmounted by states in the implementation of unprecedented or neglected norms of behavior can issue in

[378] Shaw, International Law, p. 74.
[379] Ibid., p. 73.
[380] Ibid., p. 3.
[381] Ibid., p. 73.
[382] Ibid., p. 73.
[383] Ibid., p. 73.
[384] Starke, J.G. 1963. *An Introduction to International Law.* London: Butterworths. p. 33.
[385] ICJ Reports in Shaw, International Law, p. 76
[386] Starke, An Introduction to International Law, p. 38.
[387] Ibid., p. 37.

"instant custom." Due to its general character, room for regional custom, and application in the absence of treaty law and protest, customary international law is an important external manifestation of state practice in global affairs, which is fundamental to the establishment and operation of peremptory norms (*jus cogens*) from which derogation is never permitted. All jus cogens, then, are customary international law through their adoption and acquiescence by states, but not all customary international laws are peremptory norms.

The World's Court and The Status of Individual, Collective and General Human Rights

It has been demonstrated so far that human rights encompass a range of political, economic, civil cultural, and social rights whose protection and promotion is one of the fundamental aims of the United Nations and its ancillary organizations. The ICJ has been successful in wedding "international law to notions of equality, individual rights and human dignity."[388] Its extensive jus cogens case law spanning the prohibition of genocide, torture, inhuman and degrading treatment, slavery, protection of self-determination and legal rights of the accused has evolved consistent legal standards aimed at maintaining peace and security. The ICJ has clarified the fundamental rules of international humanitarian law embedded in multilateral treaties and conventions, by insisting that their transgression will constitute a grave violation of *erga omnes* principles of international customary law applicable to all irrespective of their convention signatory and ratification status. In sum, by emphasizing the *erga omnes* character of international humanitarian law obligations; "reminding States of their duty to respect and ensure respect for important instruments of international humanitarian law"; "recognizing the right to reparations of natural and legal persons in the event of violations of international human rights and humanitarian law"; by holding occupying powers accountable for the failure to respect of human rights, the ICJ has "rendered an important contribution not only to the interpretation and development of international human rights and humanitarian rules and principles", but ultimately to humanity itself. [389] And, although, the ICJ is neither an ideal nor

[388] Zyberi, 'The Development and Interpretation of International Human Rights', p. 136.
[389] Ibid., p. 138.

jurisdictionally preferred forum for the resolution of human rights claims, it is an instrumental judicial body that can clarify discursive and practical facets of human rights law and cognate practices. It is therefore increasingly common to find the Court engaged in the adjudication of International Environmental Law cases, where its involvement has the potential for standardizing legal expectations in the arena of contested environmental policymaking due to climate change and heightened likelihood of population displacement, climate refugeeism, and intra- and inter-state conflict. The ICJ's advisory opinion on Nuclear Weapons, the Request for an Examination of the Situation Introduced by New Zealand in Relation to the Nuclear Tests case and the Pulp Mills on the River Uruguay (*Argentina v. Uruguay*) case, permitted the Court to connect the risk of significant damage to the environment, pollution of rivers, and deterioration of biodiversity to detrimental and harmful effects that such damage could have on economic prosperity and health of entire populations.

The ICJ's wide legal mandate can thus aid in abetting interstate skirmishes and compensating for trans-boundary injuries in line with well-recognized principles of international law and elementary considerations of humanity. In holding states liable for failing to live up to the standards of the Charter of the United Nations and auxiliary international conventions and declarations, the ICJ can delineate the scope of responsibility for the misappropriation of states' jurisdictional powers and limit recurrent damage to human wellbeing and the environment, ameliorate the resulting social and economic harm as well as eliminate the root causes of and prospects for intra- and inter-state conflict via interpretation and enforcement of international legal guidelines and norms of cosmopolitan justice. The increase in the role of international law in "third party settlement of international disputes through law-based forums," Charney contends, points to a degree of public trust that the ICJ has been enjoying in recent years, as evidenced by some of the heaviest caseload in its history.[390]

As glanced from the preceding discussion, the ICJ, despite its notable institutional limitations, i.e. the lack of compromissory clauses in instruments of international law of

[390] Charney, Jonathan I. 1998. "Is international law threatened by multiple international tribunals?" in Academie de Droits (eds) *Recueil des Cours. Leiden:* Martinus Nijhoff Publishers. p. 359.

human rights[391]; and the lack of standing before the court of individuals,[392] plays an influential role in the nexus of supranational jurisprudence. Its extensive jurisdiction *ratione materie* and mandate to pursue accountability for egregious violations of international law, unsettles traditional relationships between citizens and their states. Irrevocably, states subject to ICJ's jurisdiction must not only obey the normative framework laid out in the UN Charter and the Universal Declaration of Human Rights but, at the domestic level, ensure that these sacrosanct principles of humanity are not violated. The evolved supranational judicial regime can, therefore, socialize states into safeguarding judicial independence and protecting the rule of law as means toward promotion of human rights.

Phases in ICJ's Adjudication

Apart from the above, the International Court of Justice has wide-ranging jurisdiction over the acts of state and is that principal organ of legal administration, which deals with cases falling under: The UN Torture Convention; Universal Jurisdiction; State responsibility; The Vienna Convention on the Law of Treaties; and the Convention on the Prevention of Genocide, among others. The extent to which the Court acts on its jurisdictional mandate and affects the development of human rights will be explored in the following sections. Scholars, however, note three instrumental phases in the work of the International Court of Justice, which are conditioned upon and intimately correspond to the international political climate of the era: (i) the standard setting phase which commenced with the establishment of the United Nations in 1945 brought the articulation and protection of human rights to the foreground of inter-state relations. Due to scarcity of legal instruments, however, the Court's profile remained low and its activity inconsequential apart from two advisory opinions which emphasized the need to internationalize human rights. Thus, the advisory opinion on the Interpretation of the Peace Treaties ICJ (1950), and the advisory opinion on the Reservations to the Genocide Convention (1951) although appertained to treaty interpretation, allowed the Court to emphasize the civilizing purposes of human rights treaties. It is at this historical stage of the Court's work that right of peoples

[391] Zyberi, 'The Development and Interpretation of International Human Rights', p. 296.
[392] Ibid.

to self-determination was clarified and subsequently embedded in Article 1 of the ICCPR (International Covenant on Civil and Political Rights) and the ICESCR (International Covenant on Economic, Social, and Cultural Rights) adopted in 1966. (ii) The Implementation and Enforcement phase initiated in 1966-67 compelled the Court to apply itself to the main foundations of the international law of human rights articulated in the International Bill of Human Rights (which comprises of the UDHR, ICCPR, and ICESCR) and the 1948 Genocide Convention, when arbitrating questions pertaining to (a) decolonization, (b) immunity of human rights rapporteurs and (c) diplomatic protection. (iii) The Fall of the Berlin Wall in 1989, which marked the end of an ideological polarization of the Cold War era also augured an important shift in the understanding of the purpose of international regimes, which led to a much more pronounced "mainstreaming" of human rights.[393] Normalization of human rights-centered approaches in the diplomatic and humanitarian work of the United Nations and the adoption of regional treaties recognizing the authority of international human rights law in the last two decades, reinvigorated judicial proceedings before the ICJ, increased the number of cases and requests for advisory opinions with a human rights component, impacting thus both the interpretation and development of human rights law and altering state interests. In its judicial output, the ICJ has "generally taken a firm position in favor of human rights and clarified how certain human rights rules and principles were to be understood and applied." [394] Fundamentally, the Court, ever since its Corfu Channel judgment, has emphasized and reiterated, again, in *The United Kingdom v. Albania* (1949), the elementary considerations of humanity as a sound standard worthy of judicial protection.

The hallmark of an effective international legal order, however, is the resonance with which all international disputes are subject to impartial, definitive, principled, and authoritative adjudication. Judicial organs capable of delivering justice across borders and at an intersection of variegated interests have gained increasing relevance in the eyes of concerned stakeholders. Ruti Teitel notes that a departure from a preexisting interstate

---

[393] "Mainstreaming of human rights refers to the concept of enhancing the human rights program and integrating it into the broad range of UN activities, including the areas of development and humanitarian action." (Zyberi, Gentian. 2007. "The Development and Interpretation of International Human Rights and Humanitarian Law Rules and Principles Through the Case Law of The International Court of Justice" *NQHR* Vol. 25/1.)

[394] Ibid.

regime and a movement toward a regime of law focused on persons and peoples changes the role of law and international arbitration under conditions of economic and political globalization. As the importance and condition of sovereignty and territorialization as *casus belli* in international relations have been undermined and diminished by the processes of globalization, the normative foundation of the legal order has been shifting from state-sovereignty-oriented approaches and its traditional emphasis on security, territory, borders, and statehood, to human-being-oriented approaches that focus on the security of persons and peoples,[395] creating, in an otherwise confrontation-prone socio-political milieu, a space for an enlightened *orbis pacificum*, which holds perpetrators of crimes offensive to human conscience and dignity to the highest possible legal and moral standard. This emerging humanitarian turn has increased the importance of supranational judiciaries in furthering the humanity-based scheme of jurisdiction that follows the person.

Breach of Treaty Obligations and the ICJ's Impact on Individual Human Rights

A breach of treaty obligations under the 1963 Vienna Convention on Consular Relations, which results in deprivation of foreign nationals of liberty and access to counsel, constitutes an important area of judicial activity for the ICJ. In two instances, Article 36 of the Vienna Convention, which "governs the consular communication and contact with nationals of the sending state,"[396] has been instrumental in the Breard and La Grand cases involving Paraguayan and German nationals, standing trial and facing death penalty convictions in the United States courts. The Preamble of the Vienna Convention expresses a belief that "an international convention on consular relations, privileges and immunities will contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems".[397] The document complements the ICCPR, which underscores every human being's inherent right to life. "This right" the ICCPR continues, "shall be protected by law and no one shall be arbitrarily deprived of his life."[398] Uribe notes that a country's right to "communicate and to have access to the nationals of

[395] Teitel, Humanity's Law.
[396] Duxbury, Alison. 2000. "Saving Lives in the International Court of Justice: The Use of Provisional Measures to Protect Human Life", 31 *CWILJ*. p. 145.
[397] The Vienna Convention < http://www.worldtradelaw.net/misc/viennaconvention.pdf>
[398] ICCPR < http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

the sending state is of vital importance because the fulfillment of all other consular protective duties", including protection of life, "depends on their exercise."[399] Fulfillment of stipulations articulated in Article 36 is "crucial to the human rights of nationals who are arrested and detained abroad."[400] Thus, "depriving foreign nationals of their liberty, involves several basic human rights, including the right to adequate legal representation, the right to due process, and the right to an interpreter."[401] In the Case Concerning United States Diplomatic and Consular Staff in Teheran (1980), the United States argued for a wide interpretation of Article 36; such that not only aims to "ensure the efficient performance of functions by consular posts", as explicitly stated in the Preamble of the Vienna Convention, but benefits individuals or nationals of the sending state, "who are assured of access to consular officials"[402] in case of detention on foreign territory of which they are not citizens.

The Tehran case and the ensuing ICJ judgment is important for two fundamental human rights considerations: (i) the ICJ prioritized the principle of inviolability of diplomatic envoys and embassy premises as essential for the maintenance and conduct of friendly relations between states, and (ii) any deprivation of human beings of freedom through subjection to physical constraints or exposure to conditions of hardship is "manifestly incompatible" with the Principles of the UN Charter. Here the lack of standing of individuals before the court is remedied and attenuated by the Court's unlimited jurisdiction *ratione materiae,* giving basic considerations of humanity and human rights a due hearing at the supranational level and laying the prerequisite groundwork for the creation of universal standards in the service of human freedom and dignity.

The main contention in the Breard and La Grand cases focused on the U.S. violation of Article 36 of the Vienna Convention. In both instances, the United States has failed to inform consular authorities of detention of foreign nationals (Paraguay in the Breard Case and Germany in La Grand case), who have committed serious crimes on its territory and have been subjected to the due process of its criminal law, resulting in death penalty

---

[399] Uribe, Victor M. "Consuls at Work: Universal Instruments of Human Rights and Consular Protection in the Context of Criminal Justice", *HJIL*, 19(2). p. 387.
[400] Duxbury, 'Saving Lives in the International Court of Justice', p. 146.
[401] Uribe, 'Consuls at Work', p. 376.
[402] Duxbury, 'Saving Lives in the International Court of Justice', p. 146.

convictions. After U.S.'s *ex post facto* relay of information to the Consular authorities of the respective governments, Paraguay and Germany, in the hopes of staying the execution, initiated separate actions in the International Court of Justice, claiming that the "U.S. has breached its treaty obligations pursuant to the Vienna Convention"[403] and requesting ICJ action: (i) to have any criminal liability imposed on Breard and La Grand in violation of the U.S. law to be made void; (ii) to compel the US to "reestablish the situation that existed before the detention; (iii) and have the US provide Paraguay and Germany to a guarantee of "non-repetition of the illegal acts"; (iv) to grant reparations from the US for the execution of the German national, Karl La Grand (the brother of the accused currently on the execution bench).[404] "While the two applications were phrased in terms of damage to both the states and their nationals, the nationals' rights", the ICJ concurred, "were paramount."[405]

Under Article 41, the state can submit a request for provisional measures before the Court if (i) its own rights have been violated, or (ii) wishes to protect the rights of one of its nationals,[406] requesting that the ICJ grants interim measures in the specified circumstances. The history of the ICJ demonstrates its amenability to issuing protection of diplomatic officials and private persons in cases involving the conduct of atmospheric nuclear tests,[407] release of hostages, and efforts to prevent and punish the crime of genocide,[408] which provide a significant groundwork for the protection of human rights. Despite Judge Oda's dissenting opinion that the ICJ ought not to be hostage to human rights questions in specific inter-state disputes, the Court, in Breard and La Grand, agreed with the applicants' construal of the case and deemed the protection of life and liberty of their nations to be of an overriding importance. Similarly, in *Mexico v. The United States of America* concerning arrests of Mexican nationals on U.S. territory and the United States' subsequent alleged violation of the Vienna Convention resulting from its failure to notify promptly the fifty-two defendants of their right to speak to the Mexican consul following

---

[403] Ibid., p. 150.
[404] Ibid., p. 151.
[405] Ibid.
[406] Ibid., p. 153.
[407] Ibid.
[408] In *Nicaragua*, the ICJ refrained from commenting on the applicant's right to "life, liberty and security" but did indicate that whenever a sovereign right is implicated, it too, can be read as concerning persons. States ought to refrain from actions, which would prejudice the rights of either party.

their arrests[409], the ICJ made explicit - by way of reparations - that the United States undertakes a "review and reconsideration of the convictions and sentences of the Mexican nationals to ascertain whether in each case the violation … caused actual prejudice to the defendant."[410] Additionally, the Court established that the "legal rights of the applicant states could be harmed by a threat to the lives of their nationals"[411] thus opening the possibility for the states' future use of the ICJ in contentious human rights proceedings.

General Human Rights through the lens of State and Individual Criminal Responsibility

A significant development in the ICJ adjudication has been the Court's impact on the clarification of the question of individual criminal liability under international law. This is not to suggest that the ICJ is an institutional echo of the International Criminal Court (ICC) or the principal organ vested with the capacity to issue judgments in criminal proceedings, but rather to show a development in transnational adjudication with regard to the protection of human rights at the highest level of individual accountability and reveal patterns of supranational adjudication, whereby communication between supranational judicial organs enhances the pursuit of justice. Anne-Marie Slaughter argues that an ongoing interaction on common human rights concerns shows that "the international judges are networking, becoming increasingly aware of one another and of their stake in a common enterprise" as well as "acknowledge each other's potential interest and to defer to one another when such deference is not too costly."[412]

According to Ingadottir, "the Court is increasingly dealing with the linkage between state responsibility and rights and obligation of individuals"[413] and moving towards evolving the practice of reparations. As the Armed Activities case discussed earlier illustrates, the ICJ has made strides in the asserting state culpability in breaching international law obligations. As an institutional guardian of international law, the ICJ has stressed the importance of state enforcement of its obligations under Geneva Law and

[409] Breyer, Stephen. 2015. *The Court and the World.* New York: Vintage Books. p. 204.
[410] Ibid., p. 203.
[411] Duxbury, 'Saving Lives in the International Court of Justice', p. 159.
[412] Slaughter, Anne-Marie. 2004. *A New World Order*. Princeton: Princeton University Press.
[413] Ingadottir, Theorgis. 2010. "The ICJ Armed Activity Case - Reflections on States' Obligation to Investigate and Prosecute Individuals for Serious Human Rights Violations and Grave Breaches of the Geneva Conventions", *NJIL* (78). p. 589.

Human Rights treaties to pursue individual criminal responsibility at the national level and whenever necessary and feasible to compel states to cooperate with the appropriate units of the supranational judicial regime in place,[414] i.e. the ICC, in the execution of this duty and obligation. Thus, the Armed Activities case is vital to evaluating the ICJ's impact on: (i) states' international obligation to investigate and prosecute violations of human rights and grave breaches of international humanitarian law; (ii) clarification of differences between state responsibility and individual responsibility; (iii) states' obligations to prosecute grave breaches of the Geneva Convention, and (iv) establishing reparations for international wrongful acts.

When between 1998 and 2003, the DRC failed to deter incursions by militias from its territory into Rwanda and preventing Congolese armed forces from attacking local Tutsis in Eastern DRC, which prompted Rwanda and Uganda to give support to the rebel groups in the DRC in their fight against former President Mobutu, the DRC has found itself entrenched in a civil conflict fueled by inter-state skirmishes with Uganda. The war which resulted in mass killings, torture, and the use of children as soldiers and claimed the lives of some three million people and an equal number of displaced, issued in the referral of the case to the ICJ and a subsequent 2005 ICJ judgment in the *Democratic Republic of Congo v. Uganda*. The Court found Uganda's actions in breach of various international obligations, including international humanitarian law and human rights law and deemed the DRC in violation of the Vienna Convention on Diplomatic Relations. In ICJ's assessment, Uganda violated the principles of non-intervention and non-use of force in international relations when it occupied and extended military, economic, and logistical support to irregular forces on the territory of the DRC. Moreover, Article 8 of the International Law Commission's Articles on State Responsibility (ASR) stipulates that "a conduct of a person or a group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of or under direction or control of that State."[415] Should direct State attribution be missing, or the State capacity be deemed inordinately incapable of preventing non-state entities from

---

[414] Ibid.
[415] International Law Commission, Article 8 of *Articles on State Responsibility* (ASR), < http://www1.umn.edu/humanrts/instree/WrongfulActs.html>

operating in its territory, as in the case of failed States where central governmental authority is compromised, the 2001 UNSC Resolution 1368, recognizes that the right to self-defense could be activated to respond to terrorist attacks on a State. The 2005 ICJ's *Congo v. Uganda Armed Activities* case was more careful in its assessment and insisted on making the legality of the victim State's use of force in self-defense conditioned on the perpetrator State's responsibility for the act of aggression.[416]

The acts of torture and inhuman treatment committed by Uganda's armed forces and its failure to distinguish between civilian and military objects, incitation of ethnic conflict, and training of child soldiers have been found by the ICJ to be in violation of human rights and international humanitarian law. As an occupying power, Uganda was held responsible for the illegal exploitation of Congolese natural resources, failure to prevent acts of looting, plundering and exploitation by its armed forces and by armed groups in the region.[417] Reciprocally, the DRC was found in violation of the 1961 Vienna Convention on Diplomatic Relations by failing to provide effective protection to Ugandan diplomatic outposts, to prevent attacks of its armed forces on the Ugandan Embassy in Kinshasa and maltreatment of Ugandan diplomats. But it is the relationship between state and individual responsibility that has important international human rights ramifications. The Court in its attempts to establish state responsibility of Uganda for grave breaches of international law, found its armed forces culpable of committing atrocities, including torture.

Increasingly, under international law, particularly, the four Geneva Conventions of 1949, its Additional Protocol I, and the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment of 1984, states have taken upon themselves the obligation to investigate and prosecute crimes of this nature, albeit reluctantly. It is important to note in cases concerning state responsibility, the above obligations are dispossessed of an enforcement mechanism as states often fail to subject their own troops to investigative and prosecutorial scrutiny demanded. In contrast, investigations of individual criminal responsibility for international crimes have grown. The question of responsibility is referenced in Article 58 of the Draft Rules on States'

[416] Ingadottir, 'The ICJ Armed Activity Case'
[417] Ibid.

Responsibility and Article 25 of the Rome Statute of the ICC. Accordingly, both assert that "if the individual act is attributable to the state, the State is not exempted from its own responsibility even if it prosecutes and punishes the relevant individual."[418] Thus, even if the courts find the individual act in violation of pertinent human rights and humanitarian laws violations attributable to the state, the State is not exempted from its own responsibility even if it prosecutes and punishes the relevant individual."[419] The DRC and Uganda have voluntarily complied with the International Criminal Court and assented to its jurisdiction. What implications, however, does the above case have for state responsibility and the jurisdictional and investigative powers of the ICJ and its ability to advance the protection of human rights?

Under Article 36(2) of the Statute of the Court, the ICJ in the Armed Activities case was endowed with broad compulsory jurisdiction *rationae materiae* that was accepted by both parties to the conflict. In addition, the ICJ's position as an arbitrating judicial body was enhanced by the countries' pre-conflict ratification of major international human rights and humanitarian law conventions and reports of violations of human rights and international humanitarian law. After considering the facts of the case, the ICJ found

> "the Republic of Uganda, by the conduct of its armed forces, which committed acts of killing, torture and other forms of inhumane treatment of the Congolese civilian population, destroyed villages and civilian buildings, failed to distinguish between civilian and military targets and to protect the civilian … as well as by its failure … to take measures to respect and ensure respect for human rights and international humanitarian law … violated its obligations under international human rights law and international humanitarian law."[420]

The above indicts Uganda for failing to exercise, as an occupying power, due vigilance and respect for fundamental peremptory norms of International Humanitarian Law. Relying upon precedent findings in the *The Wall*, the ICJ held Uganda in breach of humanitarian law and human rights law obligations articulated in the Hague Regulations of 1907, the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949, the ICCPR, the First Protocol Additional to the Geneva Conventions

---

[418] Ibid., p. 586.
[419] Ibid.
[420] Armed Activities, para 345(3).

of 12 August 1949, the African Charter on Human and People's Rights, the Convention on the Rights of the Child, and the Optional Protocol to the Convention on the Rights of the Child[421] and obliged Uganda to make reparations to the DRC. Grievous human rights violations which resulted in physical suffering and extermination of protected persons prohibited by Article 32 of Geneva Convention and dispossessed individuals of their right to life and exposed them to torture prohibited by Articles 6 and 7 of the ICCPR, found Uganda culpable and in breach of international obligations, which incur international responsibility. The case finds precedent in the ICJ Genocide Judgment, where the Court made a determination that a state can perpetrate the crime of genocide and that intent exists in the minds of senior official capable of attaching state liability.[422] Here the ICJ relied on the ICTY's work tribunal and inquired into the criminal process of the ICC, making itself not only reliant on their findings, but erecting a broader system of mutual institutional dependency for the purpose of judicial protection of human rights.

The ICJ's docket reveals the Court as a formidable authority on questions of state responsibility for IHL violations, which frequently expose states to reputational costs of Article 37 of the International Law Commission's Draft Rules of Responsibility of States for Internationally Wrongful Acts (2001), whereby:

> "1. The State responsible for an international wrongful act is under an obligation to give satisfaction for the injury caused by that act as it cannot be made good by restitution or compensation. 2. Satisfaction may consist in an acknowledgement of the breach, and expression of regret, a formal apology or another appropriate modality."[423]

An independent duty on states to investigate and prosecute individuals for certain international crimes under international law shows a growing body of jurisprudence in international courts and tribunals, such as the regional human rights tribunals. Suffice it to mention the Jurisdictional Immunities of the State (*Germany v. Italy*), Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Georgia v. Russian Federation*), Certain Questions of Mutual Assistance in Criminal

---

[421] Ingadottir, 'The ICJ Armed Activity Case', p. 585.
[422] Groome, Dermot. 2007. "Adjudicating Genocide: Is the International Court of Justice Capable of Judging State Criminal Responsibility?", *FILJ*. p. 989.
[423] International Law Commission, *Responsibility of States for International Wrongful Acts (2001*) < http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf> U.N. Doc. A/RES/56/83

Matters (Djibouti v. France), Certain Criminal Proceedings in France (*Republic of the Congo v. France*), Avena and Other Mexican Nationals (*Mexico v. United States of America*), Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*), Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Croatia v. Serbia*), and Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia*),[424] to reveal the momentum with which the ICJ pursues state responsibility for grave breaches of humanitarian law and human rights.

The ICJ and the Right to Independence of States and Self-determination of Peoples

The question of independence and self-determination of states and peoples occupies an important subject in the international law and human rights discourse. In view of the upsurge of transborder interventions and skirmishes, which have resulted in grievous acts of violence and alleged breaches of fundamental principles of humanitarian law and the law of armed conflict, particularly, principles of necessity, distinction, and proportionality, the pronouncements of respected judicial bodies are of preeminent importance and can play a reconciliatory role in the process maintaining territorial integrity, which once violated, unleashes demonstrably disproportionate armed response under the aegis of an indubitable belief in sovereignty inviolability. Individual human wellbeing and rights are intimately affected by the integrity of the state and its ability to stand independently in the community of its political peers. Therefore, a body of UN declarations, charters, and regional human rights instruments comprised of the 1960 Decolonization Declaration, the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States, Part VIII of the Helsinki Final Act of 1975, Article 20 of the 1981 African Charter of Human and Peoples' Rights, and the 1990 Charter of Paris for a New Europe, has been developed to assist peoples in their pursuit of autonomous self-governance and self-determination. The Committee on the Elimination of Racial Discrimination and the Human Rights Committee are equally invested in defining the scope and content of their professional duties with regard to matters of self-determination.

Because questions of state responsibility for violations of international law are often

[424] Ingadottir, 'The ICJ Armed Activity Case', p. 590.

accompanied by the victim state's desire for self-determination, the ICJ's authoritative clarification of international law, reified by historical context and reinforced by legal precedent, has been in high demand in the era of political decolonization and economic globalization. Moreover, self-determination of states and peoples is often perceived as a highly contentious political aspiration, which the Court, being a judicial organ of the UN, is not predisposed to address. The ICJ, however, has been actively involved in interpreting the concept of self-determination as a legal right of peoples to political status within the international community of states. Cases of self-determination following decolonization and self-determination through secession have occupied the bulk of the ICJ's work. Since 1945, the Court has dealt with self-determination matters concerning the International Status of South-West Africa, Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South-West Africa (1949), Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) (1970), Western Sahara (1974), East Timor (1990), Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (2003), Application of the International Convention on the Elimination of All Forms of Racial Discrimination (2008), and Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (2008). The ICJ's findings in the above point to a growing interest in responding to peoples' aspirations to self-determination. As a principle, self-determination endows groups with the right to control their own destiny, pursue equal rights and freely define, without external interference, the political, economic, and social character of their polity in accordance with the UN Charter. The 2004 ICJ Advisory Opinion on the Wall and 2010 Advisory Opinion on Kosovo's declaration of independence have a distinct bearing upon human rights and reveal the Court, as will be shown below, as a purposeful legal, albeit technical, apparatus for peaceful settlement of disputes pertaining to the territorial and moral integrity of states, nations, and peoples.

On the Legality of the Construction of a Wall in the Occupied Palestinian Territory

In its 2004 Advisory Opinion regarding the legality of the construction of a Wall in the Occupied Palestinian Territory, the ICJ considered the right of the Palestinian people

to self-determination in view of Israel's prolonged occupation and its construction of a barrier separating the two people. The General Assembly resolution 2625 underscored every state's duty to "refrain from any forcible action which deprives peoples … to the right to self-determination"[425] and common Article 1 of the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights imposes upon states not only an obligation to recognize the right to self-determination but to respect and actively realize it. The Court reminded the parties that the 1993 exchange of letters between the President of the Palestinian Liberation Organization (PLO), Yasser Arafat and the Israeli Prime Minister Yitzhak Rabin, which not only settled the question of the existence of a "Palestinian people" but affirmed also Israel's right to exist in peace and security. Subsequent Israeli-Palestinian Interim Agreement of September 28, 1995 reaffirmed the status of Palestinians as a people and recognized their legitimate rights to self-determination.

Abiding by its traditional mandate, the ICJ noted that a State, in its traditional elemental form, must consist of a people and a government, therefore, in contradiction with the commitments made between the two parties, the construction of a wall severely constraints Palestinian aspirations towards statehood by severely impeding their *erga omnes* right to self-determination and constitutes, therefore, a breach of Israel's legal obligation to respect it in accordance with the provisions of the UN Charter. Should an impediment exist which continually inhibits a people's right to self-determination, states have a duty, the ICJ notes, to remove the impediment and refrain from any forcible acts of aggression, occupation, or military intervention that deprives groups of their rights. The armed conflict and Israeli occupation of postcolonial Palestinian territories have denied the Palestinians, the Court opined, their apt exercise of such rights as are compatible with the rules and principles of international law.

Advisory Opinion on Kosovo's Declaration of Independence

On 22 July 2010 the International Court of Justice by ten votes to four gave its (affirmative) Advisory Opinion on the legal question lodged before it by the United Nations General Assembly, that of the accordance with international law of the unilateral

[425] Ibid., p. 171-172, para. 88.

declaration of independence by Kosovo's Provisional Institutions of Self-Government. To answer General Assembly's request and not exceed its own legal mandate, the ICJ had to establish: (i) whether it had jurisdiction; (ii) whether it should exercise discretion and decline to exercise its jurisdiction in the case before it;[426] (iii) the scope and meaning of the question, including defining the identity of the authors of the declaration of Kosovo's independence.[427]

The declaration of independence of Kosovo's Provisional Institutions of Self-Government from the Republic of Serbia was adopted on 17 February 2008. It came "after more than one year of direct talks, bilateral negotiations and expert consultations"[428] between Belgrade and Pristina carried with the mediation of the UN Secretary General's Special Envoy, which have failed to produce mutually agreeable outcome on Kosovo's political status. Kosovo is a Serbian province and its declaration of independence is embedded in a specific political and historical context of Yugoslav Wars fought in the 1990's. Following the 1999 NATO bombing campaign against Serbia,[429], the UN Security Council Resolution 1244 (1999) "determined to resolve the grave humanitarian situation"[430] and establish the United Nations Interim Administration Mission in Kosovo (UNMIK). The UNMIK was vested with a responsibility of bringing about the constitutional framework for Kosovo's provisional Self-Government and initiating negotiations with Serbia over Kosovo's future status settlement. Following the breakdown of negotiations with Serbia over Kosovo's final political status and upon having exhausted all available measures available to it under the auspices of the SC Resolution 1244, Kosovo adopted a declaration of independence from Serbia. On Serb government's request, the General Assembly sought ICJ's advisory opinion on the legality of Kosovo's actions. The legal question before the ICJ was whether Kosovo's declaration of independence is in accordance with general international law. The UN General Assembly has requested ICJ's advisory opinion on the question under Article 96, paragraph 1 of the UN Charter.[431]

---

[426] Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Kosovo AO), Advisory Opinion of 22 July 2010, [2010] ICJ, p. 412, para. 17.
[427] Ibid., p. 405.
[428] Ibid., p. 432, para. 69.
[429] Koeck, Herbert Franz et al. 2009. *From Protectorate to Statehood*. Intersentia. p. 36.
[430] *Kosovo OA,* 426, para. 58.
[431] Ibid., p. 414, para. 24.

In its Advisory Opinion of 22 July 2010, the ICJ after considering its jurisdictional and discretionary powers contained in Article 65(1) of its Statute, [432] concluded unanimously that it had jurisdiction to give an advisory opinion, and by a nine-to-five vote [433] decided to comply with the General Assembly's request, finding that: (i) no "compelling reasons"[434] exist for the Court to "refuse to respond to the request from the General Assembly"[435] (ii) the General Assembly, under Article 11, paragraph 2 of the UN Charter is deemed competent to discuss "any questions relating to the maintenance of peace and security" [436] and (iii) the authors of the declaration of independence acted as "representatives of the people of Kosovo outside the framework of the interim administration"[437] set up by SC Resolution 1244,[438] which, (iv) does not explicitly prohibit the issuance of a declaration of independence.

Since, as the Court stated, the Resolution remained "silent" on the conditions for the final status of Kosovo not only did the declaration of independence not violate the SC Resolution 1244 (1999), but it also, the Court concluded by ten votes to four, did not violate general international law and any applicable rule of international law. [439] The Court reasoned, with reference to three centuries of historical evidence and state practice, that unilateral declarations of independence are not prohibited by customary international law. Only under exceptional circumstances can declarations of independence be held in violation of jus cogens, or norms of international law from which derogation is prohibited. Those include, declarations of independence that (i) use force, or, (ii) are declared illegal by the UN Security Council,[440] none of which apply to the present case. In his dissenting opinion, Judge Bennouna warned, however, that the Court's failure to decline to respond to the General Assembly's request has unduly exposed the Court to "frivolous" requests

---

[432] Ibid., p. 404.
[433] Ibid., p. 453(2).
[434] Compelling reasons might be construed in terms of *motives* behind the request for an advisory opinion or in terms of *adverse political consequences*, which may issue in the Court's refusal to consider the case. (*Kosovo* AO. p. 416)
[435] *Kosovo* OA, (n. 136), 421, para. 44.
[436] Ibid., p. 414, para. 22.
[437] Ibid., p. 448, para. 109.
[438] UN Resolution 1244 was designed for humanitarian purposes and provided for stabilization and reconstruction of Kosovo.
[439] *Kosovo* AO. p. 453(3).
[440] Weller, Marc. 2011 "Modesty can be a virtue: judicial economy in the ICJ Kosovo Opinion?", *LJIL*

by political organs in the future; compromised "the integrity of its judicial function";[441] and opened it to exploitation in "a political debate."[442] [443] As pertaining to the identity of the declaration's authors, Judge Koroma noted in his dissent that the General Assembly "has clearly stated that it views the unilateral declaration of independence as having been made by the Provisional Institutions of Self-Government of Kosovo"[444] and the Court's amendment of the question raises serious contentions over the authors' identity and competence.

The ICJ can of course be criticized for being too narrow in its construal of the questions set before it. It can be argued that its 'technical' focus on the "legality of the declaration" [445] is a setback to the doctrine of peoples' self-determination and states' territorial integrity. The Court's jurisdictional and discretionary powers in addressing the legal question raised by the UN General Assembly in lieu of the Security Council[446] can also constitute a legitimate point of contention. The ICJ was parsimonious and narrow in scope and interpretation of the legal question set before it. In its attempt to establish the identity of the authors of the declaration of independence, the ICJ moved beyond the language of the UNSC Resolution 1244 but did not set a precedent or open legal prospects for other separatist movements, as it principally addressed itself to Kosovo's unique political circumstances. Due to its economical interpretation of the "narrow and specific"[447] nature of the question and in the absence of an explicit request from the General Assembly, the ICJ's deduced correctly that it did not lie within its purview to consider the political impact of its decision or to reflect on the ramifications of the rights of peoples to self-determination and states' territorial integrity. Nevertheless, it would be a mistake to adduce that these two equally compelling principles of international law, find little resonance in the judicial docket. To the contrary, violent disintegration of Yugoslavia and State

[441] Dissenting Opinion of Judge Bennouna. [2010] ICJ, p. 500, para. 3.
[442] Ibid., p. 500, para. 3.
[443] As a rejoinder to Judge Bennouna's concerns, it should be noted that the Court has in the past responded to requests on many controversial and politically charged issues, such as: the legality of the threat or use of Nuclear Weapons, the construction of the Wall by the State of Israel, and genocide cases.
[444] Dissenting Opinion of Judge Koroma. [2010] ICJ
< http://www.worldcourts.com/icj/eng/decisions/2010.07.22_kosovo.htm> Accessed 15 October 2013
[445] Detrez, Raymond. 2011. "Recent International Advisory Opinion", *HLR,* p. 1101.
[446] The UNSC was seized of the matter since 1999, when the Security Council first considered the interim administration of Kosovo and its Constitutional Framework in the UNSC Resolution 1244.
[447] *Kosovo* AO. p. 423, para. 51.

sanctioned discrimination of ethnic minorities has been at the forefront of Kosovo's appeal. The Court, being a judicial and not a political organ of the UN, has merely judged the issues relating to "the extent of the right to self-determination and the existence of any right of 'remedial secession'"[448] to be "beyond the scope of the question posed.""[449] Despite some critics' allegations that the Court had an unprecedented opportunity to extend the concept and practice of "remedial secession"[450] beyond its post-colonial context[451], the Court nevertheless restricted itself to the explicit language of the question and determined its task to be determinative of "whether the declaration of independence violated either general law or the *lex specialis* created by Security Council resolution 1244 (1999)."[452]

It is important to note that the purpose of ICJ's opinions is to offer legal advice and not to issue binding legal judgments or settle political disputes between state parties.[453] Its lack of concern with the political implications should be seen in the light of the limiting scope of the question itself, that of relating only to the declaration of independence, rather than a commentary on Kosovo's rights to self-determination or final adjudication on Kosovo's statehood status. Its restraint and conservatism thus preserved the Court's judicial integrity and apolitical function and settled a legal dispute, which might have unleashed new waves of violence.

Since, as the Court declared, unilateral declarations of independence are not prohibited by international law,[454] concern might arise as to whether ICJ's advisory opinion might encourage other secessionist movements. Judge Simma's dissenting opinion regarding the evocation of the Lotus principle, which states that "international law permits whatever it does not prohibit,"[455] may give "legal license to separatist movements worldwide to declare independence"[456] to the detriment of states' territorial integrity. It is

---

[448] The "remedial secession" theory "claims that people are entitled to secede under exceptional circumstances when their right to internal self-determination is being denied and there are no available remedies but secession." (http://www.etd.ceu.hu/2012/vezbergaite_ieva.pdf)
[449] *Kosovo* AO. p. 406.
[450] The word limit prevents me from examining at lengths the nuances of the case as related to the principle of remedial secession.
[451] Weller, 'Modesty can be a virtue'.
[452] Summary, Kosovo AO [2010] ICJ.
[453] *Kosovo* AO. p. 421, para. 44.
[454] Ibid., p. 426, para. 56.
[455] Declaration of Judge Simma. [2010] ICJ. p. 478, para 2.
[456] Detrez, 'Recent International Advisory Opinion', p. 1104.

important to underscore, however, that ICJ's opinion pertains, first, to (i) the legality of declarations of independence in (ii) a very specific case, Kosovo. Second, the Court makes it clear in Paragraph 51 of its Advisory Opinion that it does not aspire to adjudicate on or establish Kosovo's status as a state or issue a blanket statement on its political standing in the eyes of the international community. Neither does the Court appear willing to unduly expand the legal question before it in order to take account of the practice of "remedial secession" and thereby affirmatively encourage secessionist aspirations of other separatist movements. In so doing, the Court sent a clear signal to the international community and other separatist movements that questions pertaining to the legality of independence declarations are not reducible to general legal proclamations on people's right to self-determination, secession, states territorial integrity, or statehood recognition,[457] but its seizure with the question is a positive instance of the ICJ's instrumental value to the peaceful settlement of politicized disputes through law and indirect protection of the integrity of the region's peoples.

The ICJ's Advisory Opinion with regard to the affirmation of Kosovo's unilateral declaration of independence raises an important issue of qualification. Namely, in insisting that declarations of independence do not violate general international law, it remains for the Court to clarify and define the types of parties entitled to seeking autonomy and self-determination through unilateral declarations of independence. Additionally, if, by the time of its ruling, "69 states, including 22 of 27 European Union member states, had already recognized Kosovo's independence"[458] the question to be pursued by the international community in view of ICJ's Advisory Opinion should be whether state creation or regulation of self-determination of peoples ought to be a matter of a political fait accompli or a non-trivial legal entitlement bolstered by the declaratory power of international judicial regimes. There is a sense that the Court could have reflected more profoundly on the question of remedial secession and state recognition with regard to the bearing such recognition has on people's human rights, if only it had been willing to stretch the original

---

[457] In order to do so, the ICJ would have to refer to the *Montevideo Convention on the Rights and Duties of States*, which define the criteria for statehood, i.e. permanent population, defined territory, government, and capacity to enter into relations with other States.

[458] Caplan, Richard. 2010. "The ICJ's Advisory Opinion on Kosovo" 55 USIP <http://www.usip.org/sites/default/files/resources/PB55%20The%20ICJs%20Advisory%20Opinion%20on%20Kosovo.pdf> Accessed 22 June 2014

language of the question set before it. Yet, the Court has shown considerable reluctance in proving itself unduly activist in this arena, determining that its decision could unnecessarily politicize the debate on the final political status of Kosovo; a matter the Court clearly was not asked to evaluate.

Conclusion: The ICJ - Prospects and Limitations

Because the "universal content of humanity law protection embraces the rights to life, to humane treatment, and to judicial protection"[459] and casts group rights in human rights terms emphasizing protection against ethnic cleansing and protection of culture, linguistic heritage, and self-determination, a diverse array of international judicial processes such as those of the Security Council, the International Criminal Court and the International Court of Justice, construe a vocabulary and create a normative scheme of protection that would not be otherwise recognized within the traditional framework of the interstate system.[460] This is not to suggest that the ad hoc tribunals and judicial regimes set up for the purpose of protecting humanity's law constitute a waterproof system of authoritative norms setting. Rather, the evidence suggests that legal mechanisms in place can often be subverted or ignored altogether. The massacres in the Balkans continued despite the convening of, and ongoing prosecutions at the International Criminal Tribunal for the Former Yugoslavia.[461] Humanitarian interventions and the responsibility to protect raise ongoing objections and pose challenges to the longstanding principles of state sovereignty, territorial integrity and political independence of states upheld by the UN Charter-based regime. Similarly, difficulties with lying down and enforcement of law in regions populated by failed states or broken apart by genocidal tendencies, i.e. Rwanda, Sudan, or Syria, raise doubts about the nexus between international criminal justice and protection of human rights. Some scholars note a considerable legality gap which means that "the same norms can pull in potentially opposite directions, and shows that the humanity-based rule of law, as it is currently framed, constitutes a comprehensive but

[459] Teitel, Humanity's Law, p. 223.
[460] Ibid., p. 113.
[461] Ibid., p. 112.

indeterminate regime – and a framework that may lend itself to politicization, with consequences for the perception of the rule of law."[462]

A. Limitations

Cesare Romano warns against a tendency among legal scholars to regard international adjudicative institutions as a foreordained achievement and a permanent feature of the landscape with indefinite lasting power.[463] The standard menu of international judicial regimes, such as the European Court of Justice, the European Court of Human Rights, the International Court of Justice, and the International Criminal Court are often depicted as "moving slowly, steadily, almost inexorably"[464] through trial and error and at a cost of becoming irrelevant or altogether ignored.[465] Admittedly, there are a number of institutional and structural limitations that any judicial organ claiming to interpret, guard and uphold international law must, therefore, confront. (i) International judicialization is inevitably uneven and fragmented reflecting the dystopian reality of unequal distribution of power between states, and the historical, political and cultural reasons for variations in their socialization into universal human rights norms and standards of international law.[466] (ii) As a result, the reliance on international judicial regimes is uneven and concentrated on specific themes or products of a particular judicial order, which is strongly associated with democracy, rule of law and hierarchical governance, which can be to the detriment of ignoring other worthy aspirations. Among some classical interests that have found themselves on the docket of international courts and have been duly legalized are trade liberalization, intellectual property, protection of basic human rights, and retrospective trials of perpetrators of certain kinds of carefully delimited atrocities,[467] while social violence, corruption, climate-management, hazardous waste disposal and humanitarian assistance await more extensive codification and judicialization.

---

[462] Ibid., p. 113.
[463] Romano, Cesare. 2014. "Trial and Error in International Judicialization" in Cesare Romano et al. eds. *Oxford Handbook of International Adjudication*. Oxford: Oxford University Press. p. 111.
[464] Ibid.
[465] Alter, Karen. 2014. "Contemporary International Adjudicators: Evolution and Multiplication" in Cesare Romano et al. (eds) *Oxford Handbook of International Adjudication*. Oxford: Oxford University Press. p. 35.
[466] Romano, Cesare. 2014. "The Shadow Zones of International Adjudication" in Cesare Romano et al. eds. *Oxford Handbook of International Adjudication*. Oxford: Oxford University Press. p. 107.
[467] Abbot, K. 2000. "The Concept of Legalization", *IO.* pp. 401-19.

(iii) Human rights litigation before international judicial bodies is increasingly involving an ever-larger number of states and non-state actors, yet scholars note, that only a handful of states have become "repeat users" who have been strongly socialized to the practice and mechanics of international adjudication.[468] (iv) The question of optics is also an important factor in the amount of trust and external legitimacy international courts, particularly the ICJ, have in the eyes of the public. Damrosch argues that the selection procedures for judges and the composition of the Court has increased the impression of the Court as a political organization, which led to a decrease of confidence in the Court as an impartial forum for the resolution of legal disputes.[469] Furthermore, while geographic diversity may have enhanced the political balance of the Court, it has undermined the perception of the court as a judicial rather than a political organ of the UN.[470] Due to its symbiotic relationship, any decline in the public perception of the UN can and has occasioned an accompanying negative perception of the Court[471] and the ICJ's handling of highly contentious cases has resulted in the perception of the court as nothing more than a political entity.[472] (v) The inter-state and consensual basis of the ICJ jurisdiction, the scope of party submission, and the Court's reluctance to reference other courts' jurisprudence or technocratically bringing legal arguments to their logical conclusion and thus regard loss of life, however distressing, to be outside of the elegantly construed legal question and therefore lie beyond the legal mandate of the Court, may be perceived as an anachronism or a residual shortcomings of an institution set up to administer justice in an otherwise unruly and variable inter-state system.

B. Prospects

The 2013 Conference convened by the International Court of Justice to mark the centennial anniversary of the Peace Palace in The Hague, gave impetus to discussions and reflections on the Court's service to international peace and justice and its singular contributions to the content of fundamental principles of international law. It is important

---

[468] Romano, 'The Shadow Zones in International Adjudication', p. 107.
[469] Fisler Damrosch, Lori (ed.). 1987. *The International Court at a Crossroads*. Transnational Publishers, Inc. p. 108.
[470] Ibid., p. 109.
[471] Ibid., p. 107.
[472] Ibid., p. 109.

to note that ICJ's relationships with the international legal system is one defined by formal, doctrinal and factual measures, which operate in a broader context of international politics, economic relationships and socio-cultural categories. Thus, the ICJ's formal impact is delimited as well as enhanced by the UN Charter and principles regulating the relationship between it and the community of States, in particular, the Lotus Principle and the recognition that states are free to act as they please as long as they do not contravene an explicit prohibition of international law. The Court's articulation of doctrine, its influence on states, other courts and tribunals defines the scope of its legal sway. Thus, during the period 1979-2000, the Court acted upon request for provisional measures in some fifteen cases,[473] nine of which involved loss of human life. In the nine situations, the ICJ has shown a growing tendency to "recognize the human reality behind disputes between states"[474] and outlining measures which ought to be taken to preserve the rights of parties in accordance with Article 41(1) of the Court's Statute. Lastly its concrete and factual achievements should be evaluated with a view to the way that the ICJ judgments impact state behavior and situate inter-state relationships in a broader legal and extra-political context.

To make international law a more responsive force, Taslim Olawale Elias, the former president of the ICJ noted the need for states to become participatory agents, who recognize and assent to the jurisdiction of the Court and have a more frequent recourse to it.[475] Among the strengths of the ICJ are (i) its consultative role with regard to questions of nuclear proliferation, self-determination of peoples, and use of force; (ii) its apolitical status; (iii) its ability to affirm the judicial character of international law and reflect on a plurality of legal questions of *lex specialis* and *lex generalis* nature; (iv) its constructive role in upholding a unity of principle dictated by the text of the Charter. The Court, along with specialized organs and agencies of the UN, has a responsibility to remind states of their duty to protect and promote the well-being of their people and investigate all

---

[473] *United States of America v. Iran, Nicaragua v. United States of America, Cameroon v. Nigeria, Paraguay v. United States of America, Yugoslavia v. Belgium, Yugoslavia v. Canada, Yugoslavia v. Germany, Yugoslavia v. U.K., Yugoslavia v. United States, The Democratic Republic of Congo v. Uganda, Germany v. United States of America,* no name a few.

[474] Lee, Yoshiyuki. 2001. "Provisional Measures and the Loss of Human Life: An Overview of a Recent Practice in the International Court of Justice", *KULR.* p. 29.

[475] Interview. 1984. "Prospects for the ICJ" *HILR* 7(2). p. 4.

complaints of human rights abuses, including misapplication of the use of force, abuse of the principles of necessity and proportionality in armed conflicts and defensive actions, and observance of humanitarian law.

The ICJ's greater focus on human rights makes evident the rising importance of human-centered as opposed to state-centered notions of law and adjudication. The emergence of humanitarian sensibility sets a high premium on a minimum threshold of decent behavior bellow which conduct becomes inhumane and subject to investigation and supranational arbitration. The Court has a potential, therefore, of becoming a court of last instance which dictates the normative and legal paradigm and expands the juridical landscape by emphasizing in its case load the elemental considerations of humanity codified in the human rights and humanitarian law discourse, which is fundamentally grounded in the protection of humanity and is well equipped to supply a viable answer to the leading conundrum of our times, that of, what do we owe each other? By balancing state interests with human security and move beyond the state to reach the locus of responsibility for human rights violations, the ICJ can localize accountability, administer judicial supervision, and affirm responsibility under international law thus compelling greater respect for the rights to life, humane treatment and judicial protection. The character of international justice and supranational adjudication represented by the ICJ inevitably alters relations among states and between states and their citizens. For the first time in the venerable history of the international system of courts, the people's claims, their human, political and civil rights have status and standing beyond the state and compel state protection that transcend nationality and citizenship. The emergence of transnational rights, recognition of human rights across borders, and legal supervision of the International Court of Justice along with the International Criminal Court and regional Human Rights bodies such as the European Court of Human Rights or the Inter-American Court of Human Rights, offer a fecund ground for the protection of humanity's law at the global level.

TABLE I. Human Rights Litigation in the International Court of Justice

No.	Parties	Name of the case	Year of filing
1.	Portugal v Australia	*East Timor*	1991
2.	Bosnia–Herzegovina v Serbia and Montenegro	*Application of the Convention on the Prevention and Punishment of the Crime of Genocide*	1993
3.	World Health Organization (Advisory Opinion)	*Legality of the Use by a State of Nuclear Weapons in Armed Conflicts*	1993
4.	General Assembly (Advisory Opinion)	*Legality of the Threat or Use of Nuclear Weapons*	1995
5.	Paraguay v United States of America	*Vienna Convention on Consular Relations*	1998
6.	Economic and Social Council (Advisory Opinion)	*Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*	1998
7.	Republic of Guinea v Democratic Republic of the Congo	*Ahmadou Sadio Diallo*	1998
8.	Germany v United States of America	*LaGrand*	1999
9.	Serbia and Montenegro v 10 NATO countries	*Legality of Use of Force* (10 cases)	1999
10.	Democratic Republic of the Congo v Burundi	*Armed Activities on the Territory of the Congo*	1999
11.	Democratic Republic of the Congo v Rwanda	*Armed Activities on the Territory of the Congo*	1999
12.	Democratic Republic of the Congo v Uganda	*Armed Activities on the Territory of the Congo*	1999
13.	Croatia v Serbia	*Application of the Convention on the Prevention and Punishment of the Crime of Genocide*	1999
14.	Democratic Republic of the Congo v Belgium	*Arrest Warrant of 11 April 2000*	2000
15.	Liechtenstein v Germany	*Certain Property*	2001
16.	Democratic Republic of the Congo v Rwanda	*Armed Activities on the Territory of the Congo (New Application : 2002)*	2002
17.	Mexico v United States of America	*Avena and Other Mexican Nationals*	2003
18.	Republic of the Congo v France	*Certain Criminal Proceedings in France*	2003
19.	General Assembly (Advisory Opinion)	*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*	2003
20.	Ecuador v Colombia	*Aerial Herbicide Spraying*	2008
21.	Mexico v United States of America	*Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals*	2008
22.	Georgia v Russian Federation	*Application of the International Convention on the Elimination of All Forms of Racial Discrimination*	2008
23.	Jurisdictional Immunities of the State	*Proceedings instituted by the Federal Republic of Germany Against the Italian Republic*	2008
24.	General Assembly (Advisory Opinion)	*Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*	2008
25.	Belgium v Senegal	*Questions relating to the Obligation to Prosecute or Extradite*	2009

Gentian Zyberi, 2010. "Human Rights in the International Court of Justice" in Mashood Baderin (ed), *International Human Rights: Six Decades after the UDHR and Beyond*. Ashgate Publishing Group.

CHAPTER III

THE EUROPEAN COURT OF HUMAN RIGHTS AND THE EVOLUTION OF CITIZEN AND HUMAN RIGHTS UNDER THE AEGIS OF COSMOPOLITAN NORMATIVITY

The Pan-European Judicial Arrangements

To a significant extent, it must be noted, countries of the European Union diagnosed and recognized early the truism of Martinez's argument during the post-war recovery decade of the 1950's, one based on the recognition of a mutually beneficial relationship between states and supranational judicial regimes. With the passage of the European Convention of Human Rights and Fundamental Freedoms in 1950 and the establishment of the European Court of Human Rights nine years later, the states of the then largely economic pact known as the Coal and Steel Community contended for a rather prescient and advanced notion of the uniformity of law and universality of human dignity across state borders. The Convention was the "first international instrument" of its kind that expressed itself in "treaty form" and possessed sufficient "institutional machinery for supervision and enforcement,"[476] which found a permanent place in the legal lexicon of the European Union (EU) and consciousness of the state's own domestic legal systems. Two outcomes of this supranational institutional arrangement have been observed to strengthen the foundations of basic "humanity's law" norms:

> (i) "When governments know that their policies must be justified in an international forum an additional element enters their decision-making … the State's obligations to the individual [constitute] a constant background to official deliberations."[477] (ii) "As a results of proceedings at Strasbourg individuals can obtain redress for violations of their rights and bring about changes in domestic law and practice … which would be unlikely without the Convention"[478] and the European Court of Human Rights charged with interpreting and executing the letter of the law.

