International Criminal Law and Constitutionalisation

On Hegemonic Narratives in Progress

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Abstract

As we move towards constructing narratives regarding the future outlook of global governance, constitutionalisation among them, the hope is that whatever shape this world order takes it will, somehow, forestall or hinder the possibility of a hegemonic order. This article tries to deconstruct the notion of hegemony and claims that as it currently stands it is useless in doing its critical work since every successful narrative will end up being hegemonic because it will employ the 'hegemonic technique' of presenting a particular value (or value system), a particular viewpoint, as universal or at least applying to those who do not share it. The only way for a narrative in this discourse not to be hegemonic would be for it to be either truly universal and find a perspective that stems from nowhere and everywhere – a divine perspective – or purely descriptive; the first being an impossibility for fallible beings and the other not worth engaging with since it has nothing to say about how things should be structured or decided in a specific situation.

Keywords: hegemony, constitutionalism, constitutionalisation, international criminal law

1. Introduction

As the old Chinese blessing (or curse) goes, we live in interesting times, times in which our view of the political world and its ordering will be re-arranged. We live in times when scholars feel the need to take stock,[1] draw a line and do the summations or offer a break[2] from previous explanations of the world's political map. The often-mentioned processes of globalisation, integration, fragmentation, global governance, etc. seem to have made our old convenient story, the one found in the opening chapters of international law textbooks – the one about an international system dominated by nation-states – seem passé. We talk about the post-*Lotus*,[3] post-national global environment, where the *Lotus* principle is relegated to the dustbin of history even though it manages to do the heavy lifting in the International Court of Justice's opinions as recently as 2010.[4] In short, what we are talking about is a contest for a change, a change of paradigms,[5] master-narratives,[6] world-views that help us both organise and shape the world around us,[7] the contest for the opening chapters of an international law textbook.

The editors of this volume have graciously asked us to assess one of four proposing narratives that vie for our attention in relation to specific international regimes, hence this contribution on the international criminal law (ICL) regime(s) and constitutionalisation. Before I start my contribution, I would like to make a small clarification. The main thrust of this article is the current discourse regarding hegemony. As we move towards constructing narratives regarding the future outlook of global governance, constitutionalisation among them, the hope is that whatever shape this world order takes it will, somehow, forestall or hinder the possibility of a hegemonic order. Moreover, constitutionalisation and its more normative iteration, constitutionalism, have been most strongly linked to the possibility of strength-

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1. J. Crawford and S. Nouwen, Select Proceedings of the European Society of International Law – International Law 1989-2010: A Performance Appraisal (2012).
2. N. Krisch, *Beyond Constitutionalism: the Pluralist Structure of Postnational Law* (2010).
3. *The Case of the S.S. Lotus (France v. Turkey)*, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).
4. *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, 2010 ICJ, General List No. 141, 22 July 2010.
5. M. Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and Beyond the State', in J.L. Dunoff and J.P. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law and Global Governance* (2009).
6. M. de S.O. l'E Lasser, 'Transforming Deliberations', in N. Huls, *et al.* (eds.), *The Legitimacy of Highest Court's Rulings: Judicial Deliberations and Beyond* (2009).
7. D. Kennedy, 'The Mystery of Global Governance', in J.L. Dunoff and J.P. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law and Global Governance* (2009).

ening hegemonic rule[8] in a rigid and vertical international system. Therefore, if we are to move forward in this debate a little deconstruction of the current concept of hegemony is in order. It is my contention that as the current discourse on hegemony stands (as a descriptive notion),[9] it is useless in doing its critical work since every successful narrative will end up being hegemonic because it will employ the 'hegemonic technique'[10] of presenting a particular value (or value system), a particular viewpoint, as universal or at least applying to those who do not share it. The only way for a narrative in this discourse not to be hegemonic would be for it to be either truly universal and find a perspective that stems from nowhere and everywhere – a divine perspective – or purely descriptive; the first being an impossibility for fallible beings and the other not worth engaging with since it has nothing to say about how things should be structured or decided in a specific situation.