It is important to add that the jurisdictional and legal functions of the Court, individual access of EU citizens to the Court and the state's responsibilities in carrying out the verdict, fundamentally alter the traditional conceptions of citizenship originally defined and, therefore, delimited by the sovereign state system paradigm, wherein citizens (i) function as entities and subjects of the state, (ii) whose political and legal personalities are exhausted by state institutions, and (iii) who are discouraged (if not prevented due to a lack of efficient and effective supranational mechanisms) from seeking meaningful redress beyond the

---

[476] Merrills, J.G. 1988. The Development of International Law by the European Court of Human Rights. Manchester: Manchester University Press. p. 1.
[477] Ibid.
[478] Ibid., p. 2.

constitutional parameters defined and upheld by the state. It is often the case that domestic law and policy, themselves, become high profile subjects of supranational scrutiny upon reaching the European Court of Human Rights. Citizens who find laws and policies in contravention of the European Convention of Human Rights are the named plaintiffs in cases of this nature. The Court's adjudicatory "obligations in the field of human rights," therefore, "concern the most intimate aspects of the relations between the citizen and the State."[479]

Only three decades ago, in 1988, the Convention as an "ancillary" document to the States' own constitutional and domestic law did not empower the Court to "pronounce on issues of domestic law."[480] I suggest that the evolution of the Court and, alongside it, of the European Union law has turned the Convention into a living and self-executing document, which symbolically empowers the Court, with notable exception defined by the margin of appreciation, to function as the "court of fourth instance"[481] in matters of a preeminently important genre of legal adjudication, namely that of the international human rights law. It is important to note, however, that ECtHR's judgments are declaratory in character and therefore lack the ever-important provision of enforceability. Here the Court must "trust" the Contracting State to voluntarily fulfill the Convention's provisions and abide by the Court's ruling, which further legitimizes it. The question of trust comprises thus far the first and, perhaps, the most fundamental element in the Court to State relations. Secondly, it is important to note, that the relationship between the two is based in contract and presumes the Contracting State's *a priori* willingness to explicitly consent to the moral and legal facets and character of the Convention. Conscious of their responsibilities to abide by the Convention and to streamline the implementation and assist in the execution of ECHR's judgments, some states have "adopted special legislative provisions."[482] The United Kingdom's passage of the 1998 Human Rights Act, for instance, aims to "give further effect" to rights and freedoms guaranteed in the European Convention, whereby (i) "Judges must read and give effect to legislation (other laws) in a way which is compatible

---

[479] Ibid., p. 9.
[480] Ibid., p. 10.
[481] Ibid., p. 10.
[482] Dijk van P. and G.J.H. van Hoof. 1998. *Theory and Practice of the European Convention on Human Rights*. The Hague: Kluwer Law International. p. 22.

with the Convention rights". (ii) "It is unlawful for a public authority to act in a way which is incompatible with a Convention right."[483] (iii) Citizens who wish to enforce the Convention can do so in domestic courts, thus avoiding long and expensive application and litigation process in the Strasbourg Court. It is important to note that "the original text of the Convention introduced a two-tier enforcement mechanism, intended to ensure state compliance with its prescribed human rights standards. The mechanism consists of two organs, the European Commission of Human Rights and the European Court of Human Rights.[484] Additionally, legislative provisions of individual member states of the EU, significantly contribute to the domestication of human rights guidelines and prescriptions, which demonstrate collective buy-in and show states' willingness and ability to abide by the sprit and the letter of the law.[485]

The European Court of Human Rights' Effects on Domestic Law

The effects of the European Convention of Human Rights[486] on the national legal systems and the Court's subsequent significance and, therefore, the relationship between international law and domestic/municipal law, can be characterized by two views: (i) Dualism; and (ii) Monism. According to a dualistic interpretation of legal practice, any contracting member state of the European Union has a right to divorce its national legal

---

[483] The Human Rights Act <http://www.liberty-human-rights.org.uk/human-rights/human-rights/the-human-rights-act/>

[484] Mackenzie, Ruth. 2010. *Manual on International Courts and Tribunals.* Oxford: Oxford University Press. p. 335.

[485] This is further substantiated by just satisfaction of victim's claims and low threshold set to encourage state buy-in. The ECHR notes that "When the Court finds that there has been a violation of the Convention, and if the domestic law of the State concerned allows only partial reparation to be made, it may award the victim just satisfaction (Article 50 of the Convention). This generally involves the reimbursement of costs and expenses, and when appropriate, compensation for pecuniary and/or non-pecuniary damage. In accordance with Article 53 of the Convention, the Contracting States undertake to abide by the decisions of the Court. To date States which have been ordered to make payments under Article 50 have consistently done so. The Court now (since October 1991) prescribes, in the operative provisions of the judgment, a period of three months from the date of the decision within which the applicant must be paid and (since January 1996) provides for interest in the event of failure to comply with this time-limit." From ECHR "Survey: Forty Years of Activity" P. 119 <http://www.echr.coe.int/Documents/Survey_19591998_BIL.pdf>

[486] List of state parties to the ECHR as of August 2009: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, the former Yugoslav Republic of Macedonia, Malta, Moldova, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russia, San Marino, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, United Kingdom. [47 in total] (Source: Mackenzie, Ruth. 2010. *Manual on International Courts and Tribunals.* Oxford: Oxford University Press. p. 359).

system from the international legal system. Under this arrangement, "the Convention does not impose upon the Contracting State the obligation to make the Convention part of domestic law or otherwise to guarantee its national applicability and prevalence over national law."[487] Unless the member state "domesticates" or transforms the law into national law, and enshrines it in the form of a federal statute, the national legal system maintains supremacy and procedural preeminence in civil and criminal cases. An alternative monistic view, on the other hand, holds that "various domestic legal systems are viewed as elements of the all-embracing international legal system, within which national authorities are bound by international law in their relations with individuals."[488] Such a legal arrangements acknowledges that "the individual derives rights and duties directly from international law" regardless of whether or not "the rules of international law have been transformed into national law."[489] Irrespective of which of the views happens to hold a monopolizing power on the State's procedural understanding of the law, the individual remains protected by the articles of the Convention and retains her right to individual petition when the state party abrogates its duties and responsibilities set out in the Convention. This question raises an extraordinary legal and political precedent, one pertaining to the jurisdiction and access to the Court and supremacy of the individual over the state in defined legal circumstances. Thus States, which are High Contracting Parties to the Convention are the only class of defendants under the Convention. "If a State is a party to the Convention it can be 'sued'"[490] by individual citizens or other states, claiming alleged violations of the Convention.

As early as 1978, states lodged cases against other states in the European Court of Human Rights contesting the legality of state behavior with regard to key articles of the Convention. Article 3, which prohibits torture and inhuman and degrading treatment became a subject of contention in an ECtHR case of *Ireland v. United Kingdom*. In this instance Ireland alleged that the UK's treatment of the IRA detainees breached Article 3. It was argued that the UK exposed Irish detainees to cruel techniques of interrogation, which included sleep deprivation, food and drink deprivation and hooding. The Court sided

---

[487] Ibid., p. 16.
[488] Ibid., p. 17.
[489] Ibid., p. 17.
[490] Hunnings, Nevill March. 1996. *The European Courts.* London: Cartermill Publishing. p. 291.

with the UK and ruled that not all forms of degrading treatment and punishment necessarily constitute torture. Since early 2000's, under the rhetoric and practice of the "global war on terror", the States' interpretation and adherence to or contravention of Article 3 of the ECHR have become subjects of wide public debate and legal contestation in the courts of law. Most recently, the 2013 "extraordinary rendition" cases of two current Guantanamo Bay detainees and suspected Al Qaeda terrorists, *Al Nashiri v. Poland* and *Husayn (Abu Zubaydah) v. Poland*, have passed through Chamber hearings on December 7, 2013. Both appellants allege being subjected to torture (water-boarding) and ill-treatment during interrogations perpetrated in secret prisons ran by the U.S. Central Intelligence Agency (CIA) on the Polish territory and with the knowledge of the Polish authorities. On July 24, 2014 the ECtHR found that Poland has failed to uphold its international obligations by violating,

> "the applicants' rights under the European Convention on Human Rights by: enabling the United States to secretly detain and torture the applicants on Polish soil, conducting an inadequate investigation into the acts of torture and ill treatment committed in Poland, and allowing the applicants' transfer to Guantánamo despite the real risk they would be tortured and could be subjected to unfair trials and the death penalty by the United States. The Court held that these failures constituted violations of the applicants' rights to humane treatment, liberty and security, respect for private and family life, an effective remedy, and a fair trial. The tribunal also held that Poland had failed to comply with its Article 38 obligation to cooperate with the European Court's investigation in the cases."[491]

The above cases are illustrative of a novel modus operandi in international law, which raises the importance of supranational courts and other like international bodies in protecting individuals from human rights violations by states. Traditionally, only states have been considered relevant actors in international law. The European Convention and the establishment of judicial institutions for its implementation grant individual citizens an active right to pursue perceived violations on the international arena and hold states accountable for their acts of commission and omission under transnational human rights law. It is important to note that regional human rights bodies, such as the African

[491] http://www.ijrcenter.org/2014/07/30/european-court-of-human-rights-poland-responsible-for-secret-detention-torture-and-rendition-of-two-guantanamo-detainees/

Commission on Human and Peoples' Rights or the Inter-American Commission on Human Rights are regularly confronted with complaints and petitions of human rights violations by state parties, reflecting a pronounced momentum in human rights litigation.

Individual Access to the European Court of Human Rights

Three different types of disputes guide the conduct of supranational legal procedures, they are: (i) Claims of individuals against the state; (ii) Suspicion and subsequent recognition that the (member) state is a criminal; (iii) Elements of the state act contrary to the political agreement underlying the state, be it its constitutional or a treaty mandate. Article 34 of the Convention serves as the definitive guide to the European Court of Human Right's jurisdictional clout. In it, we read:

ARTICLE 34

Individual applications

> "The Court may receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."[492]

The Convention delimits the Court's jurisdiction to three fundamental legal pillars: (i) *Ratione personae*: That is, any state party to the Convention is entitled to bring to the Court a case against any other state party in the alleged breach of the Convention. "Individual, NGOs, and groups of individuals who claim to have been victims of a human rights violation may also bring a case against the state party which has committed the alleged violation."[493] (ii) *Ratione materiae:* The proper material concern of the Court inheres in the alleged breaches of the provisions of the Convention and its Protocols by a Contracting State party. (iii) *Ratione temporis*: The ECtHR has jurisdiction over cases which have not exhausted the "six month rule" – or a rule designed "to promote values of legal finality and

[492] The European Convention of Human Rights <http://www.echr.coe.int/Documents/Convention_ENG.pdf>

[493] Mackenzie, Ruth. 2010. *Manual on International Courts and Tribunals*. Oxford: Oxford University Press. p. 342.

certainty, and to facilitate the establishment of the facts of the case."[494] A case must be presented to the Court within six months from the date of the final decision rendered by proper domestic legal authorities and upon exhaustion of all available domestic remedies.

Within the formal language of the Convention and the established rules of the European Court of Human Rights, it is important to note the gradual development and a distinctive protection of a new legal and political subject. Although, Article 34 speaks of "the victim of a violation" as the person entitled to a hearing and moral as well as financial redress, the Convention does not insist on construing the term too broadly. Its intention rather, according to Mackenzie, "is narrow and implies the person, who happens to be directly affected by the challenged act or omission."[495] Here a direct and legally mandated confrontation in an intermediary supranational court operating under an international human rights treaty is allowed to take place between the citizen and the state, thus giving substantive significance to Ruti Teitel's conception of law as that of "humanity's law", while maintaining a renewed salience of the notion that "the Convention and its institutions were set up to protect the individual"[496] against explicit, random and capricious "acts of state." The "victim's" right of individual petition constitutes "one of the keystones in the Convention machinery and was designed to provide a means of challenging alleged violations."[497]

It is therefore not an accident that the ECtHR's judicial mandate has been defined broadly and encompasses questions of: (a) parental and children's rights; (b) reproductive rights; (c) terrorism; (d) violence against women; (e) data protection; (f) gender identity and sexual orientation; (g) expulsions and extraditions; (h) (mental) health and social welfare; (i) hate speech; (j) prisoner's voting rights; (k) taxation and trade unions; (l) forced labor and human trafficking. In all matters of legal concern to the Court, a vital legal background is provided not only by the Articles and Protocols of the Convention, but also by international law guidelines and practices, which must be appropriately balanced and judiciously interweaved in the decisions rendered. International law is therefore not alien to the Convention, and the Court is uniquely positioned to expand upon its letter when

[494] Ibid., p. 343.
[495] Ibid., p. 342.
[496] Merrills, The Development of International Law, p. 48.
[497] Ibid., p. 48.

addressing cases of particularized and individualized concern to the victims affected by the acts of the state's commission and omission.

Thus, the very definition of international law, as that which applies and holds solely among state parties, is emended to include active human subjects. This provision becomes especially relevant in cases of international significance, i.e. those concerning acts of terrorism, security, or surveillance. The state party is "under a duty to take positive measures to ensure that a person is not disadvantaged by official action"[498] which infringes upon the positive freedoms offered by the Convention. For example, in privacy cases: "everyone's right to respect for his private and family life, his home, and his correspondence" guaranteed by Article 8, might render acts of covert state surveillance illegal under the Convention. Whether or not the applicant can challenge the various acts of secret state surveillance, given a lack of incriminating proof of such surveillance, has been decided in *Klass v. Germany*. The Court in this case concluded that a challenge to the law *in abstracto*, or in the absence of concrete evidence of the law's actual application, is a permissible legal practice. Therefore, "under certain conditions, an individual may claim to be the victim of a violation occasioned by the mere existence of legislation providing for secret surveillance."[499] The applicant's risk of victimhood was established by the ECtHR on the basis of the following two criteria: (i) "the applicants could be regarded as victims because it was possible that they had been subject to secret surveillance, although they could not prove it," and, (ii) their status as victims derived from the risk that the legislation might be applied to them in the future."[500] Thus, Article 25 entitles individuals to "contend that a law violates their rights by itself, in the absence of an individual measure of implementation, if they run the risk of being directly affected by it."[501] By making itself the party to the Convention, "every government is aware that … it places itself in a position in which domestic laws and practices may have to be modified to avoid impinging on the various liberties the Convention was brought into being to

[498] Ibid., p. 95.
[499] Ibid., p. 48.
[500] Ibid., p. 48-49.
[501] Ibid., p. 40.

protect."[502] In addition, it must skillfully balance their interference with individual rights with their active promotion.[503]

How might such balancing occur under the international regime of laws with regard to states increasingly intent on secret and intrusive methods of international surveillance, complicated by existential threats to individual and state security issuing from potential acts of terrorism?[504] Much scholarly literature has already been developed about the ongoing dialogue and influence of international law on the Convention and the balancing which must occur between national security and the right to information in democratic societies. Suffice it to say that a first comprehensive attempt to define such boundaries has been drafted on June 12, 2013 by some 22 groups over a two-year period, which involved extensive consultations with more than 500 legal experts from over 70 countries around the world. The effort culminated in a 68-page document, "The Global Principles on National Security and the Right to Information (Tshwane Principles)", which recognize:

> "that states can have a legitimate interest in withholding certain information, including on grounds of national security, and emphasizing that striking the appropriate balance between the disclosure and withholding of information is vital to a democratic society and essential for its security, progress, development, and welfare, and the full enjoyment of human rights and fundamental freedoms."[505]

As Ruti Teitel claims and as the above document illustrates, "law has become central and foundational to the normative discourse of international affairs."[506] The rights-based intervention in the affairs of states and is also a constitutive norm of the Responsibility to Protect, rendered significant by a generalized intuition that state sovereignty is not a right but a responsibility which can be questioned when serious abrogation of human rights occurs. Under a sister legal regime, the International Criminal Court, which derives its legal mandate from the Rome Statute, does not foresee the head of state immunity in cases where

---

[502] Ibid., p. 97.
[503] Ibid., p. 97.
[504] The European Union's General Data Protection Regulation adopted in 2018 is a good example of the balancing test required in the domains of rights to privacy, family life and recourse to an effective remedy and access to personal data by private and government entities. The regulation also raises important questions regarding extraterritorial application of European law and the Convention and EU Charter rights.
[505] "The Global Principles on National Security and the Right to Information (Tshwane Principles)" <http://www.opensocietyfoundations.org/sites/default/files/global-principles-national-security-10232013.pdf>
[506] Teitel, Ruti. 2011. *Humanity's Law.* Oxford: Oxford University Press. p. 217.

serious breaches of the Geneva Convention and other serious violations of the laws and customs applicable in international law have been committed. Neither is the International Court of Justice tolerant of the states' breaches of the UN Charter and of the individual human rights inherent in the document's preamble. The European Court of Human Rights, therefore, is not alone in protecting humanity from cruel and inhuman treatment, torture, mutilation, and atrocities or offenses committed by states and individual members of the government and the military against persons and their property. The state's crimes vary by degrees and must not always be grievous and atrocious violations of the individual's humanity to be adjudicated at the supranational level. As the 2011 and 2013 *Khodorkovsky and Lebedev v. Russia* cases show, an abrogation of the Convention's articles can render a state culpable in the eyes of the Court. Absent of bold statements on the political motivations driving the prosecution of Khodorovsky and his Yukos Gas company associates by the Russian government, the European Court of Human Rights justices in the 2013 ruling "found that the Russian court violated the defendants' lawyer-client confidentiality, rejected appropriate evidence, harassed the defense lawyers, arbitrarily made Khodorovsky pay over 17 billion rubles ($525 million) in back taxes for his company after he had been convicted and violated his family rights by sentencing him to serve his prison term in a far-off colony."[507] The 2011 ECtHR ruling found Russia additionally responsible for Khodorovsky's humiliating and degrading treatment during the 2005 state trial and provided for financial remedies to the plaintiff.

Given the factual basis of the above-mentioned legal precedents at the European level, it is important to inquire and examine further the theoretical ramifications of the ECtHR's role in the development of international law and cosmopolitan normativity and their subsequent bearing on citizen-state and state-citizen relations.

The Development of International Law through Supranational Adjudication

Apart from the forty-seven states that lie under the direct jurisdiction of the ECtHR, the Convention's spirit and the Court's judgments are gradually redefining the status of the person in the inter-state system. It is important to recall that international law is a body of

[507] The Moscow Times <http://www.themoscowtimes.com/news/article/russia-will-abide-by-strasbourg-court-khodorkovsky-ruling/489163.html#ixzz2n0xmsx9L>

law that applies to and holds among states. The upholders of the normative hierarchy theory believe that "state immunity in cases of human rights violations is an entitlement rooted in international law, by virtue of either a fundamental state right or customary international law."[508] States do not operate in a legal and moral vacuum, however. Between sovereign prudence and global jurisprudence lies a plethora of institutional remedies, which instruct and protect the state against object violations of the international law, such as attacks on states by non-state actors, abuses of its civilian population, and annihilation by weapons of mass destruction. The slave tribunals in the late 1800's, the Nuremberg trials and courts set up in Tokyo following the conclusion of World War II for the purpose of arbitrating claims of war crimes and crimes against humanity, have instituted a new paradigm for supranational adjudication of abject transgressions of law. Supranational courts have also become vocal agents in reconfiguring the relationship between citizens and their states, reinvesting sovereign prerogatives with duties and responsibilities of care. The following discussion aims to show the pragmatic impact of supranational adjudication on the emerging paradigm shifts in state-citizen interactions.

In *The Origins of Totalitarianism*, Hannah Arendt pointed to the human condition dispossessed of factual and practical means for asserting individual rights to existence as a full political and legal subject. In her 1951 book she contended that:

> "Something much more fundamental than freedom and justice, which are rights of citizens, is at stake when belonging to a community into which one is born is no longer a matter of course and not belonging no longer a matter of choice, or when one is placed in a situation where, unless he commits a crime, his treatment by others does not depend on what he does or does not do. This extremity, and nothing else, is the situation of people deprived of human rights. They are deprived, not of the right to freedom, but of the right to action; not of the right to think whatever they please, but of the right to opinion....We become aware of the existence of a right to have rights (and that means to live in a framework where one is judged by one's actions and opinions) and a right to belong to some kind of organized community, only when millions of people emerge who had lost and could not regain these rights because of the new global political situation."[509]

---

[508] Caplan, Lee, M. 2003. "State Immunity, Human Rights and Jus *Cogens*." *The American Journal of International Law.* p. 744.
[509] Arendt, Hannah. 1973. *The Origins of Totalitarianism.* New York: Harcourt. p. 296.

Written in the post-World War II climate of international indictments of high-ranking government and military officials for crimes against humanity and mass displacement of refugees dislocated as a result of genocide, ethnic cleansings and abject atrocities of armed conflict, Arendt's emphasis on the "right to have rights" captures a universal sentiment made manifest in the fundamental human rights-based treaties and conventions. Denaturalization against unwanted minorities, deportations of aliens, the displaced and the stateless refugees in the inter-war period in Europe constituted a serious perversion of the state-centric order intent on maintaining a firm grip on the discretionary categorization and expulsion of those human beings, whose existential value the state rendered meaningless. Not only special categories of human beings - refugees and minorities, stateless and displaced persons – have been created through the actions of nation-states, but also their entire futures and life-chances had been determined and exhausted by them.[510] Thus, in the absence of remedial supra-national institutions, who else can relegate respect for human persons and their rights to the orbit of international law and ensure a shift in expectations about the protection of humanity?

The European Court of Human Rights in Historical Context and Contemporary Legal Practice

> "Institutions and states will perish, if those who love them do not criticize them, and if those who criticize them, do not love them."
> - Judge Luzius Wildhaber

As one of the crowning achievements of the Council of Europe and one of the most important developments in European Legal history,[511] the European Court of Human Rights (ECtHR) is increasingly imperiled by the reputational shadows of its own success. Since its institution in 1953, the Court has ruled on thousands of cases, ensured individual access to justice, earned the respect and support of the 47 member states of the Council of Europe (CE) as well as public trust and confidence as a "fair and powerful instrument of justice on their behalf."[512] To garner a near unanimous agreement on its efficacy as a

[510] Benhabib, Seyla. 2001. *Transformations of Citizenship*. Amsterdam: K. V. Gorcum. p. 14.
[511] O'Boyle, Michael. 2008. "On Reforming the European Court of Human Rights", *EHRLR*, p. 1.
[512] Costa, Jean-Paul. 2011. "On the Legitimacy of the European Court of Human Rights' Judgments", *ECLR* 7(2). p. 173.

regional and supranational judicial body responsible for interpreting and monitoring the application of the European Convention of Human Rights and Fundamental Freedoms (ECHR) - a charter, envisioned by the founding fathers of the post-World War II European institutional architecture as a document "guaranteeing liberty of thought, assembly and expression as well as the right to form a political opposition"[513] - the Court exhibited a strong support for and defense of both abstract legal norms and fundamental rights and a ready ability to accommodate itself to "constant and drastic societal changes that were not anticipated at the drafting stages"[514] of treaties aimed at the unification of erstwhile European foes.

Critics of the Court, however, are quick to note (i) its beguilingly activist and liberal interpretative stance with respect to the material provisions of the Convention (ii) its lack of judicial restraint; (iii) its imposition of positive obligations compelling member States not merely to "abstain" from acting contrary to the letter and spirit of the Convention, but actively remedying any imbalances in positive rights provisions found by the Court; (iv) its transformation of civil rights into social rights requiring active intervention by the states' legislators and forcing states to act beyond and despite their limited financial resources; (v) its "recognition of the indirect responsibility of State parties for the possible violation of some rights by other States," who are not parties to the Convention[515]; (vi) "alarming rise" in the "interim measures" requested by the Court with regard to asylum and immigration cases; (vii) its narrowing of the margin of appreciation and interpretation; (viii) its interventionist tendency characterized by the insistence on the principle of proportionality whereby international judges force the desirable policy without regard to the democratic processes and institutions of member states and their own judiciary, legislative and executive functions; (ix) extension of the Court's jurisdiction to economic and social rights; and (x) its prospective and speculative as opposed to factual approach to violations of the Convention rights.[516]

---

[513] Boillat, Philippe. 2010. "The European Convention on Human Rights at 60: Building on the Past, Looking to the Future", *SM.* p. 1.
[514] Letsas, George. 2010. "The ECHR as a Living Instrument: Its Meaning and Legitimacy", *SSRN* <http://ssrn.com/abstract=2021836, 1>
[515] Bossuyt, Baron Marc. 2014. "Judicial Activism in Europe: The case of the European Court of Human Rights", *OE.* p. 5.
[516] Ibid., pp. 1-17.

The aforementioned arise out of a longstanding debate regarding the philosophical and legal status of the Convention itself. Since the document, "although not in itself a 'European constitution,' now plays a central role as a constitutional instrument of European public order on which the democratic stability of the Continent depends"[517], the debates plaguing domestic constitutional regimes surrounding the vitality of the text are not foreign to the European treaty-bound order. Therefore, "questions about how constitutional courts should interpret entrenched rights and how far they may or should depart from the constitution's original understanding" [518] are similarly relevant to the operation and efficacy of the ECtHR. Two key approaches to the interpretation of the Convention dominate: (i) a purposive or teleological interpretation, and (ii) a living instrument or the evolutive interpretation.[519] Since, as Article 32(1) of the ECHR stipulates, the primary role and task of the ECtHR is to interpret and apply the Convention, the way in which it does so can have significant legal, civil, and social implications for the EC member states and some 800 million individuals falling under the Court's direct jurisdiction. [520] Judicial interpretation, in theory and practice, is therefore, as Maduro points out,

> "at the intersection of the debates not only about different methods of interpretation (or forms of legal reasoning) but also about broader questions on the proper role of courts in a democratic society. The concrete interpretation to be given to legal rules is therefore a product of legal reasoning and of the institutional constraints and normative preferences that determine the role of courts in a given political community."[521]

Scholars note that a quick perusal of the ECtHR jurisprudence suffices to reveal that the rights and freedoms contained in the Convention have been "interpreted as applying in an ever-widening range of contexts and that the obligations upon member States have been expanding."[522] The scope of protection provided by the Convention has also been expanded by the adoption of additional protocols by member states, including:

---

[517] Boillat, 'The European Convention on Human Rights at 60', p. 3.
[518] Letsas, 'The ECHR as a Living Instrument: Its Meaning and Legitimacy', p. 1.
[519] Jacobs, White, and Ovey. 2014. *The European Convention on Human Rights*. Oxford: Oxford University Press. p. 64.
[520] Mowbray, Alastair. 2005. "The Creativity of the European Court of Human Rights", *HRLR.* p. 79.
[521] Polares Maduro, Miguel. 2006. "Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism", *European Journal of Legal Studies,* <http://www.ejls.eu/2/25UK.htm>, p. 3.
[522] Mowbray, 'The Creativity of the European Court of Human Rights ', p. 58.

the 1952 Protocol No. 1, protecting property rights, the right to education and the right to free elections; the 1963 Protocol No. 4, protecting freedom of movement and prohibiting imprisonment for debt, the expulsion of nationals and the collective expulsions of aliens; the 1983 Protocol No. 6, abolishing the death penalty in peace-time; the 1984 Protocol No. 7, setting out procedural standards relating to expulsion of aliens; the 2000 Protocol No. 12, establishing a general prohibition on discrimination; and the 2000 Protocol No. 13 abolishing the death penalty in all circumstances.[523] From the perspective of public international law, however, the 1969 Vienna Convention on the Law of Treaties governs the interpretation of the Convention as a multilateral treaty.[524] In *Golder v. United Kingdom*, the ECtHR concurred that its interpretative work should draw inspiration from and be guided by Articles 31 and 33 of the Vienna Convention, which suggest that: (i) terms used in the treaty be accorded their ordinary meaning[525]; (ii) regard must be paid to the context in which the words appear; (iii) attention must be given to the object and purpose of the treaty; (iv) the *travaux preparatoires*[526] may be used to confirm the adopted meaning, resolve ambiguities, and avoid absurdities; and (v) irrespective of language in which the treaty is written, it be equally authentic and any "differences in meaning should be resolved by adopting the meaning which best accords with the object and purpose of the treaty."[527] However, whenever the interpretative rules are found to be insufficient or equivocal, the "the court may be inclined towards an interpretation which is focused on the 'ordinary meaning' of the treaty terms or, conversely, towards an 'object and purpose' – oriented interpretation."[528] Given the "unique character" of human rights treaties, the interpretation should reflect the substantive nature of the Convention, which "proclaims

[523] Boillat, 'The European Convention on Human Rights at 60', p. 4.
[524] Mowbray, 'The Creativity of the European Court of Human Rights', p. 79.
[524] Maduro, 'Interpreting European Law', p. 58.
[525] Involves "reference to dictionaries to determine the ordinary and natural meaning of the words." When difficulties arise as to the precise scope of the Convention terms, the Court adopts its own "the autonomous meaning of terms" to secure uniformity of treatment among states. (p. 69)
[526] Or, preparatory work consisting of official documents recording the negotiations, drafting, and discussions during the process of creating a treaty, which can be consulted to clarify the intentions of the convention or treaty.
[527] Jacobs, White, and Ovey. 2014. *The European Convention on Human Rights*. Oxford: Oxford University Press. p. 66.
[528] Van Dijk and Van Hoof, Theory and Practice pf the European Convention on Human Rights in Mowbray. p. 59.

solemn principles for the humane treatment of the inhabitants of the participating States."[529]

Given its increasingly diverse constituency, the Court has made tremendous strides in giving ear to recent developments in international minority rights law as well as endeavoring to resolve ongoing or prospective conflicts over lifestyle choices, education, and human dignity within the context of the European Convention. It is the work of the ECtHR as regards the minority questions that the following sections of the chapter intend to analyze.

Minorities in the European Historical Context: A Brief Outline

The question surrounding the status of minorities within the social and legal milieu is one of significant historical weight in Europe, a continent burdened by the legacy of the Austro-Hungarian, Ottoman, and Russian imperialism and subsequent travails of the World War II experience of mass genocide, forced repatriations and ethnic expulsions. The nation-building processes that shaped Europe have been to a significant extent ethno-cultural rather than political, thus giving rise to considerable security-dilemmas in the face of radical nationalism and ethnic tensions. "Ethnic exclusivism" and "preventive repression" defined policies of states where "national minorities have been seen as a threat to the territorial structure and as a destabilizing element" in domestic and external affairs, "especially when the minority population feel themselves to be ethnically linked to other neighboring states."[530] Liebich notes that

> "Minorities are a disturbing reminder that, in political terms, Slovakia was not always Slovak, the Czech Republic was not Czech, Bulgaria was not Bulgarian and so on. At the very least, they recall that even recently parts of today's Poland were not Polish as parts of Romania were not Romanian. Inasmuch as the legitimacy of state units in East Central Europe is founded, to an even greater extent than in Western Europe, upon myths of national community, nay, of perennity, minorities are an unwelcome presence."[531]

---

[529] Bernhardt, Rudolph. 1999. "Thoughts on the Interpretation of Human-Rights Treaties" in Matscher and Petzhold (eds.), *Protecting Human Rights: The European Dimension*. p. 66.
[530] Ferrero, Ruth. 2016. "The Forgotten Issue? Eastward Enlargement and National Minorities." <http://www.recercat.net/bitstream/handle/2072/204363/5)%20The%20forgotten%20issue.pdf?sequence=> p. 104.
[531] Liebich, Andre. 2002. "Ethnic Minorities and Long-term Implications of EU Enlargement" in *Europe Unbound*, ed. Jan Zielonka. New York: Routledge. p. 120.

According to Pan and Pfeil, there are at present over 300 distinct minorities in Europe, constituting some 100 million members. Statistically, every seventh citizen of a Europe belongs to a minority.[532] "Almost three quarters of European minorities reside in the EU, although two quarters only since the accession of Eastern countries to the Union in 2004."[533] The percentage of people belonging to minorities in EU states varies from "1% in Germany, to 20% in Spain" to "90% in Belgium, a country with three distinct language communities."[534] Minorities in Eastern Europe, particularly Latvia and Estonia, make up some 30-40% of population, while in Poland and Hungary the population's ethno-cultural makeup remains more homogenous, with minorities accounting for around 1 percent of the overall population.[535] The modern-day European canvas is therefore perforated not only by multinational societies, but also by deeply intermingled historic minority populations, such as the "Hungarians in Romania, Slovakia and Vojvodina, Turks in Bulgaria, Albanians in Macedonia and Kosovo, Russians in the Baltics, and transatlantic ethnic minorities such as Roma and Jews."[536]

After 1945, Western countries, particularly Britain, France and the United States concluded, "if all citizens were allowed to enjoy their civil rights irrespective of race, language or creed, all would be well."[537] This attitude might therefore account for "little interest in developing minority standard going beyond the limited effect of general and specific anti-discrimination clauses"[538] in the immediate post-war period. Only after the fall of the Berlin Wall and following a phase of "reinternationalization" of the minority issue within the OSCE between 1975-1990,[539] had minority protections been taken up with more intense vigor within the EU intuitions, the OSCE, and the Council of Europe. Kymlicka notes that "Western countries have moved along two different and somewhat contradictory tracks. On the one hand, they have maintained but weakened the commitment

---

[532] Pan, C. and B.S. Pfeil. 2003. *National Minorities in Europe-Handbook*. Ethnos. p. XVIII.
[533] Ibid.
[534] Ibid.
[535] Ibid.
[536] Ferrero, Ruth. 2016. "The Forgotten Issue? Eastward Enlargement and National Minorities." <http://www.recercat.net/bitstream/handle/2072/204363/5)%20The%20forgotten%20issue.pdf?sequence=5>, p. 100.
[537] Ibid., p. 99.
[538] Pentassuglia, Gaetano. 2002. *Minorities in International Law*. Brussels: Council of Europe Publishing. p. 119.
[539] Ibid.

to a universal, justice-based, minority rights track; on the other hand, they have created a new contextual, security based minority rights track."[540] The collapse of the Soviet Union and appearance on the map of newly created independent republics from the ashes of communist dictatorship, reunification of East and West Germany, and disturbing ethnic violence of the early 1990's which contributed to the implosion and break-up of former Yugoslavia, constitute points of departure for regulations pertaining to national minority rights [541] and inform policies towards minority populations along the "international security" dimension.

Institutional Responses to Minority Issues in Europe

Since the European Union does not have a unified policy on national minorities,[542] a number of European institutional mechanisms have emerged to help to "normalize minority standards within the human rights framework, crucially in synergy with other UN bodies"[543], such as the Permanent Forum on Indigenous Issues (PFII), a Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People (SRIP) or the UN Human Rights Council and the and Independent Expert on Minority Issues (IEMI). At the regional level, thus, "not only EU- or Council of Europe-sponsored minority rights conditionality policies but also lower key mechanisms of supervision are making a contribution to somewhat reshaping the relationship between the state and ethno-cultural communities in order to bring out change in policy and legislation."[544] Moreover, the "bottom-up and top-down pressure affecting governmental power" reveals that the European supervisory frameworks and bodies can contribute to a wider "diffusion of minority standards" and reinforce the protection of minority groups.[545] In addition to the United Nations, the European Court of Human Rights and the Council of Europe constitute, therefore, an important catalyst in the regional and global rights discourse. Frameworks, case law, recommendations, charters, and conventions issuing therefrom, make an

[540] Kymlicka, William. 2001. *Can Liberal Pluralism be Expanded?* Oxford: Oxford University Press. p. 372.
[541] Ferrero, 'The Forgotten Issue? Eastward Enlargement and National Minorities', p. 100.
[542] Ibid., p. 97.
[543] Pentassuglia, Gaetano. 2009. *Minority Groups and Judicial Discourse in International Law.* Leiden/Boston: Martinus Nijhoff Publishers. p. 10.
[544] Ibid.
[545] Ibid.

important contribution to the broader articulation and promulgation of minority rights-claims as well as inform the status of minority protections on the European continent and within the discrete legislative spheres of EU member countries.

A. The European Convention of Human Rights and Fundamental Freedoms and the European Court of Human Rights

The European Convention of Human Rights and Fundamental Freedoms "does not contain any specific minority rights provisions" nevertheless, Pentassuglia contends, "new factors from the past few years, such as the steadfast increase in the number of States party to the ECHR resulting from the eastward expansion of the ECHR system, the adoption of general instruments protecting European minorities – particularly the Framework Convention for the Protection of National Minorities – and even the adoption of a protocol to the ECHR (not yet in force) setting forth a general prohibition of discrimination, seem to be behind – to a greater or lesser extent – a growing ECtHR case load regarding minority groups."[546] The availability of and access to legal instruments permits minority groups to become increasingly vocal before the European Court of Human Rights. The leading areas of ECtHR jurisprudence have focused on questions of pluralism (protected by Article 11 of the European Convention of Human Rights and Fundamental Freedoms), identity (Article 8) and non-discrimination (Article 14), which are to be encouraged, safeguarded and preserved in a European public sphere and a healthy democratic society.

Illustrative and precedent-setting, albeit not exhaustive, of the growing phenomenon of minority-centered court rulings are the following three ECtHR cases, which indicate an important progress in prioritizing minority rights-claims at the supranational judicial level. Thus, in:

> (i) *Orsus v. Croatia* (2010): The ECtHR stated that "as a result of their history, the Roma have become a specific type of disadvantaged group and vulnerable minority...They therefore require special protection…special consideration should be given to their needs and their different lifestyle."
>
> (ii) *Muñoz Díaz v. Spain* (2009): The case focused on a Roma widow's pension rights, refused by the authorities as her marriage had taken place according to Roma

[546] Pentassuglia, Gaetano. 2004. "Minority Issues as a Challenge in the European Court of Human Rights: A Comparison with the Case Law of the United Nations Human Rights Committee", *GYIL*. p. 2.

customs and traditions. The ECtHR extended protections to cultural rituals, which validated her marriage only because of the state's protracted passivity, which would claim otherwise.

(iii) *DH and others v. the Czech Republic* (2007): Schoolchildren of Roma origin won a case against the Czech state based on the claim that they were placed without justification in special schools intended for children with learning disabilities. By receiving inferior primary education robbed them of the chance to continue their studies at secondary or vocational level and unduly disadvantaged them in the eyes of society.

Conferral of individual rights, as opposed to group-rights, has been the modus operandi of ECtHR and the Convention within the limits of which it operates. A promulgation of positive obligations upon signatory parties to attend to general needs and rights affecting the minority group's position in society with regard to "a way of life and identity (Articles 8 and 10), education (Article 2 of the First Protocol), religious life (Article 9), and effective participation in public life (Articles 10 and 11)"[547] constitutes, therefore, subject of notable concern and responsibility for the Strasbourg Court.

B. The European Union and the Council of Europe

The Amsterdam Treaty has made "great advances in the inclusion of human rights in the framework of the EU."[548] Prominently Articles 6.1, 151, and 13 express a desire for the promotion of fundamental human rights and respect for diversity of its members and are especially sensitive to discrimination based on ethnic and racial origins and religion. The EU accession criteria and the wider integration process allow the community to utilize and work in tandem with international instruments which prioritize minority protections, such as the International Covenant on Civil and Political Rights of 1966 (UN)(ICCPR) and the Declaration of Rights to the Persons Belonging to Ethnic, Linguistic or Religious Minorities (1992). Article 27 of the ICCPR compels states to remain attentive to distinct linguistic, religious and linguistic preferences of their minority populations. The European Convention for the Protection of Minorities proposal adopted by the Venice Commission in 1991, aimed to actively engage in the clarification and promotion of minority standards

[547] Pentassuglia, Minority Groups and Judicial Discourse in International *Law,* p.122.
[548] Ferrero, 'The Forgotten Issue? Eastward Enlargement and National Minorities', p. 105.

and encourage drafting of national legislation with special sensitivity to minority protections. [549] Concurrently, the Council of Europe Framework Convention for the Protection of National Minorities (1995) intended to ensure that 43 member states, who have signed and 39 who ratified it: (i) respect the rights of national minorities; (ii) combat discrimination; (iii) promote equality; (iv) preserve and develop the identity and culture of national minorities; (v) guarantee certain freedoms in relation to access to the media, minority languages and education; and (vi) encourage participation of national minorities in public life. Article 25 of the Framework Convention binds the member states to "submit a report to the Council of Europe containing full information on the legislative and other measures taken to give effect to the principles set out." [550] The Council of Europe's European Commission against Racism and Intolerance (ECRI) reviews living situation of national minorities on in its regular country visits. Likewise, the Council of Europe High Commissioner has been tasked with remedying the anti-Gypsysim sentiments against the European Roma by: (i) fostering inclusion and mutual understanding, through (ii) promotion of Roma history, (iii) legalization of their status through provision of identity papers, and (iii) increased representation of Roma in the public sphere and public institutions. The European Social Charter has made great strides in extending and reinforcing protections of Roma rights pertaining to housing, health, education, employment, social and legal protection and non-discrimination. Additionally, the European Union's Council of Europe 2005 "All-Different-All-Equal" campaign asked member states to eradicate all forms of discrimination and thus actively

> "Highlight diversity, celebrate the richness of our differences, whatever they may be…Participation will be the key word, allowing everyone to play a part in building a better Europe, where everyone has the right to be themselves – to be different and equal."[551]

The European community and the Council of Europe remain actively committed to questions of minority rights and have been actively engaged in the drawing up of a European Minority Charter (as of yet without much tangible success) that would normalize

---

[549] Pentassuglia, Minority Groups and Judicial Discourse in International Law, p. 129.
[550] Framework Convention < http://conventions.coe.int/Treaty/en/Treaties/Html/157.htm>
[551] Council of Europe. "All Different-All Equal" Campaign.
<http://www.coe.int/T/E/Com/Files/Events/2006-All-different/default.asp>

the precarious social, economic, and political situation of minorities in view of the potential for conflagration of outbreaks of historically unresolved minority conflicts and put an end to a culture of persistent discrimination and marginalization. "In the absence of homogeneity in the legislation regarding minority rights"[552] in the member states of the EU and a lack of "specialized institutions that work specifically with minority rights, does not mean that those rights to not have any effective protection."[553] A rich compendium of "treaties of the second generation" i.e. The Charter of Paris, a close pre-EU accession monitoring of human rights/minority rights standards, and proliferation of case law at the supranational judicial level ensure that practical issues related to minority protections and legal accommodation will remain of significant concern and focus within and outside the borders of the European Union and all democratically-inclined states.

Two Interpretative Approaches

A. Teleological Approach

Whenever interpretation of the ECHR is governed by a telos or purpose, object and text, the Court is engaging in a constitutional construction or objective-driven method of construal and understanding of the Convention's rules and principles. This does not mean, however, that the Court's approach is singularly concerned with divining the aim of the document and its legal provisions but is more broadly interested in the systematic reading and appraisal of context in which the rules are to be placed. Part of the art of interpretative work of the Court, therefore, rests in not simply gauging "the telos of the rules to be interpreted … but also the telos of the legal context in which those rules exist."[554]

Confronted with a pluralist legal and constitutional milieu of the contracting member states, the ECtHR has demonstrated a willingness to seek and promote internal consistency and harmony between the Convention's various provisions. [555] That interpretation, which would best realize the objectives of the treaty by giving the provisions of the Convention "fullest weight and effect consistent with the language used and with the

---

[552] Ferrero, 'The Forgotten Issue? Eastward Enlargement and National Minorities', p. 110
[553] Ibid., p. 108.
[554] Maduro, 'Interpreting European Law', p. 5.
[555] White, Robin and Clare Ovey. 2010. *The European Convention on Human Rights*. Oxford: Oxford University Press. p. 65.

rest of the text"[556], would be preferred. Its own institutional embeddedness in the European legal sphere and the nature of cases lodged before it in hopes of finding effective remedial measures cannot but make the Court responsive to and influenced by the developments and commonly accepted standards of the member states of the Council of Europe. That is why, over the course of its existence, the Court has attempted to define and reconcile the "meaning of terms and notions in the text of the Convention"[557] with the specialized international instruments and the normative and constitutional pluralism of the states it serves. By so doing, the ECtHR has steadily and inevitably developed an activist interpretative stance towards some of the Convention's articles.

B. 'Living Instrument' Doctrine or the Evolutive Approach

To limit the Convention rights to the rudimentary "supranational institutional arrangements existing in (Western) Europe in the early 1950s", Alistair Mowbry posits, "would have been a formalistic anachronism."[558] An overwhelming majority of the ECtHR case law concurs with Mowbry's sentiments. As early as 25 April 1978 in *Tyrer v. United Kingdom* only to be repeated again in *Soering v. United Kingdom* (1989), *Loizidou v. Turkey* (1995) and *Matthews v. United Kingdom* (1999), the Court gave wind to the idea that the ECHR should be "an instrument of development and improvement rather than an 'end game' treaty which froze the state of affairs"[559] that had existed in the past. Repeatedly, therefore, in cases concerning penal policy standards or rights of association, the Court underscored the importance of treating the Convention as "a living instrument, which must be interpreted in the light of present-day conditions."[560] Likewise, by taking note of the evolving institutional architecture, the Court justified its activist approach to the reading of Convention rights by contending that:

> "The mere fact that a body was not envisaged by the drafters of the Convention cannot prevent that body from falling within the scope of the Convention. To the extent that Contracting States organize common constitutional or parliamentary

---

[556] Ibid., p. 73.
[557] Ibid., p. 76.
[558] Mowbray, Alastair. 2005. "The Creativity of the European Court of Human Rights", *Human Rights Law Review* 5(1). p. 63.
[559] Dzehtsiarou, Kanstantsin. 2010. "European Consensus and the Evolutive Interpretation of the European Convention of Human Rights", *German Law Review* 12(10). p. 1731.
[560] See Sigurdur Sigurjonsson v Iceland (1993) 16 EHRR 35.

> structures by international treaties, the Court must take these mutually agreed structural changes into account in interpreting the Convention and its Protocols."[561]

Judges, who subscribe to the evolutive approach to interpretation, have a tendency to "adopt a liberal interpretation of the jurisdiction of their court and of the material provisions they have to apply."[562] Moreover, their superior expertise and experience, they believe, makes them far better qualified to interpret the applicable law provisions than the original framers of the document.[563] However, advocates of this dynamic approach to interpretation must confront two difficulties of: (i) "explaining what kind of pre-commitment the original constitution is meant to express, if its meaning is not treated as frozen"[564] and (ii) justifying why courts and not legislatures or [other] constitutional assemblies should have the power to evolve the meaning of the constitution and how far they may go before they start abusing this power."[565] The Court recognized in *Saadi v. United Kingdom* its own positive responsibility in favor of the incremental evolution of the Convention's principles by noting that the document "must be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions."[566] Moreover, the Court continued, "it must also take into account any relevant rules and principles of international law applicable in relations between Contracting Parties"[567], but it cannot be entirely influenced by them.[568]

Thus three techniques or methods of interpretation prevail in the treatment of the ECHR as a living instrument: (i) the ECtHR will take into consideration "present-day standards", only if they are (ii) common and shared amongst the contracting states, and refrain from (iii) assigning "decisive importance to what the respondent state considers to

---

[561] See Matthews v United Kingdom (1999) 28 EHRR 361.
[562] Bossuyt, Baron Marc. 2013. "Judicial Activism in Europe: The case of the European Court of Human Rights", *Open Europe* <http://www.openeurope.org.uk/Content/Documents/speechmarcbossuytopeneuropesept2013.pdf>, p. 1.
[563] Ibid.
[564] Letsas, George. 2012. "The ECHR as a Living Instrument: Its Meaning and Legitimacy", *Social Science Research Network* <http://ssrn.com/abstract=2021836>, p. 2.
[565] Ibid.
[566] In White, Robin and Clare Ovey. 2010. *The European Convention on Human Rights*. Oxford: Oxford University Press. p. 65.
[567] Ibid.
[568] Mowbray, Alastair. 2005. "The Creativity of the European Court of Human Rights", *Human Rights Law Review* 5(1). p. 66.

be an acceptable standard in the case at hand."[569] Supporters of the "living instrument" doctrine note that the Court has been far from adopting an interventionist attitude whereby judges seek to impose radical legal duties upon member States. [570] Rather, the ECtHR has treaded cautiously, deferentially and mindfully over the human rights territory, showing itself open to developments of other international bodies and the wider international legal context and invoking them in support of its own judgments.[571] By treating the Convention as a living document, the Court was able to update the meaning of its Articles and propose an alternative reading of ethical standards regarding, among others, judicial punishment, torture, and discrimination. Its judgments contributed thus far to setting of:

> "prohibitions on corporal punishment (Tyrer); limited the role of a government minister in determining the release of a prisoner (Stafford); contributed to reducing the 'domestic deficit' in the European Union (Matthews); recognized a right not to be compelled to belong to a trade union (Sigurjonsson); and required the legal recognition of the new identity of post-operative transsexuals (Christine Goodwin)."[572]

Activism of the Court

It is not an accident that the evolutive conception galvanizes opposition. Critics point to the above developments as indicative of unrestrained judicial activism, which resulted in the broadening of the scope of the Court's jurisdiction in the sphere of civil, economic, and social rights as well as progressively elided the width of the margin of appreciation protecting the member states' sovereign decision-making powers. It should be noted, however, that the Court is mindful of the limitations of its dynamic approach to the Convention, which as Jacobs, White and Ovey note, does "not justify reading new rights into the Convention" but merely interpreting them, as has been indicated above, "in light of present-day conditions."[573]

Signs of judicial activism, however, do not escape the most besotted of critics, which not infrequently come from within the Court's bench itself. In his minority opinion

---

[569] Letsas, George. 2012. "The ECHR as a Living Instrument: Its Meaning and Legitimacy", *Social Science Research Network* <http://ssrn.com/abstract=2021836>, p. 2.
[570] Mowbray, 'The Creativity of the European Court of Human Rights', p. 69.
[571] Ibid.
[572] Ibid.
[573] White, Robin and Clare Ovey. 2010. *The European Convention on Human Rights*. Oxford: Oxford University Press. p. 72.

in *Golder v. United Kingdom*, Judge Sir Gerald Fitzmaurice argued for a "cautious and conservative approach" to the interpretation of the Convention, without which Contracting Parties would be bound by obligations "they had not intended to assume in ratifying the Convention. Therefore, doubts should be resolved in favor of the State rather than the individual"[574] by making a more extensive use of the 'margin of appreciation'. As a technique, which permits the Court to "keep in touch with legal reality" and retain "control over State conduct"[575], the "scope of differential application of the Convention provisions" via the margin of appreciation may vary according to different meanings and legal contexts, however, further exposing the Court to unwanted criticism. Therefore, in order to enjoy continued legitimacy and defend its "evolutive approach based upon its understanding of the object and purpose of the Convention"[576] the Court must confront a number of rebukes outlined below.

Creation of Positive Obligations and Narrowing of the Margin of Appreciation

Inevitably, critics of judicial activism favor its contrarian twin, judicial restraint, the practitioners of which (i) prefer to show deferential respect for the intentions of the authors of treaties, constitutions and conventions they are vested with interpreting; (ii) leave political questions and options to politically responsible organs; and (iii) act to sanction political organs only in the event of outright violations of legal regulations.[577] Bossuyt, for one, alleges manifest judicial activism in the ECtHR's case-law trajectory, which evidences reading into the Convention and evolving the meaning of States' positive obligations with regard to civil rights and fundamental freedoms.

In the 1968 Belgian Linguistic case, despite the negative formulation of Article 2 of Protocol 1 stating that "no person shall be denied the right to education", the ECtHR held that it cannot be concluded from this that the State has no positive obligation to ensure the respect for such a right."[578] Judge Wold's dissent underscored the importance of

---

[574] Ibid., p. 79.
[575] Ibid., p. 80.
[576] Ibid., p. 81.
[577] Bossuyt, Baron Marc. 2013. "Judicial Activism in Europe: The case of the European Court of Human Rights", Open Europe <http://www.openeurope.org.uk/Content/Documents/speechmarcbossuytopeneuropesept2013.pdf>, p. 1.
[578] Ibid., p. 2.

protecting absolute human rights from interference by states via negative obligations, and the Court's majoritarian stance is "not a valid interpretation" as it presumes that regulations of this type are highly dependent and "may vary in time and place according to the needs and resources of the community."[579] Likewise in *Marckx v. Belgium* (1979) regarding rights related to the status of children born "out of wedlock", the Court read positive obligations to Article 8, by stating that the "right to respect for family life does not merely compel the State to abstain from arbitrary interference by the public authorities", but requires that the right carry with it "positive obligations [that are found to be inherent] in an effective 'respect' for family life."[580] The Court deduced:

> "Whilst recognizing as legitimate or even praiseworthy the aim pursued by the Belgian legislation – namely the protection of the Child and traditional family - … in the achievement of this aim, recourse must be had to measures whose object or result is, as in the present case, to prejudice 'illegitimate' family."[581]

With this, the ECtHR called for the dismantling of any legal disabilities that had been imposed for centuries on 'non-marital' children throughout Europe.[582] Bossuyt notes, however, that the Court's judgment had effectively "transformed a civil right into a social right requiring an active intervention by the legislator" as well as neglected to distinguish "between classical freedoms and social rights" thus risking "exceeding its competence."[583] Case law from the past two decades shows that the Court has "consistently attributed positive obligations to virtually all Convention rights."[584] A fair amount of evidence exists to support this claim. In two cases, *Gaygusuz v. Austria* (1996) and *Koua Poirrez v. France* (2003), the Court decided that the State contributions towards emergency assistance in case of unemployment or social benefits for disabled adults is a pecuniary right for the purpose of Article 1, Protocol 1, the protection of property.[585] The enlargement of the Court's

---

[579] Ibid.
[580] Ibid., p. 3.
[581] Marckx v Belgium (1979) ECtHR, para. 414.
[582] Marc Salzberg, "The Marckx Case {Judgment of June 13, 1979, E. Ct. Human Rights, Series A, No. 31}: the impact on European jurisprudence of the European Court of Human Rights' 1979 Marckx decision declaring Belgian illegitimacy statutes violative of the European Convention on Human Rights", 1985 *Denver Journal of International Law and Policy*, 283.
[583] Bossuyt, 'Judicial Activism in Europe: The case of the European Court of Human Rights", p. 3.
[584] Ibid., p. 4.
[585] Ibid.

jurisdiction to social rights, including social security regulations, has also be noted in *Stec and Others v. United Kingdom* (2005), where Article 14, right to non-discrimination has been raised in the context of a complaint against the defendant state which stated that the Reduced Earnings Allowance scheme funded by general taxation and the Retired Allowance scheme treat men and women differently.[586] Economic and social legislation introduced by Contracting Parties has thus increasingly fallen under the jurisdiction of the Court. And, although, recognition of economic and social rights enjoys a wide margin of appreciation, the Court's activism in this area may expose it to further public reproach.