The argument will proceed in the following three parts, in part two I will give a brief overview of the constitutionalisation features focusing mostly on the *ad hoc* tribunals since they have had a sufficient number of years in operation and a sufficient case law to make a useful analysis. The International Criminal Court (ICC), however, will not be left too far behind. In part three, I will attempt to foreground the assumptions and values under which the constituionalisation of ICL takes place and will also show the values and assumptions that it sidesteps arguing that as the current concept of hegemony stands, ICL is a hegemonic system, imposing a liberal value system in the guise of a universal one. I will then use these insights in part four on the challenge of hegemony hurled at international criminal law by claiming that the current discourse involving hegemony has lost its critical bite. My claim is that so long as we leave the concept of hegemony on the abstract and formal level that it currently holds of "invoking legal rules and principles on which [a party's] projected meanings that support [a party's] preference and counteract those of their opponents" where the "objectives of the [actors] is to make their partial view of that meaning appear as the total view, their preferences seem like the *universal preference*"[11] then it loses its critical bite since any narrative that ultimately succeeds in displacing the current hegemonic narrative about the international legal order will also be hegemonic, just differently so. It will be hegemonic for exactly the same reasons since it will portray some partial view as the universal, accepted, natural, etc. and will try to order the world accordingly. Consequently, unless we have a rethink of what hegemony is and what is stands for, *i.e.* tie it down to a substantive notion, then we will be stuck in a constant loop of changing hegemonic narratives and relegate the term hegemonic to a rhetorical insult hurled at ones opponents to put them on the defensive in the on-going debate.

2. The Constitutionalisation of International Criminal Law

Constitutionalism and constitutionalisation are terms that are somewhat difficult to pin down. Recently the editors of the new journal *Global Constitutionalism* attempted to categorise and distinguish three sets of concepts, constitution, constitutionalisation and constitutionalism with mixed success.[12] They defined constitutionalisation as

> the process by which institutional arrangements in the non-constitutional global realm have taken on a constitutional quality. However, constitutionalisation is frequently documented as occurring in a relatively spontaneous, little coordinated and even elusive manner. Therefore, the extent and quality of constitutionalisation remain to be established by further research. Politically, this development brings with it potential conflict following contested constitutional norms, principles and procedures. (citation omitted)[13]

Constitutionalism was defined as attempt to "[grapple] with the consequences of globalisation as a process that transgresses and perforates national or state borders, undermining familiar roots of legitimacy and calling for new forms of checks and balances as a result."[14] Consequently it results in creating a 'concept that remains confusing to some, raises scepticism among many and inspires constructive debate among others' that is more of 'an 'academic artefact' rather than an actual constitution'.[15] Consequently what this contribution will focus on is the constitutionalisation part of the equation rather than on the constitutionalism one. It will explore certain features of the international criminal law regime(s) that have constitutional character in three topics: (a) the public law foundations of international criminal law, (b) budding separation of powers at the ICC and (c) the rule of law.

8. For a discussion on the possibilities of cementing hegemonic rule in the international order *see* more in M. Koskenniemi, Global Legal Pluralism: Multiple Regimes and Multiple Modes of Thought, Harvard 2005 talk given at Harvard available at: <www.helsinki.fi/eci/Publications/Koskenniemi/MKPluralism-Harvard-05d[1].pdf>; M. Koskenniemi, *The Politics of International Law* at 219-240 (2011); but also *see* S. Fish, 'Boutique Multiculturalism, or Why Liberals are Incapable of Thinking about Hate Speech', 23 *Critical Inquiry,* at 378 (1997); Krisch (2012), *supra* n. 2.
9. For the descriptive turn in the current international hegemony talk *see* Koskenniemi (2011), *supra* n. 8 at 219.
10. *Ibid*. at 221-223.
11. *Ibid.* at 222 (emphasis in the original).
12. A. Wiener, *et al.*, 'Global Constitutionalism: Human rights, Democracy and the Rule of Law', 1 *Global Constitutionalism* 1, at 5 (2012).
13. *Ibid.*, at 6.
14. *Ibid.*
15. *Ibid.*, footnote omitted.