Recognition of Indirect Responsibility of States

The indirect responsibility of state parties for the possible violation of rights by other states, presents itself as another "worrisome" development in the Courts history of judicial activism.[587] Focused on Article 3, the prohibition of torture and inhuman or degrading treatment or punishment, the ECtHR in *Soering v. United Kingdom* (1989) and *Cruz Varas and Others v. Sweden* (1991), advised the state parties that any extradition proceedings, which would expose the plaintiff to torture or inhuman treatment in States who are not parties to the Convention, would not only be ill advised, but constitute a violation of Article 3. By 2001, in *Conka and Others v. Belgium*, the Court indicated that it is desirable to implement interim measures[588] and not seek extradition against asylum seekers pending the procedure before the Court.[589] In so doing, the Court has been accused by its own dissenting judges of amending rather than interpreting the Convention, as the document does not contain any interim measures provisions.[590] Dissenting opinions notwithstanding, the number of requests for interim measures has been steadily growing from 122 requests in 2006 to 883 in 2007 to 2,871 in 2008 and some 4,786 in 2010[591] raising alarm in the Council of Europe regarding the proper function of the Court. The Member States of the Council reminded the Court

---

[586] Ibid.
[587] Ibid., p. 5.
[588] Interim measures are urgent measures which, according to the Court's well-established practice, apply only where there is an imminent risk of irreparable harm (ECHR Fact Sheet, January 2013 <http://www.echr.coe.int/Documents/FS_Interim_measures_ENG.pdf>
[589] Bossuyt, 'Judicial Activism in Europe: The case of the European Court of Human Rights", p. 6.
[590] Ibid.
[591] Ibid.

> "that the subsidiary character of the Convention mechanism is fundamental and that the Court is not an immigration Appeals Tribunal or a Court of fourth instance…The Court, when examining cases related to asylum and immigration, to assess and take full account of the effectiveness of domestic procedures and, where these procedures are seen to operate fairly and with respect for human rights, to avoid intervening except in the most exceptional circumstances."[592]

Albeit the Court's active involvement in the bettering of human rights standards across Europe, States most at risk of repatriation of vulnerable groups qua asylum seekers have asked it to be mindful of the domestic impacts interim measures might have on the native population and the socio-economic standards of society, who are increasingly bearing the costs of detention and risk internal destabilization due to potential for large-scale rioting.[593]

Lowering of the Threshold of Article 3

Scholars concerned with the Court's rulings on Article 3 violations, note that not every form of ill treatment is tantamount to torture or inhuman and degrading treatment. Yet, in cases where the question of duration of retention of asylum seekers has been raised, the Court opined in favor of shortening the terms of detention. By finding any retention exceeding several months unacceptable in *Dougoz v. Greece* (2001), *Rahimi v. Greece* (2011) and *Tehrani and Others v. Turkey* (2010), the Court has inevitably opened itself up to criticism of lowering the threshold requirements of Article 3. Likewise, the defendant government in *Sufi and Elmi v. United Kingdom* (2011) was found to be in indirect violation of Article 3 for seeking the removal to native Mogadishu, Somalia of two criminal offenders. The ECtHR ruled that those "removed to Somalia would be at risk of ill treatment- prohibited by Article 3 of the ECHR."[594] Evidence submitted to the Court suggested that "the level of violence in Mogadishu is of sufficient intensity to pose a real risk of treatment reaching the Article 3 threshold to anyone in the capital."[595] Similarly, the

---

[592] Licari, Joseph. 2013. "No Kangaroo Court in Strasbourg" Times of Malta
< http://www.timesofmalta.com/articles/view/20130825/opinion/No-kangaroo-court-in-Strasbourg.483438>
[593] Ibid.
[594] The Aire Centre, Press Release: Sufi & Elmi V. The United Kingdom
28 June 2011 <http://www.airecentre.org/news.php/29/press-release-sufi-elmi-v.-the-united-kingdom#sthash.fARAhaLO.dpuf>
[595] Sufi and Elmi v. United Kingdom, ECHR para. 248

Court in *Hirsi Jamaa v. Italy* (2012) sided with the asylum seekers turned back by the Italian navy, by awarding them 15,000 Euros in non-pecuniary damages, and thereby effectually encouraging other migrants to undertake the perilous journey across the Mediterranean Sea and possibly hampering more coordinated immigration and border control efforts.[596]

Question of Legitimacy

The public's perception and approval of the ECtHR's judgments are positively correlated with its institutional legitimacy, conferred upon it by (i) the Convention; (ii) the high legal and moral standards set out for the members of the Court; and, (iii) the system of their appointment, in addition to (iv) a working mechanism of supervision and enforcement of judgments. Some allege that unlike the International Court of Justice, the ECtHR is mostly composed of judges not trained in international law, who reinforced by a pension and social security scheme and a non-renewable nine-year term in office, tend to exercise the Court's jurisdiction in an increasingly activist and liberal way.[597] In *Lautsi v. Italy* (2009) the Court's ruling that the presence of crucifixes in Italy's schools violated the right to education and freedom of religion of two school boys not only led to an uproar of several State parties, but eventually to a revision of the decision by the Grand Chamber of the Court in 2011, citing the matter as falling within Italy's margin of appreciation. The Court's own failure to appreciate the public sentiments and strike a reasonable balance between present day conditions and cultural and religious traditions of the Contracting Parties, exposed the ECtHR to admonitions similar to the one by Judge Bonello, who referred to "a court in a glass box a thousand kilometers away which had been engaged to veto overnight what had survived countless generations."[598]

Apart from shifting protection from human rights, in *sensu stricto*, towards protection of social rights of specific categories of vulnerable persons having particular needs, i.e. the mentally disabled or the Roma population in *Orsus and Others v. Croatia* (2010) and *Alajos Kiss v. Hungary* (2010), as well as standing in defense of the convicted

[596] Bossuyt, 'Judicial Activism in Europe: The case of the European Court of Human Rights', p. 8.
[597] Ibid., p. 1.
[598] Ibid., p. 9.

prisoners' rights to vote in *Hirst v. United Kingdom* (2005), the Court, according to Baroness Hale, risks "going further than anything the member States committed themselves to at the time."[599] And because "claims for services, which require a high degree of discretionary judgment on the part of officials, are not readily susceptible to court-like adjudication on the merits"[600], the ECtHR treads a delicate line between judicial competence and its abuse. Yet, in matters where public attention is heightened, such as the mass surveillance programs implemented by States, the Court's stance in defense of fundamental rights and freedoms with serious international security implications, may reinstate its legitimate objectives. As recently as January 2014, in *Big Brother Watch and Others v. United Kingdom*, the ECtHR ordered UK government ministers to justify GCHQ's mass surveillance programs and interception of data as well as prove that its actions fall "within the law" and Article 8 or "a right to respect for his private and family life, his home and his correspondence."[601]

The caseload and sensitivity of the subject matter in front of the Court, illustrates the complex nature of its legitimate mandate for adjudication. Scholars analyzing the ECtHR's *raison d'etre* point to the importance of maintaining strong political-normative standards, such as: the effectiveness of human rights protection; democracy as an added value to the protection of human rights; common standards which harmonize judicial human rights principles across Europe; external corrective or the value of having an outside body to act as an objective check on domestic decisions; and individuals challenging the state and the level of empowerment of the marginalized to access the Court.[602] The ECtHR's normative performance, it has been found, plays a "greater role in the assessment of its overall legitimacy"[603] than its bureaucratic or managerial competence. Thus,

> "(i) the appropriateness of the 'Living Instrument' doctrine that enables the Court to interpret the Convention as a dynamic text in the light of present day conditions"; (ii) the degree of intervention in the domestic legal, political and social context; (iii) the balance between law and politics, specifically whether the Court decisions have

[599] Ibid., p. 11.
[600] Ibid., p. 11.
[601] Collins, Katie. 2014. *The Wired Magazine* < http://www.wired.co.uk/news/archive/2014-01/24/gchq-must-justify-prism>
[602] Cali, Basak et al. 2011. "The Legitimacy of the European Court of Human Rights: The View from the Ground", *ECHR Project* < http://ecthrproject.files.wordpress.com/2011/04/ecthrlegitimacyreport.pdf>, p. 9.
[603] Ibid., p. 35.

> been too strongly influenced by domestic or international political considerations; (iv) transformative quality of Strasbourg case-law or the fact the acts of the Court can lead change of mindsets about what human rights are, what they entail and what they demand from the public power and (v) effective resource for human rights protection or the extent to which the Court successfully translates general principles to concrete entitlements and thereby makes rights real and tangible for applicants as well as or judges and politicians"[604] play a constructive role in the institutional legitimization of the Court.

The institution's managerial approach to the caseload before it, which focuses on, among others, the admissibility and hearing procedures, the length of proceedings, reasoning and enforcement of judgments and qualifications of judges, instills public trust and reinforces its robustness within the legal realm. Social legitimation or popular support of the ECtHR further bolsters its performance and accentuate its constitutive legitimacy. Cali et al. argue that the "Court's legitimacy is from the outset dependent on popular support, and that an institution is fundamentally illegitimate (irrespective of its performance) if it does not enjoy this support."[605] The Court must, therefore, be especially attentive to three socio-popular standards of legitimation in order to continue to play an important part in the human rights dialogue: (i) social acceptance among the general domestic population; (ii) social usage or the frequency with which the Court is used to redress human rights violations; and (iii) social coverage, or the number of people benefitting from falling under the Court's jurisdiction.[606] The Court must also be reasonable in its assessment of the case in order to encourage state compliance and affect legislative change.[607]

---

[604] Ibid., p. 9.
[605] Ibid., p. 10.
[606] Ibid.
[607] Court's effectiveness can be gauged and deduced from the general guidelines for state compliance. In them we read: Following the finding of a violation. A finding by the Court of a violation of the Convention has often led the respondent State, and sometimes even other Contracting States, to take general measures to comply with the decision in question and the higher domestic courts to adapt their case-law. In some cases, the reference of a case to the Court has of itself prompted or expedited amendments to legislation and regulations or changes in the case-law. Judgments have also resulted in the respondent State adopting concrete measures in relation to the person or persons concerned. The list which follows provides information regarding the effects of judgments, mainly taken from the resolutions adopted by the Committee of Ministers of the Council of Europe in the exercise of its duty to supervise the execution of judgments (Article 54 of the Convention)." P. 119 – ECHR "Survey: Forty Years of Activity" <http://www.echr.coe.int/Documents/Survey_19591998_BIL.pdf> The above strike a good balance between reparation for the wrongs committed and reasonable expectations for prospective legislative amendment to avoid and prevent future violations of Convention rights.

The Nature of the ECtHR Reforms

Because of the ECtHR's scope of jurisdiction, the Court "is faced with an enormous and ever-growing workload. 44,100 new applications were lodged last year, and the number of cases pending before the Court – now at 82,100 – is projected to rise to 250,000 by 2010."[608] Yet, scholars note, it is important for the Court not to be seen as declaring cases routinely inadmissible in order to reduce its caseload.[609] Under Protocol 14 of the ECHR, strategies have been adopted to remedy the unsustainable volume of cases, such as increasing the use of single-judge procedures and competencies of three-judge committees and minimizing the admissibility of repetitive cases via the Court's Registry. The use of pilot judgments in cases where underlying systemic problems have been identified has also been advised.[610] ECHR's Protocol 15, adopted by the Committee of Ministers of the Council of Europe in 2013, proposed to reduce the time-limit of application to the ECtHR under Article 35(1) of the Convention from six to four months, and added references to subsidiarity and margin of appreciation to the preamble to the Convention, by:

> "Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention."[611]

Additionally, Protocol 15 promised to widen the Court's scope of rejection of cases when they have been found "duly considered by a domestic tribunal" under Article 35(3)(b) and state parties will no longer be able to object to the relinquishment of jurisdiction over cases when asked by the Grand Chamber under Article 30 of the Convention. To bolster judicial independence and reduce turnover, the Protocol "scraps the current compulsory retirement age (70) and introduces a requirement that candidates for judicial office must be less than

---

[608] Lord Woolf Report "Review of the Working Methods of the European Court of Human Rights", 2005, < http://www.echr.coe.int/Documents/2005_Lord_Woolf_working_methods_ENG.pdf >, 4
[609] Cali (n. 68), 36
[610] Lord Woolf Report "Review of the Working Methods of the European Court of Human Rights", 2005. < http://www.echr.coe.int/Documents/2005_Lord_Woolf_working_methods_ENG.pdf >
[611] ECHR "Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms" <http://conventions.coe.int/Treaty/en/Treaties/Html/213.htm>

65 years of age when their nominations are received by the Parliamentary Assembly."[612] Further, Draft Protocol 16 seeks to extend the ECtHR's limited advisory jurisdiction powers. Characterized as 'the protocol of dialogue' by Judge Spielmann, the document permits "highest national courts and tribunals to request non-binding advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the Protocols thereto."[613] Critics remain doubtful of its utility, however, citing the Court's already voluminous docket as a deterrent to constructive, timely, and ongoing dialogue between jurisdictions.

Conclusion

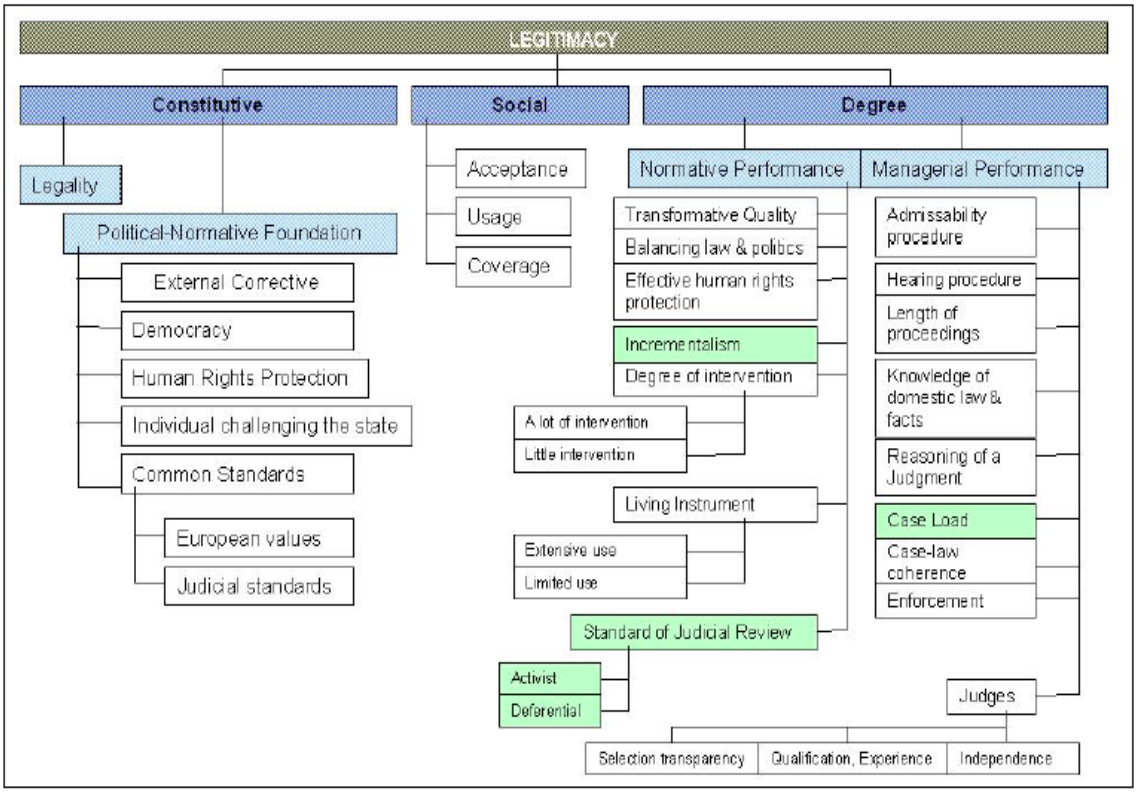
If confidence in and legitimacy of the Court and the Convention Articles of the Member States are to be gauged by their continued participation in the treaty, then the institutional framework created by the CE can be deemed a success. Notwithstanding the stern criticisms and bureaucratic shortcomings, the ECtHR is a formidable European creation, without which the judicial protection of human rights would be severely lacking. And, although the Court has been accused of amending the Convention by reading into it social and civil rights not foreseen at the time of its ratification, the ECtHR's activist approach, which carefully studies and evaluates the developments in the contemporary political and social milieu, is a welcome development. It can be said, echoing Alexander Hamilton's sentiments about the credibility of judicial institutions that, while the Court "has no influence over either the sword of the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither Force nor Will but merely judgment."[614] The root strength and future institutional influence of the ECtHR will lie therefore in its sensible assessment of the pulse of the European public with regard to judicial punishment, mass surveillance, torture, and technological progress, and a consistent approach to some of the most pressing existential questions of the age, while maintaining the independence of its judges and a dialogical

---

[612] UK Constitutional Law Association "Reforming the European Court of Human Rights through Dialogue? Progress on Protocols 15 and 16 ECHR" < http://ukconstitutionallaw.org/2013/05/>
[613] ECHR Explanatory Report "Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms" < http://conventions.coe.int/Treaty/EN/reports/html/214.htm>
[614] Alexander Hamilton *Federalist No. 78* < http://www.constitution.org/fed/federa78.htm>

engagement with, respect for, and steady evolution of human rights across national spectra as well as social and constitutional traditions.

TABLE II. The European Court of Human Rights: Legitimacy



Source: Basak Cali et al. "The Legitimacy of the European Court of Human Rights: The View from the Ground"

CHAPTER IV

THE LEGAL DISCOURSE AND PRACTICE OF THE INTER-AMERICAN HUMAN RIGHTS REGIME

Introduction

As early as 1889, the Organization of American States (OAS) recognized the importance of regional political, juridical and social cooperation between states in the Western Hemisphere. At the meeting in Washington D.C. held in April 1890 foundations had been laid for a web of international institutions aimed at supporting the Inter-American system of norms focused around questions of arbitration for the settlement of disagreements and disputes, improvement of business intercourse, means of direct communication, and encouragement of reciprocal commercial relations between the original eighteen participating countries.[615] Groundbreaking in its ideational aspirations, the Pan-American Union/OAS, initially headquartered in Washington D.C., aimed to articulate legal language which would guide States in criminal, commercial and military engagements. Legal drafts and treaties had been created to govern extradition, avoid recourse to war, assert a principled response to conquest - which was seen as not being synonymous to rights over a given territory - enhance commercial integration, strengthen state and private sector ties to ensure regional cooperation and security, and lastly establish specialized institutions which would serve to propel the lofty objectives of the parties involved. Unlike the trade-oriented European Coal and Steel Community, which preceded the formation of the European Union in the post-World War II environment, the OAS' mandate was ambitious in scope and breadth. A number of special high-level meetings of ministers of foreign affairs since 1907 generated institutions, treaties and international commitments worthy of admiration. Among them, the Pan American Health Organization (1902), which later served as the regional office of the future World Health Organization; the Inter-American Juridical Committee (1906); the Inter-American Children's Institute (1927); the Inter-American Commission of Women (1928); the Pan American Institute of Geography and History (1928); the Inter-American Indian Institute (1940); the Inter-American Institute for Cooperation on Agriculture (1942); the Inter-American Defense Board (1942), followed by the Inter-American Development Bank, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the Inter-American Drug Abuse Control Commission, the Inter-American Telecommunication Commission, the Inter-

[615] OAS< http://www.oas.org/en/about/our_history.asp>

American Committee on Ports, and the Justice Studies Center of the Americas, and the Central American Court of Justice, which functioned from 1907 to 1918.[616]

The perennially contentious questions of war and peace were also considered at the 1945 Conference on Inter-American Problems of War and Peace in Mexico City and the 1947 Inter-American Conference for the Maintenance of Continental Peace and Security in Rio de Janeiro, which resulted in the adoption of the Inter-American Treaty of Reciprocal Assistance "to ensure legitimate collective self-defense in the event of an attack from a foreign power from outside the region and to decide on joint actions in the event of a conflict between two States Parties to the Treaty"[617] in the post-WWII and pre-Cold War environment. Between 1923 and 1939, the countries of the Latin American continent were busily involved in the consolidation of legal foundations for the Organization of American States and expressed their collective will through the reaffirmation of principles and adoption of wide-ranging treaties. At the Fifth International Conference of American States in 1923, the adopted Treaty to Avoid or Prevent Conflicts Between American States and the Convention on the Rights and Duties of States ratified at the 1933 Seventh International Conference of American States "reaffirmed the principle that 'States are juridically equal, enjoy the same rights, and have equal capacity in their exercise," reiterated the principle that no state has the right to intervene (prohibition of intervention) in the internal or external affairs of another, and underscored the obligation of all States "to settle any differences that might arise between them through recognized pacific methods.'"[618]

Prospective and far-sighted in its aspirations, the 1948 Ninth International Conference of American States held in Bogota, Colombia adopted the Charter of the Organization of American States and the American Declaration on the Rights and Duties of Man, respectively, encouraging States to "settle controversies between American States by peaceful means" and listing "the procedures to be followed: mediation, investigation and conciliation, good offices, arbitration, and, failing that, recourse to the International Court of Justice of The Hague."[619] The adoption of the Universal

[616] OAS < http://www.oas.org/en/about/our_history.asp>
[617] Ibid.
[618] Ibid.
[619] Ibid.

Declaration on the Rights and Duties of Man "underscored the region's commitment to international protection of human rights and paved the way for the subsequent adoption of the American Convention on Human Rights ('Pact of San José,' Costa Rica), which was adopted in 1969 and entered into force in 1978."[620] The American Declaration is held to be the first and widely relied upon international human rights instrument of a general nature.[621] Article 1 of the UN Charter recognized the OAS's regional status and in so doing legitimized its socio-cultural, political, economic and legal agenda for the continent.

Perhaps one of the OAS' more fundamental accomplishments has been the institution of the Inter-American Commission on Human Rights in 1959 and subsequent installation of the Inter-American Court of Human Rights (IACHR) in 1979, which had been vested with the mission of protecting and promoting human rights in the American Hemisphere. The consultative objective of the IACHR privileges, in an unprecedented way for its times, a system of individual petition and monitoring of human rights situations across the region. It operates on the basis of the *pro homine* principle, which ensures the interpretation of the law "in the manner most adventitious to the human being" and focuses attention on "populations, communities and groups that have historically been the targets of discrimination."[622] In so doing, the IACHR observes the founding OAS Charter's commitment to the "fundamental rights of the individual" and aims to assist the OAS in furthering principles of solidarity and good neighborliness, democracy, individual liberty and social justice.[623]

Expansive in its nature, the OAS has evolved human rights instruments, mechanisms and the indispensable institutional backbone to support it. Thus, in tandem with its *pro homine* commitments, the region has adopted a number of legal documents, which corresponded and addressed themselves to the specific needs of the region. In addition to the above two conventions cited above, strides were made in putting in place a comprehensive regime of international justice through: (i) The Inter-American Convention to Prevent and Punish Torture of December 9, 1985; (ii) The Additional Protocol to the

---

[620] Ibid.
[621] OAS http://www.oas.org/en/iachr/mandate/what.asp
[622] Ibid.
[623] Ibid.

American Convention on Human Rights in the area of Economic, Social and Cultural Rights (Protocol of San Salvador) of November 17, 1988; (iii) The Protocol to the American Convention on Human Rights to Abolish the Death Penalty of June 8, 1990; (iv) The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ("Convention of Belém do Pará") of June 9, 1994; (v) The Inter-American Convention on Forced Disappearance of Persons of June 9, 1994; (vi) The Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities of June 7, 1999; (vii) The Inter-American Democratic Charter of September 11, 2001; (viii) The Declaration of Principles on Freedom of Expression of October 2 – 20, 2000; (ix) Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas of March 3 – 14, 2008. Collectively, the above instruments aim to ensure individual criminal responsibility and legal accountability in the face of perpetrations of torture, cruel, inhuman, or degrading treatment, physical, sexual, and psychological violence against women, and forced disappearances. Their aim is also one concerted attention to the promotion of social justice, economic participation, equality, and individual access. For this purpose, the OAS vested the Inter-American Commission and the Inter-American Court of Human Rights with consultative, oversight, investigative, and prosecutorial powers. It is upon the Commission's judgment and referral of the case, that the jurisdiction and the advisory capacity of the Court is activated. Working in tandem with the Court, the IACHR has "aggressively exploited its charge to promote and develop awareness of human rights, make recommendations, prepare studies and reports, handle individual complaints, and conduct on-site investigations throughout the Western Hemisphere."[624] And although dealing in human rights in a milieu of residual history of repressive dictatorships risks having its work largely ignored, the power of publicity, which the Commission ably wields, allow it to turn the attention of the international community to excessive and systematic state violations of international law and apply normative mechanisms of naming and shaming that can exert enough pressure to mobilize gradual reform of conduct on the part of the misbehaving states.

[624] Donnelly, Jack. 1998. *International Human Rights.* Boulder: Westview Press. p. 72.

Transitional Justice

A crucial aspect of the OAS system has been the centrality of the question of transitional and historical justice following regime change in many South American states. Historically, "justice", Teitel argues, "has gone from a prerogative of the victor, which needs restraining, to a shared international obligation."[625] The United Nations "Guidance Note of the Secretary General" sees transitional justice as consisting of "both judicial and non-judicial processes and mechanisms, including prosecution initiatives, facilitating initiatives in respect of the right to truth, delivering reparations, institutional reform and national consultations." [626] Scholars of transitional democracy have long held that prosecutions of past violations of human rights are likely to have destabilizing effects on the already weak and fragile institutions and strained social relations and impede the consolidation of the rule of law.[627] As Kathrine Sikkink has shown in her groundbreaking empirical work, *The Justice Cascade* (2011), however, that none of the predictions of violent coups and provocative and suicidal mission of holding the military accountable for human rights atrocities voiced by the likes of Samuel Huntington, Guillermo O'Donnell, Lawrence Whitehead, and Phillippe Schitter, ever fully materialize. Neither do the fears of international lawyers weary of the "one size fits all" approach to transitional justice, which runs the risk of being inattentive to the nuances of cultural, political, and legal context.[628] In sum, "many arguments against trials," Sikkink argues, "are based on the casual assumption that they block efforts to resolve conflict, and thus that people must choose either peace or justice."[629] Sikkink's quantitative studies have shown, however, that (i) "countries with more accumulated years of prosecutions after transition are less repressive than countries with fewer accumulated years of prosecutions[630]; (ii) "human rights trials must happen quickly after transition or they will not happen at all"[631]; (iii) "transitional

---

[625] Teitel, Ruti. 2013. "Rethinking *Jus Post Bellum* in an Age of Global Transitional Justice: Engaging with Michael Walzer and Larry May", *European Journal of International Law* 24(1). p. 345.
[626] UN Guidance Note of the Secretary General
< http://www.unrol.org/files/TJ_Guidance_Note_March_2010FINAL.pdf> p. 3.
[627] Sikkink, Kathryn. 2011. *The Justice Cascade*. New York: W.W. Norton & Co. p. 142.
[628]Ibid., p. 133.
[629] Ibid., p.133.
[630] Ibid., p. 27.
[631] Ibid., p. 142.

justice decisions made in the immediate post-transition period, including amnesties, are durable and mutually exclusive."[632] Moreover, prosecutions seem to enable consolidation of democracy, "by warning spoilers (leaders who use force to undermine political change) of the possible costs to them of another coup and an authoritarian interlude."[633] Thus transition to democracy combined with the utilization of transitional justice mechanisms – prosecutions, amnesties, and truth commissions – has positive effects on the peace process, political stability, democratic accountability, improvement in basic human rights practices, consolidation of legal institutions and the rule of law. This has been especially relevant for Latin America – "the region most experienced in justice."[634] There, prosecutions did not increase human rights violations, exacerbate[d] conflict, or threaten[ed] democracy; and amnesties by themselves" did not "produce peace or deter future human rights abuses."[635] Political discourse and careful legal construction allows for the continents grappling with contentious legal and moral conundrums to shift their normative understanding of transitional justice, help diminish the influence of once powerful actors, and alter the context in which political actors think about their interests.[636] Reasoning of transition justice in the framework of jus post bellum requires maintaining a sense of principled proportionality that is "not simply political but jurisprudential."[637] The UN's Guidelines are especially sensitive to the legal and human dimension of transitions and acknowledge the need of a principled approach, including: (i) support and active encouragement with international norms and standards; (ii) taking account of the political context; (iii) strengthening national capacity to carry out community-wide transitional justice processes; (iv) ensure women's rights; (v) ensure centrality of victims; (vi) ensure child-sensitive approach; (vii) coordinate transitional justice programs with other broader rule of law initiatives; (viii) integrate and reconcile other appropriate transitional justice mechanisms; (ix) take account of root causes of conflicts; (x) focus on partnerships and coordination.[638] In so doing, the UN reaffirms a scholarly consensus that promotion of reconciliation and

---

[632] Ibid., p. 142.
[633] Ibid., p. 149.
[634] Ibid., p. 159.
[635] Ibid., p. 159.
[636] Ibid., p. 160.
[637] Teitel, 'Rethinking *Jus Post Bellum* in an Age of Global Transitional Justice', p. 345.
[638] UN Guidance Note of the Secretary General
< http://www.unrol.org/files/TJ_Guidance_Note_March_2010FINAL.pdf> p. 2.

consolidation of peace is largely depended on the successful establishment of effective governing administrative and justice systems that are founded on the respect for the rule of law and the protection of human rights.[639]

The Inter-American Court of Human Rights

In no small measure, the Inter-American Court of Human Rights played a crucial role in creation of a discursive space and language for civil reconciliation and criminal accountability in the post-conflict scenario. The thirty-five OAS member countries of Latin America that fall under the jurisdiction of the Inter-American System consisting of two main entities – the Commission and the Intern-American Court of Human Rights – have agreed to recognize the human rights monitoring and judicial activities, rely upon their advisory opinions and implement their guidelines. The Court itself, established in 1979 and headquartered in San Jose, Costa Rica, plays a crucial role in the legal articulation and public scrutiny of contentious cases that have a significant bearing on conduct and reputation of states. Seven judges appointed for six-year renewable terms are vested with the responsibility of interpreting and enforcing the American Convention on Human Rights and address themselves to the cases referred to the Court by the Inter-American Commission on Human Rights or a state party in an advisory capacity. Unlike the Commission, the Court does not permit for individual petition or access; yet, it is frequently adjudicating on legal matters pertaining to the claim of the violation of individual human rights by states within its OAS jurisdictional orbit and increasingly recognizes victim's right to representation in legal proceedings, active participation in witness depositions, and restitution.

The following section will aim to focus on the Court's case law in order to illustrate the way judicial reasoning and emphasis on individual rights and accountability decenter States' traditional prerogatives and change the relational dynamics between citizens and their governments. It is precisely when domestic mechanisms fail to perform due diligence or otherwise fail their citizens that international arbitration mechanisms and international law provide a suitable alternative. As I have argued in the previous chapter, the existence of an international legal remedy and international judicial oversight creates conditions and

[639] Ibid., p. 3.

opportunities for non-state actors to exert necessary pressures on reluctant governments to abide by and enforce the international human rights agenda domestically and cosmopolitically, or extraterritorially. A number or substantively rich cases suggest themselves, which aim to show the centrality of judicialization of politics and the symbolic and legal, leverage international courts command over sovereign nation-states when wrongdoing is individualized and adequately publicized. Whenever the jurisdiction of the OAS judicial architecture is activated, the Commission and the Court visibly realign state understanding of international human rights considerations and interests and prescribe individualized remedies that place moral and financial onus on the culpable state parties.

Case Law

A. Extrajudicial Killings and Human Rights

In 1996, the Inter-American Human Rights Commission has been confronted with allegations of extrajudicial killings perpetrated by a state party against four unarmed, private individuals flying two small aircrafts in international airspace. The Incident of 24 February 1996 where a MiG-29 Cuban Air Force military aircraft shot down two private aircrafts belonging to the organization, "Brothers to the Rescue", resulted in several complaints against the Republic of Cuba and requested the Commission's initiation of proceedings in accordance with Article 32 of its Regulations. It was alleged that Cuba was responsible for failing to comply with its international obligations stipulated by the American Declaration of the Rights and Duties of Man and violating Article I the right to life and Article XVIII the right to fair trial. The practice of extrajudicial killings or summary executions and arbitrary and unjustifiable deprivation of life have been widely condemned by the international community and enshrined in leading international law documents. "The forbidding of extrajudicial executions thus raises to the level of imperative law a provision of international law that is so basic that it is binding on all members of the international community."[640] Concomitantly, the right of due process of law aims to protect individuals against states' intrusiveness and hasty and inconsequential

[640] Armando Alejandre Jr., Carlos Costa, Mario de la Pena y Pablo Morales v. Republica de Cuba, Case 11.589, Report No. 86/99, OEA/Ser.L/V/II.106 Doc. 3 rev. at 586 (1999)
< http://www1.umn.edu/humanrts/cases/86-99.html>

instrumentalization. Domestic legal instruments have responded in tandem, incorporating into their legal lexicon basic human rights, such as the right not to be murdered, tortured, or submitted to cruel, inhuman, or degrading treatment, and freedoms from arbitrary arrest and detention without charge. The universality of acceptance of these preemptory norms by state parties and the corresponding duties they impose, have promoted the Commission initiate an investigation of Cuba's actions based in two elemental considerations:

> "(a) ascertain whether the Cuban State is responsible for the death of the four civilian pilots and, consequently, (b) whether the three elements that cause a State to be internationally responsible are present, namely (i) whether there existed an action or a failure to act that violated an obligation enshrined in a rule of international law currently in force, which in this case would be the American Declaration; (ii) whether that action or a failure to act can be attributed to the State in its capacity as a juridical person, and (iii) whether harm or damage was caused as a result of the illicit act."[641]

After conducting a thorough investigation and taking numerous witness depositions from the crew and passengers of nearby ships, the Commission concluded that: "The destruction of the two civilian aircraft in international airspace and the death of their four occupants at the hands of agents of the Cuban Air Force constitute flagrant violations of the right to life."[642] Moreover, absent of outright military conflict, use of the weapons of war by combat-trained pilots against unarmed civilians showed a disproportionate use of force and the "intent to end the lives of those individuals."[643] Radio communications between the pilots revealed malicious intent permeated with contempt and scorn "toward the human dignity of the victims"[644] emanating from the perceived superior position of the agents of the state. In sum, the Commission implied, though not explicitly stated, that the Cuban State under the circumstances has a reasonable chance of being deemed to be internationally responsible for the deaths of four civilian pilots on all three counts stated above.

---

[641] Ibid.
[642] Ibid.
[643] Ibid.
[644] Ibid.

While not a precedent-setting case, the Commission poignantly pointed out that States can be held accountable for acts perpetrated outside of their territory (in international waters, twelve miles from the shore as foreseen by the International Law of the Sea), since:

> "the obligation of respecting and protecting human rights is an obligation *erga omnes*, i.e., one that the Cuban State must assume - like all other member states of the OAS, whether or not they are signatories of the American Convention on Human Rights - toward the inter-American community as a whole, and toward all individuals subject to its jurisdiction, as direct beneficiaries of the human rights recognized by the American Declaration of the Rights and Duties of Man…. the American Declaration is a source of international obligations. The fact that the Declaration is not a treaty should not lead one to conclude that it has no legal effect…"[645]

Interesting, too, is the Commission's decision to cross-reference developments in European law and actions taken by the European Commission on Human Rights in *Lozidou v. Turkey* (1995) pertaining to the establishment of jurisdiction over a given case. The willingness to borrow and reassess international law in view of arguments and decisions voiced by other international bodies reflects a deep commitment to getting the law right, fine-tuning its interpretation, and applying it to newly arising situations. Moreover, the web of interactions between judicial entities creates discursive spaces for constructing new meanings and values around which state behavior must carefully tread. Despite this, cynics of international adjudicatory mechanisms are quick to remind us that the lack of credible enforcement processes will do little to change state behavior. After all, the Commission in the above case is merely vested with the power to recommend further action, whose success can only come about with the explicit state compliance. And while the Inter-American Commission on Human Rights recommends that the Cuban State:

> "(i) Conduct a complete, impartial, and effective investigation to identify, prosecute, and punish the agents of the State responsible for the deaths of civilian pilots in the incident occurring in international airspace on 24 February 1996. (ii) Ratify the Protocol to the International Civil Aviation Convention (Article 3-bis), an international instrument of which Cuba has been a signatory since 7 December 1944. (iii) Take the steps necessary to ensure that the victims' families receive adequate and timely compensation, including full satisfaction for the human rights violations described herein and payment of fair compensatory indemnification for

[645] Ibid.

> the monetary and nonmonetary damages suffered, including moral damages"[646], it cannot compel it to do so.

Yet, as has been discussed in the previous chapters, it is not the aspect of non-compliance with international legal guidelines by few rogue regimes that denigrates the vitality and relevance of international law, as the community of states can and often does mobilize economic sanctions and reputational costs on repeated offenders of the said norms, but the evolving constructivist work of Courts and Commissions that gradually persuade states to "generally accept" and "incorporate into national law" universal standards that become irrefutably binding or reciprocally and mutually beneficial for states and their citizens. Furthermore, whenever domestic political barriers prove constraining to individuals and non-state actors, international courts can offer an effective international legal remedy by "drawing on law's autonomy and construct compliance constituencies within and across states."[647]

The following sections aim to illustrate the *pro homine* tendencies of the Inter-American Human Rights Commission and the Inter-American Court of Human Rights by analyzing recent case law in relation to forced disappearances, extrajudicial killings and torture.

B. Forced Disappearances and Missing Persons

According to the working definition of the Inter-American Court of Human Rights on Forced Disappearance of Persons, "one of the characteristics of forced disappearance, contrary to extrajudicial execution, is that it includes the State's refusal to acknowledge that the victim is in its custody and to provide information on him, in order to create uncertainty about his whereabouts, life or death, to intimidate, and to eliminate rights."[648] Moreover, according to Article II of the Inter-American Convention on Forced Disappearances of Persons, "forced disappearance is considered to be the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or

---

[646] Ibid.
[647] Alter, Karen. 2014. *The New Terrain of International Law: Courts, Politics, Rights.* Princeton and Oxford: Princeton University Press. p. 65.
[648] In Anzualdo Castro v. Peru Preliminary Objections, Merits, Reparations and Costs. Para. 91.

acquiescence of the state."[649] Moreover, their refusal to acknowledge the deprivation of freedom impedes the victim's recourse to applicable legal remedies and procedural guarantees.[650]

In 2012 alone, more than 7,500 new reports of missing persons were reported in Colombia.[651] The Country's human rights situation is made more complex by a high number of deaths, assassinations, and other forms of violence that highlight legal deficiencies in the Colombian legal justice system and its evident challenges with appropriate and timely response to ongoing human rights violations. "Figures from the National Commission for the Search of Disappeared Persons – a permanent national body, created in 2000 by Law 589 – suggest that after more than 50 years of internal conflict, they have witnessed at least 61,604 cases of forced disappearances."[652] It is widely believed that state agents, operatives, guerillas and paramilitaries are complicit in the targeted and politically motivated crimes of arbitrary arrests and abductions of civilians. Human rights defenders, trade unionists, Afro-Colombian and indigenous rural populations constituted the main targets and have been subjected to protracted and calculated "social cleansing" that met with state inaction.[653]

Developments in domestic law, such as Colombia's 1991 Constitution, and international legal guidelines in the form of the Inter-American Convention on Forced Disappearance of Persons ratified in April 2005, recognize that "forced disappearance of persons in an affront to the conscience of the Hemisphere and a grave and abominable offense against the inherent dignity of the human being, and one that contradicts the principles and purposes enshrined in the Charter of the Organization of American State"[654] and collectively (i) place "responsibility on the state to take actions to locate victims of forced disappearances"[655]; (ii) to punish those who commit, attempt to commit or assist in the crime of forced disappearance; (iii) urge the OAS countries to cooperate with one

---

[649] Article II "Inter-American Convention on Forced Disappearance of Persons"
< http://www.oas.org/juridico/english/treaties/a-60.html>
[650] Ibid.
[651] The International Committee of the Red Cross
< https://www.icrc.org/eng/resources/documents/feature/2013/07-10-colombia-report-disappearance.htm>
[652] Council on Hemispheric Affairs < http://www.coha.org/forced-disappearances-in-colombia/>
[653] Ibid.
[654] Inter-American Convention on Forced Disappearance of Persons, Preamble
< Http://www.oas.org/juridico/English/Treaties/A-60.Html>
[655] Ibid.

another in prevention, punishment and elimination of forced disappearances of persons; and lastly (iv) take necessary legislative, administrative and judicial measures to comply with international legal guidelines laid out in the Convention.[656] And, although, Colombia's Constitution prohibits forced disappearances, the inability of plaintiffs to produce physical evidence proving the disappearance or death of the victim, makes criminal prosecutions of the suspected state and non-state perpetrators highly improbable, but not unlikely. The Inter-American Court of Human Rights, despite deep concerns regarding material evidence, has shown itself actively engaged with disappearance cases, permitting members of the victim's family to file complaints against states and their agents. The Court in *Rochac Hernández et al. v. El Salvador*, *Valle Jaramillo v. Others* against Colombia case, as well as the *Heliodoro Portugal v. Panama and Ticona Estrada et al. v. Bolivia, Osario River*a and *Family Members v. Peru* affirmed that violation of victim's rights in cases of extrajudicial killings and enforced disappearances can lead to the violation of the right to integrity of relatives and friends, or secondary victims.[657] Moreover, "the evolution of the 'universal juridical conscience' and the need to protect the 'rights inherent to the human being'" impose upon states a positive obligation to "prevent, investigate, and punish the responsible" crimes of this nature.[658]

In *Rochac Hernández et al. v. El Salvador*, the Court concerned itself with a forced disappearance of four children between 1980 and 1982 during an armed conflict. In the four petitions filed by the Asociación Pro Búsqueda de Niñas y Niños Desaparecidos, it was alleged that the Republic of El Salvador was "internationally responsible for the forced disappearance of the children" and failed to "investigate, punish, and provide reparations as a result of those acts."[659] Despite initial protestations of the State, the government accepted plaintiff's argument and acknowledge "a pattern of disappearance of children during the armed conflict, as well as the facts alleged in the petitions."[660] The Inter-American Commission concluded that the State of El Salvador is responsible for:

---

[656] Ibid.
[657] Rota, Marie. 2009. "Case-law of the Inter-American Court of Human Rights" Chronicle for the Year 2008" *Revus* (9) 129-137. < http://revus.revues.org/502>
[658] Ibid.
[659] Rochac Hernández et al. v. El Salvador <http://webcache.googleusercontent.com/search?q=cache:rHG8169PV4wJ:https://www.oas.org/en/iachr/decisions/court/12.577FondoEng.doc+&cd=7&hl=en&ct=clnk&gl=uk>
[660] Ibid.

> "violating the rights to recognition of juridical personality, to life, to humane treatment, to personal liberty, to family, to special protection for children, and to judicial guarantees and judicial protection, established at Articles 3, 4, 5, 7, 17, 19, 8 and 25 of the American Convention, in relation to the obligations established at Article 1(1) of the same instrument [to the detriment of direct victims]…the State was responsible for violating the rights to humane treatment, family, judicial guarantees and judicial protection, to the detriment of the next-of-kin of the disappeared victims."[661]

By way of a remedy, the Inter-American Commission has recommended that the State take appropriate measures to thoroughly, impartially and effectively investigate the whereabouts of the disappeared victims to ensure family reunification. Moreover, it is up to the State to determine the responsibility and punish those persons who participated in the denial of justice by covering up the facts of the case. In addition to making material and non-material reparations to the victims' families, the Commission recommends putting in place a searchable webpage and genetic information system recommended by a preceding Inter-American Court of Human Rights forced disappearance case of *Serrano Cruz Sisters v. El Salvador*. The State is expected to ensure that the system of protection of children is implemented, strengthened and adequately responsive to the like international standards.[662]

The Inter-American Court of Human Rights 2008 *Heliodoro Portugal v. Panama* case, acting upon the application submitted to it by the Inter-American Human Rights Commission alleging forced disappearance and extrajudicial execution of Heliodoro Portugal by Panamian state authorities and subsequent failure to investigate and punish the perpetrators as well as fail to make reparations to the victim's family, echoes the *pro homine* turn of international jurisprudence which increasingly holds states accountable to their citizens. Empowered by international law, the Inter-American Commission of Human Rights has asked the Court to:

> "declare the international responsibility of the State for the violation of Articles 4 (Right to Life), 5 (Right to Humane Treatment) and 7 (Right to Personal Liberty) of the American Convention, in relation to Article 1(1) thereof, to the detriment of Heliodoro Portugal, and also for the violation of Articles 5 (Right to Humane

[661] Ibid.
[662] Ibid.

> Treatment), 8(1) (Right to a Fair Trial) and 25 (Judicial Protection) of the American Convention, to the detriment of Graciela De León (the alleged victim's permanent companion) and of Patria and Franklin Portugal (the alleged victim's children)."[663]

Moreover, the Court was asked to establish and rule on the international responsibility of the State for:

> "failing to comply with the obligation to define the offense of forced disappearance, established in Article III of the Inter-American Convention on Forced Disappearance of Persons; for failing to comply with the obligation to investigate and punish torture, established in Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture, and for failing to make adequate reparation for the violation of the rights that were alleged. In addition, the Commission asked the Court to order the State to adopt various pecuniary and non-pecuniary measures."[664]

And, although, the Court was unable to asserts its jurisdiction over the matter on *ratione temporis* grounds, it noted and strongly condemned the victim's arbitrary deprivation of life by state authorities. The Court acknowledged the victim's continuous suffering, terror and stress experienced in the absence of conclusive material evidence of death. The Court noted that the provisions of the American Convention impose upon states duties of adapting their domestic laws to the requirements of the Convention. Failure to do so, constrains the ability of states to prevent and punish conducts that violate juridical rights of victims, especially when definitional disparities exist between "forced disappearance as a crime [which] arises from the explicit mandate of the 1994 Inter-American Convention on Forced Disappearance of Persons"[665], which are binding upon its signatories, and the domestic definitions of the same crime.

Given the increasingly emphasis on victim's rights vis-à-vis the State and its agents and their gradual ascent to the level of domestic and international adjudication, the few exceptional cases set an important legal precedent, which changes the internal dynamics between three of the most important sectors of the state in Latin American countries – the

---

[663] Inter-American Court of Human Rights Case of *Heliodoro Portugal v. Panama* < http://www.corteidh.or.cr/docs/casos/articulos/seriec_186_ing.pdf> p. 2-3.
[664] Ibid., p. 2.
[665] Ibid., p. 4.

government, the judiciary, and the army. The deterrent and retributive effect of bringing criminals to trial aims to re-establish the victim's worth, adjudicate on the margin of victim's rights, and assert the victim's humanity[666] in the "high spheres of power."[667] Both international and domestic judicial regimes demonstrate an increasing interest in exerting jurisprudential authority over the acts of state, pronouncing the "self-help system" of international relations subject to the rule of international law and domestic oversight.

Thus, when in June 2010, the Colombian court handed its first criminal conviction of a retired Colonel Plazas Vega for the disappearances of 11 people during Army operations to retake control over the Palace of Justice seized by M-19 guerilla fighters in November 1985, which resulted in over 100 deaths, including 11 Supreme Court Justices,[668] the domestic jurisdiction reaffirmed the individual criminal accountability model for state officials and representatives, while at the same time handing "a severe shock to the reigning orthodoxy of the impunity model."[669] Kathryn Sikkink argues that the origins of new ideas and practices about individual criminal accountability for human rights violations come directly from domestic legal systems. A pattern of a "norm life cycle" ensues, whereby domestic judiciaries deliver "shocks" that create pressures for new forms of accountability that are later elevated to the international level and congealed as international norms. Gary Bass and Kathryn Sikkink believe that domestic trials are "the most sincere indication of the strengths of ideas and norms, since it is more difficult to put one's own leaders and soldiers on trial than those of another country, especially one vanquished in war."[670] The Conviction of Plazas Vega to 30 years in prison, following the work of the Truth Commission on the Palace of Justice established by the Colombian Supreme Court and its damning critique of the government for its negligence to put in place a plan to save hostages, met with positive reception from the victims, human rights organizations and the United Nations High Commissioner for the Human Rights, Navi Pillay, who deemed it a historic development. Moreover, Colombia's ratification of the

---

[666] Volcansek, Mary L. 2005. *Courts Crossing Borders*. Durham: Carolina Academic Press. p. 199.
[667] Inter-American Court of Human Rights Case of *Heliodoro Portugal v. Panama*,
< http://www.corteidh.or.cr/docs/casos/articulos/seriec_186_ing.pdf> p. 1
[668] The National Security Archive Electronic Briefing Book No. 319
< http://nsarchive.gwu.edu/NSAEBB/NSAEBB319/>
[669] Sikkink, Kathryn. 2011. *The Justice Cascade*. New York: W.W. Norton & Co. p. 245.
[670] Ibid., p. 245.

U.N. International Convention for the Protection of All Persons from Enforced Disappearance in 2010, permits "the U.N. working group on forced disappearances not only to receive testimony from Colombia but to carry out investigations, and would provide another potentially useful tool for Colombian advocates and victims."[671] Demobilization of paramilitaries, testimonial evidence collected from ex-paramilitaries, legal representation offered by human rights organizations and inclusion of the U.N. working groups in the process bode well for the prevention of wide-ranging social and criminal derelictions. Since every forced disappearance, violates "human rights such as the right to individual security and dignity, the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment, and the right to humane conditions of detention, a legal representative, and a fair trial"[672] a *pro homine* turn of domestic judicial regimes is a necessary first step in granting individuals and families affected a considerable toolbox of legal powers necessary for speedy prosecution. Whereas, the Inter-American Court recognizes families of victims as victims themselves, many domestic regimes, including the Colombian one, do not, increasing thus the relevance of non-state actors in the nexus of oversight and global justice process.

While academic literature is keen to point out areas of relative progress, practitioners and human rights organizations focus on the ways governments and their representatives' fall short of their international commitments. The 2011 Amnesty International Report underscores limited gains made by the Colombian Justice and Peace process through conscious and repeated failures to protect victims' rights to truth, justice and reparations. The government's early preference for granting de facto amnesties as opposed to holding full criminal investigations and trials resulted in convictions of only 10 percent of more than 30,000 paramilitaries who confessed to human rights abuses. [673] The Colombian Constitutional Court, mindful of its role in setting domestic legal precedent under municipal and international treaty law and mounting pressures from victims' representatives has been taking modest steps in putting a stop on further 19,000 de facto amnesties in return for them signing an Agreement to Contribute to the Historic Truth and

---

[671] Council on Hemispheric Affairs < http://www.coha.org/forced-disappearances-in-colombia/#_ftn12 >
[672] Ibid.
[673] Amnesty International Annual Report – Colombia 2011
< http://www.amnestyusa.org/research/reports/annual-report-colombia-2011?page=2>

Reparation.[674] Sentencing, however, is still elusive. In 2009, only three paramilitaries have been sentenced to eight years in prison for human rights violations. [675] While state's remedial measures might be subject to domestic politicization and structural-institutional weakness of transitional democracies on the Latin American Continent, international scrutiny by the UN High Commissioner for Human Rights, UN Special Rapporteurs overseeing legal progress on questions of summary executions, indigenous people, judicial independence as well as Economic, Social and Cultural Rights, Rights of the Child, and minority issues as well as tying international aid and assistance to the countries' human rights record are positive developments in the process of international adjudication.

C. Forced Displacement of the Indigenous Populations

One of the recurring developments in international judicial arbitration is the status of the indigenous populations under international and domestic laws. The 2007 United Nations Declaration on the Rights of the Indigenous Peoples, albeit constituting a non-binding legal instrument, nevertheless recognizes the particularity of indigenous cultures, languages, practices, and traditions that are in need of increasing protection from governmental and non-governmental interference and societal discrimination. The rights to culture, identity, language, employment, education, and health constitute "the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world" that must be preserved along with indigenous peoples claims to their institutional and cultural traditions and heritage.

According to the International Workgroup for Indigenous Affairs, "there are approximately 40,000,000 people in Latin America and the Caribbean that belong to the almost 600 indigenous peoples of the continent, many of whom are in Mexico, Peru, Guatemala, Bolivia and Ecuador."[676] It is, therefore, a curious act of omission on the part of the Organization of American States (OAS) that the rights of indigenous persons and peoples have not found full expression in the basic instruments that govern the Inter-American human rights system.[677] As the Special Rapporteur on the Rights of Indigenous

---

[674] Ibid.
[675] Ibid.
[676] International Workgroup for Indigenous Affairs < http://www.iwgia.org/regions/latin-america/indigenous-peoples-in-latin-america>
[677] Inter-American Commission on Human Rights "Situation of the Human Rights of Indigenous Persons

Peoples (1996-1999), Carlos M. Ayala Corao points out in the Situation of the Human Rights of Indigenous Persons and Peoples in the Americas Report, "neither the American Declaration on the Rights and Duties of Man nor the American Convention on Human Rights and its additional protocols or other inter-American human rights treaties contain provisions that develop indigenous rights"[678] and that only two relevant conventions, Convention 107 concerning the Protection and Integration of Indigenous and Tribal Populations and other Tribal and Semi-tribal Populations in Independent Countries (1957) and Convention 169 on Indigenous and Tribal Peoples in Independent Countries (1989) codified by the International Labor Organization (ILO) set any premium "on the elimination of discrimination; respect for the culture and institutions of the indigenous peoples, including their forms of government and customary law, with special attention to the provisions of criminal law; indigenous territories and lands; and form of social investment in indigenous populations, work, health, education, and culture."[679] Right of the indigenous peoples make a "tenuous" appearance in the American Declaration and American Convention, but only "under the right to equality, within the provisions barring discrimination on grounds of race, color, language, religion, social status, etc. (Article II of the Declaration and Article 1 of the Convention)."[680] Yet, momentum for the protection of rights of indigenous peoples has been building rapidly since the adoption of the 1981 African Charter on Human and Peoples' Rights and subsequent recognition by the 1993 Vienna Declaration of the specificity of indigenous as opposed to minority rights. The lack of specialized instruments within the Inter-American system is a glaring oversight, which the Inter-American Commission on Human Rights has been attempting to remedy through (i) on-site visits and general reports on countries with substantial indigenous population such as Colombia, Guatemala, Ecuador, Chile, Bolivia, Nicaragua, Suriname, Brazil, and Mexico; (ii) implementing an individual case system allowing for indigenous individuals to petition the Commission should individual or community rights violations occur. The adoption of the 1972 resolution on "Special Protection for Indigenous Populations, action to combat racism and racial discrimination", permitted the Commission to affirm that "for

---

and Peoples in the Americas" < http://www.cidh.org/indigenas/intro.htm>
[678] Ibid.
[679] Ibid.
[680] Ibid.

historical reasons and moral and humanitarian principles, protecting especially the indigenous populations is a sacred commitment of the States"[681] and thus make strides in admitting cases requiring resolution based on indigenous customary law.

In the 1998 Inter-American Human Rights Court case submitted by the Inter-American Commission on Human Rights, *Awas Tingi v. Nicaragua*, was asked to decide whether the State in it failure to demarcate the communal lands of the Awas Tingni Community and take effective measures to ensure ancestral property rights and protection of access to natural resources by granting, without the Community's assent and without taking note of the Community's protests, concessions to Sol del Caribe, S.A. (SOLCARSA) to commence logging on communal lands has violated Articles 1 (Obligation to Respect Rights), 2 (Domestic Legal Effects), 21 (Right to Property), and 25 (Right to Judicial Protection) of the American Convention of Human Rights. Following a stream of documentary evidence, expert depositions and anthropological and sociological opinions, indigenous leaders' testimonies, the Court: (i) found that the State violated the right to judicial protection enshrined in Article 25 of the American Convention on Human Rights by disallowing indigenous groups access to the Judiciary, and therefore discriminating against them; (ii) The State violated the right to property protected by Article 21 to the detriment of the Mayagna (Sumo) Awas Tingni Community; (iii) recommends that the State adopt legislative, administrative and other necessary measures "to create an effective mechanism for delimitation, demarcation, and titling of the property of indigenous communities, in accordance with their customary law, values, customs and mores"; (iv) considers the judgment, itself, to constitute a form of reparation for the members of the Awas Tingni Community; (v) requires the State to pay reparation for immaterial damages to the Awas Tingni Community and cover expenses and costs of domestic and international proceedings before the inter-American system incurred by the Community; (vi) requires the State to submit a report of compliance with the Judgment to the Inter-American Court of Human Rights every six months; and (vii) the Court reserves

[681] Ibid.

the right to oversee compliance with the Judgment and conclude the case once the State carries out, fully, the provisions set forth.[682]

The Court, royal to the precedent it set in the above case, has been vital in the expansion of indigenous rights across the OAS member states. In its 2007 *Saramaka People v. Suriname* case confronted the State's unilateral granting of logging and mining concessions to IAMGOLD. The Forest Peoples Programme and the Association of Saramaka Authorities alleged that the State has violated the rights to the use and enjoyment of the territory, the right to Judicial Personality, the right to communal property protected by the American Convention on Human Rights. And, although, the Court did not recognize the Saramaka as an autonomous indigenous community, their resemblance to other indigenous communities, which lead a similarly self-reliant life, rely on local subsistence and derive their livelihood from local sources of hunting, fishing, farming and ecotourism, nevertheless entitles them to the enjoyment of similar rights and protections. The timber rich ancestral lands of the Saramaka had been opened to private logging company without a proper process of consultation or consent from the Community. Despite the Court's ruling in favor of granting title and protection of Community's property rights, Suriname has insisted on carrying on with unilateral granting of land concessions to logging companies. This does not imply, however, that the State will be able to act without impunity. The Court continues to monitor the situation and requests that the State submit periodical reports of compliance with its judgment.

Similarly, in the 2012 *Sarayaku v. Ecuador* IACHR affirmed the rule that indigenous communities must be consulted prior to their government's approval of investment projects that in any way affect or compromise the communities' use and enjoyment of ancestral lands. Ecuador's decision in 1996 to grant an Argentinian oil and gas company, Compania General de Combustibles (CGC), rights to exploration and exploitation of Sarayaku ancestral lands deep in the Amazon without the Community's consent resulted in extensive damage caused by drilling, high-impact explosives, felled trees, contamination of water resources, desecration of ancestral holy sites as well as detention and torture of Sarayaku Community leaders by the Ecuadorian military. Given

---

[682] The Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Judgment of August 31, 2001, Inter-Am. Ct. H.R., (Ser. C) No. 79 < http://www1.umn.edu/humanrts/iachr/AwasTingnicase.html>

serious interference in and the extensive damage done to the culture and cosmology of the indigenous population, the IACHR found Ecuador in breach of Sarayaku's right to prior consultation, communal property, and cultural identity and ordered the State to pay damages for material and non-material harm. Additionally, Ecuador was to recognize its international responsibility for the damage and harms caused and ensure the reform of its consultation process.

Conclusion: The International Adjudicatory Mechanisms in Regional Context

Reflecting increased sensitivity to human rights concerns across the region, the Inter-American Court of Human Rights as a regional mediator of disputes between citizens and their states, has in the five decades since its inception, played a constructive and civilizing role with regard to international human rights norms and contributed to the shift in attitudes in post-conflict societies of the Latin American Continent. The Institutionalist and Liberal theses suggest that international courts and treaties are utility-maximizing mechanisms for cooperation that protect against defections and ensure long-term benefits for all participants.[683] States, even if, as Realists would have it, are interest-driven entities, find their sovereignty increasingly delimited by international norms regimes that understand power in terms of a set of positive prescripts carefully constructed by competent panels of judges, whose interpretative powers rest on an inherently *pro homine* and cosmopolitan conception of law. The very circumstances of the present-day world affairs show that rebel outliers, who repeatedly contradict the international system of laws, lose long-term legitimacy and credence on the political stage and cannot hold a moral high-ground in their inter-state conduct without incurring reputational costs and wide-spread condemnation. Moreover, ideological burnout and historical changes that led to the disintegration of socialist-communist military governments, the end of Cold War maneuverings of the great powers in the Latin American region, economic difficulties, and widespread crimes against civilians, required of the transitional democracies a serious political and legal reform. Alter argues that changes that occurred were largely spearheaded by governments and legislatures, who systematically "embedded international law into

[683] Martinez, Jenny S. 2012. *The Slave Trade and the Origins of the International Human Rights Law*. Oxford: Oxford University Press. p. 169.

national legal orders, changing constitutions and passing laws that either made international law part of domestic legal orders or encouraged national adjudications to help enforce international law."[684] Motivations for the incorporation of international discourse into domestic law and spread of international courts, such as the Inter-American Court of Human Rights, are many and varied. For one, the post-Cold War period witnessed a triumph of liberal democratic ideas and the rule of law and made the remaining dominant superpower appealing to the "huddled masses" repressed by half a century of dictatorial rule. "Well-developed legal arguments and judicial rulings" made at the time by the United States and Europe, serves as a legal model worth emulating. [685] Interest in lucrative investment projects and development initiatives on the part of the developing countries in the global South required a significant strengthening of the main pillars of social order, including security, political stability, and judicial independence. If not for prudential reasons then certainly for the sake of economic expediency, the Latin American states were compelled to rethink the legal relationship between their civilian governments, their militaries, and citizens and abide by the minimum normative standards of behavior and recourse outlined in the founding OAS Charter.

Since its inception, the IACHR, like its European counterpart, the ECtHR, has been an effective legal mechanism for the protection of human rights, which it considers to be fundamental "attributes of the human being." Through individual petition and state recourse, the Court has managed to focus its case law on specific ills of the transitioning States; namely, the right to personal integrity frequently compromised by state-sponsored extrajudicial killings and enforced disappearances. The recognition and admission of responsibility for alleged violations on the part of States has been a positive development in international human rights adjudication leading to the inclusion of victims in court procedures, moral reparation and financial compensation and, ultimately, the desired change in state practice and behavior. The phenomenon of citizens exerting pressure on States through international courts has found resounding support within the OAS system. Not only does Article 1.1 of the American Convention on Human Rights provide that "The States Parties to this Convention undertake to respect the right and freedoms recognized

[684] Alter, The New Terrain of International Law, p. 159.
[685] Ibid., p. 160.

herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms [...]"[686] and Article 2 requires compliance of domestic legal regimes with international conventions, but through case law[687] enjoins them to satisfy the requirements of respect and the "customary law" guarantees of rights of its citizens. Moreover, since jus cogens limits the capacity of States to change international law by treaty, in cases where prohibition on torture is a widely recognized and protected international norm, the IACHR *in Bayarri v. Argentina*, *Valle Jaramillo et al. v. Colombia*, *Heliodoro Portugal v. Panama* and *Ticona Estrada et al. v. Bolivia*, has held States and their operatives in violation of victims' rights to personal integrity protected by Article 5 of the American Convention on Human Rights: The Right to Humane Treatment, prohibiting further intentional ill-treatment, which causes physical and mental suffering for the purpose of achieving specific objectives defined by the State. Additionally, failure on the part of the State to speedily and fully investigate allegations of torture in and of itself constitutes a grave act of omission and negligence. As Marie Rota points out, many of the Convention's articles provide two types of obligation: (i) negative obligation not to endanger human life, and (ii) the positive obligation to protect this life.[688] The Court is very likely to hold states responsible for misconduct on the basis of these to conceptions of duties and obligations, as it did in *Valle Jaramillo et al. v. Colombia* and *Ticona Estrada et al. v. Bolivia* cases, where complicity in or acquiescence to deprivation of freedom by governmental officials, refusal of the State to recognize custody or reveal essential information about victims' whereabouts in forced disappearance cases, makes the State, in the eyes of the Court and in view of the Convention, liable for the violation of personal integrity and of the right to life.[689] In rendering judgments and decisions, the Court solidifies continuity and consistency in the development of its own doctrine that responds to the particularities of the region and its socio-political and military arrangements. In that, the IACHR acts as a moral conscience, alongside the Inter-American Commission on

[686] American Convention on Human Rights < http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm>
[687] ICHR Ticona Estrada et al. v. Bolivia, §101 and Salvador Chiriboga v. Ecuador (§§119-124)
[688] Rota, 'Case-law of the Inter-American Court of Human Rights', pp.129-137.
[689] Ibid.

Human Rights, constitutes a leading apolitical organ capable of putting an end to impunity for atrocities perpetrated by States against their often-defenseless citizens and victims.

CHAPTER V

COSMOPOLITAN JUSTICE: THE INTERNATIONAL CRIMINAL COURT AND THE EXPANSION OF INDIVIDUAL AND STATE CRIMINAL ACCOUNTABILITY FRAMEWORKS

"But I'm not guilty," said K. "there's been a mistake. How is it even possible for someone to be guilty? We're all human beings here, one like the other." "That is true" said the priest "but that is how the guilty speak."
- Franz Kafka, *The Trial*

"The Sovereign is he who decides on the exception"
- Carl Schmitt

Introduction

Humanization of international law has been a subject of considerable interest to scholars and practitioners alike. Following a period of internal ethnic purges on the European continent, brutalization, torture and genocidal killings of helpless civilians in Rwanda, the Balkans, Syria, Chechnya or East Timor, the global civil society and legal community have begun to inquire after the status and significance of laws aimed at prohibiting war and the accompanying manifest outbreaks of violent conflict. Up to date, questions of classification have constituted the subject matter of doctrinal development. Thus, distinctions between internal versus external conflict, between civilians and armed personnel, between governmental and non-governmental entities, between human rights law and the law of war had preoccupied and monopolized the debate. Criticisms regarding a disconnect between the norms of international law and the reality of human rights mounted and delegitimized the more aspirational aspects of the law and its proper place within the orbit of sovereign nation-states. An exhaustive historiography of international law, as a holistic body of prescriptive and binding character, has also been largely neglected until the early years of the post-9/11 era of the war on global terrorism and the rapidly advancing technologies of warfare. Judge Theodor Meron, for one, has responded to a growing public consensus and urgency for the development of international guidelines geared towards bridging the gap between international law's normative aspirations and its practice by making a compelling case for highly individualized humanitarian aspects of the law and strengthening of international justice via supranational judicial institutions, most prominently, the International Criminal Court and regional Tribunals vested with interpretative and investigative powers. If, as Judge Meron writes, the American Civil War gave rise to the Lieber Code which led to the development of the Hague law, the Battle of Solferino inspired the creation of the International Red Cross, the Nazi atrocities provoked

the writing of the Nuremberg Charter of 1949 and the Geneva law, then the atrocities in Yugoslavia and Rwanda spawned a renewed investment in the creation of independent ad hoc Tribunals and criminal courts vested with the weighing of evidence aimed at attribution of state and individual responsibility for violations of basic norms of humanity. [690]

A return to and a reassertion of Hugo Grotius' fundamental premise, that the society of states has ultimate jurisdiction over "gross violations of the law of nature and of nations, done to others states and subjects", has followed the centuries of tragic conspiracies against human life and dignity. In *Prosecutor v. Furundzija* case, the ICTY (International Criminal Tribunal for the former Yugoslavia) emphasized the inherent dignity of human life as a common thread permeating humanitarian and human rights laws: "The essence of the whole corpus of international law as well as human rights law lies in the protection of the human dignity of every person" irrespective of gender or ethnicity, and that "the general principle of respect for human dignity … is the very *raison d'etre* of international humanitarian and human rights law." As a principle of "paramount importance" it intends to "shield human beings from outrages on their personal dignity, whether such outrages are carried out by unlawfully attacking the body or by humiliating or debasing the honor, the self-respect or the mental well-being of a person."[691] Attacks on human dignity have been interpreted broadly and encompass a list of offenses considered as crimes against humanity under the Nuremberg Charter and subsequent ICC Rome and ICTY Statutes. Thus, imprisonment, rape, torture, deportation, murder, extermination, enslavement and other inhuman acts merit prosecution and moral as well as legal culpability on the part of their perpetrators and are increasingly liable to prosecution under universal jurisdiction.

The question of human dignity as a moral and philosophical concept entered the legal lexicon with the 1945 Universal Declaration of Human Rights and constituted a point of departure for scholars theorizing the breadth and depth of public international law. In *Human Dignity and the Future of Global Institutions* (2014), Lagon and Arend ponder the place of dignity, understood as consisting of the "agency of individuals to apply their gifts to thrive" under an umbrella of "broad social recognition of each person's inherent

[690] Meron, Theodor. 2000."Humanizing International Law" in *The American Journal of International Law* 94(2), p. 243.
[691] Ibid., p. 267.

value"[692], in state and hybrid global institutions, and develop strategies for inscribing in the global and cross-cultural framework of politics and law. Thus, "chronic threats of hunger, disease, repression" or "sudden and hurtful disruptions in the patterns of daily life"[693], which undermine human security bear an imprint of inhumanity, which is found to be detrimental to the normal development of a dignified human life. Encroachments upon human dignity meet increasingly with international condemnation and routine mobilization of naming and shaming as deterrent-inducing techniques in the often-inept arsenal of global civil society. Lebovic and Goeten argue that the act of shaming in the United Nations Commission on Human Rights through resolutions that "explicitly criticized governments for their human rights records, provided substantive information about rights abuses and gave political cover for the World Bank and other liberal multilateral aid institutions seeking to sanction human rights violators. Statistical analyses support these theoretical claims. The adoption of a UNCHR resolution condemning a country's human rights record produced a sizeable reduction in multilateral, and especially World Bank, aid."[694] Such methods are not inconsequential, as citizens of countries subject to condemnation "perceive the human rights conditions in their country more negatively when their country is shamed by the international community for human rights violations"[695] leading to pressures on governmental entities to reform their own internal constitutional orders and behavior. Beck and Meyer show that "human rights language – formerly absent form almost all constitutions – now appears in most of them", particularly in countries "imprinted with global social conditions, which now stress the discourse of human rights." [696] States' socialization in and domestication of jus cogens norms as well as their manifest failures in their execution, has led to the expansion of international humanitarian law and a renewed impetus for the creation of investigative and punitive mechanisms aimed at deterrence, compensation and accountability.

---

[692] Arend, Anthony Clark and Mark Lagon. 2014. *Human Dignity and the Future of Global Institutions.* Washington DC: Georgetown University Press.
[693] Teitel, Ruti. 2011. *Humanity's Law.* Oxford, Oxford University Press. p. 151.
[694] Lebovic, James H. and Erik Voeten 2009. "The Cost of Shame: International Organizations and Foreign Aid in the Punishing of Human Rights Violators" *Journal of Peace Research* 46(1). pp. 79-97.
[695] Ausderan, Jacob. "How naming and shaming affects human rights perceptions in the shamed country" *Journal of Peace Research.* 52(1). pp. 81-95.
[696] Beck, Colin J. and John W Meyer. 2012. "World influences on human rights language in constitutions: A cross-national study" *Journal of International Sociology* 27(4). pp. 483-501.

Moral and Political Dimension of Human Rights

Human rights literature reflects a deep interest in distinguishing between human rights as a moral concept, that is one which is concerned with guaranteeing rights on the basis of universal humanity, and human rights as a political fact, that is a privilege which individuals hold against their states in order to limit or curb sovereign power. Allen Buchannan in *The Heart of Human Rights* (2013) has argued that what distinguishes human rights is that they are grounded in corresponding moral rights, yet not all human rights are necessarily moral rights. There are certain human rights, which have a moral *ex ante* basis and justification, however, not all human rights have a moral justification as not all causes of being wronged or injured are cases of moral injury. The most basic function of human rights lies, according to Buchannan, in (1) protecting individual well-being; (2) ensuring status egalitarianism or preventing individuals from being treated in inferior ways. Human rights are thus a mean for ensuring foundational equality, distributive equality and relational equality - as all beings belonging to the human species are guaranteed the same rights - before the law. On this account, the aim of human rights is not to bend societies to Western liberal dogma, but to prevent governments from repressing and doing unseemly things to individuals. In the words of Jack Nichols, human rights provide a "floor" and not a "ceiling" for a minimal normative framework within the confines of which behavior of actors is scrutinized.

Given the above, on whom does one call to protect one's positive human and welfare rights? One of the main arguments of the dissertation has been the recognition of an institutional legal framework, which increasingly recognizes and empowers individual role in international law. Yet, due to its youthful age and contested status, the Courts have much to accomplish in order to defend their legitimacy and claim a rightful place within the community of international actors. Buchannan proposes five higher-level criteria of legitimacy that must be met by human rights institutions. Thus, international judicial regimes vested with human rights protection to be deemed legitimate must: (i) not have tainted origins; (ii) be effective and efficient; (iii) have integrity; (iv) avoid unfairness; (v) be accountable. In addition, institutions must have a telic justification, that is, they must have a point and purpose, define aims worthy of pursuit and identify reasons behind them. Justifications and legitimacy of international human rights bodies must entail assessment

of goals and command sufficient amount of standing, democratic buy-in, and respect in order to act as authoritative voices in the international legal discourse and practice. When divergence between the law and public sentiments and perceptions of international human rights institutions is at its minimum, reciprocal legitimation occurs. High institutional legitimation, in turn, generates a more inflexible and more robust application of international legal norms and insures high cooperation of states. Habermas has argued that states lose the authority to command respect when things associated with international law decay and sociological, political and normative grounds for legitimacy are lost.

One of the more compelling experiments in international adjudication has been the addition to the legal lexicon and normative-political discourse of the international criminal law regime and its hard-won bases for public democratic legitimation. It is the purpose of the subsequent sections of the chapter to focus on the International Criminal Court and its discursive and constructivist function within the international human rights law and international humanitarian law regime.

The International Criminal Court: Structure and Process

The International Criminal Court (ICC) is a treaty-based tribunal, whose existence derives from the Rome Statute.[697] Its jurisdiction is determined by the number of governments which choose to ratify and accede to the Treaty and thus enjoy certain rights and perform designated duties.[698] And although the UN Security Council refers cases to the ICC, the Court itself was not established by nor is an organ of the Security Council. Rather, thanks to the Negotiated Relationship Agreement between the United Nations and the ICC, a relationship of mutual cooperation exists between the two institutions. David Shaffer underscores, however, that the independence of the Court is "a paramount characteristic of its existence."[699]

Like most supranational judicial institutions of its kind, the ICC is divided into four organs consisting of the judicial chambers, the presidency, the prosecutor, and the registry and is supported by a large administrative bureaucracy. The eighteen judges elected by

[697] Scheffer, David. 2011. "The International Criminal Court" in William A. Schabas and Nadia Bernaz (eds.) *Routledge Handbook of International Criminal Law*. New York: Routledge. p. 69.
[698] Ibid., p. 69.
[699] Ibid., p. 69.

majority vote of the Assembly of State Parties for terms of nine years[700] preside over a substantial and highly complex and controversial caseload, which falls under four categories of ICC jurisdiction, which covers:

> "Jurisdictional regimes relating to subject matter (the crimes that be investigated and prosecuted), personal (individuals who fall under the Court's scrutiny), territorial (where the crimes are committed), and temporal (the time frame during which the Court can consider the commission of crimes in any particular situation)."[701]

Once a situation is referred to the ICC, the prosecutor has the sole authority to investigate individual suspects and seek indictments against them as long as they fall under the subject matter jurisdiction defined the by the Rome Statute. [702] The precedent setting Nuremberg and Tokyo Tribunals have been instrumental in further codification of international law with regard to crimes against humanity and individual criminal responsibility. The Rome Statute is thus the most far-reaching document to date, which expands significantly not only upon previous judicial precedent but many conventional definitions of crimes. Thus, "the crime of genocide in the Rome Statute has its roots in the 1948 Genocide Convention"[703], and crimes against humanity subsumed under Article 7 criminalize the most egregious violations of human dignity such as forcible transfers of populations, severe deprivations of physical liberty, sexual slavery, enforced prostitution, sexual violence, persecutions on national, ethnic, cultural, gender or religious grounds, enforced disappearances, and serious injuries to body and mind. [704] Article 8 updates the definitions of war crimes that go beyond earlier construal(s) recorded by past tribunal charters and statutes. [705] Drawing upon the Geneva Conventions, the Hague Conventions, Geneva Protocols of 1977, the Rome Statute in Articles 3 and 8(1) gives the ICC jurisdiction over war crimes "in particular when committed as part of a plan or policy or as a part of a large-scale commission of such crimes."[706] And Article 21(3) "provides for an unprecedented

[700] Ibid., p. 69.
[701] Ibid., p. 69.
[702] Ibid., p. 73.
[703] Ibid., p. 70.
[704] Ibid., p. 71.
[705] Ibid., p. 71.
[706] Ibid., p. 72.

and far-reaching application of 'internationally recognized human rights', not only as a source of law but also as a 'general principle of interpretation.'"[707] The Court can exercise jurisdiction over any state party to the Rome Statute, who are subject to referral on the basis of alleged commission of the crime. Yet, its area of operation is not unlimited but temporarily bound and restricted. Article 11(1) of the Rome Statute gives the ICC power to exercise its "jurisdiction only over atrocity crimes committed following the entry into force of the Rome Statute on 1 July 2002" [708] or after the ratification of the Statute by the State party. No State or individual can bear retroactive liability for crimes allegedly committed before that date. To prevent impunity for war atrocities that took place prior to the full activation of the ICC mandate, however, the Security Council, through a number of special treaty relationships, has established a number of tribunals and hybrid courts especially tasked with investigating and trying crimes prohibited under the International Law of Armed Conflict or the International Humanitarian Law, such as the International Criminal Tribunals for the former Yugoslavia and Rwanda, the Special Court for Sierra Leone, special panels in East Timor, or the Extraordinary Chambers in the Courts of Cambodia.

The work of the International Criminal Court is guided by a "cascading priority of sources" and includes, in the first place, the Rome Statute itself and its Rules of Procedure and Evidence and the Elements of Crimes; secondly, the principles of international law and the law of armed conflict; and lastly, the general principles of law derived from national legal systems.[709] Like its supranational counterpart, the ICJ, the ICC cannot ignore the growing import and prospective integration (and possible conflicts of law) between the law of war and international human rights law, allowing for prioritization and protection of humanity against arbitrary acts of state of grievous character on the international scene. Given its tremendous legal potential and international standing, the ICC's operation and process is characterized by deferential complementarity. Its primary duty is to ensure that national court systems are given sufficient opportunity to "Investigate and prosecute

[707] Cryer, Robert et al. 2016. *An Introduction to International Criminal Law and Procedure.* Cambridge: Cambridge University Press. p. 429.
[708] Ibid., p. 73.
[709] Ibid., p. 74.

individuals suspected of committing atrocity crimes referred to the Court."[710] The ICC takes initiative only after national courts are unwilling or unable to carry out proper investigations or prosecutions. After all, "the long-term objective is to strengthen the capabilities of an incentivize national courts to prosecute atrocity crimes and use the Court … for cases that cannot be prosecuted elsewhere."[711]

One of the groundbreaking developments in international justice has been the ICC mandate permitting the Court to investigate and bring to justice individual human beings, who under Article 25 of the Rome Statute, are suspected of having been the perpetrator, a "lead planner or organizer of the atrocity crime and acted individually or jointly with another or through another person"[712] to "order, solicit, or induce" the crime or have been deemed an accomplice or an accessory to the crime by aiding, abetting, or otherwise assisting the crime.[713] Moreover, Article 27 of the Statute, "denies immunity from prosecution for any government official, civilian, or military" regardless of that individual's official capacity.[714] The Rome Statute thus, while paying tribute to its Nuremberg precedent, constitutes the "first treaty codification among nations of an explicit principle of leadership liability devoid of immunity defenses"[715], which may be highly consequential to the way in which State officials and military planners conduct themselves in international relations and theaters of war.

Impacts of International Adjudication

The political failures of the 1990's have ushered in an era of criminal accountability aimed at the renewal of faith in international justice, redress, contribution to peace and reconciliation through a methodical but non-negotiable reaffirmation of values. Domestic as well as international courts have shown an invested effort in the rule of law through its articulation and refinement on the basis of the principle of fairness, avoidance of arbitrariness and transparency. There is now an emerging international consensus, which stresses the significance of international criminal accountability of states and individual

[710] Ibid., p. 75.
[711] Ibid., p. 75.
[712] Ibid., p. 76.
[713] Ibid., p. 76.
[714] Ibid., p. 77.
[715] Ibid., p. 77.

responsibility of the heads of states for egregious crimes against humanity and a renewed faith in international courts, which are rooted in the rule of law and human rights principles. Their extraordinary mandate pursued under the aegis of universal jurisdiction seeks to not only copy but expand the work of domestic courts by hearing witness depositions, weighing evidence, developing rules of evidence and procedure through an extraordinary corpus of rulings which aims at the promotion of legal certainty, procedural transparency, and coherence of law in accordance with the legality principle, or, a fundamental principle which ensures fair application of the law in all circumstances and rendering of decisions beyond reasonable doubt. The explicit, albeit often-misunderstood, aim of international adjudicatory and prosecutorial mechanisms is their consistent affirmation of the rule of law, facilitation in the rebuilding and stabilization processes of societies by faithful and apolitical execution of justice and accountability. Contrary to public expectations, the court is neither a proper nor a desired entity for the establishment of peace or ushering in of post-conflict reconciliation. As Judge Meron notes, such a mandate could lead to the subversion of respectable legal principles for extraneous purposes (i.e. meeting the needs and expectations of the wronged victims as outlined above) and divert the court form the pursuit of evidence, its assessment and meting out of individual responsibility beyond reasonable doubt as suggested by the evidentiary record and facts of the case. One of the most serious misdemeanors of the court signifying a failure of the system of international justice would be its blind attempt to prosecute in the absence of evidence satisfying the prosecutorial threshold beyond reasonable doubt. It is easy to see, then, how the desires of the victims to prosecute and the court's denial to do so on the basis of a lack of strong evidentiary grounds or the concern for stepping outside of its narrow statutory mandate, may cause a fragmentation in the public perceptions of international justice, if not accusations of its outright denial. In the words of Judge Meron, the decision not to prosecute does not mean that the crime has not occurred, but merely that the prosecutor has failed to prove the case beyond reasonable doubt rather than serve as a partial pawn of the rightfully indignant victims, whose misperceptions of the court's mandate and absence of desired outcomes issue in an indiscriminate indictment and disconcerting devaluation of all international legal mechanisms.

Victim representation in the ICC has been a subject of much interest in the academic circles and reform in the practice of the Court. The UN General Assembly Resolution of 29 November 1985 "enables victims" to take part in proceedings initiated on account of serious and egregious violations of the international human rights law and humanitarian law. Article 75 of the Rome Statute considers vital the right of victims directly affected by crimes lying under the Court's jurisdiction and endows them with a full range of entitlements to (i) restitution, (ii) compensation, and (iii) rehabilitation. Their participation in the proceedings must be effective and not merely symbolic and assisted by legal representation guaranteed by a procedural Rule 90 of the Rules and Procedures. To fulfill the procedural rights and entitlements, the counsel-client relationship is one of close and ongoing contact, legal advice, and exchange of evidence and the ICTY Tadic Case serves as an important precedent and guide in the ever-evolving nature of the victims' interaction with the Court. Due to budgetary constraints, however, the ICC projects to introduce practical reforms, such as: (i) revisions and cuts to the legal aid budget by 25%; (ii) transform Counsel-Victim interactions into more technocratic and administrative relations; (iii) turn victimhood into a symbolic and collective rather than individual concept. The Court's youth and international skepticism surrounding its work, necessitates that the Court assigns a system of representation on a case-by-case basis grounded in need and nature of the case and its victims and that it weighs carefully, in the context of an adversarial trial system, the interests of justice and the defendant's right to a "fair trial" with the interests of victims.

Another inherent weakness of the system which breeds much distrust and delegitimization is the court's assertion of jurisdiction and the perceived arbitrary selectivity of situations and cases. By inquiring after Libya and Sudan, but not Syria, the court has pointed to the need for deep structural and administrative reforms which would permit it to expand the scope of its operations and act independently of the UN Security Council's political and financial influence. Limited jurisdiction presents an enormous challenge to international justice and is typically delimited by: (i) States accession to treaties; (ii) the UN Security Council's political alignments, configurations and the power of the purse; (iii) Scarcity of resources, which undermine the will and effort to create or replicate new judicial bodies with similarly minded human rights mandates. Yet, measures

can be developed to overcome the real and perceived difficulties in delivering justice across borders, as "jurisdiction over some cases is still better than no jurisdiction at all."[716] Thus, (i) trust in positive complementarity, (ii) incentivizing of states to maximize their own domestic investigative and prosecutorial powers in a timely and exhaustive fashion, (iii) exchange of legal know-how and innovation across jurisdictions, (iv) borrowing of jurisprudence and finessing of an inter-institutional vision and substantive content of international law between complementary supranational judicial regimes, are apt prospective steps in responding to and remedying the popular opprobrium and the many legal controversies and criticisms stemming from the courts' work.

The existing system of international criminal justice endeavors to balance state's accountability against conceptions of national interest and state sovereignty. Yet, in so doing, the Courts must confront and reframe the foundational principles of the international state order conceived on the idea of sovereign immunity, the doctrine of act of state and exhaustion of domestic remedies. The following chapter aims to show that consistent prosecution of crimes of the most serious offence and gravity by the International Criminal Court is a *conditio sine qua non* for the preservation of an international system of human rights and cosmopolitan norms. The Court is involved in a significant work of normative translation and precedent setting, which has a future-oriented aim, that of mitigation, remediation, and deterrence which have an enormous bearing on state behavior and citizens' own human, political, and economic rights. The subsequent sections will attempt to illustrate the importance of the international criminal regime through an in-depth analysis of the cases, which have come before the Court since its inception in 2003. Theoretical and practical implications will be considered with a view to suggesting policy-implications and recommendations for the continued collaboration and cooperation with the institution, which constitutes an instrumental part and parcel of international adjudication, law-making and a system of punishments at the highest level of governance.

[716] Judge Meron lecture at Oxford University Law Faculty (All Souls College) - December 2, 2014.

The ICC Innovations

A. State Criminal Responsibility

The development of international criminal responsibility of states and individuals came as a response to the inadequacies of traditional bilateral procedures' deterrent efficacy against breaches of international law.[717] Before the revolution in international adjudication, misbehavior of states was met with largely symbolic and nominal injunctions whereby the General Assembly or the Security Council declared it contrary to the spirit of international law and expectations of the global civil society. Punishment by disgrace constituted an inkling of international criminal responsibility, which was to be speedily followed by calls for reparations, the restoration of the previously existing order and alternation of state's behavior. The language of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts ("Draft Articles") by the International Law Commission (ILC) in August 2001, however, makes evident the legal import of attributions of responsibility to the conduct of states. The Draft addresses itself to a broad range of circumstance ranging from: (i) characterization and articulation of the elements of internationally wrongful acts of State; (ii) Conduct of organs of a State, of persons and entities under the jurisdiction of a State and other official authorities; (iii) Conditions determining State's breach of international obligations; (iv) Responsibility of a State in connection with the act of another State; (v) Circumstances precluding wrongfulness; (vi) Legal consequences of an internationally wrongful acts; (vii) Reparation for injury; (viii) Admissibility of claims and considerations for the loss of the right to invoke responsibility; (ix) Individual responsibility; (x) Responsibility of an international organizations. Collectively, the Articles intend to specify:

> "the principles which govern the responsibility of States for internationally wrongful acts, maintaining a strict distinction between this task and the task of defining the rules that place obligations on States, the violation of which may generate responsibility. [I]t is one thing to define a rule and the content of the obligation it imposes, and another to determine whether that obligation has been violated and what should be the consequences of the violation."[718]

---

[717] Gray, Christine D. 1990. *Judicial Remedies in International Law.* Oxford: Clarendon Press.
[718] Ago, Roberto. 2001. "Responsibility of States for Internationally Wrongful Acts"
< http://www.eydner.org/dokumente/darsiwa_comm_e.pdf > p. 60.

As a commentary on the Draft makes plain, the articles "seek to formulate, by way of codification and progressive development, the basic rules of international law concerning the responsibility of States for their internationally wrongful acts" rather than attempting to "define the content of the international obligations breach which gives rise to responsibility."[719] Specificity of content still abides with customary and conventional international law.

The Report on a More Secure World points to six clusters of threats to which international organizations serious about defining, aligning, and operationalizing their values and principles,[720] must inevitably respond. They are:

> "economic and social threats including poverty, infectious diseases, and environmental degradation; international conflicts; internal conflicts including civil war, genocide, and other large-scale atrocities; threats from nuclear, radiological, chemical, and biological weapons; terrorism; and transnational organized crime…"[721]

Courts are not immune from forceful interpretation of international legal guidelines when confronted with serious violations of state and human rights. Particularly challenging for the International Criminal Tribunals and Courts will be a reasonable accommodation of the "responsibility to protect" norm into a cluster of internal law principles, which rely upon fundamental and absolute principle of state sovereignty, which R2P subverts by qualifying it. Hotly contested UN authorizations in favor of forcible humanitarian actions, which fail to meet the vaguely defined parameters of what level of heinous conduct constitutes genocide, ethnic cleansing, or serious violations of humanitarian law[722] will undoubtedly constitute a subject of legal adjudication. Already the International Criminal Court opened several cases in Africa concerning 25 individuals accused of perpetrating crimes in Libya, Kenya, Sudan (Darfur), Uganda (the Lord's Resistance Army, LRA), the Democratic Republic of Congo, and the Central African Republic. Preliminary examinations of Côte d'Ivoire, Guinea, and Nigeria, along with Afghanistan, Colombia, Georgia, Honduras, and the Republic of Korea are ongoing.

---

[719] Ibid., p. 59.
[720] Tsagourias, Nicholas. 2010. "Cosmopolitan legitimacy and UN Collective Security" in: Pierik, R. and Werner, W., (eds.) *Cosmopolitanism in Context.* Cambridge: Cambridge University Press. p. 144.
[721] Ibid., p. 145.
[722] Ibid., p. 140.

Thus, international judicial and arbitration mechanisms hold a crucial and constantly evolving responsibility for the promotion of justice. The following sections aim to explore just how successful are such judicial processes, particularly the pioneering International Criminal Court, in securing international and domestic justice. Does the appearance of the ICC and other like regional judicial bodies strengthen or undermine domestic institutions and the global topography of justice? In the absence of domestic forum for redress, can the increasing crystallization and codification of international law lead to an inevitable over-legalization of the global system and, in consequence, severely and ultimately undermine the pursuit of cosmopolitan justice?

If law, as Wendell Holmes has us believe, is a function of judicial behavior – "law is what courts will do" – then, formal adjudication by a court of elected or especially formed tribunal constitutes an important insight into the development, evolution and interpretation of international norms and guidelines by which states and, increasingly, individuals ought to abide and be protected. Yet, much criticism of the international system prevails. Namely, concerns over fragmentation of international law due to excessive regionalization and variable political will in the enforcement of mechanisms and decisions of international courts constitutes one of the more formidable obstacles to an integrated, yet pluralist conception of law. Second, with some 125 operative judicial bodies in place, fears of achieving a good balance between different legal and moral value systems abound.[723] An especially challenging *problematique* of modern international jurisprudence is the creation of a sufficiently robust framework for balancing states' accountability with their own conceptions of national interest, sovereign immunities, and the privileged evocation of the doctrine of act of state. Hence the growing necessity of moving beyond the state-centric model of adjudication to a human-centered and cosmopolitan one, where an increasing number of treaties address and regulate not only relations between states, but also serve individual and community interests in the sphere of international criminal responsibility for acts of commission and omission in times of war, the use of force, economic affairs and human rights. This may very well require, as Andreas Paulus, contends, a shift from a territorially-oriented jurisdiction to the one based on functionality

[723] Paulus, Andreas. 2010. "Adjudication and International Law" in Samantha Besson and John Tasioulas eds., *The Philosophy of International Law*. Oxford: Oxford University Press. p. 208.

– or, "from a world of sovereign territorial states to a world of functional institutions"[724] – of which the ICC constitutes an intriguing experiment. What's more, the analytical and political agenda of international relations, Timothy J. Sinclair suggests, may require a movement way from a scholarly *idee fixe* of sovereignty and anarchy, which are so very central to and dominant in our present-day conceptualizations of international justice.[725]

Like its similarly-minded regional cousin (the ECtHR), the ICC has a potential of crystalizing, codifying and cementing international norms and laws regarding the international law of war and the international humanitarian law in the consciousness of states and their emissaries. By enhancing thus, the functionality of a specialized international legal system,[726] here the LOAC and IHL, the ICC provides clear and relatively undisputed guidelines for the institutionalization and maintenance of order between states, and increasingly between states and citizens, which is perceived to be non-arbitrary and fair. In so doing, the international judicial regime has an opportunity to articulate the "inner morality" of international law. The Court, thus, in insisting on "subjecting human conduct to the governance of rules"[727] follows in the footprints of its domestic counterparts, if and only if, it and other law-articulating bodies, adhere in their legal reasoning and law-making trajectory to several principles: (i) articulation of rules, (ii) publication of rules; (iii) prospective application of rules: (iv) intelligibility of rules; (v) non-contradiction of rules; (vi) possibility of compliance with stated rules; (vii) lack of too frequent or too dramatic a change in the rules; and (viii) application of rules as declared.[728] The above-stated, do not aim at making the legal system sterile and efficient. To the contrary, their objective is to sustain dignity, reduce arbitrariness in the use of power, and ensure conditions for autonomy.[729] *In toto*, they give the international legal system a moral character whose formal intention lies in endeavoring justice. If law is a particular way of achieving a socio-legal order, then the rules and norms governing such order must be intrinsically (i) purposive and value-laden to elicit emotive and rational commitment, and (ii) procedural and functional in order to come to full practical fruition.

---

[724] Ibid., p. 213.
[725] Sinclair, Timothy. 2008 *Theory Talks* < http://www.theory-talks.org/2008/05/theory-talk-5.html>
[726] Paulus, 'Adjudication and International Law', p. 214.
[727] Fuller, Lon L. 1964. *The Morality of Law.* New Haven: Yale University Press. p. 122.
[728] Ibid.
[729] Ibid.

The ICC's present involvement in 22 cases and 9 situations makes the consistent application of the above a moral and judicial imperative in order to ensure legitimacy of the international criminal system as a whole. The 1998 Rome Statute provides an explicit rulebook within which the judges of the Court must operate irrespective of the changeable moods and preferences of the international community of states, political climate, or special interests or interest-guided directives of the UN Security Council. Close followers of the ICC's work agree that the Court "represents a clear improvement in the codification of human rights, sometimes going further than international human rights law."[730]

Yet, to state that the ICC is an utter success, which meets with little to none resistance on the part of states would be a terrible misconstrual of its limited mandate and present prosecutorial crisis. Among the founding fathers of the international system of law, one prominent state actor stands out, the United States, and its all too eager embrace of historical exceptionalism and sui generis mission in world affairs. In recent years, Philippe Sands contends, the media portrayed the USA as "having turned its back on established international rules, in particular on the use of force, the protection of individual human rights and the conduct of warfare."[731] The ongoing crisis of legitimacy of international law, and by extension of international courts, has been exacerbated by "a la carte multilateralism"[732] of the United States shaped and defined by the post-9/11 security environment. Indefinite and unlawful detentions at Guantanamo Bay prison, extrajudicial killings of US citizens and other non-US nationals by drone-guided missiles, prisoner capture and detention in CIA black sites spread across Europe, waging of a legally questionable war in Iraq, has led many to question the US commitment to the evolution of and obedience to the normative and practical contours of international law thus also highlighting the judicial system's own incapacity to bring independent and self-initiating oversight and accountability for overt violations of the law of nations, humanitarian and human rights laws. The above does not suggest, however, that the subversion of

---

[730] Cryer, Robert et al. 2016. *An Introduction to International Criminal Law and Procedure.* Cambridge: Cambridge University Press. p. 437.

[731] Sands, Philippe. 2003. "And God Came Down from the Mountain" *Index on Censorship* 4(03), 2003. p. 116.

[732] "America's 'a la carte multilateralism' – a polite term used in the State Department for its self-serving support for only those international laws that suit it – is undermining the international legal order and US long-term interests." Philippe Sands in *Index on Censorship* p. 116.

international rules by one, albeit powerful, state actor is able to dissolve normative and ideological commitments to the spirit and utility of the law. After all, the United States has been a vocal and leading proponent of international commitments with regard to commerce, trade and economic liberalization and has been behind numerous international agreements, which resulted in a rules-based system of international governance under the auspices of NAFTA and the WTO. The U.S. army manual takes exceptional measures to ensure that the codes of conduct in war are adhered to and normative ideals of humanity preserved in combat operations by its military personnel. Therefore, especially egregious crimes against the non-combatant and civilian population are treated with exceptional attentiveness of the international humanitarian law and special regional, military and international courts and tribunals determined in the words of the Rome Statute to "put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes" in order to "guarantee lasting respect for and the enforcement of international justice."[733]

But it is precisely the inability to enforce international law guidelines that provokes the ire of skeptics, who not only question its efficacy but also its genesis. Is international law really law if it lacks punitive and enforcement mechanisms visibly present at the municipal level and when states retain a monopoly on compliance with its codes of conduct in international affairs? Scholars, such as Anthony D'Amato, Jonathan Charney and Norman Geras suggest that there already exists "an effective decentralized system for imposing sanctions on violators of the law through individual state and collective acts of disapproval, denial, and penalties."[734] Sikkink finds that countries with human rights prosecutions tend to have better human rights practices than countries without prosecutions.[735] Perpetration of acts of torture, summary executions, disappearances, genocide, and political imprisonment are naturally influenced by levels of democracy and development, as well as, the states' own buy-in into international conventions and treaties. Studies have shown that ratification of international human rights treaties, the population

[733] Rome Statute of the International Court , "Preamble" < https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf>
[734] Geras, Norman. 2011. *Crimes Against Humanity: Birth of a Concept.* Manchester: Manchester University Press. p. 115.
[735] Sikkink, Kathryn. 2011. *The Justice Cascade*. New York: W.W. Norton & Co. p. 185.

size and population growth of the country has an impact on human rights practices, just as much as transition to democracy, improvements in the levels of liberty, functionality of the judicial system and willingness to muster legal resources for human rights prosecutions and punishment.[736] Contrary to the claims of doubters, human rights prosecutions do not elevate levels of violence in transitional societies or exacerbate governmental repression.[737] Eric Posner, himself a skeptic of the international human rights regime, points out that states' compliance with the international treaty law is motivated by fear that any instances of non-compliance might cause other states to reciprocally retaliate or violate their own legal obligations towards them. In his *Twilight of Human Rights* (2014), Posner notes, however, the reasons for an inconsistent compliance with international law on the part of states that range from collective action problems, free riding, the lack of coercive mechanisms that can effectively exert pressure or sanction countries in key areas of trade, security, technological assistance, political isolation or boycott. [738] At the domestic lever, states' compliance with treaty law is influenced by pressures issuing from voters and NGOs in democratic constituencies and the political elites in non-democratic constituencies. Likewise, access of citizens to judicial arbitration and litigation mechanisms can force states to comply, albeit ambiguously and inconsistently, Posner implies, with human rights and international treaty law.[739]

Case Law and Effect of Supranational Adjudication on Domestic Regimes

Consider that since the period of decolonization that swept across Asia and Africa between 1945-1960 and more consistently since the end of the Cold War,

> "the rulings of international judges have led Latin American governments to secure indigenous peoples' land rights; the United States Congress to eliminate a tax benefit for American corporations; Germany to grant women a wider role in the military; Niger to compensate a former slave her entrapment in Niger's family law justice system; and Congolese warlord Thomas Lubanga Dyilo, Liberian President Charles Taylor, Jean Paul Akayesu, and others to be convicted for conscripting child soldiers, abetting insurgents in neighboring countries, and tolerating rape."[740]

---

[736] Ibid., p. 182.
[737] Ibid., p. 185.
[738] Posner, Eric, A. 2014. *The Twilight of Human Rights*. Oxford: Oxford University Press. p. 80-82.
[739] Ibid., p. 85.
[740] Alter, Karen. 2014. *The New Terrain of International Law*. Princeton, Princeton University Press. p. 3.

What is essential to note, therefore, is not only the preponderance of judicial institutions and rulings on the world stage, but also the growing and self-evident role of emboldened judges, both, at the domestic and international level.[741] International courts are increasingly speaking to "issues that used to fall exclusively within the national domain"[742] and literature and case law confirm that domestic courts and supreme judicial bodies of the land increasingly respond to international legal precedent as well as shape the interpretation and understanding of international human rights with regard to a plethora of international crimes detrimental to human well-being and flourishing that range from unlawful detention and torture of persons, terrorism, arms trafficking, conspiracy to commit crimes in the context and under an umbrella of the war on terror. Yet some formidable critics, such as Posner and Yoo, accuse the international system of courts of judicial ineffectiveness when it comes to compelling state compliance. Alter, Helfer and Slaughter rightly distinguish, however, compliance from effectiveness by arguing that effectiveness is different than compliance. "Effectiveness entails inducing a change from the status quo in the desired direction, even if the result is less than full compliance."[743]

Even the notoriously inward-looking U.S. Supreme Court in *Hamdan v. Rumsfeld, Secretary of Defense, et al.* took note of plaintiffs' rights under Hague and Geneva Conventions when the United States charged him with a conspiracy to commit acts of terrorism, which resulted in his detention without charge at the US Guantanamo Bay prison. Domestic means and "acts of state", such as the US Congress Joint Resolution authorizing the President of the United States to "use all means necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided" the September 11, 2001 al-Qaeda terrorist attacks on the World Trade Center Towers in New York City, have had significant impact on rights of foreign nationals engaged in the theatre of the "war on terror." The U.S. invasion of Afghanistan, a capture of a Yemeni national, Salim Ahmed Hamdan, by militia forces and his subsequent handing over to the U.S. military which led to his transfer and detention at Guantanamo Bay, Cuba raised important questions of international law, those of jurisdiction and authority of trial

[741] Ibid., p. xv.
[742] Ibid., p. xv.
[743] Ibid., p. 6.

by military commission for "then-unspecified crimes" of foreign fighters and suspected terrorists. In 2002, the U.S. charged Hamdan with conspiracy "to commit … offenses triable by military commission." The international law of war, however, sets clear preconditions for the tribunal's exercise of jurisdiction in Article of War 15 (and UCMJ Art. 21). The tribunal's jurisdiction, thus, must be "limited to trying offenses committed within the convening commander's field of command, i.e., within the theater of war, and that the offense charged must have been committed during, not before or after, the war."[744] In habeas and mandamus petitions, Hamdan argued that the military commission lacks authority to try him because "(1) neither congressional Act nor the common law of war supports trial by this commission for conspiracy, an offense that, Hamdan says, is not a violation of the law of war; and (2) the procedures adopted to try him violate basic tenets of military and international law, including the principle that a defendant must be permitted to see and hear the evidence against him."[745] Since, Hamdan is "not alleged to have committed any overt act in a theater of war or on any specified date after September 11, 2001", which would fall under the rubric of conspiracy, the offense purported "is not triable by law-of-war military commission."[746] The U.S. Supreme Court in its June 29, 2006 decision agreed that Hamdan's (i) military commission is unauthorized under the Uniform Code of Military Justice, 10 U. S. C. §§836 and 821 and the Geneva Conventions; (ii) "The crime of 'conspiracy' has rarely if ever been tried as such in this country by any law-of-war military commission not exercising some other form of jurisdiction, and does not appear in either the Geneva Conventions or the Hague Conventions—the major treaties on the law of war."[747] Furthermore, the U.S. Supreme Court took note of precedent and other international judicial bodies when justifying its conclusions:

> "conspiracy is not a recognized violation of the law of war is confirmed by other international sources, including, e.g. the International Military Tribunal at Nuremberg, which pointedly refused to recognize conspiracy to commit war crimes as such a violation. Because the conspiracy charge does not support the

[744] Supreme Court of The United States - *Hamdan V. Rumsfeld, Secretary of Defense, Et Al.* Certiorari to the United States Court of Appeals for the District of Columbia Circuit <https://www.law.cornell.edu/supct/html/05-184.ZS.html>
[745] Ibid.
[746] Ibid.
[747] Ibid.

> commission's jurisdiction, the commission lacks authority to try Hamdan."[748]

What is more important, the Supreme Court asserted heeding Alexander Hamilton's warning, that arbitrary imprisonment is "the most formidable instrument of tyranny"[749] and that even "the Constitution does not give the President (or Congress) a blank check to determine the response"[750] or breach their political authority in responding to international crises. Similarly, the judgments of the European Court of Human Rights with regard to Central Intelligence Agency's rendition and secret detention sites in Lithuania, Italy, Macedonia, Poland, and Romania show a concerted and consistent application and defense of the European Convention of Human Rights across borders, which challenge foreign policy agendas and objectives of states. In *El-Masri v. The Former Yugoslav Republic of Macedonia* (2014) the ECtHR established beyond reasonable doubt that the defendant state has violated Article 3 (prohibition of torture and inhuman or degrading treatment), Article 5 (right to liberty and security), Article 8 (right to respect for private and family life) and Article 13 (right to an effective remedy) of the European Convention, when it exposed a German national of Lebanese origin to secret "rendition" operations during which El-Masri was "arrested, held in isolation, questioned and ill-treated in a Skopje hotel for 23 days, then transferred to CIA agents, who brought him to a secret facility in Afghanistan, where he was further ill-treated for over four months." [751] In highly controversial judgments, critics of international courts do not hesitate to "suggest that judges inevitably overstep their authority" when they question state behavior or "generate domestically binding higher order law."[752] Moreover,

> "Opponents of international legal authority regularly argue that national democratic will should trump international legal obligations, that governments should not be able to use international law to circumvent domestic processes, and that national court rulings should be based purely on analyses of domestic laws and the national constitution." [753]

---

[748] Ibid.
[749] Breyer, Stephen 2015. *The Court and the World: American Law and the New Global Realities*. New York: Vintage Books. p. 76.
[750] Ibid., p. 78.
[751] ECHR "Secret Detention Sites" <http://www.echr.coe.int/Documents/FS_Secret_detention_ENG.PDF>
[752] Alter, The New Terrain of International Law, p. 293.
[753] Ibid., p. 293.

State compliance with international law and judicial interpretations and decisions is, therefore, made all the more problematic by various instances of the "state of exception" which seems to guide state behavior under conditions of the "war on terror" and results in routine suspensions of civil and constitutional rights of American citizens as a consequence of surveillance and arrest practices of the United States government. Not only did the Bush administration not take international law seriously, but "disregarded it whenever it was thought to conflict with the national interests of the country"[754] invariably, eliding the country's moral standing among the community of states and leading to significant foreign policy ramifications. Bradley brings up numerous high-profile nullifications of vital international agreements, which ease international cooperation and ensure moral and political commitment to international legal standards.

> "First, the Administration withdrew from two treaties—the Anti-Ballistic Missile Treaty with Russia, and the Optional Protocol to the Vienna Convention on Consular Relations, which gave the International Court of Justice in The Hague jurisdiction over certain disputes relating to the arrest of foreign nationals in the United States. Second, the Administration allegedly took the unprecedented step of 'unsigning' the treaty establishing the International Criminal Court. Third, the Administration concluded that it would not apply the protections of the Geneva Conventions to terrorist detainees, including the detainees held at the Guantanamo Bay naval base in Cuba. Fourth, the Administration announced a military preemption doctrine, a doctrine that many international lawyers think exceeds the international law right of self-defense. Fifth, the United States invaded Iraq in early 2003—an action that many regard as a violation of fundamental international law norms governing the use of force. Finally, the Administration allegedly authorized torture of terrorism suspects, in violation of treaty obligations and other international responsibilities."[755]

Despite the Obama administration's promise to recommit the United States to compliance with international law and its institutions,[756] its own unauthorized drone strikes and warfare by alternative means in Pakistan, Afghanistan, and Iraq remains gravely unfulfilled and complicates the country's foreign policy objectives which it must endeavor in cooperation

---

[754] Bradley, Curtis. 2009. "The Bush Administration and International Law: Too Much Lawyering and Too Little Diplomacy" *Duke Journal of Constitutional Law & Public Policy* (4): 57-75.
[755] Ibid., p. 57.
[756] Ibid., p. 57.

with other state partners.