2.1. Kompetenz-Kompetenz

The concept of international criminal law as public law is simple to grasp. It starts from the Germanic tradition of public law which

> is understood, in keeping with the liberal and democratic tradition, as a body of law to protect individual freedom and to allow for political self-determination, [consequently] any act that has an impact on those values, whether it is legally binding or not, should be included if that impact is significant enough to give rise to meaningful concerns about its legitimacy.[16]

The notion of public law is closely linked to the notion of public authority with international public authority being understood as

> any authority exercised on the basis of a competence instituted by a common international act of public authorities, mostly states, to further a goal which they define, and are authorized to define, as a public interest. The 'publicness' of an exercise of authority, as well as its international character, therefore depends on its *legal basis*. (footnote omitted, emphasis in original)[17]

To the point, "an exercise of international public authority requires a public law framework."[18] Consequently, and as specifically related to the ICL regimes, issues that arise regarding competences such as substantive and procedural jurisdictions, legality and delimitation of powers must be based in public law instruments not only on the tribunals themselves but of other international actors as well. The various international criminal tribunals (ICTs) clearly fall in the category of public authorities, they can have a significant impact on an individual's rights and duties, have the power to pronounce on an individual's guilt or innocence, on that individual's detention or incarceration for a significant amount of time. As such, under the notion of public authority it must be established and limited by public law instruments.

In the *Tadić case,* one of the first post-Cold War ICL cases, the International Criminal Tribunal for Yugoslavia (ICTY) was faced with exactly these issues.[19] The issues before the tribunal, at least the ones relevant to this article, were (a) whether the ICTY as an international tribunal can decide on issues of its own jurisdiction without having specific jurisdictional authorisation to do so under its statute and (b) whether it as an international tribunal can review the legality of an act of the United Nations Security Council (UNSC) by which the ICTY was established. Using the German doctrine of *kompetenz-kompetenz,* the ICTY decided that as a judicial organ it has some inherent powers, one stemming not from the written text of its statute, but on broader public law notions. It held that "jurisdiction is not merely and ambit or sphere, … [but] a legal power … 'to state the law' … within its ambit, in an authoritative and final manner."[20] Furthermore "[t]his is the meaning it carries in all legal systems"[21] and that "the constitutive instrument of an international tribunal can limit some of its jurisdictional powers, but only to the extent to which such limitation does not jeopardise its 'judicial character'" and that "[s]uch limitation cannot … be presumed and … cannot be deduced from the concept of jurisdiction itself."[22] It went on to reason that, given the nature of the organ that the UNSC established – a tribunal – such an organ would have not only the powers explicitly stated in the establishing document but those that are inherent in the nature of the organ itself, something that cannot be divorced from the concept of such an organ, in this case a tribunal to decide on the scope of its competence and the legality of its founding document.

> This power, known as the principle of '*Kompetenz-Kompetenz*' in German or '*la compétence de la compétence*' in French, is part, and indeed a major part, of the incidental or inherent jurisdiction of any judicial or arbitral tribunal, consisting of its 'jurisdiction to determine its own jurisdiction.' It is a necessary component in the exercise of the judicial function and does not need to be expressly provided for in the constitutive documents of those tribunals.[23]

'True' the ICTY also said 'that this power can be limited by an express provision' in the founding document, so long as it does not constitute the 'undermining of the judicial character or the independence of the Tribunal'.[24] The authority of international criminal tribunals thus are determined and limited not only by their founding documents but also by the very substantive notions inherent in the concepts of legality, one of the hallmarks of courts (both domestic and international) in short, by the basics substantive notions of the concept of public law, a concept which also includes what a court is and what it is supposed to do.