Whether the constitutional tradition of the United States recognizes the supremacy of international treaty law is a matter of intellectual contestation and legal dispute. While, generally, strong evidence based in case law suggests the U.S. Supreme Court's reliance upon and incorporation of international legal doctrine into domestic law since 1790s, the recent "internationalist" turn of the Court has generated political controversy and fears over diminution of US sovereignty. The Supreme Court's international law discourse in *Sosa v. Alvarez-Machain*, *Republic of Austria v. Altmann*, *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, *and Rasul v. Bush*, demonstrates, according to Harlan Grant Cohen, that "the Justices clearly do not agree with each other on the nature and role of international law, or international sources, for that matter, and at times the nascent theorizing seems hesitant or confused."[757] Moreover, the Court remains wary of impinging upon "its own independence of that of the United States" in an era of globalization and terrorism. [758] Thus,

> "the Court is far more likely to invoke international and foreign law to redress wrongs abroad than at home. It also appears to be far more comfortable with foreign and international law as persuasive authority or as an interpretive device which it can choose to apply, rather than as a rule of decision by which it would be bound. The Court is eager to engage international and foreign law, but only on its own terms."[759]

Yet, the Court's willingness to delve into international law discourse also demonstrates opportunities for the United States to play a more active role in the construction, development, and articulation of the international legal order. [760] Unlike its supranational counterparts, however, the U.S. Supreme Court's support for human rights is situational and precarious at best and its fear of exposing lower courts to international litigation presents an obstacle to the advancement of international theory and doctrine.

One of the victories of the recognized presence and instrumental value of international judicial regimes, however, is the insistence of weaker states often victimized by tenuous commitments of the international community to their very existence and well-

---

[757] Cohen, Harlan Grant. 2006. "Supremacy and Diplomacy: The International Law of the U.S. Supreme Court", Berkley Journal of International Law 24(1). p. 279.
[758] Ibid., p. 280.
[759] Ibid., p. 280.
[760] Ibid., p. 280.

being, on becoming active members and participants in their discourse and practice. It remains to be seen, of course, in what ways the Palestinian Authority's inclusion in the ICC mandate impacts the behavior of Israeli officials, military commanders, and alters the trajectory of the Israeli acts of state. Yet, if the controversy surrounding this move on the part of Palestine is to be indicative of its potential effects on state behavior, then it can be said that the ICC mandate to prosecute crimes against humanity and bring those responsible for violations of the laws of war and other international agreements bodes well for strengthening the grip of international litigation on inhumane and illegal behavior against the protected objects and civilian population under the respective Geneva and Hague Conventions. The Palestinian Authority's accession to the Rome Treaty on January 1, 2015 opens possibilities for investigating Israel's conduct in the Gaza Conflict and legally challenging Israel's settlement construction. Since, Israel, like the US, is not a state party to the ICC's Rome Statute, it is still very likely that its citizens could be tried on accusations of crimes on Palestinian lands.[761] Conscious of the potential repercussions, Israel has expressed its disapproval of Palestinian intentions by "freezing the transfer of Palestinian tax revenues, plunging the West Bank into a deeper financial crisis."[762] Meaningful legal action by the ICC will have to resolve the perennially difficult and highly politicized questions of the precise geographical boundaries of the state of Palestine and decide upon the temporal framework or statute of limitations for ICC investigations. Additionally, the Court will have to address itself to the question of complementarity. As a matter of procedure, the ICC does not look into cases that are under investigation in other relevant jurisdictions. It is therefore unlikely that the Court will take up the 2014 Gaza conflict as internal Israeli investigations are already underway.[763] The issue of settlements, however, is not being actively investigated at this time and will likely generate a substantial debate in view of the International Court of Justice's past opinions regarding Israel's construction of the wall.

When scholars speak of judicialization of politics they mean to suggest the

---

[761] Lazareva, Inna. 2015. "Palestinian Authority formally joins the ICC – but what will it mean for Israel and PA? *The Guardian*
<http://www.telegraph.co.uk/news/worldnews/middleeast/palestinianauthority/11505741/Palestinian-Authority-to-formally-join-ICC-but-what-will-it-mean-for-Israel-and-PA.html>
[762] Ibid.
[763] Ibid.

instances in which "politicians conceive of their policy and legislative options as bounded by what is legally allowed and when courts gain authority to define what the law means."[764] Increasingly, the onus of responsibility for political decisions with legal consequences rests on individual heads of state and commanders on the battlefield vested with execution of sovereign and strategic aims of the state. Article 7 of the Rome Statute of the International Criminal Court reserves for itself the special privilege of prosecuting especially egregious crimes against humanity such as murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment or severe deprivation of physical liberty, torture, rape, sexual slavery, persecution against collectivities on political, racial, national, ethnic, cultural, religious or gender grounds, enforceable disappearance of persons, the crime of apartheid, and other inhumane acts of similar character.[765] Additionally, the ICC has broad jurisdiction over the crime of genocide, crimes of aggression and war crimes and has involved itself in total of 22 cases and 9 situations[766] in Uganda, the Democratic Republic of the Congo, the Central African Republic and Mali, Darfur, Sudan, Kenya, and Libya. Investigations and pre-trial hearings are ongoing in *The Prosecutor v. Joseph Kony, Vincent Otti, and Okot Odhiambo* and *The Prosecutor v. Dominic Ongwen* (Uganda). Joseph Kony, who remains at large, is "allegedly criminally responsible for thirty-three counts on the basis of his individual criminal responsibility (articles 25(3)(a) and 25(3)(b)"[767] of the Rome Statute, including:

> "Twelve counts of crimes against humanity (murder - article 7(1)(a); enslavement - article 7(1)(c); sexual enslavement – article 7(1)(g); rape - article 7(1)(g); inhumane acts of inflicting serious bodily injury and suffering - article 7(1)(k)); and, Twenty-one counts of war crimes (murder - article 8(2)(c)(i); cruel treatment of civilians – article 8(2)(c)(i); intentionally directing an attack against a civilian population – article 8(2)(e)(i); pillaging - article 8(2) (e)(v); inducing rape – article 8(2)(e)(vi); forced enlistment of children - 8(2)(e)(vii))."[768]

---

[764] Alter, The New Terrain of International Law, p. 64.
[765] de Londras, Fiona. 2011. "The International Criminal Court" in William A. Schabas and Nadia Bernaz (eds.) *Routledge Handbook of International Criminal Law*. New York: Routledge. p. 172.
[766] International Criminal Court, "Situations under Investigation" <http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx>
[767] International Criminal Court, *The Prosecutor v. Joseph Kony and Vincent Otti*< http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200204/related%20cases/icc%200204%200105/Pages/uganda.aspx>
[768] Ibid.

Other defendants face similar gravity of charges. The ICC's active caseload concerning war crimes and armed activities in the Central Republic of Congo in *The Prosecutor v. Thomas Lubanga Dyilo*; *The Prosecutor v. Bosco Ntaganda*; *The Prosecutor v. Germain Katanga*; *The Prosecutor v. Mathieu Ngudjolo Chui*; *The Prosecutor v. Callixte Mbarushimana*; and *The Prosecutor v. Sylvestre Mudacumura*, puts enlistment and conscription of children under the age of 15 year old Force patriotique pour la libération du Congo [Patriotic Force for the Liberation of Congo] (FPLC) and using them to participate actively in hostilities of non-international character punishable under article 8(2)(e)(vii) of the Rome Statute[769] on the radar of international jurisdiction. Moreover, heinous crimes of murder, torture, rape, inhumane acts and persecution, attacks against the civilian population, murder, mutilation, torture, rape, inhuman treatment, destruction of property and pillaging[770] shape the ICC judicial proceedings in the situation in Darfur, Sudan cases of *The Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")*; *The Prosecutor v. Omar Hassan Ahmad Al Bashir; The Prosecutor v. Bahar Idriss Abu Garda*; *The Prosecutor v. Abdallah Banda Abakaer Nourain*; and *The Prosecutor v. Abdel Raheem Muhammad Hussein*; The Central African Republic in *The Prosecutor v. Jean-Pierre Bemba Gombo*; in the Republic of Kenya case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang* and *The Prosecutor v. Uhuru Muigai Kenyatta*; Cote d'Ivoire and Mali. [771] The Office of the Prosecutor is also "conducting preliminary examinations in a number of situations including Afghanistan, Georgia, Guinea, Colombia, Honduras, Korea and Nigeria"[772], which aim to determine whether crimes against humanity have been committed during armed conflict or following a coup d'état, which may fall under the jurisdiction of the Court.

It is also essential to note that crimes of this character under Article 27 of the Rome

---

[769] ICC, *The Prosecutor v. Thomas Lubanga Dyilo* <http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200106/Pages/democratic%20republic%20of%20the%20congo.aspx>
[770] ICC, *The Prosecutor v. Callixte Mbarushimana* <http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc01040110/Pages/icc01040110.aspx>
[771] ICC, "Situations under Investigation" <http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx>
[772] Ibid.

Statute are prosecuted with 'irrelevance' to official capacity of the accused, that is:

> "…official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence."[773]

In sum, ascertaining that both military and civilian personnel engaged in the planning and execution of crimes falling under the jurisdiction of the Court does not go unpunished. The principle of *nulla poena sine lege* additionally requires that the defined penalties be attached to criminal prohibitions and under Article 23 of the Rome Statute not be construed by analogy but be defined with strict reference to the Statute.

While immunity from prosecution may be limited under the Statute, the June 2018 ruling in *Prosecutor v. Bemba*, the ICC exonerated a politician-warlord from the Democratic Republic of Congo by deeming all five counts of conviction unsustainable and adjudging certain command responsibility crimes to have no cognizable author, thus raising questions as to whether there exists a body of "command responsibility" crimes for the Court which simply commit themselves. Critics of the decision point to the significant dilution of the notion of "command responsibility" and remind the Court of its obligation to call to account "persons" deemed responsible "for the most serious crimes of international concern" who have led others to criminality.[774] With this judgment, the Court reasserted another precedent setting ruling of *Prosecutor v. Katanga* (2016) where illegal recruitment and use of underage children in conflict had been acknowledged but left unattributed to the accused leader responsible for the war crimes arbitrated before the ICC.[775] In so doing, the ICC retraced the reasoning of the Application of the Convention on the Prevention and Punishment of the Crime of Genocide International Court of Justice 2007 judgment in which the ICJ affirmed that "genocide did take place in the Balkans, but that no state was responsible". [776] The Court by failing to find a "state guilty for the commission of genocide with respect to the acts in Srebrenica in 1995" gave birth to the

---

[773] International Criminal Court, The Rome Statute, Article 27.
[774] Amann, Diane Marie. 2018. "In Bemba and Beyond, Crimes Adjudged to Commit Themselves." *EJIL:Talk* < https://www.ejiltalk.org/in-bemba-and-beyond-crimes-adjudged-to-commit-themselves/>
[775] Ibid.
[776] Bransten, Jeremy. 2007. "World: ICJ Bosnia Ruling Sets Important Precedents *Radio Free Europe.* <https://www.rferl.org/a/1074986.html >

controversial notion of "a crime without punishment"[777] whereby factual attribution of crimes to a state or individual party does not necessarily rise to the threshold of complicity or ultimate responsibility for such crimes. It is important to note, however, that in the former case the ICC was engaged in ascertaining individual criminal responsibility under international criminal law, while in the latter instance, the ICJ looked towards state responsibility under general international law.

The International Criminal Court, however, can boast a modest record of convictions and developments. In recent years, Al Mahdi was found guilty of intentionally directing attacks against religious and historic buildings in Timbaktu, Mali in June and July of 2012, which constitute a war crime under the Rome Statute, and was sentenced to nine years in prison. Lubanga was found guilty of war crimes consisting of enlisting children under the age of fifteen and using them to participate in hostilities as child soldiers in the Democratic Republic of Congo. He was subsequently sentenced to fourteen years in prison. As an accessory to war crimes consisting of murder, attacking a civilian population, destruction of property and pillaging of the village of Bogoro in the Democratic Republic of Congo, Katanga will face twelve years imprisonment.[778] In May 2019, the ICC Appeals Chamber in the Al Bashir Appeal held that "there is neither State practice nor *opinio juris* that would support the existence of Head of State immunity under customary international law vis-à-vis an international court"[779] and thus extended the Court's effective jurisdiction over crimes against humanity, war crimes and genocide in Darfur, Sudan irrespective of the perpetrator's political status. In all cases, the ICC was mindful of victim representation and reparations. Yet, the ICC's sentencing and reparations track begs a number of questions. Are sentences of nine to twelve years imprisonment for war crimes and crimes against humanity sufficiently severe? Will they possess the requisite deterrent effect? Are symbolic reparations of nominal monetary value to victims of heinous international crimes satisfactory? What penal gravity should 'crimes offensive to human conscience' of the scale and magnitude far exceeding those of domestic character carry?

---

[777] Dupuy, Pierre-Marie. 2016. "A Crime without Punishment." *Journal of International Criminal Justice*, Volume 14 (4): 1. pp. 879–891.
[778] ICC Convictions < https://www.icc-cpi.int/Pages/cases.aspx>
[779] ICC Appeals Chamber in the Case of The Prosecutor v. Omar Hassan Ahmad Al-Bashir
< https://www.icc-cpi.int/CourtRecords/CR2019_02593.PDF>

B. New Technologies, Collateral Damage, and the Fog of War

The question of individual criminal accountability and state responsibility under international law remains a timely and contested concept. The recent wave of protracted conflicts in Syria and Ukraine suggests normative and procedural complexity with respect to attribution and evidence gathering. The use of modern-day technologies, which invite state surveillance and monitoring, may also require a reassessment of the types of evidence, which would satisfy the international community's pursuit of justice and remediation. Yet, the Rome Statute in Article 28(a) makes plain that superior responsibility is a form of liability for omission as well as commission of the crimes charged. Under the statute, "it is only necessary to prove that the commander's omission increased the risk of the commission of the crimes charged in order to hold him criminally responsible"[780] and Tribunals have shown themselves highly flexible in the types of evidence they admit in international trials.

When on July 18th, 2014 the world awakened to yet another tragedy – the downing of the Malaysian Airlines flight HM17 carrying 298 people representing over eight different nationalities over pro-Russian separatist occupied territory of Ukraine, which in its horrendous totality shocked, to an amplified degree, the collective conscience of the public - claims of responsibility for the tragedy spread over the popular and up-to now innocuous social media portal, Twitter, and instantly internationalized what has been perceived as a largely domestic conflict. For the first time, the lay and up to now indifferent to the day-to-day activities of the pro-Russian separatists, public learned that Twitter is being used as a propaganda tool and a mean for nefarious communication subject to virtual deletion and emendation for the purposes of advancing a military objective and a political cause. References to Tweets and videos bearing an imprint of responsibility have been invoked in the Security Council's emergency meeting hours later, where the US Ambassador to the United Nations, Samantha Power, cited them in her impassioned speech. The above raise a legal conundrum, namely, what is the legal status of a boastful Twitter confession by Separatist leaders of a state-sponsored rebel group containing first-hand accounts and admissions of responsibility for shooting down a plane via Twitter in

[780] Cryer, Robert et al. 2016. *An Introduction to International Criminal Law and Procedure.* Cambridge: Cambridge University Press. p. 393.

the midst of a conflict? Are Tweets a novel form of incriminating evidence in a rapidly changing terrain of modern warfare? What ought to be their evidentiary value and legal status under international criminal law, international law of armed conflict and international humanitarian law? And, lastly, what criminal liability should those claiming responsibility bear under domestic and international law?

Protocol I of 1997, Additional to the 1949 Geneva Conventions and Article 51(5)(b) of the Protocol warns that

> "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated"[781] is forbidden and tantamount to a war crime.

Similar sentiments are contained in Article 57(2)(a)(iii) of the Protocol and Article 8(2)(b)(iv) of the Rome Statute of the International Criminal Court.[782] Article 25 of the Hague Regulations forbids any "attack or bombardment by any means whatever, of towns, villages, dwellings or buildings which are undefended."[783] In the fog of war, the key principle commanders of armies are to hold sacrosanct is the principle of distinction contained in Article 48 of Additional Protocol I, which mandates discrimination between belligerents and non-belligerents and military versus civilian objects. This generally accepted norm holds all objectives which are "not military are considered civilian and may not be made the object of direct attack or of reprisals."[784]

In the spirit of the fundamental legal precept of *pacta sunt servanda*, the principles of the Law of Armed Conflict (LOAC) are binding upon parties to it and must be performed in good faith. A degree of reciprocity in honoring the laws of war is therefore a mitigating factor in the altogether dehumanizing machinery of armed conflagrations. It is incumbent upon the parties to the conflict to adhere to customary international law and fundamental protocols, which privilege and essentialize human life. Thus Protocol I of 1977, Additional to the 1949 Geneva Conventions on the Protection of War Victims and Article 51(5)(b) of

---

[781] In David Wippman and Matthew Evangelista (ed.), 2005. *New Wars, New Laws? Applying the Laws of War in 21st Century Conflicts*. Boston: Nijhoff. p. 213.
[782] Ibid., p. 213.
[783] ICRC – Customary International Humanitarian Law, Rule 37 <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule37>
[784] Ibid.

the Protocol forbid an indiscriminate attack that appears excessive or disproportionate to the military objectives sought. Thus, "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects … which would be excessive in relation to the concrete and direct military advantage anticipated"[785] is strictly prohibited. Further, Article 8(2)(b)(iv) criminalizes,

> "Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated."[786]

Article 8(2)(b)(iv) echoing the principles in Article 51(5)(b) of the 1977 Additional Protocol I to the 1949 Geneva Conventions, "restricts the criminal prohibition to cases that are "clearly" excessive. The application of Article 8(2)(b)(iv) requires, inter alia, an assessment of: (a) the anticipated civilian damage or injury; (b) the anticipated military advantage; (c) and whether (a) was "clearly excessive" in relation to (b)."[787]

The modern jus in bello's embrace of proportionality does not and cannot preclude and eliminate, however, accidental injuries to non-belligerents. Therefore, as Dinstein claims, "even after the endorsement of the principle of proportionality … the danger of incidental injury to civilians – as a collateral damage resulting from attacks against military objectives – cannot be lightly dismissed."[788] Especially challenging, here, are the non-state actors and terrorist organizations involved in a protracted conflict with regular state armies, which choose to operate from within civilian encampments, i.e. Hezbollah in Lebanon or Hamas in the Palestinian territory, or the Twitter-savvy separatist rebels in eastern Ukraine, thus threatening to expose a large non-belligerent population to harm, injury or death.

Property predestined for civilian use is given especial consideration in international treaties and protocols. Thus, hospitals, hospital ships and medical units, places for religious

---

[785] Dinstein, Yoram. 2005. "Collateral Damage and the Principle of Proportionality" in David Wippman and Matthew Evangelista (ed.), *New Wars, New Laws? Applying the Laws of War in 21st Century Conflicts.* Boston: Nijhoff. p. 217.
[786] Moreno-Ocampo, Louis. 2006. "Allegations concerning War Crimes"
< http://www.iccnow.org/documents/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf>
[787] Ibid.
[788] Dinstein, 'Collateral Damage and the Principle of Proportionality', p. 217.

worship, cultural property, dangerous installations (dykes, dams, and nuclear electricity-generating stations), and government buildings are immune from direct attacks, unless they are used to conceal or shield military objectives. Should an attack on the aforementioned occur, "such methods would amount to prohibited ruses of war."[789] It is also incumbent upon the commanders of the military forces to immediately abandon or "suspend an attack should it become apparent that it may cause civilian damage excessive to the military advantage anticipated"[790] and the home state to ensure that "civilian objects are kept away from military objectives."[791] And although it is not "a breach of the law of armed conflict if civilians suffer injury incidental to an attack upon a lawful military objective"[792], in general, such losses must be avoided in limited war, as civilian life is exempt from being made an object of attack as far as the established custom, principles of international law and of humanity, as well as dictates of public conscience demand.[793]

Recent events in eastern Ukraine, Palestine, and Syria remind us that there is such a thing as the International Law of Armed Conflict or the International Humanitarian Law, which aims to limit the effects of conflict and protect civilians against the abhorrent nature and terrors of war. Yet, the disappearance of a substantive and ongoing dialogue, unsoiled by political maneuvers and economic calculations, from the UN Security Council and the very institutions vested with maintaining peace and security in an ever-uncertain world, also reveal the inherent limitations of international law itself. The cumulative effects of this deafening silence dim any hopes of putting in place legal mechanisms aimed at properly investigating crimes broadcast on Twitter by rebel forces of questionable origin and mysterious funding sources, and ascribing individual criminal responsibility to perpetrators of such crimes and their patrons, who protected by their head-of-state immunity are given a far too liberal reign to reshape the borders and histories of entire nations without immediate political consequences or the necessary scrutiny called for by a fragile human conscience and a full and impartial review mandated by law. Yet, the

---

[789] Detter De Lupis, Ingrid. 1987. *The Law of War.* Cambridge: Cambridge University Press. p. 248.
[790] ICRC – Customary International Humanitarian Law, Rule 37 <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule37>
[791] Ibid.
[792] Ibid.
[793] "Protocols Additional to the Geneva Conventions" - Article 1, paragraph 2, of Additional Protocol I of 1977 < https://www.icrc.org/eng/assets/files/other/icrc_002_0321.pdf>

dynamic and evolving nature of international legal prosecution can also offer modest glimmers of hope. In November 2018, Argentinian prosecutors sought to file charges against Prince Mohammed bin Salman of Saudi Arabia for "mass civilian casualties caused by the Saudi-led coalition's campaign in Yemen, and the torture of Saudi citizens"[794], which fall under the rubric of war crimes under international law, thus putting in practice a long-standing multilateral treaty principle of universal jurisdiction. While diplomatic immunity and head of state status may present an obstacle to prosecution, the "crown prince's attendance at the G20 Summit in Buenos Aires could make the Argentine courts an avenue of redress for victims of abuses unable to seek justice in Yemen or Saudi Arabia."[795] International community's interest in asserting universal jurisdiction is based in the idea that some international crimes are simply too serious for the States to ignore or have no interest in prosecuting and that offenders and perpetrators of such crimes cannot absolve themselves of responsibility or evade justice by crossing State borders.

Consequent Questions of State and Individual Responsibility: Prospects and Limitations

Judge Meron believes that despite the ethical and moral significance of the concept of criminal responsibility of States, it is doubtful that it has taken root in contemporary international law.[796] For one, "there had been no significant practice supporting the concept of State crimes in international law" and the absence of robust institutions willing and able to enforce the prohibition of international crimes of States complicates prevention of such crimes from occurring. [797] Moreover, "penal responsibility and punishment make no sense when applied to States" as "criminal responsibility is neither criminal nor civil."[798] That is why the contemporary international law has humanized state responsibility by developing international criminal law and human rights law, which treats individuals as both victims of violations and as violators of international norms.[799] The founding statute of the ICC

[794] Borger, Julian. 2018. "Argentina Prosecutors considering charges against Mohammed bin Salman at G20." *The Guardian*< https://www.theguardian.com/world/2018/nov/27/argentina-prosecutors-considering-charges-against-mohammed-bin-salman-at-g20 >
[795] Ibid.
[796] Meron, 'The Humanization of International Law', p. 267.
[797] Ibid., p. 267.
[798] Ibid., p. 268.
[799] Ibid., p. 271.

"affirms the individual's legal personality as a bearer of rights and obligations under international law" and aims to "centralize the enforcement of international legal norms governing the conduct of individuals."[800] This is not to say that States are exempt from bearing any type of liability for misbehavior. As shown in Chapter 2, the International Court of Justice has shown determination in holding States accountable for violating the UN Charter and basic principles of the Geneva and Hague Law of *erga omnes* character while, at the same time, elevating the good of the human subject caught up in the crossfire of international politics. The concept of *erga omnes* obligations has led to a renewed resolve to codify law around State responsibility without compromising the sacrosanct notion of state sovereignty. In the 1998 report of the International Law Commission (ILC), Article 19(3), criminal responsibility of States is derived from: (i) "a serious breach of international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression"; (ii) "a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid." [801] Additionally, breaches of international obligations regarding the preservation of the human environment and safeguarding the right to self-determination of peoples are of central importance in determining international wrongs. As Meron observes, however, conceptual and institutional hurdles and difficulties complicate the implementation of the idea of crimes of States, [802] among them: (i) inadequate rationales for distinguishing between the civil and criminal responsibility of States; (ii) the need to identify remedies for criminal responsibility; (iii) the availability of competent organs and enforcement mechanisms for determining culpability of States. [803] Yet, significant progress achieved in the conceptual and practical institutionalization of individual criminal responsibility, which drives the work of the ICC, has redefined the relationship between citizens and states. For one, victim representation and participation in the criminal proceedings of former heads of state, military commanders, rebel forces and guerilla fighters has enhanced the cosmopolitan notion of the right to have rights as a consequence of common humanity.

---

[800] Ibid., p. 271.
[801] Ibid., p. 266.
[802] Ibid., p. 266.
[803] Ibid., p.266-267.

A particularly groundbreaking development which looks to national, regional and international legal obligations has been the negotiated peace process between the Colombian government and FARC where restitution of victim's rights to truth, justice and reparations constitutes one of the four main pillars of peacemaking. "The Statement of Principles for the Discussion of Item 5 of the Agenda: Victims" issued in 7 June 2015 in Havana reinforces the National Government's and the FARC's commitment to (i) the recognition of victims not only in their condition as victims but in their capacity as citizens with rights; (ii) the recognition of responsibility before the victims of the conflict; (iii) satisfaction of non-negotiable victims' rights; (iv) victim participation in the discussion about the satisfaction of the rights of victims of gross human rights violations and International Humanitarian Law breaches related to the conflict; (v) elucidation of the truth and regaining of trust, including the clarification of causes and effects of conflict; (vi) victim reparation and redress for damages suffered; (vii) guarantees of protection and security of victims' dignity; (viii) guarantees of non-repetition requiring implementation of political reforms and consolidation of the peace treaty framework deterring future reoccurrence of conflict; (ix) the principle of reconciliation aiming at the satisfaction of victims' rights and coexistence; (x) a rights-based approach ensuring human rights irrespective of status and acknowledging the principle of universality, equality and progressiveness, which promotes economic, social and cultural flourishing. [804]

The change in the status of individuals as bearers of rights and subjects of international law dates back to the Permanent Court of International Justice 1928 Advisory Opinion concerning Jurisdiction of the Courts of Danzig, where it was recognized that States through treaties directly grant individuals an international legal personality, without the need for municipal norm translation or recognition. Ad hoc international tribunals for the former Yugoslavia and Rwanda, the 1998 Rome Statute and the ICC have strengthened and reinforced common Article 3 protections guaranteed by the law of war, international human rights law and humanitarian law which not only aim to safeguard humanity against crimes of egregious character, but directly prosecute those accused of perpetrating them

[804] Office of the High Commissioner for Peace "Peace Process in Colombia" <http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/proceso-de-paz-con-las-farc-ep/Documents/Learn_about_the_peace_procces_in_Colombia_22_sept_VF.pdf > p. 11-12.

before appropriate international bodies without the interposition of international law.[805] Moreover, universal jurisdiction over war crimes or crimes against *jus gentium*, gives States "the right under international law to exercise criminal jurisdiction over offenders present in their territory."[806] Military manuals have recognized the principle of universality of jurisdiction and place special premium on punishment. According to the Austrian Military Manual, "if a soldier breaches the laws of war, although he can recognize the illegality of his own action, his own State, the enemy State and also a neutral State can punish him for that action."[807] Beth Van Schaack and Norman Geras contend that, "by putting citizens of every country under the protection of international law … has the potential of piercing the trope of sovereignty," which by their nature are "attacks by the state on the 'rights of man.'"[808] The cosmopolitan principle embedded in the concept of crimes against humanity insists on "a minimum standard of human rights, which should be guaranteed anywhere, at any time, and against anybody."[809] The constructivist work, which the institutions such as the ICC do in articulating the norms and rules of international conduct under a comprehensive legal framework, cannot be discounted, even if states themselves prove difficult or reluctant followers. The judicial task of distinguishing between rules and principles of law and the very promise of discursive engagement, which it creates, bodes well for the ever evolving and dynamic concept of cosmopolitan or humanity's law that has long-standing implications for the state and its citizens to which I turn in the next chapter.

International Criminal Law: Performance Indicators

Suffice it to say that the International Criminal Court (like many of its like-minded predecessors, particularly the ICTY and the ICTR) must grapple with and respond to mounting criticisms and skepticism surrounding the effectiveness of international adjudication. Given their awesome case-load and, consequently, important pronouncements in the development of international criminal law, the ICC's public image,

---

[805] Ibid., p. 41.
[806] Ibid., p. 131.
[807] Ibid., p. 131.
[808] Geras, Crimes Against Humanity, pp. 76-77.
[809] Ibid., p. 77.

its raison d'être, is under constant scrutiny from the community of states, academics and practitioners alike. The Office of the Prosecutor in two separate reports of 12 November 2015[810] and 11 November 2016[811] sought to establish and asses the Court's four key goals regarding its proceedings, leadership, witness security, and victim access and to assess more broadly its performance to satisfy the Assembly of State Parties' inquiry. In its internal review proceedings, the ICC promised to

> "[...] intensify its efforts to develop qualitative and quantitative indicators that would allow the Court to demonstrate better its achievements and needs, as well as allowing States Parties to assess the Court's performance in a more strategic manner."

The ICC's Office of the Prosecutor has been seized with two questions, which are determinative of and relevant to the Court's public image and credibility as an international institutional in the business of administering justice. They are: (i) What are the appropriate ways to measure the ICC's progress towards its stated goals? And (ii) How can the performance of the ICC as a whole be properly assessed?

The reports review the Court's work in view of the four key aspirations that the ICC has set for itself in ensuring that:

1. The Court's proceedings are expeditious, fair, and transparent at every stage;
2. The ICC's leadership and management are effective;
3. The ICC ensures adequate security for its work, including protection of those at risk from involvement with the Court; and
4. Victims have adequate access to the Court.[812]

The Office of the Prosecutor acknowledges the difficulties and challenges associated with measuring progress and ICC's effectiveness. The complexity of the measurement is compounded by the fact that the ICC is "but one actor in the system of international justice created by the Rome Statute"[813], it has a limited number of cases on its docket to provide

---

[810] International Criminal Court "Report of the Court on the development of performance indicators for the International Criminal Court" <https://www.icc-cpi.int/itemsDocuments/Court_report-development_of_performance_indicators-ENG.pdf>

[811] International Criminal Court "Second Court's report on the development of performance indicators for the International Criminal Court" <https://www.icc-cpi.int/itemsDocuments/ICC-Second-Court_report-on-indicators.pdf>

[812] International Criminal Court's Office of the Prosecutor < http://iccforum.com/performance>

[813] Ibid.

a comprehensive and empirically suitable approximation of its performance, it deals with diverse country situations "each with their own unique political, diplomatic and legal cultures"[814], and lastly, it is dependent on states and other actors for cooperation and budgeting. Methodologically speaking, any serious assessment of the Court's work must evaluate whether a uniform application of benchmarks – given the peculiarities and particularities of each situation and case – is appropriate. Furthermore, factors "extrinsic to the Court"[815] impact performance, the expeditiousness of its trials, integrity of its investigations, and delivery of justice. Therefore, the Office of the Prosecutor has rightly inquired whether it is possible to assess the Court's "performance" with exclusive reference to the Court's activities? After all,

> "There are on-going investigations in eight different situations. The operational, logistic, and security-related considerations on the ground; and the extent of cooperation of local and international partners, including States and the United Nations Security Council, can impact on results-based performance, and vary significantly from one situation to another."[816]

In addition, quantification of highly contested qualitative and normative assumptions upon which the Court relies in its daily operations – i.e. a considerable lack of a shared definition and understandings of the question of fairness – makes it, the Office of the Prosecutor acknowledges, "an inherently difficult value to measure."[817] Likewise, assessment of the Court's "leadership and management" effectiveness or whether the Court can ensure the "protections of those at risk from involvement with the Court?"[818] further complicate the delivery of meaningful and useful metrics. Irrevocably, however, metrics are a measure of success in today's scientifically-minded society and scholars have been eager to weigh in on the approach to the evaluation of ICC successes and failures. Some suggest applying cutting-edge social science methodology and careful design of inquiry as promising starting points. The Court is advised to "maintain a critical distinction between performance evaluation and impact assessment."[819] Others advise the Court to take a

[814] Ibid.
[815] Ibid.
[816] Ibid.
[817] Ibid.
[818] Ibid.
[819] Ibid.

holistic look at the context in which it operates and avoid partial or disaggregated assessment of its work. "That means, inter alia, that performance assessment must take account of the system created by the Rome Statute in which the ICC operates, including the primary role played by State Parties in the operationalization of that system."[820] Still others, point out that the key goals for evaluating the overall effectiveness of the ICC can readily miss the point. After all, the core "evaluative criteria—judicial effectiveness, cost-effectiveness, and efficiency—and do not sufficiently relate to the core business of the ICC—e.g. ending impunity and developing international criminal law" [821] and the assessment of the ICC based on four key evaluative criteria alone risk presenting a distorted picture of the Court's operations. "In many cases, the importance of ICC proceedings", Carsten Stahn argues, "lies not only in the production of certain judicial outcomes (i.e. cases, trials, reparation), but in the transformation of certain normative discourses, the creation of common discursive spaces or the initiation of longer-term processes."[822] In sum, while expediency, management and effectiveness, security, and victim access to the Court are significant and consequential variables for the internal validity of ICC's operations, they do not operate in a vacuum and cannot be isolated from the statutory mandate and socio-political-legal context of the Court's work, which ensures deterrence, complementarity, institutional legitimacy, and State Parties' perception of one of the world' primary organs for the administration of international justice.

Perhaps one of the many successes of international criminal prosecution and adjudication, from which the ICC can inevitably draw legalistic inspiration, is the International Criminal Tribunal for Former Yugoslavia (ICTY). Established as an ad hoc tribunal tasked by the United Nations Security Council to prosecute war crimes that took place during the conflicts in the Balkans in the 1990's, the Tribunal (after its 24 year long run) is broadly perceived as having "irreversibly changed the landscape of international humanitarian law and provided victims an opportunity to voice the horrors they witnessed and experienced."[823] As the first court to undertake the prosecution and adjudication of the gravest and most egregious crimes since the post-World War II Nuremberg and Tokyo

---

[820] Ibid.
[821] Ibid.
[822] Ibid.
[823] United National International Criminal Tribunal for Former Yugoslavia < http://www.icty.org/en/about>

trials, the ICTY indicted 161 individuals, acquitted 19, sentenced 83, heard testimony of 4,650 witnesses, in its 10,800 trial days and produced 2.5 million pages of transcripts[824] in four types of crimes under its jurisdiction: Genocide, Crimes against Humanity, Violations of the Laws or Customs of War, and Grave Breaches of the Geneva Conventions. Its precedent-setting decisions have shown that an "individual's senior position can no longer protect them from prosecution" [825] inaugurating thus an era of individual criminal responsibility and terminating an era of impunity. The Tribunal, and many others that follow in its footsteps, thus give practical substance to international criminal law articulated in its founding treaties and treaty-based sources, including the 1907 Hague Regulations, the 1949 Geneva Conventions (and their Additional Protocols), and the 1948 Genocide Convention. Likewise, domestic law can and has (in the case of the ICTY) provided an important reference point and a major material source of evidence about international criminal law.[826] The ICC, albeit a separate judicial organ guided and limited by its own statute, can rely on the breadth and depth of ICTY's extensive and instrumental body of legalistic conceptualization of crimes against the universal conscience of humanity and significantly extend criminalization of such crimes with the assistance of the three areas of international law that it objectively relies upon for its substantive direction – international human rights law, international humanitarian law, and international criminal law relating to state and individual responsibility.

Fundamental to its success are the many innovations in international criminal law and recognition by the ICC of the emergent situations and crimes, such as terrorism, cyber-crimes, slavery, or sexual and gender crimes. While terrorism and cyber-crimes are yet to make a formal appearance before the Court, slavery and sexual and gender crimes have been given due attention in the ICC's preliminary inquiry on crimes against migrants and refugees in Libya[827] and in the active cases currently before the Court in the *The Prosecutor v. Jean-Pierre Bemba Gombo*, *The Prosecutor v. Bosco Ntaganda, The Prosecutor v. Joseph Kon*y and *Vincent Otti, The Prosecutor v. Dominic Ongwen* and in the Warrant of

---

[824] "Infographic: ICTY Facts & Figures" < http://www.icty.org/en/content/infographic-icty-facts-figures>
[825] Ibid.
[826] Cryer, An Introduction to International Criminal Law and Procedure, p. 12.
[827] Reuters. 2017. "ICC prosecutor mulls inquiry on crimes against migrants in Libya"
< http://www.reuters.com/article/us-libya-migrants-icct-idUSKBN1842EX>

Arrest for Muammar Mohammed Abu Minyar Gaddafi. Inclusion of victims in trial proceedings and the creation of the victims' fund have also contributed to the perception of the Court as not only appropriately judicious but timely and adequately sensitive to the context and individualized as well as communal and collective impact of international crimes it is vested with investigating and ultimately prosecuting. In terrorism cases, international criminal law as both a study and a practice will undoubtedly benefit from the ongoing work of the Special Tribunal for Lebanon (STL) in the *The Prosecutor v. Ayyash et al.* and *The Prosecutor v. Hamadeh, Hawi and El-Murrand***,** relating to the 14 February 2005 assassination of former Lebanese Prime Minister Rafik Hariri and the killing of others. Albeit controversial for its in absentia proceedings, the STL has an opportunity to establish a historical narrative in a politically divisive context pertaining to events that transpired in Lebanon; establish and utilize, for the first time in an international criminal trial, telecommunications data as incriminating evidence against the accused; and adopt and adapt, in its court procedures, elements of both common and civil law traditions. International criminal adjudication thus demonstrates a fair amount of innovation around some of the complexities, sophisticated execution, and crippling aspects of international crimes, which also subject it to considerable criticisms, especially in the area of procedural consistency.[828] In all, however, the optimistic climate in The Hague and a belief that humanity has entered the age of the Court continue to inspire the unrelenting pursuit of justice and a consolidation of international criminal law through international law's most prominent institutional, legal, and judicial instruments.

International criminal law can now also boast of another achievement. The Extraordinary Chamber in the Courts of Cambodia (ECCC), after three decades of political opposition, came into being in 2006 to trial crimes committed by the Khmer Rouge regime that ruled Cambodia from 1975-79 and as a result of the regime's mass executions and

[828] While the ICC has explicit jurisdiction over individuals who are arrested and presented before the Court, the Special Tribunal for Lebanon exercises jurisdiction and can initiate criminal trials and proceedings *in absentia,* exposing ICL to criticisms of a lack of procedural uniformity. Whether or not *in absentia* proceedings will continue in the future, remains one of the unanswered questions of international criminal law. Suffice it to say that the STL is currently the only leading judicial body under the direct mandate of the United Nations that is vested with an opportunity to develop novel investigative techniques and set a judicial and procedural precedent with regard to terrorism cases.

draconian policies led to starvation, disease, and death in labor camps of some two million people.[829]

> "In its pursuit of justice, the ECCC Tribunal has secured all-important convictions against key leaders Nuon Chea, who ranked number two to supreme leader Pol Pot, and Khieu Samphan, the former head of state, judged to be part of the inner circle of Khmer Rouge decision-makers found guilty of crimes against humanity. They were both sentenced to life imprisonment in 2014… Hearings on a second part of the trial against already convicted leaders Nuon Chea and Khieu Samphan on charges of genocide, forced marriages, and sexual violence was recently completed."[830]

Despite considerable delays in delivering justice, high cost of proceedings, concerns of politicization, and the slow pace of the trial, the ECCC was "able to record and preserve the history of the Khmer Rouge regime for future generations and establish a critical foundation for the rule of law, which is very vital for national reconciliation in Cambodia."[831] In November 2018 the ECCC delivered its first verdict declaring senior figures in the Khmer regime to be "responsible for murder, extermination, enslavement, deportation imprisonment, torture, persecution on religious, racial and political grounds, enforced disappearances and mass rape through the state policy of forced marriages" of some 1.7 million individuals.[832] The British newspaper, *The Guardian,* hailed it Cambodia's 'Nuremberg' moment. Both the STL and ECCC follow in the footprints of their eminent predecessor, the International Criminal Court for Former Yugoslavia, which boasts a formidable record of indictments and contributes to the development of modern day international criminal court. The legacy of the ICTY ensured that international adjudication not be conducted in a legal vacuum but be reinforced and strengthened by precedent.

---

[829] Fawthrop, Tom. 2017. "Cambodia's Khmer Rouge Tribunal: Mission Accomplished?" *The Diplomat.* <http://thediplomat.com/2017/07/cambodias-khmer-rouge-tribunal-mission-accomplished/?utm_content=bufferbba03&utm_medium=social&utm_source=facebook.com&utm_campaign=buffer>

[830] Ibid.

[831] Ibid.

[832] Ellis-Petersen, Hannah. 2018. "Khmer rouge leaders found guilty of genocide in Cambodia's 'Nuremberg' moment", *The Guardian,* <https://www.theguardian.com/world/2018/nov/16/khmer-rouge-leaders-genocide-charges-verdict-cambodia?fbclid=IwAR29Xdtd9NJIUZUjJ3si5pIo3FjUDDOoHKZoRvCFSCaQZyO0WFfAmC272Es> accessed 16 November 2018.

C. Gender and Sexual Crimes under International Law

The aforementioned *nullum crien sine lege* principle echoes the loudest in the case of gender and sexual crimes under international law. The earliest mention of sexual offenses punishable by law was made in the trial proceedings of Peter von Hegenbach in Breisach in 1474.[833] Lack of substantial precedent and limited remit of the court, however, failed to provide a comprehensive definition of the crime. Yet, its inclusion among other offenses pursued in the trial, such as, superior orders, cooperation in evidence gathering, and pleas[834] was particularly forward-looking for the chivalric system of the medieval Europe. Despite their inclusion in the Hague Convention of 1907, sexual offenses did not reach a level of international crime until the conclusion of World War I, albeit not explicitly. In 1919, Articles 227, 228, 229 of the Treaty of Versailles provided for prosecution of German nationals, including the Kaiser himself, for violations of the laws of war and humanity. "A supreme offense against international morality and the sanctity of treaties"[835] of which the Kaiser stood accused, called for an Allied High Tribunal and smaller mixed commissions and Allied courts ready to proceed with charges on the basis of command responsibility. During the course of the Nuremberg trials, gender based sexual violence was never the focus of the proceedings and, surprisingly by today's standards, never charged for the simple reason that the Nuremberg Statute - within the remit and limits of which the court operated - circumscribed crimes of sexual violence to 'gentlemanly discomfort', especially if such crimes were committed on males and contravened all sexual norms and mores of the time. Control Law Number 10, however, included rape in a list of prosecutable crimes and the Tokyo Tribunal referred explicitly to the rape of Nanking, however, referentially made little impact in terms of precedent setting in international law. The International Military Tribunal for the Far East pursued charges against high ranking state officials, prominently the Emperor himself, the Foreign Minister Koki Hirota, General Yamashita and Admiral Toyoda for high crimes and misdemeanors of criminal nature on the principle of command responsibility, without paying due attention or isolating crimes on the basis of gender-specificity. The Tribunal did not fail to amplify the criminality of

[833] Cryer, An Introduction to International Criminal Law and Procedure, p. 115.
[834] Ibid.
[835] Ibid.

the offences against women but fell short of setting a judicial precedent in the matter by confining such offenses to acts of 'criminal negligence' for omissions to prevent or punish criminal acts of Japanese troops. Referring to the infamous 'Rape of Nanking' in the trial of Koki Hirota, the Tribunal noted:

> "As Foreign Minister he received reports of these atrocities immediately after the entry of the Japanese forces into Nanking. According to the Defense evidence credence was given to these reports and the matter was taken up with the War Ministry. Assurances were accepted from the War Ministry that the atrocities would be stopped. After these assurances had been given reports of atrocities continued to come in for at least a month. The Tribunal is of the opinion that HIROTA was derelict in his duty in not insisting before the Cabinet that immediate action be taken to put an end to the atrocities, failing any other action open to him to bring about the same result. He was content to rely on assurances which he knew were not being implemented while hundreds of murders, violations of women, and other atrocities were being committed daily. His inaction amounted to criminal negligence."[836]

Not until 1998 did prosecution of gender based crimes begin to finally assume legal shape and expression and live up to the 1949 Geneva Conventions' insistence that "Women shall be especially protected … against rape, enforced prostitution, or any form of indecent assault."[837] The culprit that propelled the much overdue judicial focus was the ICTY's an ICTR's jurisdictional mandate and the types of crimes that were abominably etched on the war-torn territory of former Yugoslavia and Rwanda and upon the bodies and minds of the conflict's victims and its many refugees.

---

[836] The Complete Transcripts of the Proceedings of the International Military Tribunal for the Far East, reprinted in R. John Pritchard and Sonia Magbanua Zaide (eds.), The Tokyo War Crimes Trial, Vol. 20 (Garland Publishing: New York & London 1981) 49,791.

[837] A brief historiographical account of the status of rape in international law in the ICTY's Macic et al. judgment makes explicit: "There can be no doubt that rape and other forms of sexual assault are expressly prohibited under international humanitarian law. The terms of article 27 of the Fourth Geneva Convention specifically prohibit rape, any form of indecent assault and the enforced prostitution of women. A prohibition on rape, enforced prostitution and any form of indecent assault is further found in article 4(2) of Additional Protocol II, concerning internal armed conflicts. This Protocol also implicitly prohibits rape and sexual assault in article 4(1) which states that all persons are entitled to respect for their person and honour. Moreover, article 76(1) of Additional Protocol I expressly requires that women be protected from rape, forced prostitution and any other form of indecent assault. An implicit prohibition on rape and sexual assault can also be found in article 46 of the 1907 Hague Convention (IV) that provides for the protection of family honour and rights. Finally, rape is prohibited as a crime against humanity under article 6(c) of the Nürenberg Charter and expressed as such in Article 5 of the Statute." ICTY Mucic et al.
< http://www.icty.org/x/cases/mucic/tjug/en/cel-tj981116e.pdf> p. 180

The realities of conflict situated rape, forced pregnancy, mutilation, and sterilization at the height of international legal hierarchy of the 1990's, which disproportionately affected women. Rape as: (i) a weapon of war; (ii) a mechanism of war; (iii) a form of looting; (iv) a technique of torture perpetrated with genocidal intent, tested the physiological limits of comprehension and revealed the biological essentialism inevitably present in war. The ICTR judgment in Prosecutor v. Jean-Paul Akayesu defined rape as "a physical invasion of a sexual nature committed on a person under circumstances which are coercive"[838], while the ICTY statutes, following domestic law, include rape (conceptually) but offer no precise definition. Conventions and other relevant international instruments also lack a working definition of the term. The Rome Statute aimed at reaching a compromise between the two, by taking into account the conflicts' context and increasingly rape's non-gender-specific nature and character as an international crime and a crime against humanity. Notably, the 1998 ICTR Akayesu judgment delivered not only a first conviction in the international criminal law's history for genocide but also rape, and rape as constitutive of a wider act of genocide, soon to be followed by the Musema case (ICTR, sexual crime of rape), Mucic et al. (ICTY, rape as torture); Furundzija (ICTY, sexual violence); Kunarac (ICTY, sexual enslavement and rape as crimes against humanity); Kristic (ICTY, link between rape and ethnic cleansing); and Tadic (ICTY, first-ever trial for sexual violence against men).[839] The ICC's Anguin, Bemba, Kony and Ntanga cases and outstanding arrest warrants include charges of rape, sexual violence, forced pregnancy, enslavement, and other broadly defined sexual crimes perpetrated on the civilian population, women, men, and children.

Sexual violence against women in conflict is an especially atrocious form of aggression that serves a strategic purpose if perpetrated deliberately and routinely. The above cases established rape as a form of ethnic cleansing or genocide and as a broader act of torture. "The rape of women of a community, culture or nation can be regarded - and is so regarded - as a symbolic rape of the body of the community"[840] and is thus both a

---

[838] United Nations Mechanism for International Criminal Tribunals - *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR–96-4-T, Trial Chamber I, 2 Sept. 1998. < http://unictr.unmict.org/en/cases/ictr-96-4>

[839] ICTY Landmark Cases: <http://www.icty.org/en/in-focus/crimes-sexual-violence/landmark-cases>

[840] Seifert, R. 1996. "The Second Front: The Logic of Sexual Violence in Wars", *Women's Studies International Forum* 19: 1-2, p. 39.

representational and physical extension of national or ethnic pride and honor, which the aggressors seek to taint or eliminate altogether. As "markers of national identity", violation of women's bodies becomes "primarily an act of ethnic violence instead of an expression of gender power relations"[841], of revenge[842], humiliation, shaming and demoralization between and of men from opposing sides of the conflict. Yet, violent infringement on the most private and intimate aspects of individual identity - that is closely linked to and expressed through sexual identity - and its further dehumanization through forceful physical violation and consequent psychological trauma, constitutes also an "assault on the very core of a person's self"[843] and is therefore a fundamental contravention of the basic principles of humanity protected by international conventions and domestic laws, whose enforcement supranational courts have finally recognized as paramount to the health and robustness of international criminal law and the human person him or herself.

In the Mucic et al. judgment, mentioned above, the ICTY Trial Chamber maintained that:

> "It is undeniable that acts such as murder, torture, rape and inhuman treatment are criminal according to "general principles of law" recognised by all legal systems. (…)"[844]

And linked the act of rape to that of torture when employed in the context of conflict:

> "In support of the contention that torture can be employed for a variety of purposes beyond that of eliciting information, the Prosecution notes Bassiouni's comment, when considering the issue of rape as torture, that the commission of mass rape was employed during the conflicts in the former Yugoslavia in order to punish the victims and/or to intimidate them or their communities. In particular, rape and other sexual assaults have often been labeled as "private", thus precluding them from being punished under national or international law. However, such conduct could meet the purposive requirements of torture as, during armed conflicts, the purposive elements of intimidation, coercion, punishment or discrimination can often be integral components of behaviour, thus bringing the relevant conduct within the definition."[845]

---

[841] Sofos S.1996. 'Inter-ethnic Violence and Gendered Constructions of Ethnicity in former Yugoslavia', *Social Identities*, 2: 1, p. 82.
[842] Nikolic-Ristanovic, V. 1999. "Living Without Democracy and Peace: Violence Against Women in the Former Yugoslavia", *Violence Against Women*, 5: 1, p. 64.
[843] Seifert, 'The Second Front: The Logic of Sexual Violence in Wars', p. 41.
[844] ICTY *Mucic et al.* < http://www.icty.org/x/cases/mucic/tjug/en/cel-tj981116e.pdf> p. 170-179.
[845] Ibid.

It is now recognized that sexual and gender crimes [846] fall under the purview of supranational courts and are established as crimes of an especially egregious character meriting their prosecution under international criminal and humanitarian laws as crimes against humanity. The 1998 Rome Statute – thanks to advances made by the ICTY and ICTR – expended the remit of prosecutorial mandate under international law of armed conflict, genocide, and crimes against humanity and - borrowing from the ICTY's groundbreaking reliance on victims' participation - implemented mechanisms guaranteeing protection of victims' rights and rights to reparations, and thus ensuring a promulgation and furtherance of a *pro homine* turn in international adjudication.

In line with the trend, the International Criminal Court is now establishing measures that (i) represent and protect victim's rights; (ii) explore conditions of further human rights violations, including all forms of enslavement, including sexual enslavement; and (iii) put emphasis, in addition to direct responsibility, on accessory liability for the provision of practical assistance, encouragement, or moral support, in other words, on aiding and abetting of such crimes as fall under the immediate mandate and jurisdiction of the ICC. Deliberate attempts to inflict acts of violence on the civilian population or failing to prevent or punish such acts constitutes reasonable grounds for prosecution and inadvertently privileges the enforcement of fundamental human rights provisions of convention and treaty law to which state parties are both signatories and subjects.

Conclusion

The Chapter aimed to draw attention to three significant innovations in international adjudication: a) State and individual responsibility in the context of universal jurisdiction; (b) new technologies of warfare and accrual of responsibility for their use; (c) gender and sexual violence under international law. By drawing attention to the existing case law, the preceding pages also aimed to show the potential for a mutually reinforcing relationship between domestic and international judicial regimes, assess impacts and effects of ICC judgments in their domestic contexts, as well as, reveal shortcomings and opportunities for reform and improvement. It is generally acknowledged, as has been shown above, that the

[846] It is important to note, however, that rape is not a stand-alone crime in international law, but a crime perpetrated in the context of crimes against humanity.

ICC is dynamically engaged in the rethinking and reassessment of its internal organization and open to the reappraisal of the opportunities and limits of its mandate in order to better respond to and meet the challenges of the new realities of the global order.

CHAPTER VI

THE TECTONIC PLATES OF COSMOPOLITAN JUSTICE AND THEIR IMPLICATIONS ON STATE TO STATE AND STATE TO CITIZEN RELATIONS IN THE 21ST CENTURY

"Above the nations is humanity."
- Goethe

Introduction

The volume, *In Whose Name? A Public Theory of International Adjudication* (2014) by Bogdandy and Venzke, suggests three distinctive conceptions of international judicial system. They are: "(i) The state-oriented conception which sees international courts as mere instruments of dispute settlement in a state-centric world order; (ii) International courts as organs of the value-based international community; (iii) International courts as institutions of legal regimes."[847] Given the above, inevitably the authors ask, "In whose name do courts deliberate?" Naturally, the state-oriented conception intends to emphasize the centrality of states as main subjects of international law, who establish, concede to, and legitimate the very existence of the international judicial skeleton. States ratify the founding statute of the court, appoint judges and hold them politically accountable, influence democratic legitimation by holding judicial organs up to the task of transparency. Under ideal conditions and in accordance with its strict meaning,

> "international adjudication, that is, settlement of international disputes by international tribunals, implies the existence of a standing court of general or specified jurisdiction, established permanent to a multilateral, global or regional treaty, in which independent and impartial judges render legally binding decisions on the basis of international law accordingly to previously set rules and procedures, usually spelled out in the court's statute, which generates the parties' right to submit their views on the basis of full equality."[848]

While the dissertation does not contest this assertion, it does mean to suggest that international judicial regimes are demonstrably increasingly cosmopolitically-minded and operate, as the case law in the previous chapters has shown, in the interest of and with a view towards the advancement of individual human rights, even if, and especially when it doing so goes against the traditional arbiters of law, the States themselves. It is also undeniable and non-contradictory to assert as Cryer et al. do that "States get the

[847] Bogdandy, Armin von and Ingo Venzke. 2014. *In Whose Name? A Public Law Theory of International Adjudication.* Oxford: Oxford University Press.
[848] Boczek, Boleslaw Adam. 1994. *Historical Dictionary of International Tribunals.* Lenham: Scarecrow Press. p. 190.

international law they want, and they have decided to create international criminal law"[849] influencing the nature and function of adjudicatory institutional mechanisms and their place in the international order.[850]

The very presence of judicial actors of cosmopolitan orientation in the international arena, therefore, cannot but test and challenge the long-standing relations between states and their citizens. Acting in the spirit of cosmopolitanism does not mean harboring a Stoic love for humanity, but in a Kantian sense, treating each and every human being as an end in him/herself, worthy of respect and consideration. Concepts of recognition, universal jurisdiction, individual criminal accountability, state responsibility for internationally wrongful acts, protection of civilian population during hostilities, prohibition on the use of force, and international arbitration characterize the contours of the new world order and dislocate long-held assumptions dating back to Hugo Grotius' belief that the state's primary sovereign good is to be found in the preservation of the right to conquest, immunity from prosecution, duties of neutrality, duress in international agreements, right to the acquisition and possession of booty, gunboat diplomacy, and the use of force. These general rules, and others like them, present a vision of society as it ought to be under international law, so structured as to give full expression to the advancement of the 'good' of its members and afford the global society a semblance – in Rawlsian terms - of 'a public conception of justice'. Principles contained in treaties echo fundamental concerns of members of the global society, who in their 'original position' attempt to define values, which are objectively just and thus eliminate opportunities of their hijacking or exploitation by the socially advantaged minority. General considerations and facts about human society demand the elevation of that which is objectively good, that is, equal access to and expression of basic liberties and human rights.

It is not an accident that the contemporary Law of Armed Conflict/International Humanitarian Law and the respective Hague and Geneva Conventions take humanity as an end and cause for protection against the discombobulated machinery and violence of the State. Eric A. Posner's assertion that there is "only weak evidence that human rights treaties

[849] Cryer, Robert et al. 2016. *An Introduction to International Criminal Law and Procedure.* Cambridge: Cambridge University Press. p. 23.
[850] Ibid., p. 24.

have improved governments' respect for human rights"[851] remains oblivious to the very improvements in the human condition over the past seventy years since the inception of serious international adjudication. In many respects, the dissertation has attempted to counter this claim and reflect on the impact and purpose of supranational judicial arbitration and international courts and their growing relevance in international relations and global governance by attempting to define emerging accountability frameworks for transnational human rights violations within a predominantly state-centric political paradigm, analyzing emerging normative frameworks for transnational human rights obligations, and delineating theoretical, legal and political channels for rethinking the relationship between power, ideas, and international institutions in the areas of global multilateral governance, international humanitarian and human rights law and state security.

In the following, closing chapter of the dissertation, it is necessary, therefore, to take a retrospective and prospective view of two elementary variables in the present study, the international courts, states, and citizens by (i) scrutinizing the altered state of legal personality of States and individual citizen-subjects and their cosmopolitan dimension; and (ii) accounting for the limits and prospects of international adjudication at a time when the nature of the State and the relationship between sovereignty and international law are subject to theoretical and empirical evolution.

The State in International Context

There are two stories to be told about the international system. One of socio-political gravity intently focused on the works of Aristotle, Plato, Hobbes, Locke, Rousseau, Marx, Weber and Habermas that collectively comprise the social contract tradition. The other, legal by design, invokes the likes of Grotius, Pufendorf, de Vattel, and Kelsen. And although much theoretical analysis of the above has already been done elsewhere (see *The Gentle Civilizer of Nations* by Martii Koskenniemi), the following section will attempt to draw attention to the significant assumptions which are undergoing change as a result of increasing activism of international courts.

---

[851] Posner, Eric, A. 2014. *The Twilight of Human Rights*. Oxford: Oxford University Press. p. 126.

Scholars, such as Oona A. Hathaway and Scott Shapiro, have recently argued that international law is far more efficacious than we allow ourselves to imagine.[852] For one, the concerted efforts of the world powers to put in place international commitments, i.e. the Kellogg-Briand Pact of 1928, which was the first among many influential documents prescribing renunciation of violence as an instrument of national policy, has shown the evolving logic and realization that the use of force, a long-standing norm in international relations, ought to be seen as a direct contravention of international law and any territorial gains made were to be deemed manifestly unlawful. Unprecedented in state and military practice, the imperial tactics of expansionary politics through territorial annexation and geographical opportunism had now no basis in law and constituted a serious breach in inter-state relations. The ravages of World War II, which manifestly violated the ideational aspirations of the Pact, and the nascent notion of a crime against peace, which has been articulated shortly after, led to the institution of the Nuremberg and Tokyo Tribunals and the consolidation of international legal norms of behavior. The Kellogg-Briand Pact established thus, at minimum, a rational expectation that signatories to it would abide by the promise of peaceful resolution of disputes and change their relations with one another. "Any signatory Power", the Pact asserts, "which shall hereafter seek to promote its national interests by resort to war should be denied the benefits furnished by this Treaty."[853] Yet, like any legally-binding treaty of voluntary accession, the Pact allowed for a significant amount of vagueness and qualification, providing ample room for interpretation. Thus, wars of self-defense, military obligations arising from the League Covenant, the Monroe Doctrine, or postwar treaties of alliance stood in the way of effective means of enforcement, which were never explicitly stipulated. Yet, despite a historical verdict rendering the Kellogg-Briand Pact immensely ineffective given the recurrence of war and subsequent reordering of hemispheric relations between states, the pact constituted a bold step in the right direction, for from its ashes emerged a much more persuasive legal language and a demonstration of serious commitment to a variety of multilateral international agreements

[852] Hathaway, Oona A. and Scott Shapiro. 2017. *The Internationalists: How a Radical Plan to Outlaw War Remade the World.* New York: Simon and Schuster.
[853] The Kellogg-Briand Pact <http://avalon.law.yale.edu/20th_century/kbpact.asp>

which would put a much heavier and more pricey moral and political onus on the shoulders of state entities in their attempts at justifying recourse to war.

The Law of Armed Conflict and its Normative Social Contract Implications

The insertion of international legal discourse and a corresponding concern for the general welfare of humanity gave rise to the internal reevaluation of the meaning of the social contract itself. Up to now, the social contract tradition justified subjective sovereign assessment of external threat and mandated and vindicated externalization and projection of power by violent means and the use of force. It is not an accident that much ink has been spilled over the course of the two millennia on the question of just war and the moral bases for its wager. Since their inception, the guidelines regulating conduct in war as a function that states perform to meet the requirements of the social contract, i.e. (i) to protect the integrity of the state and (ii) ensure the security of its citizens, have moved in the progressively humanizing direction.

The rules and principles of the law of armed conflict (LOAC) thus find their origin in (i) the Declaration of Paris of 1856; (ii) the Declaration of St. Petersburg of 1869; (iii) the Hague Peace Conferences of 1899 and 1907; (iv) the Geneva Protocol of 1925; (v) the Geneva Convention of 1929; (vi) the Four Geneva Conventions of 1949; and (vii) Two Additional Protocols of 1977. Collectively, they constitute the *jus in bello* rules that govern conduct during armed conflict and delineate moral limits on the use of force, set out principles for the treatment of individuals in the course of war, and minimize unnecessary suffering and the use of excessive violence. Alongside *jus ad bello*, or laws pertaining to the circumstances surrounding the initiation of conflict, the actors involved and their respective legal and moral justifications for the use of military power, *jus in bello*, aims to define the parameters and set restrictions on the conduct of war. Both sets of rules fall under the domain of public international law and hold humanity at the center of legal and moral concern.

The *jus in bellum* as the body of law pertaining to the control of conduct during war takes its inspiration from the Old Testament and Koran, which, as scholar claim, provide the earliest articulation of the appropriate relationship between the "victors and the

vanquished."[854] Respectful treatment of captured soldiers and civilians according to established rules of war was also a matter of considerable concern for the Seventh Century Babylonians.[855] And the Fourth Century Chinese military general and philosopher, Sun Tzu, in his work The Art of War considered "treatment and care of captives, and respect for women and children in captured territory"[856] of significant importance to a civilized and humane conduct of warfare. Arbitrary declarations of war without just cause for the purposes of "avenging of injuries, punishing wrongs, and returning what was wrongfully taken" was conceived by St. Augustine to be contrary to the natural order tailored for the purposes of preserving "peace of mortal things."[857] The *ad bellum* principles calling for a just cause to war and proper authority in declaring it remained the cardinal sphere of concern for early Christian theologians, prompting Thomas Aquinas to reflect more expansively on the inner demons propelling nations to war with one another. For him, as much as for St. Augustine, thus, inward dispositions of rulers and soldiers engaged in the business of war mattered a great deal. A lawful war, writes Aquinas in his *Summa Theologiae*, waged with a legitimate authority and a just cause "may be rendered unlawful by wicked intent"[858] where "the desire for harming, the cruelty of revenge, the restless and implacable mind, the savageness of revolting, the lust of dominating" [859] adds St. Augustine, reveal an utterly malevolent propensity and cruel and vindictive inner character, which must be avoided. Francisco Suarez, a Spanish Jesuit priest, philosopher and theologian, would emphasize and prioritize the right manner of waging war (*debitus modus*) over right intention, giving rise to questions of the appropriate conduct in war, with which jus in bello has since concerned itself. Any sovereign, therefore, who takes his nation to an unjust war, Emer de Vattel concluded in his 1797 Law of Nations,

> "is guilty of a crime against the enemy, whom he attacks, oppresses, and massacres, without cause: he is guilty of a crime against his people, whom he forces into acts of injustice, and exposes to danger, without reason or necessity, —against those of

[854] Bovarnick, Jeff A. et al. 2011. "Law of War Deskbook" The United States Army Judge Advocate General's Legal Center and School. p. 11.
[855] Ibid., p. 22.
[856] Ibid., p. 11.
[857] Sharma, Serena K. 2008. "Reconsidering the *Jus ad Bellum/ Jus in Bello* Distinction" in Carsten Stahn and Jann K. Kleffner (eds.) *Jus Post Bellum Towards a Law of Transition from Conflict to Peace*. Cambridge: Cambridge University Press. p. 11.
[858] Thomas Aquinas – Summa - IIaIIae 40
[859] Sharma, 'Reconsidering the *Jus ad Bellum/ Jus in Bello* Distinction', p. 14.

> his subjects who are ruined or distressed by the war, —who lose their lives, their property, or their health, in consequence of it: finally, he is guilty of a crime against mankind in general, whose peace he disturbs, and to whom he sets a pernicious example"[860]

A brief genealogy of just war theory suggests that its origins are deeply rooted in Christian ethics, which have been informed by a tradition of natural law, that is, a collection of normative precepts and universal principles whose authority is "absolute, immutable, and universal for all times and places"[861] and whose source rests in other than human invention, that is in (i) nature, (ii) Supreme Being; or (iii) human reason. Cicero would therefore claim that "true law is right reason in agreement with nature; it is of universal application, unchanging and everlasting … to curtail this law is unholy, to amend it illicit, to repeal it impossible."[862] Such inadmissibility of challenge permitted the natural law theory, and alongside it, the *jus gentium* (the law of the people) and *jus civile* (the civil law), to continue to evolve and flourish. With "peace and well-being of the community"[863] in mind, "the obligation of government was to protect the natural rights to life, liberty, and possessions."[864] To this important facet of jurisprudence has been added a consideration for a doctrine of human rights as a rationale for just war, which today, as Walzer argues, can constitute the only consequential motivation worth fighting for and the "most effective limit on military activity."[865]

The New versus the Old-World Order

The scarcity of rules governing the use of force and conduct of war from antiquity to the Middle Ages, however, made itself apparent in unregulated practices of enslavement, trade in human capital, use of poisoned weapons, and indiscriminate appropriation and seizure of territory. The era of the just war doctrine, dominant in the medieval international system, conditioned the rights and duties of the belligerents on "the justice of the cause for

---

[860] de Vattel, Emer. 1797. *The Law of Nations.* p. 383.
[861] Hayman, Robert, et al. 2002. Jurisprudence Classical and Contemporary: From Natural Law to Postmodernism. St. Paul: West Group. p. 1.
[862] Hayman, Robert, et al. 2002. *Jurisprudence Classical and Contemporary: From Natural Law to Postmodernism.* St. Paul: West Group. p. 3.
[863] Ibid., p. 4.
[864] Locke, John. 1988. *Two Treatises of Government.* Cambridge: Cambridge University Press. p. 303.
[865] Walzer, Michael. 2000. *Just and Unjust Wars.* New York: Basic Books. p. 304

which they waged war."[866] As long as the war (i) was conducted with *justa causa* or a just cause, i.e. in self-defense or to avenge past injuries; (ii) it was sanctioned by a lawful authority; and (iii) based on the right intention of belligerent parties, the means utilized could only be limited by what was necessary to achieve the desired purpose. [867] The Treaty of Westphalia of 1648 and the inauguration of the modern state system did away with the just cause doctrine and considered the wager of war to be "a sovereign entitlement of every state." [868] With inviolable prerogative to wage war, the cruelty and devastation that followed, with time, awakened the international community's public conscience. The turning point came in 1859, when the "miserable fate of the wounded left on the battlefield" [869] after the Battle of Solferino fought between the French, Sardinian and Austrian armies, propelled Henry Durant to articulate general principles aimed at humanizing the battlefield.

The enthusiastic response of the European nation-states to Durant's proposals of (i) giving "a legal protection to the military wounded in the field" and (ii) creation of national societies who were to prepare in peacetime all the material and personnel needed in war"[870] resulted in gradual formalization of "non-derogable protections for the victims of war"[871] formally collected and codified after World War II under four respective Geneva Conventions, jointly referred to as Geneva Law. Thus, the Geneva Convention of 1864 for the Amelioration of the Condition of the Wounded in Armies in the Field (GCI), intended to obligate states engaged in armed conflict to "respect, protect and aid wounded and sick military personnel without adverse discrimination." [872] The Geneva Convention on Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea (GCI) extended GCI land warfare protections to wounded, sick and shipwrecked personnel at sea and took protective note of hospital ships. The Geneva Prisoners of War Convention of 1949 (GCIII) defined the status of troops taken prisoner of war and, finally, the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 1949 (GCIV) aimed at the

---

[866] Kolb, Robert and Richard Hyde. 2012. *An Introduction to the International Law of Armed Conflicts*. Oxford: Hart Publishing. p. 22.
[867] Ibid., p. 22.
[868] Ibid., p. 22.
[869] Ibid., p. 38.
[870] Ibid., p. 41.
[871] Bovarnick, 'Law of War Deskbook', p. 20.
[872] Kolb, An Introduction to the International Law of Armed Conflicts, p. 38.

protection of the civilian population from the ravages of war. "The International Red Cross was created in 1870 to alleviate suffering in war."[873]

The proliferation of non-international conflict in the decades following the end of World War II, gave rise to Two Additional Protocols of 1977, which "strengthen the protection of victims of international (Protocol I) and non-international (Protocol II) armed conflicts and place limits on the way wars are fought."[874] The Two Protocols extend protections: (i) to civilian medical and religious personnel, (ii) of cultural objects and places of worship, (iii) of hospitals, medical ships and aircraft.[875] While the Geneva Law represents "the passive side of the same coin (what the protected persons should not suffer), the Hague Law "expresses the active side of the coin (what the military may do)"[876] under conditions of armed conflict.

The prohibition on certain means and methods of combat (including weapons, tactics, and targeting decisions), which are considered excessive, is the primary aim of a body of rules collective referred to as the law of the Hague. In addition to the Declaration of Paris of 1856, which abolished privateering and regulated the relationship between enemy ships on the high seas,[877] the Declaration of St. Petersburg of 1869 was among the first documents to articulate "the legitimate aims of warfare" and set out limitations on the means of its conduct.[878] The Hague Conventions of 1899 and 1907 explicitly forbade the use of "poisoned weapons, or arms or projectiles which would cause unnecessary suffering, or the refusal of quarter"[879] and defined the "rights and duties of belligerents in occupied territories."[880] Additionally, Article 22 of the Hague Convention IV states that "the means of injuring the enemy are not unlimited"[881] and the injunction applies to all theatres of war and mediums of combat: land, sea and air. Moreover, specific treaties and protocols aim to

---

[873] Detter De Lupis, Ingrid. 1987. *The Law of War.* Cambridge: Cambridge University Press. p. 123.
[874] International Red Cross < http://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm>
[875] Ibid.
[876] Kolb, An Introduction to the International Law of Armed Conflicts, p. 41.
[877] International Red Cross <http://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=10207465E7477D90C12563CD002D65A3>
[878] Kolb, An Introduction to the International Law of Armed Conflicts, p. 53.
[879] Starke, J.G. (1963): *An Introduction to International Law*. London: Butterworths, p. 423.
[880] Kolb, An Introduction to the International Law of Armed Conflicts, p. 54.
[881] Bovarnick, 'Law of War Deskbook', p. 19.

limit or prohibit the use of weapons which cause suffering disproportionate to military objectives and military necessity. The 1923 Geneva Protocol prohibits use of poisonous and asphyxiating gas; the 1993 Chemical Weapons Convention prohibits production, stockpiling, and use of chemical weapons; the 1925 Geneva Protocol prohibits use of biological weapons and the 1972 Biological Weapons Convention prohibits their production and stockpiling; the 1980 Certain Conventional Weapons Convention prohibits or restricts the use of weapons which cause indiscriminate suffering, such as, laser weapons, mines, booby traps, or explosive remnants of war; and the 1954 Hague Cultural Property Convention seeks to preserve and protect cultural property in the event of armed conflict.[882] Moreover, the 1998 Rome Statute on the International Criminal Court (itself, not an implicit part of the LOAC) expands upon the provisions of the LOAC, and aims to repress and penalize the occurrence and perpetration of international crimes, including war crimes,[883] ensures that States abide by international humanitarian law, and provides new guidelines for the scope and methods of war and use of force under public international law.

The law of armed conflict consists thus of a set of practical and clearly defined principles, which seek to strike a balance between humanity and military necessity (Kolb and Hyde 2012: 55). They are, the principle of: (i) distinction (GPI, Arts. 48, 52) – armed forces must distinguish between combatants and civilians; (ii) proportionality (HR IV, Arts. 22, 23; GPI, Arts. 57, 51(5)(b) of Additional Protocol) – excessive use of force is in violation of LOAC; (iii) military necessity (H IV, Art. 23(g) – to make the opponent submit, reasonable use of force is permitted; (iv) limitation (HR IV, Arts 22, 23; GP I, Arts. 35(1), 57, Additional Protocol 1) – means and methods of warfare are not unlimited and unnecessary suffering and superfluous injury are prohibited; (v) humanity (GC I-IV, Art. 12; Article 4 of Additional Protocol II) – belligerents are to treat protected persons with respect; (vi) good faith and reciprocity – between opponents is a customary principle of warfare and good faith must be shown in the interpretation of the LOAC.[884]

[882] Ibid., p. 20.
[883] Kolb, An Introduction to the International Law of Armed Conflicts, p. 55.
[884] Ibid., p. 45-49.

In toto, the above reflect an evolving moral landscape, which puts emphasis on individual subjects as entities proper of public international law. In sum, the fundamental purpose of the modern-day laws of armed conflict, derived from rich and varied historical disputations among venerable scholars, is to prevent unnecessary suffering, avoid unmitigated escalation of force and spread of conflict, protect civilian objects from indiscriminate targeting or annihilation, and protect civilian population and non-combatants and hors de combat from sustaining damages to the mind and body during armed struggles. The principles of law and the realities of combat, however, often conflict and require proper and judicious balancing by both the military and civilian personnel directly involved in the pursuit of and conduct of war. Moreover, developments in the normative bases of the twenty-first century framework of the Responsibility to Protect (R2P) call into question the indivisible sovereign authority and appeal to humanitarian conscience for the right to intervene in the name of preserving humanity from harm at the hands of the state. The duty and responsibility to protect the most vulnerable strata of non-belligerent civilian population in times of egregious human rights violations brought about by the inevitable fog of war, also provides the international community and international courts with urgent and ample opportunities for moral and legal refinement of the just war doctrine with a view to further theorization and grounding in reason and law of the modern-day humanitarian-intervention mandate. It is not an accident that the rise in cosmopolitan consciousness combined with government and literacy, as Harvard sociologist Steven Pinker contends, has led to the gradual and steady pacification of human society. His sophisticated and data-rich study has shown death rates from conflict falling from 15 percent per annum to 3 percent per annum. This does not mean to do away with conflict entirely, but merely to suggest the 'civilizing' effects of the above on human proclivities towards violence. Max Roser of Oxford University confirms Pinker's conclusions by way of a series of charts tracing the decline in violence from 1400-2000 and again from 1945-2007[885] illustrated in Graph I "Global deaths in conflict since the year 1400" and Graph II "Number of annual war battle deaths by world region, 1946-2007" enclosed at the end of the chapter.

[885] Max Roser, "World in Data Project" <http://ourworldindata.org/data/war-peace/war-and-peace-before-1945/>

If political theory concerns itself with ongoing intellectual oscillations between the liberal[886] and republican[887] model of the State and its manifest mandate to wage war in the interest of survival, then the all-encompassing common denominator for both is the State's ever-evolving conception and role. If as has been observed, the State is a voluntary organization for mutual benefit, promotion of the good, and preservation of common interests, which yield to an uncompromising monopoly on the use of force, then the modern strictures of the U.N. Charter, Laws of Armed Conflict, and Human Rights Conventions condition its powers on the principles of necessity and proportionality. Due to an increasing institutionalization of international human rights principles, states are compelled to recognize not only the universality of rights within their domestic context, but also pay heed to extraterritorial human rights obligations necessitating international cooperation and assistance. The Maastricht Principles on States Extraterritorial Obligations in the arena of Economic, Social and Cultural Rights, the development in UN human rights committees and UN Special Rapporteurs[888] impose moral obligations on states to act in the interest of the whole of humanity and not only their own citizens. Globalizing trends in international trade have had a significant impact on the international trade law, environmental legislation, financial regulation and basic considerations of humanity overseen and protected by the IHRL. In her work, Sigud Signey shows that a true commitment to human rights provokes states to rethink their political commitments to individual well-being on the basis of cosmopolitan sentiments of universality and non-discrimination. After all, Signey asks, "why should a state be able to kill people arbitrarily abroad, if they cannot do so at home? Why should it be of no consequence to provide contaminated food to starving

[886] The liberal model: (i) includes protections against state interventions; (ii) is characterized by negative freedoms, or freedoms from (persecution, interference, compulsion, etc.) rather than positive freedom or freedoms to (free speech, assembly, religion, etc.); (iii) citizens possess individual rights; (iv) fairness in society is seen as a compromise between competing interests; (v) the state is an institution of public administration, and society is conceived as a system of market-structures and interactions between private persons and the state or corporation; (vi) looks for compromises between citizens' competing interests.

[887] The republican model: (i) the status of citizens in not determined by negative liberties, but rather by political participation and communication – or by positive liberties; (ii) the state consists of politically responsible subjects of a community of free and equal citizens; (iii) protection of equal individual rights is not the sole criterion for the state's raison d'être – rather, the state's basis for existence is found in citizen's inclusion in the opinion and will formation – in which citizens reach an understanding on which goals and norms lie in the equal interest of all; (iv) citizens' practice of self-determination is not driven by market forces, but by dialogue.

[888] Skogly, Sigrun, 2006. Beyond National Borders: States' Human Rights Obligations in International Cooperation. Cambridge: Intersentia LTD.

people in Africa, if that food could not be served for human consumption in a hospital at home?"[889] Concomitantly, a universal cosmopolitan norm prompts a debate on the question of whether an obligation to provide international assistance by rich countries exists at all? And, whether there is a right to receive international assistance on part of poorer countries? [890] Peter Singer in his 2004 book *One World* raised similar challenges, advocating for an other-oriented ethic that moves beyond the boundaries of nation-states on issues of climate change, human rights, world trade, foreign aid, and humanitarian intervention. International law and concern for the other features prominently in international relations calculus. Karen Alter is right to point out that

> "governments have long considered international law in their foreign policy decision making, thus it is not new for international law to shape international relations. Governments have also long used legal arguments to justify policies, and then come to find themselves constrained by their legal invocations."[891]

In view of morally obliging and often legally obligating cosmopolitically-oriented treaties, States can no longer sustainably maintain that "might makes right" for, as Henri Rolin observed, "the public judgment that falls upon public acts has become more severe, more enlightened, more honest"[892] and certain juridical notions hold public and private conscience at bay. Crystallization of this cosmopolitan moment in international law came in 1815 when Pasquale Fiore, having recognized the force of elevated European humanitarian-liberal intuitions, subject to "the movement of incessant progress and history", in "European international law" aimed to transcend them by contending that "the unity of the human species conduces to the recognition that the empire of legal rules that are applicable to all forms of human activity in the *Magna civitas*, must be universal."[893] His dualistic view of the world, divided among the civilized[894] and the barbaric nations, nevertheless gave rise to the notion of a juridical community – "this community is already

---

[889] Ibid., p. 3.
[890] Ibid., p. 17.
[891] Alter, Karen. 2014. *The New Terrain of International Law: Courts, Politics, Rights.* Princeton and Oxford: Princeton University Press. p. 65.
[892] Henri Rolin in Koskenniemi, Martti. 2001. *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960.* Cambridge: Cambridge University Press. p. 79.
[893] Pasquale Fiore in Koskenniemi, Martti. 2001. *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960.* Cambridge: Cambridge University Press. p. 54-55.
[894] Meant in the Kantian sense as a state of cultivation of human faculties manifested in diplomacy and popular conscience.

a product of civilization. To the extent that it expands to savage countries, it gives rise to needs and interests that unite the civilized nations with barbaric or other peoples less advanced in the path of progress."[895] The momentum of progress, for Fiore, required "the spread of liberal political institutions, protection of individual rights, freedom of trade, interdependence and the civilizing mission," and ultimately, a confederation of states "becoming increasingly bound to act through conferences, treaties and dispute-settlement procedures."[896] Acting in the zeitgeist of the times, Kelsen suggested a pyramidal hierarchy of law's norms, grounding the system of laws in basic norms, or *grundnorm*, from which all others are derived. In its traditional conception, norms are regulatory mechanisms that standardize how individuals are to behave. Thus, a norm "is an ought proposition; it expresses not what is, or must be, but ought to be"[897] in certain conditions. For Kelsen, creation of legal norms is authorized by other legal norms. Judges, therefore, do not create norms de novo, but derive them from other norms already in operation, which match or respond to the particular circumstances of a case before them. Constitutional norms or treaty norms are the "higher" expressions of law, which authorize the creation of lower ones. The ultimate *grundnorm* confers validity upon all other norms derived therefrom. In every legal order, therefore, a hierarchy of 'oughts' is traceable to a fundamental *grundnorm*. For Kelsen, municipal and international law have the same subject matter in common – the dominant *grundnorm* – which is essentially human centered and aims at the legal protection of human rights. Since, for Kelsen, the fundamental *grundnorm* of international law is encapsulated by the principle of *pacta sun servanda* ("agreements must be kept"), this implies that every international treaty in force "is binding upon the parties to it and must be performed by them in good faith."[898] State parties to it, cannot, therefore, invoke municipal laws as justification for failure to live up to the spirit and obligations of international agreements, especially when the good of the human person conceived in terms of rights threatens to be compromised. Cosmopolitan political and legal project "involves

---

[895] Koskenniemi, Martti. 2001. The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960. Cambridge: Cambridge University Press. p. 56.
[896] Ibid., p. 57.
[897] Kelsen, Hans. What is Justice? Justice, Law, and Politics in the Mirror of Science: Collected Essays. Berkeley: University of California Press. p. 235-244.
[898] Vienna Convention on the Law of Treaties, 1969
< http://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf>

reconceiving legitimate political authority in a manner which disconnects it from its traditional anchor in fixed territories", David Held holds, "and instead, articulates it as an attribute of basic cosmopolitan law which can, in principle, be entrenched and drawn upon in diverse associations."[899] The presence of international courts turns the principle into a fact. Held recognizes that "this process of disconnection has already begun, as political authority and forms of governance are diffused 'below', 'above', and 'alongside' the nation-state."[900]

International Adjudication: Prospects and Limitations

International judicial organs, examined in the preceding chapters as markers of an above alluded to diffusion of co-constitutive power, demonstrate a particular loyalty to the fundamental *grundnorm* of international law by holding States and agents of the state accountable for acts of commission and omission, which contravene international obligations. This does not imply, however, that Courts are exhaustive mechanisms for the preservation of human rights. To the contrary, many controversial questions concerning the so called 'drone wars', extrajudicial killings of citizens suspected of acts of terrorism, the use of torture, CIA black sites, war on terror, and admissions of responsibility for perpetrations of war crimes via social media and twitter accounts await judicial scrutiny and ascription of individual criminal responsibility for violations of the international law of armed conflict and fundamental human rights. While plaintiffs have been largely successful in redressing the violations of human rights in the CIA black sites cases challenged under the European Convention of Fundamental Human Rights and Freedoms within the ECtHR judicial regime, crimes against humanity committed under the "war on terror" state of exception or micro-aggressions, proxy, and hybrid-wars waged by Russia, Syria and its agents, still await proper international response, recognition, and adjudication by domestic and international courts. It may be the case that adjudication of such cases will be taken up by Courts embedded in a strong tradition of judicial independence and democratic rulemaking. Courts in the Netherlands, on the basis of extensive evidence gathering, expressed willingness to engage in full judicial proceedings pertaining to the

[899] Held, David. *Cosmopolitanism: Ideals and Realities.* Cambridge: Polity. p. 113.
[900] Ibid., p. 113.

downing of the Malaysian Aircraft over the Ukrainian territory by separatist rebels and suspects.[901] Domestic courts under universal jurisdiction have demonstrated an active interest in prosecuting war crimes, acts of torture, murder of political opponents, arbitrary detentions, and "cruel and inhuman treatment of civilians and fighters who had laid down their arms"[902] during the 1970s revolutionary regime rule in Ethiopia, ensuring that perpetrators are called to account before the court of law. Similar proceedings are likely to take place with regard to alleged war crimes in Syria. New developments in France suggest that international financial institutions, such as the BNP Paribas,[903] will be investigated for complicity in the Rwandan genocide,[904] thus ascertaining that the mandate of international law will be much broader and far more exhaustive than ever before, reaching not only the heads of state, commanders in the field, terrorist networks, but also financial institutions violating arms embargos, breaking sanctions, and enabling transfers of funds to finance purchases of illegal weapons.

Consider recent events in Ukraine and the tremendous legal void and lack of political and legal enforcement mechanisms to adequately address state violence against civilians described in Chapter 5 of the dissertation. Yet, despite considerable exceptions, gaps and time lags in addressing major international law violations, States and non-state entities nevertheless aspire to become part of the international judicial regime and see the guarantees and protections offered by international law as essential to their very survival, legitimacy, and credibility as a State. The Palestinian Authority's recent decision to accede to the Rome Statute and join the International Criminal Court, despite vehement criticisms and opposition from the United States, Israel, Canada, France and the United Kingdom, promise to give the ICC the self-initiating authority to investigate and prosecute war crimes committed on the Palestinian Territory by both parties - Israel and Palestine - to the long-

---

[901] De Rechtspraak, "The MH17 Disaster" <https://www.rechtspraak.nl/Uitspraken-en-nieuws/Bekende-rechtszaken/ramp-met-de-mh17/Paginas/MH17-disaster.aspx#82df64ce-3d19-499f-a18c-4b32dd3f4c635>

[902] AFP, "Dutch court to open Ethiopia 'Red Terror' war crimes trial" <http://www.news24.com/Africa/News/dutch-court-to-open-ethiopia-red-terror-war-crimes-trial-20171029>, 29 October 2017.

[903] FT "BNP Paribas under investigation over role in Rwanda genocide" <https://www.ft.com/content/25abe656-a1f3-11e7-9e4f-7f5e6a7c98a2>

[904] France 24 "France opens full-scale inquiry into BNP Paribas over alleged complicity in Rwanda genocide" <http://www.france24.com/en/breaking/20170925-france-opens-full-scale-inquiry-bnp-paribas-over-alleged-complicity-rwanda-genocide?ref=fb_i>

standing conflict. Rather than contributing to the climate of continuous mutual suspicion and lack of trust, as many Western powers have alleged would ensue as a result of Palestinian membership, Ken Roth of Human Rights Watch believes that nothing would be more deleterious to trust

> "than impunity for the war crimes that Human Rights Watch has found continue to characterize the conflict, whether settlement expansion, Hamas rocket strikes or Israel's lax attitude toward civilian casualties in Gaza. By helping to deter these crimes, the ICC could discourage these major impediments to peace."[905]

After all, "compulsory jurisdiction and access to non-state actors to initiate litigation, make it increasingly possible for international courts", Karen Alter contends, "to broaden the constituency of actors within and across states who support the goals and objectives associated with international legal regimes"[906] and bring them within an orbit of legality.

While many scholars, most prominently Eric A. Posner, contend that human rights treaties do little to incentivize state compliance, a wave of international litigation shows that international courts, as has been shown in preceding chapters, can exert sufficient pressure on states by means of *pro homine* litigation, oversight, and monitoring mechanisms. Yet, a number of arguments launched by staunch skeptics of the international human rights system consistently find fault with the treaty mechanisms in place. I shall cite them subsequently, word-for-word, and respond in tandem.

A. Shortcomings

1. "In the case of ordinary treaties, the main reason that states comply with their obligations is that they fear that if they do not, other treaty parties will violate their own obligations. … This logic does not easily carry over to human rights treaties. (Convention Against Torture) – torture of political prisoners in Guatemala does not provoke Sweden to retaliate in tandem.
2. Even powerful countries often cannot exert sufficient pressure on a human rights violator to cause it to improve its behavior.
3. Targets of sanctions can often retaliate by improving its ties with the sanctioning countries' rivals.

---

[905] Roth, Ken. "The Palestinians' Decision to Join the ICC Deserves Support" <http://www.hrw.org/news/2015/01/14/palestinians-decision-join-icc-deserves-support>

[906] Alter, The New Terrain of International Law: Courts, Politics, Rights, p. 66.

4. Even when all states care about human rights violations in a particular state, they face a collective action problem. (Free riding problem).
5. The evidence suggests that countries do not consistently cut aid to human rights violators, or otherwise put pressure on them.
6. NGOs lack the power to coerce and ultimately rely on their power to persuade governments, voters, businesses, etc.
7. Neither can domestic litigation cause countries to comply with human rights treaties.
8. Failure to comply with international treaties results from vagueness and conflict with each other. Ambiguity and internal inconsistency are the problem.
9. Although not all treaty terms are vague, the actual legal effect of even specific norms is often ambiguous because they conflict with terms in other treaties as well as with broader norms of public international law. I.E. section 3 and 4 of Article 9 of the ICCPR.
10. The proliferation or hypertrophy of human rights. The original idea of human right is that they would protect only the most significant human interests – in being alive, being free of pain, being free to speak, etc. But the number of internationally recognized rights has increased exponentially.
11. None of the international courts and organizations has managed to issue authoritative interpretations of human rights treaties, as domestic courts have for domestic law. …. Arg. Against ECHR - while the US Supreme Court is an American institution, staffed by American justices, who are appointed by American politicians, the ECHR is a foreign institution (from the perspective of the UK), staffed mostly by foreigners, who are appointed mostly by foreign politicians. … While Americans feel that they can trust the Supreme Court to rule in the public interest, is harder for the British to know whether the ECHR will rule in the UK's interest. (ECHR is not there to rule in any country's interest if it is accused of violating human rights Posner.
12. International human rights institutions - the distance between the national and cultural character of the body and the national and cultural character of the citizens of a particular member state becomes even more vast.
13. An international human rights body is an agent of the nations that establish it.
14. People don't care much about the human rights of foreigners. – populations in democracies put little pressure on their governments to give aid to foreigners, either in the form of development projects or human rights enforcement.
15. Enforcement is too hard. The enforcing state could threaten to cut off trade, terminate diplomatic relations, refuse to grant visas to visitors from the target state, freeze the funds of the target state, issue arrest warrants for the leaders of the target state, launch a military invasion, etc. All of these activities are highly costly.

16. A deeper problem with international human rights is the problem of epistemic uncertainty. … even if governments tried to comply in good faith with human rights treaties, it does not mean that human rights outcomes would improve.
17. Because of the peculiar requirements of international cooperation, the international human rights institutions lack authoritative agencies that can modify rights in response to changing mores and the growth of empirical knowledge. The result is a system that is both rigid and vague, unresponsive to the needs of governments and populations, and thus ultimately plagued by circumvention on the part of the states it is supposed to bind.
18. Westerners no longer believe that white people are superior to other people on racial grounds, but they do believe that regulated markets, the rule of law, and liberal democracy are superior to the systems that prevail in non-Western countries." [907]

Moreover, in his influential The Twenty Years' Crisis, E.H. Carr reflecting on the relationship between politics and law indicted international law on three accounts. First, Carr concluded, international law lacks a strong institutional basis, a competent judicature, capable of issuing decisions that are recognized as binding by the community of states as a whole. Second, it lacks an executive dimension in the forms of "agents competent to enforce observance of the law." [908] As far as this indictment holds, Carr argues that international law lacks a sufficiently punitive character and not merely a preventive one. Third, international law is a result of custom rather than legislation and therefore is of an inferior quality, as it can – in its treaty or convention form - be easily suspended, dissented from, renounced, or not acceded to by individual states. Its scope thus is limited and its content contingent. The aforementioned, for Carr, do not preclude international law from being considered a law. International law, for him, "is a function of the political community of nations" and its "defects are due, not to any technical shortcomings, but to the embryonic character of the community in which it functions."[909] The evolutionary character of the global community, alluded to by Carr, already holds the first two of the above listed shortcomings as invalid, while also nullifying, in certain regional jurisdictions, i.e. the European Union, the third.

Of particular concern, too, is the yet underdeveloped field of international criminal sentencing procedures and principles. In the face of egregious human rights violations, war

[907] Posner, Twilight of Human Rights, p. 79-122. Pt. 19. p. 140.
[908] Carr, E.H. 2001/1981 (orig.). *The Twenty Years' Crisis.* New York: Palgrave Macmillan. p. 159.
[909] Ibid., p. 165.

crimes, and crimes against humanity what punitive measures seem most proportionate to the crimes committed? As Silvia D'Ascoli observed, sentencing in international criminal law is still 'under construction' and remains unregulated. Lacking in guiding international principles concerning determination of sentences, international judges are ill-equipped – despite voluminous precedent - to make consistent rulings in sentencing matters.[910]

The preceding chapters have showed the nuances of international judicial accountability frameworks, which respond to the international political environment by creating laws and establishing judicial precedent in the attempt to redress misbehavior of political actors and establish a normative consensus on questions of international significance. Yet, it would be wise to also acknowledge, without negating the above stipulated achievements of international adjudicatory mechanisms, that international legal institutions can also fall short on consequential questions to the international community, including questions of the legality of state occupation – as in the cases of Israel-Palestine and Turkey-Northern Cyprus[911] - or the imperfectly worked out punitive mechanisms and sentencing incongruencies stemming therefrom.

B. Response: International Courts' Effectiveness

The suggestion that international law and international courts are a figment of Western imagination that like many other eccentricities of Western capitalism and ideology must be imposed on the rest of humanity, ignores the fact that in 1945 at the gathering in San Francisco inaugurating the UN Declaration of Human Rights, non-Western countries participated on an equal basis in the drafting and implementation of the foundational human rights principles. Moreover, the very ascension to international treaties occurs voluntarily and cannot be coerced. Countries are invited to sign and respective parliamentary bodies, to ratify international treaties and agreements and make domestic laws (in a dualist system) correspond to the letter and spirit of human rights treaties. States are held accountable for acts of commission and omission, which starkly contravene the international law that they

[910] D'Ascoli, Silvia. 2011. *Sentencing in International Criminal Law.* Oxford: Hart Publishing.
[911] The ECtHR views Northern Cyprus as occupied territory and considers the Turkish Republic of Northern Cyprus illegal. The ICJ, on the other hand, deems Israel's construction of the Wall in violation of international law. Yet, on both counts, enforcement mechanisms of the Courts' decisions are lacking, and the situation of occupation continues unresolved and remains politically contentious.

conceded to adopt. Enforcement via sanctioning mechanisms arises only when States repeatedly violate agreements, they are parties to, in order to economically punish and compel respect for basic human rights. But, what if states, aware of the letter of the law and despite their international commitments, still violate them repeatedly? After all, international law is not really law when it lacks clear enforcement mechanisms and exists only in the sphere of ideal-typical scenarios, expressing faith in States own largesse is naïve at best. According to "reciprocal-entitlement violation, mechanisms already exist to exert pressure on repeated violators of international norms. A decentralized system of imposing sanctions, penalties, and collective acts of disapproval do much to name and shame those who breach the basic guidelines of the law. Arrests made by the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and the International Criminal Court, extradition requests of former dictators, and UN-backed trials of former Khmer Rouge officials in Cambodia[912] show an organized adherence to an international system of law that cannot be easily dismissed or forgotten. Critics here too, may allege that the international prosecution is highly selective and egregiously skewed towards the developing world and is therefore inconsistent with the impartial rule of law. Many Western governments domesticate international legal guidelines to suit their particular foreign policy interests and in so doing give them a much narrower meaning so as to prevent their own citizens from being subject of international prosecutorial interest. The United States itself makes repeated reservations with respect to international criminal law and objects to as well as rejects entirely the idea of being a sovereign subject of the ICC and the Rome Statute. France, too, has divested the concept of crimes against humanity of its fundamental meaning in legal decisions of the French courts so as to keep their soldiers and police from prosecution with respect to policing and military practices in Algeria.[913] Belgium has changed its constitution to give a much narrower meaning to universal jurisdiction. Thus, "the persistence of state and political criminality without punishment or redress is a mark of … failure"[914] of a system of norms created for a

[912] Geras, Norman. 2011. *Crimes Against Humanity: Birth of a Concept.* Manchester: Manchester University Press. p. 116.
[913] Ibid., p. 120.
[914] Finkielkraut, Alain. 1992. Remembering in Vain. New York: Columbia University Press. p. 12.

community, which cannot and does not exist globally[915] nor can ever be ideationally unified. Yet, one may claim that in the post-World War II environment during which the Nuremberg and Tokyo trials took place, not only was the international system in ruins, but any conception of a unified humanity according to some global ethical standard based in humanitarian empathy and law was likewise absent. This did not prevent the Nuremberg Tribunal from articulating and codifying offenses resulting from criminal conduct of states against other states and against their own citizens. Thus, to claim that protection of human rights (and only those human rights which are recognized to be human rights by Western cultures and not by others) is culturally inappropriate or an instance of Western imperialism when human life is concerned is highly problematic and misplaced. After all, the question of humanitarianism, the feeling of empathy towards a suffering distant other, and a willingness and a moral need to do something about it is not confined to political and socio-cultural boundaries but is fundamental to being human.

Thus, when the problematic of humanitarian intervention arises and persists in challenging the global moral conscience and legal rationalizations, the fact that crimes against humanity are being perpetrated with impunity if intervention on *sensu stricto* humanitarian grounds does not take place, one should reflect deeply whether a prohibition on humanitarian intervention congealed into a norm of civilized law ought be, in a Kantian sense of the word, a universally binding one. The collective action problems, to which Posner alludes to above, are pronounced but not because of costs associated with launching military strikes or putting the proverbial "boots on the ground", but because of the very composition of the UN Security Council which determines on political grounds the expeditious means of response or non-response to governments standing accused of mass atrocities, terrorism, torture and other egregious crimes. The five permanent members who hold veto power rely on the means and mechanisms of prevention and enforcement, which depend on individual state interests.[916] While the Security Council's influence may be most prominent in the ICC, the sheer depravity of crimes, however, could not make it stand idle after conflicts in Rwanda or Yugoslavia. Moreover, independent truth commissions and

[915] Johnson, DHN.1995."The Draft Code of Offences Against the Peace and Security of Mankind", *International and Comparative Law Quarterly, 4,* p. 445-68.
[916] Geras, Crimes Against Humanity: Birth of a Concept, p. 118.

regional human rights courts and tribunals do not need Security Council's permission to initiate investigations and pursue individual and state responsibility for atrocities committed during conflict. After all, as Geras poignantly underscores,

> "there are certain things that may not be done by one human being to another. Not to anyone and not in any circumstances. They are never justified. No sovereign state, no authority of any kind, may do these things. They may not be done in any cause, however good or noble, or by any movement, however aggrieved those for whom it claims to speak or however justified in their grievance. The actions in which these things are perpetrated are crimes under all civilized law and, now, according to the law of the world. They are crimes against the human soul."[917]

There are "limits", therefore, "to the omnipotence of the state"[918] and international law makes certain

> "that the individual human being, the ultimate unit of all law, is not disentitled to the protection of mankind when the state tramples upon his rights in a manner which outrages the conscience of mankind … the rights of humanitarian intervention by war is not a novelty in international law – can intervention by judicial process then be illegal?"[919]

What Posner may be suggesting by his claims against international law, however, is not only the lack of fit between ideal conception and legal reality, but also the very fault in the Euro-centric pedigree and genealogy of the idea itself, brought to you by the same white merchandise sellers who had once deemed colonial conquest a savory prospect and at the turn of the twenty-first century rebranded themselves as carriers of democracy, trade liberalism, and human rights. Yet, practical realities on the ground seem to suggest otherwise. The very need for international criminal law and accountability mechanisms grounded in human rights have very little concern for genealogical roots and historical derivatives. International law serves, after all, as a "source of protection for those individuals who are either attacked by their States, or whose States fail to protect them from other individuals or groups."[920] Due to their egregious nature they "harm all of

---

[917] Ibid., p. 129-130.
[918] Ibid.
[919] Ibid., p. 132-133.
[920] May, Larry. 2004. *Crimes Against Humanity: A Normative Account.* Cambridge: Cambridge University Press. p. 82.

humanity and hence call for international prosecution."[921] Thus, on moral minimalist grounds according to the international harm principle, "for an offence to qualify as a crime against humanity it must constitute a harm to all of humanity or to the institutional community."[922] The notion of harm has nothing to do with cultural or geographical proximity to its source. American citizens remain unscarred when the CIA perpetrates waterboarding and other enhanced interrogation techniques on individuals of Middle Eastern decent, or when women are subjected to rape as a weapon of war in former Yugoslavia, Sudan or Mali, or when Guantanamo Bay prisoners are force-fed or stripped naked during Ramadan. Yet, the very revulsion and moral distaste that such actions provoke in innocent bystanders cannot be said to be of no concern to the public, as Posner would suggest, and to engage citizens politically through electoral means or non-governmental activism in demanding that governments desist in their dehumanizing treatment. International courts and tribunals "have been guided, and are likely to continue to be guided, by the degree of offensiveness of certain acts to human dignity; the more heinous the act, the more the tribunal will assume that it violates not only a moral principle of humanity but also a positive norm of customary law."[923] After all, "there are rights that people have by virtue of being human, and … certain of these rights cannot be waived."[924] Rights preventing deprivation of physical liberty, enslavement, torture, rape, murder, persecution may, after all, be the only tools that humanity has in its arsenal against the militarized and all-too-powerful machinery of State power. Infractions of bare minimum standards and violations thereof implicate all of humanity, since in actuality or potentiality, all States are capable, if unrestrained by legal normativity, to treat their civilian populations instrumentally and dispose of it as seen fit and expeditious. This is why the concept of universal jurisdiction[925] is an important legal tool allowing those indirectly affected by state violence to bring criminal prosecutions on behalf of the victims, thus reflecting a principle that the violation of dignity, equality, and inviolability of fellow human beings,

---

[921] Ibid., p. 82.
[922] Ibid., p. 82.
[923] Theodor Meron in Teitel, Ruti. 2011. *Humanity's Law.* Oxford, Oxford University Press. p. 203.
[924] Ibid., p. 75.
[925] "Universal jurisdiction" refers to the competence of a national court to try a person suspected of a serious international crime—such as genocide, war crimes, crimes against humanity or torture—even if neither the suspect nor the victim are nationals of the country where the court is located ("the forum state"), and the crime took place outside that country. From "Universal Jurisdiction State of the Art." p. 1.

"offends all civilized peoples and the conscience of mankind."[926]

Domestic courts, too, respond to international legal principles. *Hostis humani generis* (an enemy of all mankind) has been invoked in (i) Pinochet extradition proceedings; (ii) the 1981 US Supreme Court case involving acts of torture in Paraguay; and (iii) the 1986 US Supreme Court extradition procedures to Israel of John Demjanjuk, the former World War II SS guard. The Court held that offenders such as these are "common enemies of all mankind and all nations have an equal interest in their apprehension and punishment."[927] Pirates, war criminals, and torturers by (i) committing inhumane acts; (ii) diminishing the human race; (iii) threatening the peace and security of humankind; (iv) breaching the sovereign authority of humankind; (v) shocking the consciences of humankind; (vi) committing grave, genocidal acts against the human status or condition, threaten thus the existence of all humankind.[928] And it is the duty of domestic and international legal regimes to expand appropriate resources to bring justice to law under universal jurisdiction. According to the 2006 Human Rights Report "Universal Jurisdiction in Europe: The State of the Art", since 2000 there has been a "steady rise in the number of cases prosecuted under universal jurisdiction laws in Western Europe." Furthermore, at "the level of European Union (EU) policy, the Council of the European Union on Justice and Home Affairs (the Council) has adopted a decision recognizing that EU member states are 'confronted on a regular basis' with persons implicated in genocide, crimes against humanity and war crimes, and who are trying to enter and reside in the EU."[929] The phenomenon of judicial cross-referencing, evocation of international legal practices and utilization of available legal tools, proves that "international law is really law". In *The Concept of Law* (1961), H.L.A. Hart argued that what makes international law a veritable legal system, in the absence of centralized interpretative authority and multilayered legal order, is the fact that binding rules organizing global society not only exist, but also are spoken of and function as such.[930] This assertion challenges the subjective notion of international adjudication according to which states remain the only

---

[926] Geras, Crimes Against Humanity: Birth of a Concept, p. 77.
[927] Ibid., p. 35.
[928] Ibid., p. 38-57.
[929] Human Rights Report. 2006. "Universal Jurisdiction in Europe: The State of the Art", <https://www.globalpolicy.org/images/pdfs/0606univjuris.pdf > p. 3.
[930] H.L.A. Hart in Teitel, Ruti. 2011. *Humanity's Law.* Oxford, Oxford University Press. p. 187.

validators, interpreters, and enforcers of the law to which they have consented in the absence of a shared morality and overarching common values. The legal pluralism thus understood, which is a consequence of multilayered interpretative legal processes, creates a fragmented system of adjudication that falls short of the core global values ideal. Yet, simply because there exists a rich confluence of legal traditions under the umbrella of legal pluralism does not imply, necessarily, that there also exists moral relativism and no clear normative and legal distinction between good (law) and evil or bad (law).

One of the promising outcomes of the human-centered consensus in international law and *pro homine* turn in adjudication by international courts is the way in which countries with weak records of human rights protections have sought to reform their performance in view of the recently published Country Reports on Human Rights Practices (2014) by the US State Department and the UN Human Rights Council's Universal Periodic Review (UPR), which highlight a number of negative developments in the field of human rights at the level of the state. The publications cite failures in the government conduct of transparent, public investigations into allegations of unjustified killings, torture and abuse by security forces, corruption, persecution of religious and social minorities, human trafficking, and child labor as a standard fare of state-mandated human rights violations. Contrary to reports of this kind, which aim to incentivize countries to honor the rights and dignity of their citizens, do not fall on deaf ears. Indonesia, for one, has vowed to remedy its own shortcomings by integrating the reports' recommendations into a national action plan. This type of response on the part of the state is indicative of international law's embeddedness or anchoring power of judgments "in domestic legal orders, enabling national actors to remedy potential treaty violations at home and avoid the need for international litigation"[931] thus assuring considerable long-term improvement in the safety and security of their citizens.

An especially legally problematic case for international law and adjudication rests with countries who are not signatories to a selected number of international treaties and conventions. The United States is a staunch opponent of the Rome Statute, whereas Saudi

[931] Helfer, Laurence R. 2014. "The Effectiveness of International Adjudication" in *The Oxford Handbook of International Adjudication,* Cesare Romano, Karen J. Alter, & Yuval Shany, (eds.) *The Oxford Handbook of International Adjudication*. Oxford: Oxford University Press. p. 1.

Arabia, Qatar, Bahrain, and Kuwait have not acceded to the International Convention on Refugees (1951). And, although, critics of international legal institutions may readily attribute the circumvention and selectivity on the part of the states to the inherent weakness of the entire international legal skeleton and lack of compelling and self-reinforcing legal-judicial impetus, it ought to be underscored that not all matters of urgency fall under the purview of international adjudication. There are instances, where solutions, which issue in full knowledge and awareness of international legal guidelines, can only come about by extra-judicial, political and diplomatic means as a result of protracted negotiations and inter-state agreements. Recent refugee crises in Northern Africa and Southern Europe, parts of South-East Asia and Australia, demonstrate a pressing need for countries to recognize and absorb into their respective legal orders the normative and legal precepts contained in the 1951 Refugee Convention, the 1998 Guiding Principles on Internal Displacement, and the International Refugee Law, which stand by the Kantian notion of cosmopolitan "hospitality" whenever in situations of armed conflict, natural disasters, or outright persecution, human life becomes severely compromised. However, in dire humanitarian circumstances and in the absence of immediate domestic remedies, international courts are ready and able to step in. This is especially true for courts that "exercise jurisdiction over countries in which governments are unstable, the rule of law is weak, or judges are only partially independent"[932] as well as in "hot spots of civil unrest in Turkey or Chechnya"[933] where human well-being and rights might be endangered by state violence or sheer unresponsiveness in the face of atrocities. Irrespective, however, of state signatory status or lack of enforcement mechanisms, willfully causing great suffering or serious injury to body or health or committing outrages upon personal dignity is strictly embedded in the *erga omnes* character of Article 3 of the Additional Protocols to the Geneva Conventions, which provide a minimum threshold for civilized conduct, violations of which are prosecutable in municipal and international jurisdictions.

[932] Ibid., p. 7.
[933] Ibid., p. 7.