The ICTY did not only treat itself as a public authority but the UNSC as well since one of the challenges launched at the jurisdiction of the tribunal was the claim that the UNSC did not have the legal basis to establish an ICT. It specifically referred to the issue so raised as a constitutional issue[25] noting that the

16. A. von Bogdandy, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities', in A. von Bogdandy *et al.* (eds.), *The Exercise of Public Authority by International Institutions* (2010), at 13.
17. *Ibid*.
18. *Ibid*., at 16.
19. *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, *Prosecutor* v. *Dusko Tadić*, Case No. IT-94-1, Appeals Chamber Decision, 2 October 1995 (hereafter *Tadić Defense Motion*).
20. *Ibid*., para. 10.
21. *Ibid*.
22. *Ibid*., para. 11.
23. *Ibid*., para. 18.
24. *Ibid*., para. 19.
25. *Ibid*., paras. 26-27.

> Security Council is thus subjected to certain constitutional limitations, however broad its powers under the constitution may be. Those powers cannot, in any case, go beyond the limits of the jurisdiction of the Organization at large, not to mention other specific limitations or those which may derive from the internal division of power within the Organization. In any case, neither the text nor the spirit of the Charter conceives of the Security Council as *legibus solutus* (unbound by law).[26]

The ICC has also had its mini constitutional crisis and it revolved around the issue of what can be called 'original powers' under the Rome Statute in relation to the protection of witnesses and the concept of who has the final say regarding the interpretation of the Rome Statute. The issue arose in the *Lubanga case*[27] in which the Office of the Prosecutor (OTP) refused to disclose the identity of a witness despite an order[28] to do so by the Trial Chamber. The Chamber decided that because the OTP "decline[d] to be 'checked' by the Chamber … it [was] necessary to stay … [the] proceedings as an abuse of the process."[29] The confrontation between the Trial Chamber and the OTP proceeded to a boiling point when the Trial Chamber ordered the release of Mr. Lubanga[30] on the grounds that the 'Prosecution has materially breached one of its fundamental obligations, leading to the conclusion that the fair trial of the accused is thereby rendered impossible'[31] due to the Chamber's impossibility to carry out one of its primary functions under the Rome Statute which is to direct and control the trial process. The crisis was eventually defused by the Appeals Chamber, which annulled the oral decision[32] on the grounds that all remedies under the Rome Statute to compel the Prosecutor to cooperate were not undertaken and that a stay of proceedings, which was the reason for the release of Mr. Lubanga, was not necessary. The Appeals Chamber thus concluded that there was no need to release Mr. Lubanga and it did so without settling the issue of 'original powers'.[33] In this case, two important considerations clashed, both of which were essential for the different departments established by the Rome Statute. For the Trial Chamber, the issues were seen as revolving around fundamental principles of the Statute, the competence of the Court proper to guarantee a fair trial, while the OTP saw the issue as one of the necessities of protecting witnesses and the willingness of future witnesses to cooperate with it in other cases – a power necessary if the OTP is to conduct investigations and entice individuals to come forward as witnesses. The language chosen to dispel these differences was one of public law, the language of jurisdictional competences, of limitations and proper functions of different organs as well as substantive concepts of the proper nature of a judicial function – the guaranteeing of a fair trial.

2.2. Separation of Powers in the Rome Statute

A continuation of this theme is the budding separation of powers amongst the institutions of the ICC. Since the ICC is a permanent Court with a given structure of organisation, the shape of arrangements that are currently in place will likely change in the future. Nevertheless, Scholars have criticised the institutional arrangements brought about the Rome Statute, including the over-independent nature of the ICC Prosecutor,[34] while others have addressed the nascent emergence of a tri-pillar system of governance.[35] But why is the separation of powers important in the context of the ICC, and what does it entail?

The separation of powers is a constitutional doctrine on which virtually all contemporary constitutional states rest. It is a doctrine that is as old as the idea of constitutions and its purpose, in its original design, was to provide an institutional answer to 18th century absolute monarchs by separating the concentration of power vested in one individual or institution.[36] The idea was that by creating an arrangement by which different organs would be invested with different functions – legislative, executive and judicial – while at the same time being involved in the workings of the other organs so as to put checks on the possible aggrandisement of power by one of them (hence the system of separation of powers with checks and balances) the chances of miss-use of power would be avoided.[37] Different countries have developed different meshes of this general idea, varying from a strict separation of powers to more cooperative arrangements with more or less checks and balances.