The Four Categories of Judicial Effectiveness

The international courts' effectiveness and relevance has been widely discussed by scholars and practitioners of international law and has been categorized along four relevant dimensions: (i) case-specific effectiveness; (ii) *erga omnes* effectiveness; (iii) embedded effectiveness; and (iv) norm-development effectiveness.[934] In each of the four, the ICs have shown themselves to be creative in legal interpretation and activist in international law norm-development. Helfer defines the three measures in following terms:

> "Case-specific effectiveness evaluates whether the litigants to a specific dispute follow the orders and provide the remedies that a court awards. *Erga omnes* effectiveness assesses whether IC rulings have systemic precedential effects that influence the behavior of all states subject to a tribunal's jurisdiction. Embeddedness effectiveness evaluates the extent to which ICs anchor their judgments in domestic legal orders, enabling national actors to remedy potential treaty violations at home and avoid the need for international litigation. The effectiveness in developing international law or norm-development effectiveness considers how IC decisions contribute to building a body of international jurisprudence."[935]

Given the wide-ranging extent of judicial tasks, which increasingly encompass the exercise of judicial enforcement, administrative review, improvement of state compliance with legal norms, and stabilization of normative expectations[936] and not merely providing a public forum for the settlement of inter-state disputes, the international courts play an instrumental role in guiding, advising and exerting normative and legal influence upon states. To the question posed in the dissertation's introduction, of whether courts have an exogenous effect on states, even when compliance with international rulings may prove minimal, Anne-Marie Slaughter and Laurence Helfer have shown that international courts have utilized measures of affecting domestic actors and domestic instruments in mobilizing local support for its rulings, thus building enough momentum for deterring potential state violators of the said international law principles. The deterrent is thus already primarily local, only to be reinforced, should a violation occur, at the international level of adjudication. Other scholars point to the prevalence of external conditions which may have

[934] Ibid., p. 1.
[935] Ibid., p. 1.
[936] Ibid., p. 1.

little to do with the legal process itself, such as "where states draft their treaties to mirror preexisting behavior"[937] to be instrumental factors in compliance. Failure in compliance, however, should not be taken as an outright dismissal of the courts' effectiveness. For "if a legal standard is quite demanding, even widespread failure to meet it may still correlate with observable, desired changes in behavior."[938] Karen Alter has rightly pointed to the counterfactual evaluation of effectiveness in arguing that "the real effectiveness test...is not compliance but the counterfactual of what the outcome would have been absent the IC. Those concerned with effectiveness should ask whether the IC contributed to moving a state in a more law complying direction."[939] Naturally, one may suspect the courts' decisions to mirror state behavior and thus only impose those norms, which states themselves already turned into custom, issuing in high rates of compliance with their rulings. In other scenarios, however, IC rulings may be more far reaching and demanding, imposing significant constraints upon the closely guarded state sovereignty and advancing normative claims, which the states have routinely violated, i.e. extraterritorial use of force, indiscriminate aerial bombardments of civilian targets, lack of military necessity in the use of force, refusal of the claims of repatriation of refugees, abrogation of jus cogens or peremptory norms of *non-refoulement*, torture, non-aggression, slavery, genocide and territorial aggrandizement. The Vienna Convention on the Law of Treaties makes certain that

> "a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[940]

It is the responsibility of the court, as the legal and increasingly moral conscience of the international society to ascertain that customary law, that is, law which issues as a result of treaties between states, state consent, or special custom, is not violated. Moreover, as the

---

[937] Raustiala, Kal. 2000. "Compliance and Effectiveness in International Regulatory Cooperation", *Case Western Res. J. Int'l L.* 32(3). p. 393.
[938] Ibid., p. 394.
[939] Helfer, Laurence R. 2014. "The Effectiveness of International Adjudication" in *The Oxford Handbook of International Adjudication,* Cesare Romano, Karen J. Alter, & Yuval Shany, (eds.) *The Oxford Handbook of International Adjudication*. Oxford: Oxford University Press. p. 3.
[940] U.N. Doc. A/CONF.39/27 (1969).

1923 ICJ Wimbledon case[941] has demonstrated, a sovereignty defense for violations of customary rules of conduct and peremptory norms is severely inadequate. The Court established that sovereignty is not an inalienable right of states and under circumstances of grave danger to jus gentium and jus cogens, states are obligated to show restraint and deference to implicit and explicit rules governing the conduct of states in the international theater.

Domestic courts and judges, too, play a significant role in ascertaining that laws to which they answer do not conflict with international guidelines. As Richard Goldstone pointed out, serious questions raised at the inception of first major international tribunals concerning the ability of judges and prosecutors coming from different legal traditions, including "common and civil law jurisdictions, could work together and fashion a system of criminal justice that would be considered fair by international standards."[942] The total output by the first international criminal court, the United Nations International Criminal Tribunal for the former Yugoslavia (ICTY) established on August 15, 1994, and additional 100 international courts and tribunals established since, have shown that international standards of fairness have been met and largely complied with.[943] The public perception of fairness depends on the quality of the judges and their professional integrity and conduct, which must be "beyond reproach."[944] Furthermore, international courts and tribunals, which require exhaustion of all domestic legal remedies or seek implementation of preliminary reference procedures before admitting the case for further consideration and adjudication, contribute to the "embeddedness" and reinforcement of international laws at the national level. Standards of complementarity require that municipal laws do not conflict with international legal guidelines and are adequately considered by judges and prosecutors. This is especially significant in international criminal law, where egregious violations prosecuted domestically, must be attuned to the obligations, rules, laws, and

---

[941] The case concerned a British cargo ship, S.S. 'Wimbledon', carrying munitions destined for the Polish Naval Base in Danzig, which was refused passage through the German operated Kiel Canal on the grounds of neutrality determined by the Treaty of Versailles. The Court concluded in its decision that the Canal ceased to be a navigable canal under German jurisdiction and its claims to neutrality did not preclude it from giving the right of passage to the British Cargo ship destined for Poland, who at the time, was engaged in the Russo-Polish War.

[942] Goldstone, Richard J. 2015. "International Judges: Is There a Global Ethic?" *EIA*, < http://www.ethicsandinternationalaffairs.org/2015/international-judges-global-ethic/>

[943] Ibid.

[944] Ibid.

procedures imposed on signatory state parties by the Rome Statute.[945] For this reason, the ICC's Office of the Prosecutor has been active in building relationships with national decision-makers to encourage them to "develop trial and accountability mechanisms that satisfy the complementarity standard"[946] and induce behavioral change and normative-legal compliance.

Only when the values of peace and protection of human rights are fundamental and "internal to the normative structure of international affairs, not just to international law"[947], which must be "distilled into ethically defensible principles of justice" the promotion of peace, argues Steven Rattner, will constitute "a compelling standard of global justice against which to measure international law."[948] Embeddedness of international norms in domestic jurisdictions is crucial to the statistical decrease in caseload or repetitive litigation at the international level and, in the long-term, in assisting international courts in exerting normative influence on state actors. In terms of development, Helfer notes an enormous bank of creativity and legal potential in the Courts' prospective doctrinal innovations.

> "The IACtHR, for example, is a pioneer in fashioning creative and far-reaching remedies for human rights abuses. The ECtHR is famous for using the margin of appreciation doctrine to temper global human rights standards to local particularities. The WTO jurists are well known for consulting dictionaries to deduce the ordinary meaning of trade treaties. The ATJ has made its mark by balancing intellectual property rights against consumer protection and public health goals. Even the ICJ—a court of general jurisdiction—has developed a niche market in territorial and maritime boundary disputes."[949]

The Courts have shown themselves open to communication and trans-judicial dialogue often filling the gap in international litigation through citing of precedents and reading of each other's opinions.[950] This is especially important for ensuring doctrinal consistency,

---

[945] To be subject to the ICC jurisdiction, the state must have previously signed and ratified the Rome Statute. By so doing, the state has consented to the letter and spirit of the law expressed therein.
[946] Helfer, 'The Effectiveness of International Adjudication', p. 6.
[947] Ratner, Steven. 2015. "Response to Critics of *The Thin Justice of International Law*" <http://www.ethicsandinternationalaffairs.org/2015/response-to-critics-of-the-thin-justice-of-international-law/> p. 65.
[948] Ibid.
[949] Helfer, 'The Effectiveness of International Adjudication', p. 7.
[950] Neuman, Gerard L. 2008. "Import, Export, and Regional Consent in the Inter-American Court of Human Rights", *EJIL*19/101. p. 116–18.

imbuing the system with a certain level of predictability, and preventing a growing body of international case law from becoming too fragmented, redundant, and ineffectual.[951] Even institutions like the WTO, which address themselves to matters of private international law in *sensu stricto*, have followed closely the legal output of the public international law courts, and cannot diverge too widely from the common usage and ordinary reading of many international conventions without putting their own reputation on the line. The European Court of Human Rights has inspired its younger counterparts to systematically analyze their own case output, cite relevant precedent and make attempts at aligning their legal output with the ECtHR's already well-developed human rights jurisprudence. Courts, argues Gerard Neuman, have a number of pragmatic reasons for adopting pre-existing interpretations and borrowing widely from a number of normatively overlapping jurisdictions, such as:

> "The Court might conclude that the protection of human rights would benefit from coordinating the content of states' obligations at the regional and global levels; importation of an interpretation might decrease the Court's own burden of independent argumentation; or the Court might believe that invocation of objective external standards helped to fortify adverse decisions against state resistance."[952]

Moreover, Courts make regular references to global soft-law documents, i.e. the UN Guiding Principles on Internal Displacement, the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, the United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, or other private organizations of international civil society,[953] to rationalize their decisions and in so doing, make them more universally applicable.[954] By being "bold

---

[951] A good illustration of this phenomenon is the Inter-American Court of Human Rights reference to a number of related normative and legal questions that have been considered in the European Court of Human Rights. The Inter-American Court took note, for instance of the rulings and principles invoked in the *Handyside v. United Kingdom (1976), Five Pensioners Case (2003), and Gaygusuz v. Austria (1996).*

[952] Neuman, 'Import, Export, and Regional Consent in the Inter-American Court of Human Rights', pp. 116–18.

[953] Ibid.

[954] Neuman notes: "the Moiwana Village Case, the Court invoked UN Guiding Principles on Internal Displacement,46 which 'illuminate the reach and content of Article 22 of the Convention in the context of forced displacement', as a major basis of its conclusion that the state had violated the rights of the Moiwana community members by not doing enough to facilitate their return to their traditional lands. In the Tibi Case, the Court made repeated reference to the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, particularly in finding that the right to humane treatment under Article 5 requires the state to provide adequate and timely treatment of injuries suffered by prisoners. In the Juan

experiments" in international legal adjudication, to remain relevant, effective, and innovative, Judge Meron of the ICTY has argued, Courts must be rooted in the law and human rights principles.[955] By having already made significant contributions to (i) the human rights revolution; (ii) development of rules of procedure and evidence; (iii) extraordinary corpus of rulings; (iv) promotion of legal certainty; (v) insuring of coherence and consistency of international law through cross-reference and cross-citation across legal regimes; and (vi) robustness of legal precedent, any expectations which Courts might have fallen short of ensue primarily from the misplacement of public expectations and failure to understand the Courts' legal mandate expressly spelled out in their founding documents.[956] Oftentimes, the Court's shortcomings are the result of severe underfunding by state-parties and international organizations. Financial burden results in long trials, which in turn lead to a failure of the Court to abide by to one of the major principles of law, that of a litigant or plaintiff's right to a speedy trial,[957] and an uneven geographic distribution of international legal bodies across the international legal system.[958]

Financial difficulties, however, have not deterred courts from pursuing norm-generating functions and effective elucidation of legal principles that find following among states and other judicial counterparts. International politics and dynamic behavior of states in the international arena offer ample opportunities for opening jurisprudential space for legal questions defining the new world order, such as: (i) the use of drones in inter-state conflict; (ii) extrajudicial killings as tools of national security; (iii) the use of torture; (iv) electronic surveillance; (v) use of social media as evidence in international criminal proceedings. Extraordinary research potential exists for scholars of politics and international law to examine in further detail these and similar questions with significant human rights implications to which the dissertation alluded. Having established the normative relevance and the essential role that international judicial regimes play in

---

Humberto Sánchez Case, the Court relied on the United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, as setting forth minimum requirements for the serious and effective investigation of a suspected extra-legal execution, in compliance with Articles 8 and 25 of the ACHR." In Gerard L. Neuman, "Import, Export, and Regional Consent in the Inter-American Court of Human Rights" (2008) 19 EJIL 101, 116–18.

[955] Judge Theodore Meron "The International Criminal Tribunals and the Rule of Law." Oxford University lecture, March 2015.

[956] I have elaborated further on this question in Chapter 5 of the dissertation.

[957] Judge Theodore Meron 'The International Criminal Tribunals and the Rule of Law.'

[958] Helfer, 'The Effectiveness of International Adjudication', p. 8.

affecting political interests of states and state-citizen relations, future research can focus its normative purview on the practical and legal ramifications of the above cited and the increasingly pressing externalities of power politics.

International Law's Impact on State Behavior

The Kampala Amendments on the Crime of Aggression, in addition to conventions and treaties already mentioned in the preceding chapters of the dissertation, constitute yet another area of the law's interest with and prospective intermediation of the affairs of states. The Amendments are the most recent addition to the debate on the criminalization of the crime of aggression, understood as:

> "The planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations … The 'act of aggression' means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations."[959]

The proposal to amend the Rome Statute to permit the ICC to exercise jurisdiction over state conduct upon referral from the UN Security Council recognizes that international criminal law – and by extension, judicial organs in charge of its implementation - cannot be understood as an isolated or self-contained entity[960], but one increasingly mindful of and aware of the political background of aggression and the political context compelling states to revert to the use of force. The manifest goal of international courts is to uphold the law, ensure enforcement and compliance, and ultimately prevent or deter violations. State conduct is progressively being filtered through treaty law; violations or which become adequately publicized and criminalized. Persons in a position of effective control over acts of state or in direct military and political control of the commission of an act of aggression violating Charter of the United Nations provisions, under jus contra bellum Kampala amendments, face criminal prosecution and conviction inevitably impacting the

[959] United Nations Resolution RC/Res.6 < https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf> p. 2.
[960] Judge Christopher Greenwood lecture "The Crime of Aggression: The Dawning of a New Era?" Leiden University – The Hague. 29 June 2017.

strategic calculus or changing altogether the material rationale, which in the absence of prohibition and means of judicial enforcement, might otherwise vindicate inter-state skirmishes, interventions, and preemptive military attacks.

The elements of crime of aggression make manifest the Rome Statute's intimate relationship with the UN Charter provisions and, to the maximum extent possible, ensure that perpetrators of crimes violating the peace and stability of the world order are held to account. The Amendments stipulate that: (i) The perpetrator of the crime of aggression, planned, prepared, initiated, or executed the act. (ii) The perpetrator was a person in a position to exercise effective control over the act of state accused of committing the crime. (iii) The act of aggression consisted of the use of armed force by a State against the sovereignty, territorial integrity or political independence of another state. (iv) "The perpetrator was aware of the factual circumstances that established that such a use of armed force was inconsistent with the Charter of the United Nations." (v) The character, gravity and scale of the act of aggression constituted a manifest violation of the UN Charter, and (vi) that the perpetrator was aware of the factual circumstances establishing manifest violation of the UN Charter.[961]

International Criminal Law recognizes that the crime of aggression, in line with the UN Charter, is "the most serious and dangerous form of the illegal use of force"[962] and requires proper consideration of the circumstances and its consequences. Furthermore, protracted conflict initiated on illegitimate grounds has distinct human consequences by breaching not only fundamental rights of states but also basic human rights provisions that become abrogated through subsequent endemic displacement of the civilian population. Regional mechanisms to redress the abominable cost and consequences of conflict on individuals have in 2012 become congealed into actionable remedies in the form of continent-wide Convention for the Protection and Assistance of Internally Displaced Persons in Africa, also known as the Kampala Convention. The continent plagued by struggles for political power, communal violence, disputes over land, natural hazards, floods and storms, have launched fragile Sub-Saharan states into chronic political disarray

[961] United Nations Resolution RC/Res.6 < https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf> p. 5.
[962] Ibid., p. 6.

provoking mass population migrations. Significant susceptibility and vulnerability to threats to human security in the form of gender-based sexual violence, arbitrary killings or forced recruitment culminated in an agreement by African Union member states on the framework for protection and accountability. The Kampala Convention aims to: (i) Ensure state responsibility to protect internally displaced populations; (ii) Address potential causes of displacement; (iii) Enshrine "individuals' right to be protected from displacement and states' duty to adopt all measures needed to prevent it"; (iv) Hold "all those involved, including private and multinational companies, accountable for their actions"; (v) Prohibit "armed groups from committing acts of arbitrary displacement"; (vi) Stipulate that "states must collaborate with civil society and humanitarian organisations to ensure IDPs' protection and assistance"; and (vii) Make "national authorities responsible for creating the conditions required to achieve durable solutions."[963] A continent confronted with 12 million[964] internally displaced people (IDPs), has thus demonstrated a political will to enforce some of the fundamental legal obligations stemming from its signatory status to international treaty law and refocused attention away from sole and superior sovereign prerogatives to decide on state conduct to that of individual rights and state responsibility and accountability. The international dialogue exemplified by the above cited documents, demonstrates the intimate interweaving of concerns of transnational nature and illustrates organized efforts to redress intrinsic systemic and systematic failures of state to live by the letter and spirit of international agreements.

Prospects for International Courts and Cosmopolitan Law

In a world defined by porous borders and prevalence of transnational conflict, it becomes all the more pressing to inquire – as Chapter 1 has done – whether cosmopolitanism, and its institutionalized instantiations – require international legality? What types of laws does the proverbial 'love of humanity' or 'international altruism' - to which cosmopolitan sentiments have been reduced to by their critics - require in arbitrating questions of population displacement, chronic refugeeism, illegal immigration, state

[963] Briefing Paper "The Kampala Convention two years on: Time to turn theory into practice." < http://www.internal-displacement.org/assets/publications/2014/201412-af-kampala-convention-brief-en.pdf> p. 2.
[964] Ibid., p. 1.

surveillance, foreign aid and poverty, humanitarian intervention, protection of civilians against state aggression in times of war and peace?

A has been said elsewhere; if cosmopolitanism remains at the level of emotion it will be too weak to be "motivationally reasonable". What types of institutions and what types of international legal regimes, then, could provide a realistic and consequentialist basis for acting upon and fulfilling cosmopolitan duties? (Assuming of course, that the fundamental presupposition behind cosmopolitan orientation – that of, holding every human being's life as equally valuable regardless of standing or nationality – is uncontested). If institutions are capable of (i) "assent without making extraordinary psychological and physical demands" and (ii) "set forth plausible mechanisms for achieving these ends"[965], should not political theory scholarship reinvest itself anew in ascribing cosmopolitan duties to institutions, particularly, international courts vested with the capacity to provide legal vocabulary for transnational rule and claims-making across borders and irrespective of state preferences and interests? The preceding chapters aimed to explore and, to the extent possible, answer the theoretical conundrums our shifting loyalties and rapidly changing dynamics of world politics impose upon our moral conscience and legal adjudication. Following Fuller, it can be said that supranational courts and cosmopolitan norms with which they invest the realm of politics, war, migration, state surveillance, and terrorism, among others, require "a strong commitment to the principles of legality", which compel "a ruler to answer to himself, not only for his fists, but for his elbows as well."[966] The international legal regimes analyzed, provided a sufficiently illustrative basis for believing that the ruler is, indeed, held individually accountable not only for his fists but for his elbows also.

Proliferation of international courts (ICs) and tribunals has necessitated a rethinking of state responses to supranational judicial oversight.[967] While the United States and

---

[965] Goldsmith, Jack and Eric A. Posner. 2005. *Limits of International Law.* Oxford: Oxford University Press. p. Goldsmith and Posner. p. 210.

[966] Fuller, Lon. 1964. *The Morality of Law.* New Haven and London. Yale University Press. p. 159.

[967] It is conceivable that the nature of oversight can also be implemented at the level of the UN. The UNODC's enforcement of UNTOC by means of a review mechanism to combat transnational organized crime (including terrorism,) is already paying dividends. The Convention, in its substantive chapters sets out preventive measures, encourages international cooperation on asset recovery, criminalization of illicit activities, and law enforcement. It is a globally binding framework which seeks to end impunity for political and economic crimes through extradition agreements and mutual legal assistance.

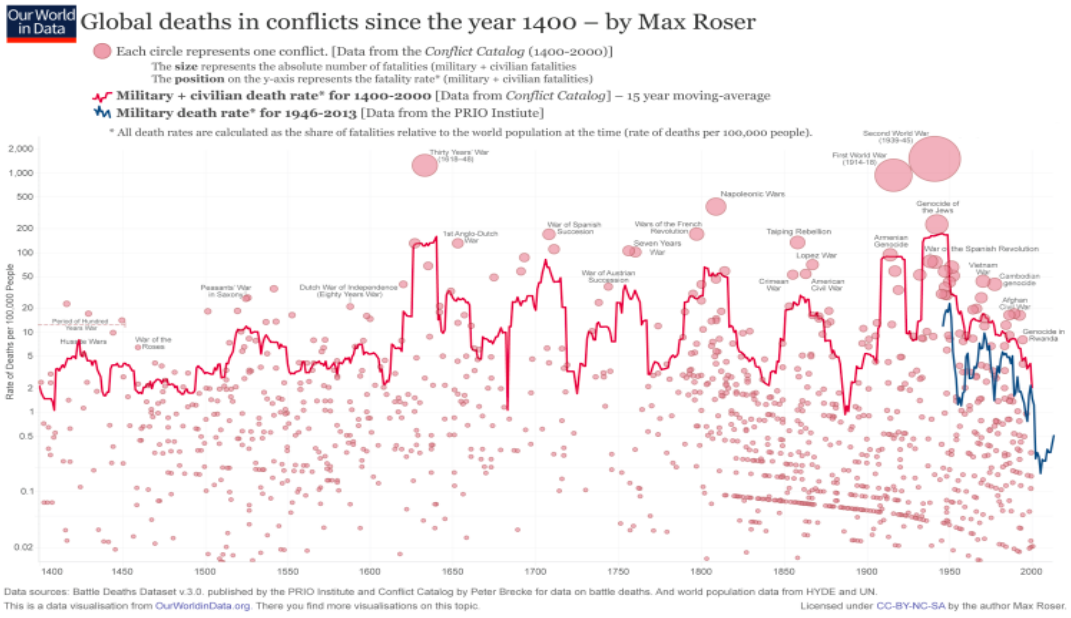
Europe appear as natural allies of norms the courts advocate, they too have posed political challenges to the institutional effectiveness of the international judicial regime. Shifts in the domestic political balance of power in the United States, especially, account for 'schizophrenic' oscillations in the support of, both, international law principles and the work of international courts. Alter points out that political factionalism and conservative values tend to breed skepticism of external judicial oversight[968] with the exception of dispute settlement systems provided for through the World Trade Organization. Yet, the overall evolutive nature of international law suggests states' increased openness to ICs on account of five distinct societal trends. Alter suggests that: (i) public distrust of governments provides the necessary impetus behind broader political support of international judicial oversight. Crises events in the form of major political unrests, human rights violations or brutal military dictatorships,[969] create opportunities for rights advocacy and regime change/reform in the direction of greater respect for the rule of law and citizen rights. (ii) Convention and treaty laws contribute to gradual embeddedness of international law in domestic jurisdictions[970] spurring institutional change in the direction of ensuring compliance. (iii) Interaction of regional and international initiatives creates overlapping jurisdictions, which enable multilateral enforcement and ensure further compliance. (iv) Legalism develops when political channels are blocked.[971] The supremacy of international law in national legal orders permits for the exercise of extraterritorial legal jurisdiction even, and especially, in the absence of an explicit political mandate. (v) Western countries facilitate the spread of international law when leaders articulate, accept, and respond to legalist arguments [972] in the daily affairs of the state. Judicialization of politics, humanization of law, and legalization of international relations occurs when governments articulate their objectives and interests in legalistic terms and are challenged on the basis of the strength of their argument. Routine participation of states in the international court system, civilizes and acculturates governments to the language of the laws to which they are also subjects and makes manifest their obligations to their citizens. The presence of

[968] Alter, The New Terrain of International Law, p. 157.
[969] Ibid., p. 154.
[970] Ibid., p. 155.
[971] Ibid., p. 156.
[972] Ibid., 157.

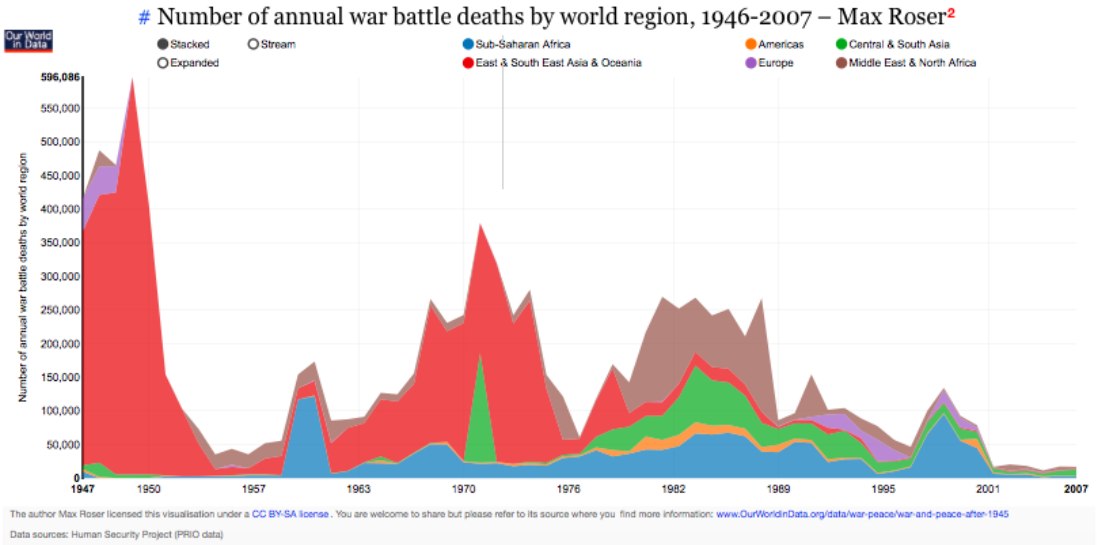
legal checks enabled by the IC regime ensures that a balance of power is maintained through peaceful means and that grievances be resolved by means of a better argument. Precedent setting case law and *opinio juris* evolve a common vernacular, which in turn, leads to a definition of universal values and aspirations of the global community, which some have referred to as transnational constitutionalism, and ensures a progressive development and ascension to transnational and cosmopolitan orientation that promote structural enhancements to the domestic and international spheres of governance. Litigation of interests, rights, and objectives proofs the international systems against ill-advised courses of action and unexpected fluctuations stemming from sudden ideological shocks to the domestic system[973] and further ensures that economic and political decisions will not be taken too hastily, and their consequences given their full attention and weight.

[973] Particularly relevant here are the existential shocks to the domestic system, which nudge the political establishment into an ill-advised and poorly litigated U.S. march towards the invasion of Afghanistan and Iraq following the 9/11 terrorist attacks in New York and Washington D.C.

Graph I.



Graph II.



CONCLUSION

"In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which … we are now fighting, that the judges … stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is prohibited in law."
- Lord Atkin

The six chapters of the dissertation have collectively attempted to distill the practical implications of the cosmopolitan *pro homine* turn in international law and litigation (discussed in Chapter 1) through a study and analysis of case law of four major supranational judicial regimes, the International Court of Justice (Chapter 2); the European Court of Human Rights (Chapter 3); the Inter-American Court of Human Rights (Chapter 4); and the International Criminal Court (Chapter 5). Each of the international judicial regimes discussed has demonstrably shown that courts have an exogenous effect on state behavior and influence the balance of power between states and their citizens by imbuing individual human-beings with a plethora of legal instruments and unprecedented legal standing protected by convention and treaty law, which once congealed into custom, has been recurrently protected in *opinio juris* and case-law of international courts and tribunals. Together, the chapters attempted to (i) draw a wide historical overview of the evolution of cosmopolitan norms, (ii) their embeddedness in international law, particularly in the international human rights law, international humanitarian law, the law of armed conflict, and international criminal law (or what I subsume under the rubric of cosmopolitan *pro homine* law) and (iii) their effects on individuals and states. In so doing, the dissertation attempted to offer a rejoinder to realism, which sees politics as a zero-sum game that does not tolerate or abide by normative constraints of international law and illustrate a potential for a mutually reinforcing and beneficial relationship between states and supranational regimes.

The emergence of cosmopolitan law and a sophisticated language of rights, despite many notable conceptual and practical shortcomings outlined in the dissertation, have, nevertheless, been shown to be not only influential in remedying violations in international politics but also enforceable through a variety of legal and extra-legal means. It is a legal fact that that: (i) international legal rulings routinely trump domestic legal rulings; (ii) the rules of international declarations, treaties, and legal custom inform the rules of domestic

constitutions; (iii) international legal rulings become cited precedents in domestic legal cases and judgments; (iv) state leaders are increasingly made individually accountable, through supranational courts, for the government and its use or misuse of power. The revival of the cosmopolitan tradition, whose central tenets uphold that individuals are the fundamental units of moral concern and ought to be regarded as one another's moral equals; (b) whatever rights and privileges states have, they have them only in so far as they thereby serve individual's fundamental interests; (c) states are not under a greater obligation to respect their individual member's fundamental rights than to respect the fundamental rights of foreigners issues in a much altered and far more ethically-minded political environment. National and international courts which uphold that: "every human being possesses an intrinsic worth and moral entitlement to human rights, merely by being human; this moral worth and entitlement must be recognized and respected by others; also the state must be seen to exist for the sake of the individual being, and not vice versa" cannot but assist in giving renewed salience to an enlightened cosmopolitan sentiment of thinking nothing human alien.

For those harboring residual skepticism concerning the efficacy of the international legal order, it is worth considering a parallel order where no binding agreements exist to exert exogenous effect on state behavior, where individuals remain dispossessed of enforceable rights and legal means beyond and outside of their domestic jurisdictions, and where governments and governmental entities remain unaccountable to the public and the international community at large for flagrant violations of agreed upon norms and practices. Such a world is not difficult to imagine as history supplies ample illustrations of egregious violence without regard to race or creed. The only variable worth noting are the sheer numbers of the fallen and the victimized. Recall historical accounts of the Peloponnesian War by Thucydides and the struggle between Athens and Sparta in the 5th century BC or the atrocities committed during the Mongol conquest of the Middle East and Asia in the 13th century, when a loss in battle permitted the Persian and Hindu victors to tie the Mongol soldiers behind horses and drag them through the streets of the city for entertainment, drive nails into the heads of captives or have them crushed by elephants.[974] Byzantine emperor Basil following the defeat of Bulgarians in 1014 had his war captives

[974] Weatherford, Jack. 2004. Genghis Khan and the Making of the Modern World. Three Rivers Press.

blinded. He would then leave "one man out of each hundred with one eye in order that he might lead the other ninety-nine homeward and thereby spread the terror."[975] The Crusader's capture of the Antioch in 1098 and Jerusalem in 1099 resulted in slaughter of Jews and Muslims "without regard for age or gender, but merely because of their religion."[976] The Holy Roman Emperor Frederick Barbarossa during the conquest of the north Italian city of Cremona in 1160 permitted his soldiers to behead their prisoners and play with their "heads outside the city walls, kicking them like balls."[977] In response,

> "The defenders of Cremona then brought out their German prisoners on the city walls and pulled their limbs off in front of their comrades. The Germans gathered more prisoners and executed them in a mass hanging. The city officials responded by hanging the remainder of their prisoners on top of the city walls. Instead of fighting each other directly, the two armies continued their escalation of terror. The Germans then gathered captive children and strapped them into their catapults. which were normally used to batter down walls and break through gates. With the power of these great siege machines, they hurled the living children at the city walls."[978]

The Second Sino-Japanese War, which began in 1937 when Imperial Japan invaded China under Chiang Kai-Shek, left an estimated 20 to 35 million victims. To this day, the "Rape of Nanking" is among the most horrifying events in the history of war. In his *Chiang Kai-Shek: China's Generalissmo and the Nation He Lost* (2013), Jonathan Fenby describes the scene of the crime in no uncertain terms. Needless to say, atrocities of such gratuitous cruelty and wanton violence perpetrated on a vast scale by regular armies would surely not only not go unnoticed but would also not be left unpunished.

> "The Rape of Nanking was unique as an urban atrocity not only for the number of people who died but also for the way the Japanese went about their killing, the wanton individual cruelty, the reduction of the city's inhabitants to the status of sub-humans who could be murdered, tortured, and raped at will in an outburst of the basest instincts let loose in six weeks of terror and death. The death toll was put at 300,000 - some accounts set it even higher, though one source for the former figure, Harold Timperley of the Manchester Guardian, used it to refer to deaths in the Yangtze Valley as a whole. (…)

---

[975] Ibid.
[976] Ibid.
[977] Ibid.
[978] Ibid.

On the first day, a Japanese division killed more than 24,000 prisoners of war and fleeing soldiers. On the wharves by the river, coolies threw 20,000 bodies into the Yangtze before being killed themselves. Behind its white flags and Red Cross symbols, the foreign Safety Zone proved weak protection: indeed, by concentrating refugees there, it inadvertently provided a big target for the killers; the 'good Nazi of Nanking', the German John Rabe could only roam the streets trying to rescue individuals in his path. (…)

As the Nationalist capital, Nanking was obviously an important target where the Japanese wanted to achieve maximum humiliation of their adversary. But the sustained mass bestiality can better be explained - if it can be rationally explained at all -- by the tensions that had built up in the army since the Shanghai battle erupted, by the knowledge of the Japanese troops that they were heavily outnumbered by the Chinese in the city, by the callousness bred in the previous four months - and, above all, by the dehumanisation of the Chinese which had become part of the psyche of the Imperial Army. The invaders saw the people around them as lower than animals, targets for a bloodlust which many, if not all, their commanders felt could only spur their men on to fight better. In his diary, one soldier described the Chinese as 'ants crawling on the ground ... a herd of ignorant sheep'. Another recorded that while raping a woman, his colleagues might consider her as human, but, when they killed her, 'we just thought of her as something like a pig'."[979] [980]

The aspect of collective dehumanization and depersonalization and a profanity of

---

[979] Further we read: "There were no imperial orders, as such, for the Rape of Nanking, and General Matsui gave senior officers a scathing rebuke after he entered the city for the victory parade on 17 December. But the general left for Shanghai two days later and, though he insisted there that misconduct must be severely punished, his words had no discernible effect. Any Chinese was liable to be a target. People were roped together and machine-gunned, doused with kerosene and set on fire. Thousands were buried alive -- or put in holes up to their necks and then savaged by army dogs. Others were frozen to death after being thrown into icy ponds. Japanese soldiers used Chinese for bayonet practice. Civilians were nailed to boards and run over by vehicles, Mutilation, disemboweling and eye gouging took place before executions. People were sprayed with acid, or hung up by their tongues. Medical experiments were conducted in a former hospital where Chinese, known as 'logs', were injected with germs and poisons. Women, young and old, pregnant and ill, were raped in enormous numbers, and then killed, some with sticks rammed into their ******s. Fetuses were ripped from the bodies of expectant mothers. Other women were taken to so-called 'comfort houses' set up for the soldiers, who called the inmates 'public toilets'. (…)
"Japanese newspapers recorded a competition between two lieutenants to behead 100 Chinese with their swords. When they both passed the mark, it was not clear who had got there first, so the contest was extended to 150. One of the lieutenants described the competition as 'fun', though Japanese newspapers noted that he had damaged his blade on the helmet of a Chinese he cut in half. Reveling in their savagery, Japanese soldiers took photographs of the massacres and sent them to Shanghai to be developed…"

[980] Fenby, Jonathan. 2003. *Chiang Kai-Shek: China's Generalissimo and the Nation He Lost.* Carroll & Graf Publishers.

human dignity witnessed in the above account, elicit moral condemnation. Yet, principled moral dicta in and of themselves are impotent in the absence of laws penalizing perpetrators of crimes offensive to human conscience.[981] Increasingly, therefore, international law has been seen to take on a humanizing dimension by articulating norms and standards, which put the human being at the center of the legal universe. This argument has already been advanced and aptly documented in the previous chapters of this dissertation and the above excerpt aims to bring it to greater relief. At the same time, however, it is possible to assert that modern-day crimes perpetrated by non-state actors continue to wreak havoc irrespective of international legal norms in place and that the international community is unable to utterly proof the system against anomalies, which challenge international consensus. Groups such as ISIS or authoritarian regimes of Iran and North Korea continue to pulverize and dehumanize with impunity; Russia land grabs and annexes territories in violation of sovereignty and without transparent due process; and Syria and Yemen hold their own citizens hostage to humanitarian crises. Even peace-loving states, the cornerstones of international liberal consensus, can place reservations on the utility of international treaties, agreements, and institutions. The United States' recent withdrawal from the 'Treaty of Amity' with Iran following an unfavorable ruling by the International Court of Justice in *Iran v. United States* and its subsequent reevaluation and rethinking of its relationship with international courts can halt the arc of progress in international adjudication and the accompanying evolution of legal norms.

It is important to remember, however, that international law – as articulated and advanced in its contemporary form – is not "a piece of cobweb work, spun out of fantastic conceits and verbal analogies", but rather, "a mass of substantial justice cast in the mould of reason."[982] Increasingly, the negotiated treaty law solidified by custom and precedent is not only capable of positing and articulating criminal charges against states, heads of states, and individuals in commanding positions, but also international corporations, private companies, large banking institutions and conglomerates. Their effectiveness stems from an impartial and transparent legal process, which in fulfilling its judicial trajectory, leads

[981] Legal principle adhered to in international law – there is no crime without law or *nullum crimes sine lege* – applies here and is encapsulated in the ICCPR's Article 15.
[982] Bentham, Jeremy. 1843. *The Works,* Vol. 1. P. 182.

to conviction and, ultimately, punishment. While retroactivity in prosecution is not foreseen or advised in international criminal cases, one of the important outliers of this norm has been the establishment of the Extraordinary Chambers in the Courts of Cambodia for the prosecution of crimes perpetrated by the Khmer Rouge between 1975-79. In absentia trials in the Special Tribunal for Lebanon provide another instance of the pursuit of justice and an apt adaptability to the realities and nature of the offense in cases of non-state violence and terrorism. The aforementioned follow in the footprints of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) and are guaranteed a reasonable measure of success, given the amount of precedent already accrued in international criminal law and international law of war or international humanitarian law.

Despite criticisms and opposition, international courts have proved themselves to be innovative and evolutive trailblazers in the field of international law. They have shown a tremendous amount of institutional willpower and flexibility in order to better reflect and face the ever-shifting political landscape. Lastly, cosmopolitan norms proffered by international courts, have ensured that international law is humanized as politics is judicialized. In 1995, the Appeals Chamber in the ICTY Tadić case presciently acknowledged and recognized that

> "A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach … international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings."[983]

Since then, international criminal adjudicatory bodies and mechanisms have aimed to focus their practice on retribution and deterrence by means of a forward-looking teleological and deontological understanding of punishment. They have done this by assessing the virtues of proportionality in sentencing and appreciating both the victim and the perpetrator of the crime as autonomous reasoning moral agents in possession of full personhood subject to legal protection as well as punishment.

What does the appearance of judicial actors and supranational courts in international arena tell us about international relations? For one, they point to a

[983] *Tadić*, ICTY (October 1995), para. 97.

transformation in political relations between citizens and their states. Individual prerogative of taking governments to court for outright violations of human, civil, and political rights has now been routinized under the European Convention of Human Rights in the context of peace and increasingly, under the Inter-American Convention of Human Rights, in the context of post-conflict transitional justice initiatives. Victims of atrocities are protected under the Rome Statute and perpetrators held criminally accountable. A plethora of convention and treaty law further regulates conduct between states and citizens and ensures that abuses of state power receive a fair and impartial hearing in the court of law of domestic or international character. Second, international courts engage in the construction of norms and vocabulary - a common global vernacular - as has been illustrated in the preceding chapters, for rights articulation and claims making across borders. Third, in relying on normative justifications for adjudication, supranational judicial regimes in upholding (i) individual's basic entitlements as being fully independent of political borders, (b) maintaining that states have authority to the extent that they respect and promote those entitlements, and (c) asserting that whatever rights and privileges states have, they have them only in so far as they serve individual's fundamental interests, privilege – for the first time in the anarchic state-centric self-help configuration of power-relations – the individual human being, and seek accountability and recourse for states' transgression of their elementary obligations to their citizens and foreigners alike. By instituting transnational accountability frameworks for violations of international commitments and laws, courts, under the principle of universal jurisdiction, have an obligation and authority to trial and sentence principal perpetrators of crimes offensive to human dignity and conscience, thus inevitably influencing choices and decisions of government officials and commanders in the field with respect to sovereign privilege. The courts' activist *pro homine* approach to international law effects change in the legal discourse and gives rise to a new generation of treaties, which take the fundamental considerations of humanity as a fundamental unit of moral, legal, and political concern. Lastly, it is a political fact and a legal reality that supranational courts have ended an era of impunity and given life and renewed salience to an era of state and individual

accountability.[984] By doing so, supranational courts borrow the know-how and trade legal innovations with cognate ad hoc tribunals and domestic jurisdictions, while remaining consistent with and working alongside their fundamental statutory remit and precedent-setting mandate. In the absence of an overarching leviathan, supranational courts have shown themselves to be the moral conscience of the global community and a legal guardian of the basic rights and entitlements that transform citizens from mere objects at states' whimsical disposal to fully embodied political and legal subjects, whose status, in the eyes of the court, is not only not exhausted, but validated and fully legitimized by cosmopolitan normativity, which it affirms.

[984] See Table III. "The Remit of International Courts" for the nature and number of actively pursued cases under the respective courts' jurisdiction since their official founding.

TABLE III. The Remit of International Courts

IC	Governing Treaty	Jurisdiction/ Member States	Jurisdiction/ Voluntary or Compulsory	Primacy over domestic courts	State-to-State	State-to-Individual	Individual Responsibility	State Responsibility	Number of Cases since founding
ICJ (1945)	The Charter of the United Nations	198 UN Member States	Compulsory	x	x			x	151[985]
ECtHR (1959)	Convention for the Protection of Human Rights and Fundamental Freedoms	47 States	Compulsory	x		x		x	100,000 +[986]
IACHR (1979)	American Convention on Human Rights	35 Member States of the Organization of American States	Compulsory	x		x	x	x	12,000
ICC (1998)	The Rome Statute	122 Statute of Rome signatory states	Compulsory	x	x	x	x	x	24[987]

[985] International Court of Justice. "List of All Cases" < http://www.icj-cij.org/en/list-of-all-cases>
[986] European Court of Human Rights. "Survey: Forty Years of Activity 1959-1998" <http://www.echr.coe.int/Documents/Survey_19591998_BIL.pdf>
[987] The International Criminal Court < https://www.icc-cpi.int/about>

BIBLIOGRAPHY

INTRODUCTION

Adelman, Sam. 2012. "Cosmopolitan Sovereignty" in *Cosmopolitan Justice and its Discontents*, Cecilia Bailliet and Katja Franko Aas (eds.). New York: Routledge.

Alter, Karen. 2014. *The New Terrain of International Law: Courts, Politics, Rights*. Princeton and Oxford: Princeton University Press.

Arnull, Anthony. 2000. *The European Union and its Court of Justice.* Oxford: Oxford University Press.

Beardsworth, Richard. 2011. *Cosmopolitanism and International Relations Theory.* Cambridge: Polity.

Bederman, David J. 2006. *International Law Frameworks*. New York: Foundation Press.

Beyleveld, Deryck and Roger Brownsword. 1986. *Law as a Moral Judgment*. London: Sweet & Maxwell.

Biersteker, Thomas et al. 2007. *International Law and International Relations: Bridging Theory and Practice*. New York: Routledge.

Breyer, Stephen 2015. *The Court and the World: American Law and the New Global Realities*. New York: Vintage Books.

Buchanan, Allen. 2006. "Democracy and the Commitment to International Law." Georgia *Journal of International Law and Compliance*. 34.

Carr, E.H. 2001/1981 (orig.). *The Twenty Years' Crisis*. New York: Palgrave Macmillan.

Creutz, Katja. 2013. "Law versus Codes of Conduct: Between Convergence and Conflict" in Jan Klabbers and Touko Piiparinen (eds) *Normative Pluralism and International Law: Exploring Global Governance*. Cambridge: Cambridge University Press.

Donne, John. "No Man is an Island" <https://web.cs.dal.ca/~johnston/poetry/island.html>

Goldsmith, Jack and Eric A. Posner. 2005. *Limits of International Law*. Oxford: Oxford University Press.

Goldsmith, Jack and Eric A. Posner. 2006. "The New International Law Scholarship." Public Law and Legal Theory Working Paper Series. University of Chicago. <http://www.law.uchicago.edu/academics/publiclaw/index.html > Accessed 24 July 2017

Jacobson, David. 2006. *Rights Across Borders*. Baltimore: Johns Hopkins University Press.

Schaffer, Karlsson Johan and Andreas Follesdal and Geir Ulfstein. "International human rights and the challenge of legitimacy" *in International Human Rights and the Challenge of Legitimacy*. Cambridge: Cambridge University Press.

Kennedy, David. 2004. *The Dark Sides of Virtue: Reassessing International Humanitarianism*. Princeton and Oxford: Princeton University Press.

Kennedy, David. 2006. "The Last Treatise: Project and Person. (Reflections on Martti Koskenniemi's *From Apology to Utopia*)" <http://www.law.harvard.edu/faculty/dkennedy/publications/LastTreatise.pdf> Accessed 15 June 2017.

Koskenniemi, Martti. 1989/2005. *From Apology to Utopia: The Structure of International Legal Argument*. Helsinki: Finnish Lawyers' Publishing Company. Epilogue.

Lagon, Mark. 2012. "Policy Innovation Memorandum No. 26 – A Global Trust for Rule of Law." Council on Foreign Relations. <http://www.cfr.org/rule-of-law/global-trust-rule-law/p29170 > Accessed 2 May 2018.

Martinez, Jenny S. 2012. *The Slave Trade and the Origins of the International Human Rights Law*. Oxford: Oxford University Press.

Nijman, Janne Elizabeth. 2004. *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law*. The Hague: TMC Asser Press.

Peat, Daniel. 2014."Partly Laws Common to All Mankind": Foreign Law in American Courts by Jeremy Waldron. *The Cambridge Law Journal* 73(3)

Peters, Anne. 2009. "Membership in the Global Constitutional Community" in Klabbers, Jan, Anne Peters and Geir Ulfstein, *The Constitutionalization of International Law.* Oxford: Oxford University Press.

Piernik, Roland and Werner, Wouter. 2010. "Can Cosmopolitanism Survive?" in Roland Piernik and Werner Wouter (eds.) *Cosmopolitanism in Context: Perspectives from International Law and Political Theory*. Cambridge: Cambridge University Press.

Posner, Eric, A. 2014. *The Twilight of Human Rights*. Oxford: Oxford University Press.

Schaffer, Karlsson Johan and Andreas Follesdal and Geir Ulfstein. "International human rights and the challenge of legitimacy" in *International Human Rights and the Challenge of Legitimacy*. Cambridge: Cambridge University Press.

Schütze, Robert. 2007. "On 'Middle Ground'. The European Community and Public International Law." EUI Working Paper < http://cadmus.eui.eu/bitstream/handle/1814/6817/LAW-2007-13.pdf;jsessionid=4F8E96B868365EEFCC339BAF59E0074D?sequence=3> Accessed 9 January 2017.

Sloane, Robert D. 2010. "Review of Law as a Vanishing Point: A Philosophical Analysis of International Law by Aaron Fichtelberg". *American Journal of International Law*, vol. 104. <http://www.bu.edu/law/workingpapersarchive/documents/sloanefichtelbergrev.pdf> Accessed 3 March 2017.

Steinmo, Sven. 2008. "What is Historical Institutionalism?" in *Approaches in the Social Sciences,* Donatella Della Porta and Micheal Keating (eds.).

Streeck, Wolfgang and Kathleen Ann Thalen. 2005. *Beyond Continuity: Institutional Change in Advanced Political Economies*. Oxford: Oxford University Press.

Teitel, Ruti. 2011. *Humanity's Law*. Oxford, Oxford University Press.

Thelen, Kathleen. 1999. "Historical Institutionalism in Comparative Politics". *Annual Review of Political Science.* (2): 369-404.

Ulfstein, Geir. 2009. "The International Judiciary" in Klabbers, Jan, Anne Peters and Geir Ulfstein, *The Constitutionalization of International Law*. Oxford: Oxford University Press.

Volanscek, Mary L. *Law Above Nations: Supranational Courts and the Legalization of Politics*. Gainesville: University Press of Florida.

Walker, Neil. 2014. *Intimations of Global Law*. Cambridge: Cambridge University Press.

Weatherall, Thomas. 2015. *Jus Cogens: International Law and Social Contract.* Cambridge: Cambridge University Press.

Other:

"International Law in Domestic Courts" Oxford University Press Blog < https://blog.oup.com/2016/12/international-law-domestic-courts/> Accessed 24 April 2017.

International Criminal Court. "Katanga case: ICC Trial Chamber II awards victims individual and collective reparations" < https://www.icccpi.int/Pages/item.aspx?name=pr1288 > Accessed 24 April 2017.

International Court of Justice. "Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)" < http://webtv.un.org/watch/icj-ukraine-v.-russian-federation/5349310122001#full-text / http://www.icj-cij.org/docket/files/166/19322.pdf > Accessed 24 April 2017.

The Universal Declaration of Human Rights, Article 1 <http://www.un.org/en/documents/udhr/ > Accessed 2 May 2016.

Press Releases:

CNN. "Nikki Haley: An unprecedented step on human rights" <http://edition.cnn.com/2017/04/19/opinions/human-rights-cycle-violence-nikki-haley/index.html > Accessed 24 April 2017.

de Rechtspaak. "19 years prison sentence for illegal arms trafficking and complicity in war crimes in Liberia and Guinea" <https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Gerechtshoven/Gerechtshof-s-Hertogenbosch/Nieuws/Paginas/19-years-prison-sentence-for-illegal-arms-trafficking-and-complicity-in-war-crimes-in-Liberia-and-Guinea.aspx> Accessed 24 April 2017.

Human Rights Watch. "Zambia: Support International Criminal Court: ICC Crucial for Atrocity Victims, Global Justice" < https://www.hrw.org/news/2017/04/10/zambia-support-international-criminal-court > Accessed 24 April 2017.

Jurist. "Spain court begins hearings on Syria war crimes" <http://www.jurist.org/paperchase/2017/04/spain-court-begins-hearings-on-syria-war-crimes.php> Accessed 24 April 2017.

Washington Post. "Kosovo citizen indicted for alleged war crimes in 1999" <https://www.washingtonpost.com/national/kosovo-citizen-indicted-for-alleged-war-crimes-in-1999/2017/04/20/ab59a1f4-25bf-11e7-928e-3624539060e8_story.html?utm_term=.f7c7371dd4ac > Accessed 24 April 2017.

CHAPTER I

Agamben, Giorgio. 1998. *Homo Sacer: Sovereing Power and Bare Life*. Stanford: Stanford University Press.

Archibugi, Daniele. 1998. "Principles of cosmopolitan democracy." in Daniele

Archibugi, David Held and Martin Köhler, eds, *Re-imagining Political Community*. Cambridge:Polity Press.

Balibar, Etienne. 2004. *We, the People of Europe?* Princeton: Princeton University Press.

Barkin, Samuel. 2006. *International Organization: Theories and Institutions*. New York: Palgrave Macmillan Press.

Barnett, Michael. 2011. *Empire of Humanity: A History of Humanitarianism.* Ithaca. Cornell University Press.

Barry, Brian. 2008. "Humanity and Justice in Global Perspective" in Thomas Pogge *Global Justice: Seminal Essays*. Paragon Books.

Beardsworth, Richard. 2011. *Cosmopolitanism and International Relations Theory*. Cambridge: Polity.

Beck, Ulrich and Edgar Grande. 2007. *Cosmopolitan Europe*. Cambridge: Polity Press.

Bellamy, A. "The responsibility to protect and the problem of military intervention." *International Affairs*, 84(4).

Benhabib, Seyla. 2006. *Another Cosmopolitanism.* Oxford: Oxford University Press.

Benhabib, Seyla. 2007. "Twilight of Sovereignty or the Emergence of Cosmopolitan Norms? Rethinking Citizenship in *Volatile Times. Citizenship Studies* 11(1).

Benhabib, Seyla. 2008. "Just Membership in a Global Community." Macalester Civic Forum.

Benhabib, Seyla. 2009. "Claiming Rights across Borders: International Human Rights and Democratic Sovereignty." *American Political Science Review*, (November).

Bennet, LeRoy. 1995. *International Organizations: Principles and Issues.* New Jersey: Prentice Hall.

Berman, Paul. 2012. *Global Legal Pluralism*. Cambridge: Cambridge University Press.

Bohman, James and Matthias Lutz-Bachmann. 1997. *Perpetual Peace: Essays on Kant's Cosmopolitan Ideal*. Cambridge: The MIT Press.

Borchard, Edwin, M. "The Access of Individuals to International Courts." *The American Journal of International Law.* Vol. 24, No. 2 (Apr. 1930), pp. 359-365.

Bull, Hedley. 1977. *The Anarchical Society: A Study of World Politic*s. London: The Macmillan Press.

Cohen, Mitchell. 2008. “Rooted Cosmopolitanism: Thoughts on the Left, Nationalism and Multiculturalism.” *Dissent*.

Caney, Simon. 2005. “Cosmopolitanism, Democracy and Distributive Justice” in Weinstock, Daniel. (ed.) 2005. *Global Justice, Global Institutions*. Calgary: Calgary University Press.

Caron, David. 2007. “Towards A Political Theory of International Courts and Tribunals.” *Berkley Journal of International Law* (24) 2. 401-422.

Charney, J.I. 1993. "Universal International Law". *American Journal of International Law,* 87.

Chayes, Abram and Antonia Handler Chayes. 1998. *The New Sovereignty: Compliance with International Regulatory Agreements.* Cambridge: Harvard University Press.

Cohen, Mitchell. 2008. “Rooted Cosmopolitanism: Thoughts on the Left, Nationalism and Multiculturalism.” *Dissent*.

Deutsch, Karl, et al. 1957. *Political Community and the North Atlantic Area: International Organization in the Light of Historical Experience*. Princeton: Princeton University Press.

Dillon, Michael and Julian Reid. 2009. *The Liberal Way of War: Killing to Make Life Liv*e. London and New York: Routledge.

Finnis, John. 1980. *Natural Law and Natural Rights*. Oxford: Clarendon Press.

Foot, Rosemary. 1995. *The Practice of Power: US Relations with China since 1949*. Oxford: Oxford University Press.

Franceschet, Antonio. 2009. “Four Cosmopolitan Projects: The International Criminal Court in Context” in Steven Roach *Governance, Order, and the International Criminal Court.* Oxford: Oxford University Press.

Grande, Edgar. 2006. “Cosmopolitan political science.” *The British Journal of Sociology* 57(1).

Habermas, Jurgen. 2012. *The Crisis of the European Union: A Response*. Cambridge: Polity Press.

Hale, Thomas, David Held, Kevin Young. 2013. *Gridlock: Why Global Cooperation is Failing When We Need It Most.* Cambridge: Polity Press.

Hayden, Patrick. 2005. *Cosmopolitan Global Politics.* New York: Routledge.

Held, David. 1995. *Democracy and the Global Order*. Stanford: Stanford University Press.
_____ 2004. *Global Covenant*. Cambridge: Polity Press.
_____ 2005. "Principles of Cosmopolitan Order." In Christopher Bertram et al. (ed.) *The Political Philosophy of Cosmopolitanism*. Cambridge: Cambridge University Press.

Henkin. Louis. *How Nations Behave. Law and Foreign Policy*. New York: Columbia University Press.

Hopmann, Terrence. 1998. *The Negotiation Process and the Resolution of International Conflict.* Columbia: University of South Carolina Press.

Jacobson, David. 2003. "Courts Across Borders: The Implications of Judicial Agency for Human Rights and Democracy." *Human Rights* Quarterly 25(2003).

Jacobson, David. 2006. *Rights Across Borders.* Baltimore: Johns Hopkins University Press.

Johnson, Samuel. 1840. "The Vanity of Human Wishes" in Arthur Murphy, *The Works of Samuel Johnson*, LL.D. New York: Alexander V. Blake Publisher.

Kant, Immanuel. 1978. *Anthropology from a Pragmatic Point of View*. London: Feffer and Simmons, Inc.

Kant, Immanuel. 1991."Toward Perpetual Peace" in *Kant: Political Writings*, ed. H.S. Reiss. Cambridge: Cambridge University Press.

Katzenstein, Peter J. 1996. *The Culture of National Security*. New York: Columbia University Press.

Kokaz, Nancy. 2005. "Institutions for Global Justice" in David Weinstock, *Global Justice, Global Institutions*. Calgary: University of Calgary Press

Koremenos, Barbara et al. 2004. "International organization, the rational design of international institutions." *International Organizations*, 55: 766-67

Krasner, Steven. 1983. *International Regimes*. Ithaca: Cornell University Press.

Lagon, Mark. 2012. "Policy Innovation Memorandum No. 26 – A Global Trust for Rule of Law." *Council on Foreign Relations*. < http://www.cfr.org/rule-of-law/global-trust-rule-law/p29170 > Accessed 3 May 2017.

Lagon, Mark and Anthony Clark Arend (eds.). 2014. *Human Dignity and the Future of Global Institutions.* Washington DC: Georgetown University Press.

Martinez, Jenny S. 2012. *The Slave Trade and the Origins of the International Human Rights Law*. Oxford: Oxford University Press.

McCrudden, Christopher. 2013. "In Pursuit of Human Dignity: An Introduction to Current Debates." Public Law and Legal Theory Research Paper Series.

Mittleman, James. 2001. *Capturing Globalization*. New York: Routledge.

Moravcsik, Andrew. 1991. "Negotiating the Single European Act: National interests and conventional statecraft in the European Community", *International Organization*. 45(1), 19-56.

Navari, Cornelia. 2000. *Internationalism and the State in the Twentieth Century*. London. Routledge.

Peat, Daniel. 2014."Partly Laws Common to All Mankind": Foreign Law in American Courts by Jeremy Waldron. The Cambridge Law Journal 73(3).

Pentassuglia, Gaetano. 2009. *Minority Rights, Minority Groups and Judicial Discourse in International Law*: A Comparative Perspective. Leiden. Martinus Nijhoff Publishers.

Petersmann, Ernst-Ulrich. 2011. "Human Rights and International Economic Law" in E.U. Petersmann *International Economic Law in the 21st Century: Constitutional Pluralism and Multilevel Governance of Interdependent Public Goods*. Oxford: Hart Publishing

Pinker, Steven. 2011. *The Better Angels of Our Nature*. New York. Viking Penguin Press.

Pogge, Thomas. 2005. *Global Institutions and Responsibility*. Malden: Blackwell Publishing.

Rawls, John. 1993. *The Law of Peoples*. Cambridge: Harvard University Press.

Rawls, John. 1999. *A Theory of Justice*. Cambridge: Harvard University Press.

Reidy, David. 2007. *On the Philosophy of Law*. Belmont: Thomson Wadsworth.

Renan, Daphna. 2018. "Presidential Norms and Article II" Harvard Law Review, Harvard Public Law Working Paper No. 18-16. Available at SSRN: https://ssrn.com/abstract=3123780

Roach, Steven. 2005. "Decisionism and Humanitarian Intervention: Reinterpreting Carl Schmitt and the Global Political Order. *Alternatives*. 30.

Roach, Steven. 2009. *Governance, Order, and the International Criminal Court*. Oxford: Oxford University Press.

Schmidt, Sebastian. 2011. "To Order the Minds of Scholars: The Discourse of the Peace of Westphalia in International Relations Literature." *International Studies Quarterly*, 55.

Shapiro, Martin and Alec Stone Sweet. 2002. *On Law, Politics, and Judicialization*. Oxford: Oxford University Press.

Sikkink, Kathryn. 2011. *The Justice Cascade*. New York: W.W. Norton & Co.

Slaughter, Anne-Marie. 2004. *A New World Order*. Princeton: Princeton University Press.

Sornarajan, M. 1997. "Power and Justice in International Law." *Singapore Journal of International & Comparative Law* (1).

Starke, J.G. 1963. *An Introduction to International Law*. London: Butterworths.

Teitel, Ruti. 2011. *Humanity's Law*. Oxford: Oxford University Press.

Volcansek, Mary L. 1997. *Supranational Courts in a Political Context*. Gainesville: University Press of Florida.

Weinstock, Daniel. (ed.) 2005. *Global Justice, Global Institutions*. Calgary: Calgary University Press.

Welch, D.A. 1993. *Justice and the Genesis of War*. Cambridge: Cambridge University Press.

Wendt, Alexander. 1992. "Anarchy is What States make of it." *International Organization* 46(2).

Zolo, Danilo. 1997. *Cosmopolis: Prospects for the World Government*. Cambridge. Wiley Press.

Other:

The UN Declaration of Human Rights, Article 1 <http://www.un.org/en/documents/udhr/>

International Development Research Center. 2001."The Responsibility to Protect". Report of the International Commission on Intervention and State Sovereignty.

CHAPTER II

Abbot, Kenneth et al. 2000. 'The Concept of Legalization'. *International Organizations* < https://www.princeton.edu/~amoravcs/library/concept.pdf > 401-419.

Abramson, Kara. 2003. 'Beyond Consent, Toward Safeguarding Human Rights: Implementing the United Nations Trafficking Protocol' (2003), *HILJ* 44 (2), 473-502.

Alfredsson, Gudmandu et al. 2009. *International Human Rights Monitoring Mechanisms.* Leiden/Boston:Martinus Nijhoff Publishers.

Alter, Karen. 2014. "Contemporary International Adjudicators: Evolution and Multiplication" in Cesare Romano et al. (eds) *Oxford Handbook of International Adjudication*. Oxford: Oxford University Press.

Alston, Philip and James Crawford. 2000. *The Future of UN Human Rights Treaty Monitoring.* Cambridge: Cambridge University Press.

Baderin, Mashood (ed), 2010. *International Human Rights: Six Decades after the UDHR and Beyond.* New York: Routledge.

Benhabib, Seyla. 2009. "Claiming Rights Across Borders", *APSR*, 5-29.

Bodie, Thomas J. 1995. *Politics and the Emergence of An Activist International Court of Justice.* Westport: Praeger Publishers.

Brooks, Rosa Ehrenreich. 2004. "War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror" *UPLR* 153(2), 675-761.

Caplan, Richard. 2010. "The ICJ's Advisory Opinion on Kosovo" *USIP* (55) <http://www.usip.org/sites/default/files/resources/PB55%20The%20ICJs%20Advisory%20Opinion%20on%20Kosovo.pdf> Accessed 15 October 2013

Cassese, Antonio. 2009. "The International Court of Justice and the right of peoples to self-Determination" in Vaughan Lowe and Malgosia Fitzmaurice (eds.) *Fifty Years of the International Court of Justice*. Cambridge: Cambridge University Press.

Charney, Jonathan I. 1998. "Is international law threatened by multiple international tribunals?" in Academie de Droits (eds) *Recueil des Cours*. Leiden/Boston Martinus Nijhoff Publishers.

Chetail, Vincent. 2003. "The contribution of the International Court of Justice to international humanitarian law", *IRRC* 85(850), 235-269.

Cover, Robert. '2008. "Law as an Instrument of Social Change – or of Repression" in Robert Hyman Jr et al. (eds*) Jurisprudence, Classical and Contemporary: From Natural Law to Postmodernism*. American Casebook Series.

Coleman, Andrew. 2003. "The International Court of Justice and Highly Political Matters", *MJIL* 3(1), 1-47.

Crook, John R. 2004. "The International Court of Justice and Human Rights", *NJIHR* 1(1), 1-8.

Damrosch, Lori Fisler. (ed.). 1987. *The International Court at a Crossroads*. Ardsley: Transnational Publishers, Inc.

Detrez, Raymond. 2011. "Recent International Advisory Opinion" Harvard Law Review <https://harvardlawreview.org/wpcontent/uploads/pdfs/vol124_kosovo_declaration_of_independence.pdf > 1090-1105. Accessed 5 May 2018.

Duxbury, Alison. 2000. "Saving Lives in the International Court of Justice: The Use of Provisional Measures to Protect Human Life" *CWILJ* 31: 141-176.

Evans, Malcolm. 2003. *International Law*. Oxford: Oxford University Press.

Gardam, Judith. 1993. "Proportionality and Force in International Law", *AJIL* 87(3), 391-413.

Ghandhi, Sandy. 2011. "Human Rights and the International Court of Justice: The Ahmadou Sadio Diallo Case" *HRLR* 11(3), 527-555.

Gray, Christine. 2008. *International Law and the Use of Force*. Oxford: Oxford University Press.

Groome, Dermot. 2007. "Adjudicating Genocide: Is the International Court of Justice Capable of Judging State Criminal Responsibility?" *FILJ* 31(4), 911-989.

Gross, Aeyal. 2017. *The Writing on the Wall: Rethinking the International Law of Occupation*. Cambridge: Cambridge University Press.

Higgins, Rosalyn. 2007. "Human Rights in the International Court of Justice" *LJIL*, 745-751.

Hongsheng, Sheng. 2006. "The Evolution of Law of War" *CJIP* (1): 267-301.

Imseis, Ardi. 2005. "Critical Reflections on the International Humanitarian Law Aspects of the ICJ Wall Advisory Opinion", *ASIL* 99(1): 02-118.

Ignatieff, Michael. 2001. *Human Rights as Politics and Idolatry*. Princeton: Princeton University Press.

Ingadottir, Theorgis. 2010. "The ICJ Armed Activity Case - Reflections on States' Obligation to Investigate and Prosecute Individuals for Serious Human Rights Violations and Grave Breaches of the Geneva Conventions", *NJIL* (78), 581–598.

Jacobson, David. 1996. *Rights across Borders: Immigration and the Decline of Citizenship.* Baltimore: Johns Hopkins University Press.

Katzenstein, Peter J. 1996. *The Culture of National Security*. New York: Columbia University Press.

Keith, K.J. 2010. "The International Court of Justice and Criminal Justice", *ICLQ* 59(4), 895–910.

Kerr, Christa-Gaye L. 2018. "The United Nations and Reparation for the Trans-Atlantic Slave Trade and Colonialism", *MJIL* 40 < http://www.mjilonline.org/the-united-nations-and-reparations-for-the-trans-atlantic-slave-trade-and-colonialism/>

Koeck, Herbert Franz et al. 2009. *From Protectorate to Statehood*. Intersentia.

Kolb, Robert. 2013. *The International Court of Justice*. New York: Hart Publishing.

Kolb, Robert and Richard Hyde. 2012. *An Introduction to the International Law of Armed Conflicts.* New York: Hart Publishing.

Ku, Julian G. 2006. "International Delegations and The New World Court Order", *WLRA*, 3-69.

Lachs, Judge. 2008. "The Lockerbie Case" in Malcolm Shaw *International Law.* Cambridge: Cambridge University Press.

Lee, Yoshiyuki. 2001. "Provisional Measures and the Loss of Human Life: An Overview of a Recent Practice in the International Court of Justice", *KULR*, 29-46.

Martinez, Jenny S. 2011. *The Slave Trade and the Origins of International Human Rights Law.* Oxford: Oxford University Press.

Mitchell, Sarah and Justyna Powell. 2011. *Domestic Law Goes Global*. Cambridge: Cambridge University Press.

Omar, Sidi M. 2008. "The right to self-determination and the indigenous people of Western Sahara", *CRIA* 21(1), 41-57.

Posner, Eric & Miguel de Figueiredo. 2004. "Is the International Court of Justice Biased?" John M. Olin Program in Law and Economics Working Paper No. 234, 1-43

Quigley, John. 2008. "International Court of Justice as a Forum for Genocide Cases", *CWRJIL* 40(1-2), 243-263.

Robertson, A.H. 1972. *Human Rights in the World*. Manchester: Manchester University Press.

Romano, Cesare. 2014. "Trial and Error in International Judicialization' in Cesare Romano et al. (eds) *Oxford Handbook of International Adjudication*. Oxford: Oxford University Press.
_____2014. "The Shadow Zones of International Adjudication" Cesare Romano et al. (eds) *Oxford Handbook of International Adjudication*. Oxford: Oxford University Press.

Shaw, Malcolm. 2008. *International Law*. Cambridge: Cambridge University Press.

Sikkink, Kathryn. 2011. *The Justice Cascade*. New York: W.W. Norton & Company.

Slaughter, Anne- Marie. 1997. "The Real New World Order" FA < http://www.foreignaffairs.com/articles/53399/anne-marie-slaughter/the-real-new-world-order> Accessed 20 June 2014

Starke, J.G. 1963. *An Introduction to International Law*. London: Butterworths.

Teitel, Ruti. 2011. *Humanity's Law*. Oxford: Oxford University Press.

Uribe, Victor M. 1997. "Consuls at Work: Universal Instruments of Human Rights and Consular Protection in the Context of Criminal Justice", *HJIL*, 19(2).

Volcansek, Mary L. 2005. *Courts Crossing Borders.* Durham: Carolina Academic Press.

Weller, Marc. 2011. "Modesty can be a virtue: judicial economy in the ICJ Kosovo Opinion?", *LJIL* 24(1): 127-143.

Wendt, Alexander. 1992. "Anarchy is What States make of it" *IO*, 391-425.

Yee, Sienho. 2009. "Notes on the International Court of Justice (Part 2): Reform Proposals Regarding the International Court of Justice—A Preliminary Report for the International Law Association Study Group on United Nations Reform", *CJIL* 8(1), 181-189.

Zyberi, Gentian. 2008. "The Development and Interpretation of International Human Rights and Humanitarian Law Rules and Principles Through the Case Law of The International Court of Justice", *NQHR* Vol. 25/1

_____ 2013. "The International Court of Justice and the Rights of Peoples and Minorities' in Christian Tams and James Sloan (eds.), *The Development of International Law by the International Court of Justic*e. Oxford: Oxford University Press. pp. 327-352.

_____ 2010. "Human Rights in the International Court of Justice' in Mashood Baderin (ed), *International Human Rights: Six Decades after the UDHR and Beyond*. Farnham: Ashgate Publishing Group.

Conventions, Declarations, Reports, and Case Law:

Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Kosovo AO), Advisory Opinion of 22 July 2010, [2010] ICJ < http://www.icj-cij.org/docket/files/141/15987.pdf.> Accessed 12 August 2017.

Declaration of Vice-President Tomka [2010] ICJ , < http://www.icj-cij.org/docket/files/141/15989.pdf> Accessed 12 August 2017.

Declaration of Judge Simma [2010] ICJ , <http://www.icj-cij.org/docket/files/141/15993.pdf> Accessed 12 August 2017.

Dissenting Opinion of Judge Bennouna. [2010] ICJ. < http://www.icj-cij.org/docket/files/141/15999.pdf> Accessed 12 August 2017.

Dissenting Opinion of Judge Koroma. [2010] ICJ < http://www.icj-cij.org/docket/files/141/15991.pdf> Accessed 12 August 2017.

Argentina v. Uruguay [2006] ICJ Provisional Measures Order <http://www.icj-cij.org/docket/files/135/11235.pdf> Accessed 11 July 2017.

Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda) [2005] ICJ < http://www.icj-cij.org/docket/files/116/10455.pdf> Accessed 27 July 2018.

Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)[2002] ICJ<http://www.icjcij.org/docket/index.php?pr=552&code=cobe&p1=3&p2=3&p3=6&case=121&k=36> Accessed 27 July 2018.

Avena and Other Mexican Nationals (Mexico v. United States of America) [2004] ICJ <http://www.icj-cij.org/docket/files/128/8188.pdf> Accessed 27 July 2018.

Case Concerning Application of The Convention On The Prevention and Punishment of The Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)

[2007] ICJ <http://www.icj-cij.org/docket/files/91/13685.pdf > Accessed 13 August 2018.

Case Concerning United States Consular and Diplomatic Staff in Tehran [1980] ICJ <http://www.icj-cij.org/docket/index.php?sum=334&p1=3&p2=3&case=64&p3=5> Accessed 23 August 2018.

Case Concerning the Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America) [1986] ICJ <http://www.icjcij.org/docket/index.php?sum=367&p1=3&p2=3&case=70&p3=5 > Accessed 23 June 2018.

Case Concerning East Timor (Portugal v. Australia) [1995] ICJ <http://www.icjcij.org/docket/index.php?sum=430&p1=3&p2=3&case=84&p3=5 > Accessed 2 July 2018.

Case concerning the Vienna Convention on Consular Relations (Paraguay v. United States of America) [1998] ICJ < http://www.icj-cij.org/docket/index.php?sum=506&p1=3&p2=3&case=99&p3=5> Accessed 2 July 2018.

Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation) [2008] ICJ < http://www.icj-cij.org/docket/files/140/16398.pdf> Accessed 1 September 2018.

Case concerning certain criminal proceedings in France (Republic of the Congo v. France) [2005] ICJ <http://www.icj-cij.org/docket/files/129/8206.pdf> Accessed 24 June 2018.

The Charter of the United Nations <http://www1.umn.edu/humanrts/instree/principles1970.html> Accessed 3 July 2017.

Commentary on the Fourth Geneva Convention, [1958] ICRC, <https://www.princeton.edu/~achaney/tmve/wiki100k/docs/Fourth_Geneva_Convention.html> Accessed 12 June 2017.

Human Rights Report 2008 < http://www.hrw.org/reports/2008/01/30/world-report-2008> Accessed September 1, 2017.

International Council on Human Rights Policy, Assessing the Effectiveness of National Human Rights Institutions <http://www.ichrp.org/files/reports/18/125_report.pdf> Accessed 21 June 2018.

International Covenant on Civil and Political Rights < http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> Accessed 23 August 2017.

International Law Commission, Article 8 of Articles on State Responsibility (ASR), < http://www1.umn.edu/humanrts/instree/WrongfulActs.html> Accessed 19 May 2018.

International Law Commission, Responsibility of States for International Wrongful Acts (2001) <http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf> U.N. Doc. A/RES/56/83, Accessed 19 May 2018.

La Grand Case (Germany V. United States Of America) [2001] ICJ < http://www.icj-cij.org/docket/files/104/7736.pdf> Accessed 23 May 2018.

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, [2004] ICJ Rep. 136 <http://www.icj-cij.org/docket/files/131/1671.pdf> Accessed 21 May 2018.

Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, [1996] ICJ Rep. 66 <http://www.icjcij.org/docket/index.php?sum=498&code=unan&p1=3&p2=4&case=95&k=e1&p 3=5> Accessed 19 May 2019.

Louis Moreno-Ocampo, "Allegations concerning War Crimes" <http://www.iccnow.org/documents/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf> Accessed 27 August 2018.

Military and Paramilitary Activities in and against Nicaragua [1986] ICJ <http://www.icj-cij.org/docket/index.php?sum=367&p1=3&p2=3&case=70&p3=5> Accessed 17 July 2018.

Pulp Mills on the River Uruguay (Argentina v. Uruguay) [2010] ICJ < http://www.icj-cij.org/docket/files/135/15877.pdf> Accessed 8 July 2018.

Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal) [2012] ICJ < http://www.icj-cij.org/docket/files/144/17064.pdf> Accessed 3 September 2018.

Request for an Examination of the Situation in the Nuclear Tests (New Zealand v. France) [1974] ICJ <http://www.icjcij.org/docket/index.php?sum=502&code=nzfr&p1=3&p2=3&case=97&k=cd&p3=5 > Accessed 8 July 2018.

Vienna Convention on the Law of Treaties <http://www.worldtradelaw.net/misc/viennaconvention.pdf> Accessed 5 September 2017.

United Nations Conference Report, The Question of Self-Determination: The Cases of East Timor, Tibet and Western Sahara < http://www.unpo.org/downloads/Selfdetermination%20Conference1996.pdf> Accessed September 1, 2017.

CHAPTER III

Bernhardt, Rudolph. 1998. "Thoughts on the Interpretation of Human-Rights Treaties" in Matscher and Petzhold (eds.), *Protecting Human Rights: The European Dimension*. Kohln: Karl Heymanns Verlag.

Boillat, Philippe. 2010. "The European Convention on Human Rights at 60: Building on the Past, Looking to the Future", *Synergy Magazine*, 47(1) < http://issuu.com/vpmarketing/docs/synerg47> Accessed 5 May, 2017.

Bossuyt, Baron Marc. 2013. "Judicial Activism in Europe: The case of the European Court of Human Rights", *Open Europe* <http://www.openeurope.org.uk/Content/Documents/speechmarcbossuytopeneuropesept2013.pdf> Accessed 5 May 2017.

Cali, Basak et al. 2011. "The Legitimacy of the European Court of Human Rights: The View from the Ground", ECHR Project < http://ecthrproject.files.wordpress.com/2011/04/ecthrlegitimacyreport.pdf> Accessed 5 May 2017.

Costa, Jean-Paul. 2011. "On the Legitimacy of the European Court of Human Rights' Judgments", *European Constitutional Law Review*, 7(2): 173-182.

Dzehtsiarou, Kanstantsin. 2010. "European Consensus and the Evolutive Interpretation of the European Convention of Human Rights", *German Law Review* 12(10): 1730-1745.

Ferrero, Ruth. 2010. "The Forgotten Issue? Eastward Enlargement and National Minorities." <http://www.recercat.net/bitstream/handle/2072/204363/5)%20The%20forgotten%20issue.pdf?sequence=5> Accessed 5 May 2017.

Kymlicka, William. 2011. *Can Liberal Pluralism be Expanded?* Oxford: Oxford University Press.

Liebich, Andre. 2002. "Ethnic Minorities and Long-term Implications of EU Enlargement" in *Europe Unbound*, ed. Jan Zielonka. New York: Routledge.

Letsas, George. 2012. "The ECHR as a Living Instrument: Its Meaning and Legitimacy", Social Science Research Network <http://ssrn.com/abstract=2021836> Accessed 5 May 2017.

Maduro, Miguel Polares. 2006. "Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism", European Journal of Legal Studies, <http://www.ejls.eu/2/25UK.htm> Accessed 5 May 2017.

Mowbray, Alastair. 2005. "The Creativity of the European Court of Human Rights", *Human Rights Law Review* 5(1): 57- 79.

Van Dijk and Van Hoof. 2005. "Theory and Practice of the European Convention on Human Rights" in Alastair Mowbray, "The Creativity of the European Court of Human Rights", *Human Rights Law* Review 5(1): 57-79

O'Boyle, Michael. 2008. "On Reforming the European Court of Human Rights", *European Human Rights Law Review.*

Pan, C. & B.S. Pfeil. 2003. *National Minorities in Europe-Handbook*. Amherst: Ethnos.

Pentassuglia, Gaetano. 2002. *Minorities in International Law*. Brussels: Council of Europe Publishing.

Pentassuglia, Gaetano. 2004. "Minority Issues as a Challenge in the European Court of Human Rights: A Comparison with the Case Law of the United Nations Human Rights Committee", *GYIL*.

Pentassuglia, Gaetano. 2009. *Minority Groups and Judicial Discourse in International Law*. Leiden/Boston: Martinus Nijhoff Publishers.

Salzberg, Marc. 1985. "The Marckx Case {Judgment of June 13, 1979, E. Ct. Human Rights, Series A, No. 31}: the impact on European jurisprudence of the European Court of Human Rights' 1979 Marckx decision declaring Belgian illegitimacy statutes violative of the European Convention on Human Rights", *Denver Journal of International Law and Policy* (13).

White, Robin and Clare Ovey. 2010. *The European Convention on Human Rights*. Oxford: Oxford University Press.

Press Articles:

The Aire Centre, Press Release: Sufi & Elmi v. The United Kingdom

28 June 2011 < http://www.airecentre.org/news.php/29/press-release-sufi-elmi-v.-the-united-kingdom#sthash.fARAhaLO.dpuf>

Katie Collins, The Wired Magazine < http://www.wired.co.uk/news/archive/2014-01/24/gchq-must-justify-prism>

ECHR Explanatory Report "Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms"
< http://conventions.coe.int/Treaty/EN/reports/html/214.htm>

Joseph Licari "No Kangaroo Court in Strasbourg" Times of Malta
< http://www.timesofmalta.com/articles/view/20130825/opinion/No-kangaroo-court-in-Strasbourg.483438>

UK Constitutional Law Association "Reforming the European Court of Human Rights through Dialogue? Progress on Protocols 15 and 16 ECHR"
< http://ukconstitutionallaw.org/2013/05/>

Joseph Licari "No Kangaroo Court in Strasbourg" Times of Malta
< http://www.timesofmalta.com/articles/view/20130825/opinion/No-kangaroo-court-in-Strasbourg.483438>

Case Law:

Alajos Kiss v. Hungary (2010)
<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-98800#{"itemid":["001-98800"]}>

Big Brother Watch and Others v. United Kingdom (2014)
< http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-140713#{"itemid":["001-140713"]}>

Conka and Others v. Belgium (2002)
< http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60026#{"itemid":["001-60026"]}>

Cruz Varas and Others v. Sweden (1991)
< http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57674#{"itemid":["001-57674"]}>

Dougoz v. Greece (2001) < http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59338#{"itemid":["001-59338"]}>

Gaygusuz v. Austria (1996)

< http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58060#{"itemid":["001-58060"]}>

Golder v. United Kingdom (1975)
< http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57496#{"itemid":["001-57496"]}>

Hirsi Jamaa v. Italy (2012)
< http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109231#{"itemid":["001-109231"]}>

Koua Poirrez v. France (2003)
< http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61317#{"itemid":["001-61317"]}>

Lautsi v. Italy (2009) < http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-104040#{"itemid":["001-104040"]} >

Loizidou v. Turkey (1995)
< http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57920#{"itemid":["001-57920"]}>

Marckx v. Belgium (1979)
< http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57534#{"itemid":["001-57534"]}>

Matthews v. United Kingdom (1999)
< http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58910#{"itemid":["001-58910"]}>

Orsus and Others v. Croatia (2010)
< http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-97689#{"itemid":["001-97689"]}>

Rahimi v. Greece (2011)
<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{"languageisocode":["FRA"],"itemid":["001-104366"]}>

Sigurdur A Sigurjonsson v. Iceland (1993)
<http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-57844#{"itemid":["001-57844"]}>

Soering v. United Kingdom (1989)
< http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57619#{"itemid":["001-57619"]}>

Stec and Others v. United Kingdom (2005)
< http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-73198#{"itemid":["001-73198"]}>

Tehrani and Others v. Turkey (2010)
< http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-98259#{"itemid":["001-98259"]}>

Other:

Council of Europe. "All Different-All Equal" Campaign.
<http://www.coe.int/T/E/Com/Files/Events/2006-All-different/default.asp> Accessed March 8, 2017.

European Framework Convention
<http://conventions.coe.int/Treaty/en/Treaties/Html/157.htm > Accessed March 6, 2017.

ECHR "Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms"
<http://conventions.coe.int/Treaty/en/Treaties/Html/213.htm> Accessed 8 May 2017.

ECHR Explanatory Report "Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms"
< http://conventions.coe.int/Treaty/EN/reports/html/214.htm> Accessed 8 May 2017.

ECHR Explanatory Report "Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms"
< http://conventions.coe.int/Treaty/EN/reports/html/214.htm> Accessed 8 May 2017.

ECHR Fact Sheet, January 2013 <
http://www.echr.coe.int/Documents/FS_Interim_measures_ENG.pdf> Accessed 5 May 2017.

Federalist No. 78 (Alexander Hamilton)
< http://www.constitution.org/fed/federa78.htm> Accessed 9 April 2018.

Lord Woolf Report "Review of the Working Methods of the European Court of Human Rights", 2005.
<http://www.echr.coe.int/Documents/2005_Lord_Woolf_working_methods_ENG.pdf > Accessed May 7, 2017.

CHAPTER IV

Alter, Karen. 2014. *The New Terrain of International Law*: Courts, Politics, Rights. Princeton and Oxford: Princeton University Press.

Donnelly, Jack. 1998. *International Human Rights.* Boulder: Westview Press.

Martinez, Jenny S. 2012. *The Slave Trade and the Origins of the International Human Rights Law*. Oxford: Oxford University Press.

Rota, Marie. 2009. "Case-law of the Inter-American Court of Human Rights" Chronicle for the Year 2008" *Revus* (9) 129-137. < http://revus.revues.org/502> Accessed 24 May 2018.

Teitel, Ruti. 2013. "Rethinking Jus Post Bellum in an Age of Global Transitional Justice: Engaging with Michael Walzer and Larry May", *European Journal of International Law* 24(1), pp. 335–342.

Sikkink, Kathryn. 2011. *The Justice Cascade*. New York: W.W. Norton & Co.

Volcansek, Mary L. 2005. *Courts Crossing Borders*. Durham: Carolina Academic Press.

Other:

American Convention on Human Rights < http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm>

Amnesty International Annual Report – Colombia 2011 < http://www.amnestyusa.org/research/reports/annual-report-colombia-2011?page=2>

Article II "Inter-American Convention on Forced Disappearance of Persons." < http://www.oas.org/juridico/english/treaties/a-60.html>

Council on Hemispheric Affairs < http://www.coha.org/forced-disappearances-in-colombia/>

Inter-American Commission on Human Rights "Situation of the Human Rights of Indigenous Persons and Peoples in the Americas" < http://www.cidh.org/indigenas/intro.htm>

Inter-American Convention on Forced Disappearance of Persons, Preamble < Http://www.oas.org/juridico/English/Treaties/A-60.Html>

The International Committee of the Red Cross

< https://www.icrc.org/eng/resources/documents/feature/2013/07-10-colombia-report-disappearance.htm>

International Workgroup for Indigenous Affairs < http://www.iwgia.org/regions/latin-america/indigenous-peoples-in-latin-america>

The National Security Archive Electronic Briefing Book No. 319
< http://nsarchive.gwu.edu/NSAEBB/NSAEBB319/>

OAS < http://www.oas.org/en/about/our_history.asp>

UN Guidance Note of the Secretary General
< http://www.unrol.org/files/TJ_Guidance_Note_March_2010FINAL.pdf>

Case Law:

Armando Alejandre Jr., Carlos Costa, Mario de la Pena y Pablo Morales v. Republica de Cuba, Case 11.589, Report No. 86/99, OEA/Ser.L/V/II.106 Doc. 3 rev. at 586 (1999) < http://www1.umn.edu/humanrts/cases/86-99.html>

Inter-American Court of Human Rights Case of Heliodoro Portugal v. Panama
< http://www.corteidh.or.cr/docs/casos/articulos/seriec_186_ing.pdf>

The Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Judgment of August 31, 2001, Inter-Am. Ct. H.R., (Ser. C) No. 79
< http://www1.umn.edu/humanrts/iachr/AwasTingnicase.html>

Rochac Hernández et al. v. El Salvador
<http://webcache.googleusercontent.com/search?q=cache:rHG8169PV4wJ:https://www.oas.org/en/iachr/decisions/court/12.577FondoEng.doc+&cd=7&hl=en&ct=clnk&gl=uk>

ICHR Ticona Estrada et al. v. Bolivia, §101 and Salvador Chiriboga v. Ecuador (§§119-124) in Rota, Marie. 2009. "Case-law of the Inter-American Court of Human Rights" Chronicle for the Year 2008" Revus (9) 129-137. < http://revus.revues.org/502> Accessed 24 May 2018.

CHAPTER V

Ago, Roberto. 2001. "Responsibility of States for Internationally Wrongful Acts" < http://www.eydner.org/dokumente/darsiwa_comm_e.pdf > pp. 58-365.

Alter, Karen. 2014. *The New Terrain of International Law*. Princeton, Princeton University Press.

Amann, Diane Marie. 2018. "In Bemba and Beyond, Crimes Adjudged to Commit Themselves." *EJIL:Talk* < https://www.ejiltalk.org/in-bemba-and-beyond-crimes-adjudged-to-commit-themselves/> Accessed 9 July 2018.

Ausderan, Jacob. "How naming and shaming affects human rights perceptions in the shamed country", *Journal of Peace Research*. 52(1). pp. 81-95.

Beck, Colin J. and John W Meyer. 2012. "World influences on human rights language in constitutions: A cross-national study", *Journal of International Sociology* 27(4): 483-501.

Bradley, Curtis. 2009. "The Bush Administration and International Law: Too Much Lawyering and Too Little Diplomacy*", Duke Journal of Constitutional Law & Public Policy* (4): 57-75.

Bransten, Jeremy. 2007. "World: ICJ Bosnia Ruling Sets Important Precedents Radio Free Europe. <https://www.rferl.org/a/1074986.html > Accessed 9 July 2018

Breyer, Stephen 2015. *The Court and the World: American Law and the New Global Realities*. New York: Vintage Books.

Cohen, Harlan Grant. 2006. "Supremacy and Diplomacy: The International Law of the U.S. Supreme Court", *Berkley Journal of International Law* 24(1): 273 – 329.

Cryer, Robert et al. 2014. *An Introduction to International Criminal Law and Procedure*. Cambridge: Cambridge University Press.

Detter De Lupis, Ingrid. 1987. *The Law of War.* Cambridge: Cambridge University Press.

Dinstein, Yoram. 2005. "Collateral Damage and the Principle of Proportionality" in David Wippman and Matthew Evangelista (ed.), *New Wars, New Laws? Applying the Laws of War in 21st Century Conflicts*. Boston: Nijhoff.

Dupuy, Pierre-Marie. 2016. "A Crime without Punishment", *Journal of International Criminal Justice*, 14 (4):1. pp. 879–891.

Ellis-Petersen, Hannah. 2018. "Khmer rouge leaders found guilty of genocide in Cambodia's 'Nuremberg' moment", *The Guardian,* <https://www.theguardian.com/world/2018/nov/16/khmer-rouge-leaders-genocide-charges-verdict-cambodia?fbclid=IwAR29Xdtd9NJIUZUjJ3si5pIo3FjUDDOoHKZoRvCFSCaQZyO0WFfAmC272Es> Accessed 16 November 2018.>

Geras, Norman. 2011. *Crimes Against Humanity: Birth of a Concept*. Manchester: Manchester University Press.

Gray, Christine D. 1990. *Judicial Remedies in International Law*. Oxford: Clarendon Press.

Lebovic, James H. and Erik Voeten. 2009. "The Cost of Shame: International Organizations and Foreign Aid in the Punishing of Human Rights Violators", *Journal of Peace Research* 46(1): 79-97.

de Londras, Fiona. 2011. "The International Criminal Court" in William A. Schabas and Nadia Bernaz (eds.) *Routledge Handbook of International Criminal Law*. New York: Routledge.

Meron, Theodor. 2000. "The Humanization of International Law", *The American Journal of International Law* 94(2): 239- 278.

Meron, Theodor. Lecture at Oxford University Law Faculty (All Souls College) - December 2, 2014.

Moreno-Ocampo, Louis. 2006. "Allegations concerning War Crimes" <http://www.iccnow.org/documents/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf>

Nikolic-Ristanovic, V. 1999. "Living Without Democracy and Peace: Violence Against Women in the Former Yugoslavia", *Violence Against Women*, 5: 1

Paulus, Andreas. 2010. "Adjudication and International Law" in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law*. Oxford: Oxford University Press. p. 208.

Posner, Eric, A. 2014. *The Twilight of Human Rights*. Oxford: Oxford University Press.

Pritchard, R. John and Sonia Magbanua Zaide (eds.). 1981. *The Tokyo War Crimes Trial, Vol. 20* New York & London: Garland Publishing.

Sands, Philippe. 2003. "And God Came Down from the Mountain" *Index on Censorship* 4(03).

Scheffer, David. 2011. "The International Criminal Court" in William A. Schabas and Nadia Bernaz (eds.) *Routledge Handbook of International Criminal Law.* New York: Routledge.

Seifert, R. 1996. "The Second Front: The Logic of Sexual Violence in Wars", *Women's Studies International Forum* 19: 1-2

Sikkink, Kathryn. 2011. *The Justice Cascade*. New York: W.W. Norton & Co.

Sinclair, Timothy. 2008. *Theory Talks* < http://www.theory-talks.org/2008/05/theory-talk-5.html>

Sofos S.1996. "Inter-ethnic Violence and Gendered Constructions of Ethnicity in former Yugoslavia", *Social Identities,* 2(1)

Teitel, Ruti. 2011. *Humanity's Law*. Oxford, Oxford University Press.

Tsagourias, Nicholas. 2010. "Cosmopolitan legitimacy and UN Collective Security" in: Pierik, R. and Werner, W., (eds.) *Cosmopolitanism in Context*. Cambridge: Cambridge University Press. pp. 129-154.

Other:

ECHR "Secret Detention Sites" <http://www.echr.coe.int/Documents/FS_Secret_detention_ENG.PDF>

"Infographic: ICTY Facts & Figures" < http://www.icty.org/en/content/infographic-icty-facts-figures>

International Criminal Court's Office of the Prosecutor < http://iccforum.com/performance>

International Criminal Court, "Situations under Investigation" <http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx>

International Criminal Court "Report of the Court on the development of performance indicators for the International Criminal Court" < https://www.icc-cpi.int/itemsDocuments/Court_report-development_of_performance_indicators-ENG.pdf>

International Criminal Court "Second Court's report on the development of performance indicators for the International Criminal Court" <https://www.icc-cpi.int/itemsDocuments/ICC-Second-Court_report-on-indicators.pdf>

ICRC – Customary International Humanitarian Law, Rule 37 < https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule37 >

Office of the High Commissioner for Peace "Peace Process in Colombia" < http://www.altocomisionadoparalapaz.gov.co/procesos-y-conversaciones/proceso-de-paz-con-las-farc-ep/Documents/Learn_about_the_peace_procces_in_Colombia_22_sept_VF.pdf >

"Protocols Additional to the Geneva Conventions" - Article 1, paragraph 2, of Additional Protocol I of 1977

< https://www.icrc.org/eng/assets/files/other/icrc_002_0321.pdf>

Rome Statute of the International Court < https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf>

United National International Criminal Tribunal for Former Yugoslavia < http://www.icty.org/en/about>

Case Law:

ICC - Appeals Chamber in the Case of The Prosecutor v. Omar Hassan Ahmad Al-Bashir < https://www.icc-cpi.int/CourtRecords/CR2019_02593.PDF>

ICC - The Prosecutor v. Joseph Kony and Vincent Otti< http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200204/related%20cases/icc%200204%200105/Pages/uganda.aspx>

ICC - The Prosecutor v. Thomas Lubanga Dyilo http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200106/Pages/democratic%20republic%20of%20the%20congo.aspx

ICC, The Prosecutor v. Callixte Mbarushimana http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc01040110/Pages/icc01040110.aspx

ICTY Mucic et al. < http://www.icty.org/x/cases/mucic/tjug/en/cel-tj981116e.pdf>

ICTY Landmark Cases - < http://www.icty.org/en/in-focus/crimes-sexual-violence/landmark-cases>

Supreme Court of The United States - Hamdan V. Rumsfeld, Secretary Of Defense, Et Al. Certiorari to the United States Court of Appeals for the District of Columbia Circuit https://www.law.cornell.edu/supct/html/05-184.ZS.html

United Nations Mechanism for International Criminal Tribunals - Prosecutor v. Jean-Paul Akayesu, Case No. ICTR–96-4-T, Trial Chamber I, 2 Sept. 1998. < http://unictr.unmict.org/en/cases/ictr-96-4>

Press Releases:

Fawthrop, Tom. 2017. “Cambodia's Khmer Rouge Tribunal: Mission Accomplished?” The Diplomat. <http://thediplomat.com/2017/07/cambodias-khmer-rouge-

tribunalmissionaccomplished/?utm_content=bufferbba03&utm_medium=social&utm_source=facebook.com&utm_campaign=buffer>

Lazareva, Inna. 2015. "Palestinian Authority formally joins the ICC – but what will it mean for Israel and PA? The Guardian <http://www.telegraph.co.uk/news/worldnews/middleeast/palestinianauthority/11505741/Palestinian-Authority-to-formally-join-ICC-but-what-will-it-mean-for-Israel-and-PA.html>

Reuters. 2017. "ICC prosecutor mulls inquiry on crimes against migrants in Libya" < http://www.reuters.com/article/us-libya-migrants-icct-idUSKBN1842EX>

CHAPTER VI

Alter, Karen. 2014. *The New Terrain of International Law: Courts, Politics, Rights*. Princeton and Oxford: Princeton University Press.

Boczek, Boleslaw Adam. 1994. *Historical Dictionary of International Tribunals*. Lenham: Scarecrow Press.

Bogdandy, Armin von and Ingo Venzke. 2014. *In Whose Name? A Public Law Theory of International Adjudication*. Oxford: Oxford University Press.

Bovarnick, Jeff A. et al. 2011. "Law of War Deskbook", The United States Army Judge Advocate General's Legal Center and School.

Carr, E.H. 2001/1981 (orig.). *The Twenty Years' Crisis*. New York: Palgrave Macmillan.

D'Ascoli, Silvia. 2011. *Sentencing in International Criminal Law*. Oxford: Hart Publishing.

Detter De Lupis, Ingrid. 1987. *The Law of War*. Cambridge: Cambridge University Press. Hayman, Robert, et al. 2002. Jurisprudence Classical and Contemporary: From Natural Law to Postmodernism. St. Paul: West Group.

Finkielkraut, Alain. 1992. *Remembering in Vain*. New York: Columbia University Press.

Fuller, Lon. 1964. *The Morality of Law*. New Haven and London. Yale University Press.

Geras, Norman. 2011. *Crimes Against Humanity: Birth of a Concept*. Manchester: Manchester University Press.

Goldsmith, Jack and Eric A. Posner. 2005. *Limits of International Law*. Oxford: Oxford University Press. p. Goldsmith and Posner.

Goldstone, Richard J. 2015. "International Judges: Is There a Global Ethic?" *EIA*, < http://www.ethicsandinternationalaffairs.org/2015/international-judges-global-ethic/>

Hathaway, Oona A. and Scott Shapiro. 2017. *The Internationalists: How a Radical Plan to Outlaw War Remade the World.* New York: Simon and Schuster.

Held, David. 2010. *Cosmopolitanism: Ideals and Realities*. Cambridge: Polity.

Helfer, Laurence R. 2014. "The Effectiveness of International Adjudication" in The Oxford Handbook of International Adjudication, Cesare Romano, Karen J. Alter, & Yuval Shany, (eds.) *The Oxford Handbook of International Adjudication*. Oxford: Oxford University Press.

Johnson, DHN.1995. "The Draft Code of Offences Against the Peace and Security of Mankind", *International and Comparative Law Quarterly*, 4, p. 445-68.

Kelsen, Hans. *What is Justice? Justice, Law, and Politics in the Mirror of Science: Collected Essays*. Berkeley: University of California Press.

Kolb, Robert and Richard Hyde. 2012. *An Introduction to the International Law of Armed Conflicts*. Oxford: Hart Publishing.

Koskenniemi, Martti. 2001. *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*. Cambridge: Cambridge University Press.

Locke, John. 1988. *Two Treatises of Government*. Cambridge: Cambridge University Press.

May, Larry. 2004. *Crimes Against Humanity: A Normative Account*. Cambridge: Cambridge University Press.

Neuman, Gerard L. 2008. "Import, Export, and Regional Consent in the Inter-American Court of Human Rights", *EJIL* 19(101).

Sharma, Serena K. 2008. "Reconsidering the Jus ad Bellum/ Jus in Bello Distinction" in Carsten Stahn and Jann K. Kleffner (eds.) *Jus Post Bellum Towards a Law of Transition from Conflict to Peace*. Cambridge: Cambridge University Press.

Posner, Eric, A. 2014. *The Twilight of Human Rights*. Oxford: Oxford University Press.

Ratner, Steven. 2015. "Response to Critics of The Thin Justice of International Law" < http://www.ethicsandinternationalaffairs.org/2015/response-to-critics-of-the-thin-justice-of-international-law/>

Roth, Ken. "The Palestinians' Decision to Join the ICC Deserves Support" <http://www.hrw.org/news/2015/01/14/palestinians-decision-join-icc-deserves-support>

Raustiala, Kal. 2000. "Compliance and Effectiveness in International Regulatory Cooperation*", Case Western Res. J. Int'l L*. 32(3): 387-440.

Skogly, Sigrun, 2006. *Beyond National Borders: States' Human Rights Obligations in International Cooperation*. Cambridge: Intersentia LTD.

Starke, J.G. 1963. *An Introduction to International Law*. London: Butterworths,

Teitel, Ruti. 2011. Humanity's Law. Oxford, Oxford University Press.

de Vattel, Emer. 1797. *The Law of Nations*.

Walzer, Michael. 2000. *Just and Unjust Wars*. New York: Basic Books.

Other:

Briefing Paper "The Kampala Convention two years on: Time to turn theory into practice."
< http://www.internal-displacement.org/assets/publications/2014/201412-af-kampala-convention-brief-en.pdf>

Human Rights Report. 2006. "Universal Jurisdiction in Europe: The State of the Art", <https://www.globalpolicy.org/images/pdfs/0606univjuris.pdf >

International Red Cross < http://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm>

Judge Christopher Greenwood lecture "The Crime of Aggression: The Dawning of a New Era?" Leiden University – The Hague. 29 June 2017.

Judge Theodore Meron, "The International Criminal Tribunals and the Rule of Law." Oxford University Lecture - March 2015.

The Kellogg-Briand Pact <http://avalon.law.yale.edu/20th_century/kbpact.asp>

United Nations Resolution RC/Res.6 < https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf>

Vienna Convention on the Law of Treaties, 1969
< http://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf>

Press Releases:

AFP, “Dutch court to open Ethiopia 'Red Terror' war crimes trial” <http://www.news24.com/Africa/News/dutch-court-to-open-ethiopia-red-terror-war-crimes-trial-20171029>, 29 October 2017.

De Rechtspraak, “The MH17 Disaster” https://www.rechtspraak.nl/Uitspraken-en-nieuws/Bekende-rechtszaken/ramp-met-de-mh17/Paginas/MH17-disaster.aspx#82df64ce-3d19-499f-a18c-4b32dd3f4c635

France 24 “France opens full-scale inquiry into BNP Paribas over alleged complicity in Rwanda genocide” <http://www.france24.com/en/breaking/20170925-france-opens-full-scale-inquiry-bnp-paribas-over-alleged-complicity-rwanda-genocide?ref=fb_i>

Financial Times “BNP Paribas under investigation over role in Rwanda genocide” <https://www.ft.com/content/25abe656-a1f3-11e7-9e4f-7f5e6a7c98a2>

CONCLUSION

Fenby, Jonathan. 2003. *Chiang Kai-Shek: China's Generalissimo and the Nation He Lost*. Carroll & Graf Publishers.

International Court of Justice. “List of All Cases” < http://www.icj-cij.org/en/list-of-all-cases>

European Court of Human Rights. “Survey: Forty Years of Activity 1959-1998” <http://www.echr.coe.int/Documents/Survey_19591998_BIL.pdf>

The International Criminal Court < https://www.icc-cpi.int/about>

APPENDIX

APPENDIX I: Cascade of Rights

Figure I.

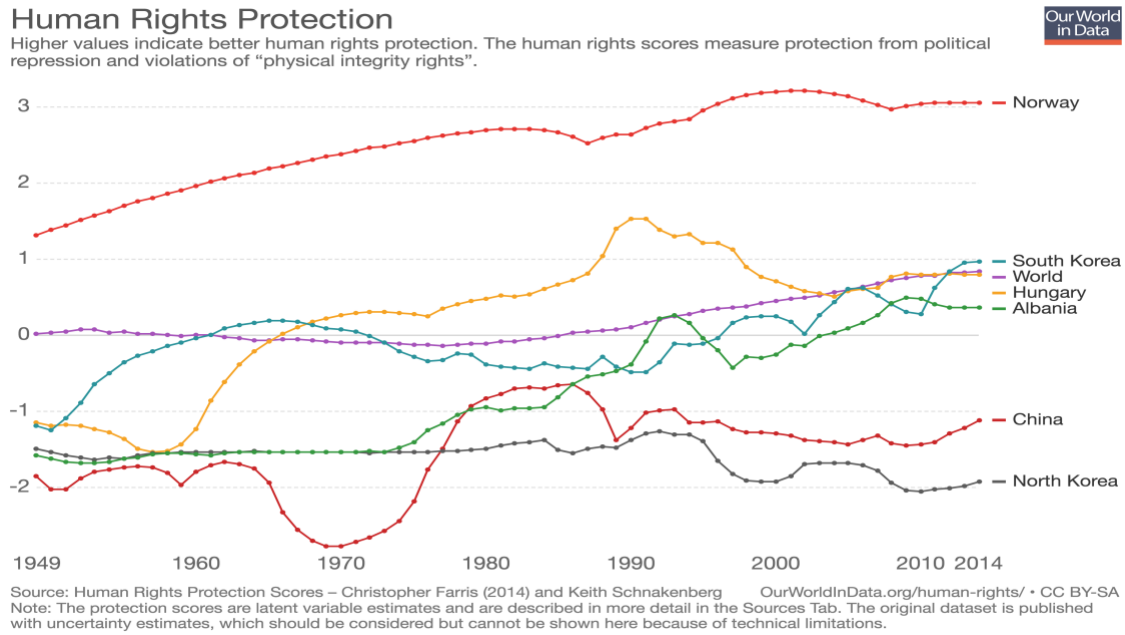


Figure II.

Use of the phrases 'civil rights', 'women's rights', 'children's rights', 'gay rights' and 'animal rights' in English-language books, 1900-2008 – Google Ngram[11]

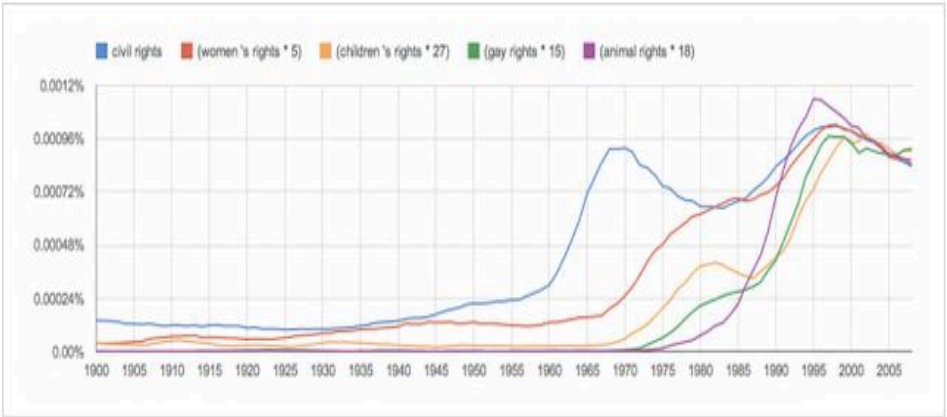


Figure III.

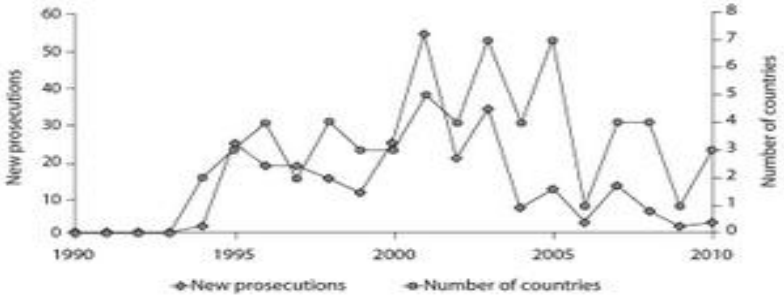


FIG. 6.7. International prosecutions (all countries). *Source*: Adapted from Geoffrey Dancy's chart for the Transitional Justice Research Collaborative website (https://www.transitionaljusticedata.com) using data from the NSF-funded Transitional Justice Collaborative.

FIG. 6.8. Transitional domestic criminal prosecutions (DCPs) and guilty verdicts. *Source*: Adapted from Geoffrey Dancy's chart for the Transitional Justice Research Collaborative website (https://www.transitionaljusticedata.com) using data from the NSF-funded Transitional Justice Collaborative.

Figure IV.

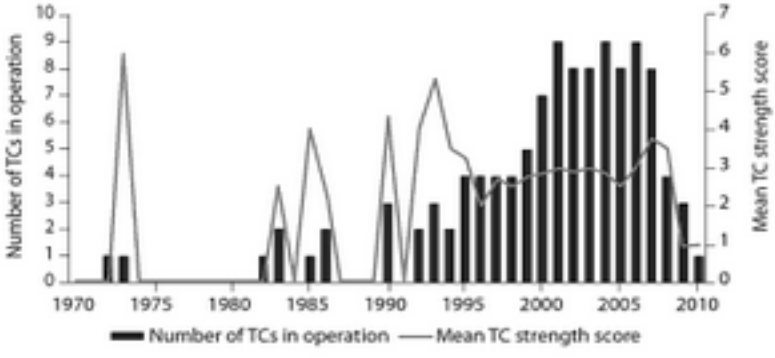


FIG. 6.9. Number and strength of truth commissions. *Source*: Adapted from Geoffrey Dancy's chart for the Transitional Justice Research Collaborative website (https://www.transitionaljusticedata.com) using data from the NSF-funded Transitional Justice Collaborative.