Certainly a rough analogy can be made of the ICC as a nascent separation of power system. The Rome Statute[38] does have a tri-part structure: with the Assembly of State Parties having the role of the legislator, being

26. Ibid., para. 28.
27. *The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Trial Chamber Judgment, 14 March 2012.
28. *Redacted Decision on the Prosecution's Urgent Request for Variation of the Time Limit to Disclose the identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU, The Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Trial Chamber Decision, 8 July 2010.
29. *Ibid*., para. 31.
30. *Oral decision of Trial Chamber I of 15 July 2010 to release Thomas Lubanga Dyilo*, *The Prosecutor* v. *Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Trial Chamber Decision, 15 July 2010, ICC-01/04-01/06-T-314-ENG.
31. *Ibid*., at 7 lines 9-12.
32. *Judgment on the appeal of Prosecutor against the oral decision of Trial Chamber I of 15 July 2010 to release Thomas Lubanga Dyilo, The Prosecutor v. Thomas Lubanga Dyilo,* Case No. ICC-01/04-01/06, Appeals Chamber, 8 October 2010.
33. *Ibid*., paras 23-24.
34. S. Rosenne, 'Poor Drafting and Imperfect Organization: Flaws to Overcome in the Rome Statute', 41 *Virgina Journal of International Law,* at 164 (2000); L.A. Casey, 'The Case Against the International Criminal Court', 25 *Fordham International Law Journal,* at 840 (2001).
35. R. Haveman *et al*., *Supranational Criminal Law: A System Sui Generis* (2003); D. Raab and H. Bevers, 'The International Criminal Court and the Separation of Powers', 3 *International Organizations Law Review,* at 93 (2006).
36. Raab and Bevers (2006), *supra* n. 35 at 93-96.
37. *Ibid*.
38. Rome Statute of the International Criminal Court, United Nations, *Treaty Series*, vol. 2187, p. 3.

the only one with the power to amend the Statute; the executive resting in the hands of the Prosecutor and to some extent the Registry; and the judicial function invested in the Court proper and composed of the Presidency, the Appeals Chamber, Trial and Pre-Trial Chambers. To some extent parallels can be drawn between the position of these various branches within the ICC with their counterparts in different constitutional systems, if we take into account that the ICC is a limited criminal justice system. Consequently, a proper comparison might just be the position of different organs as they would be in relation to their comparative criminal justice opposites in domestic systems.[39] Raab and Bevers, for instance, compare the roles of the OTP, the Court proper and the Assembly of States parties with the analogues institutions and procedures in England & Wales and the Netherlands in relation to three specific areas: prosecutorial discretion, sentencing and victims' compensation.[40] They concluded that, even though there are some admirable safeguards through a separation of powers in the Rome Statute (mostly related to curbing prosecutorial discretion regarding the bringing forth of charges and issuing arrest warrants), the overall structure is somewhat lacking, mostly in the area of the Assembly of State Parties, which does not use the full potential given to it under the Rome Statute to instigate subsidiary organs of oversight over the Court proper and the OTP.[41]

The point of this section is not to establish whether there is or not a separation of powers mechanism at the ICC. It is rather to show the inescapability of thinking in terms of public authority that is not enmeshed in some sort of an oversight structure and that the most 'natural' structure of comparison being the separation of powers concept. One can make the case that thinking in terms of separation of powers for international organisations simply makes little sense since the whole idea of having a separation of powers in a state was to safeguard the existence of a democratic system of governance with rights and individual autonomy as its ultimate aim. Since those are not the aims shared by the international system – the system, some would say, is designed for the peaceful co-existence of states and as such is state centric – any separation of powers necessity simply goes out the window. Yet the separation of powers is a recurring theme for the simple fact that international law (international criminal law as well), is public law and as such has an effect on individuals and their rights and autonomy and consequently any institution designed around it or for it needs to incorporate some safeguards familiar to domestic constitutional law. The Rome Statute in its current form certainly does not comply with that ideal, but there are mechanisms in it that if used properly might bring us closer to that ideal.

39. Raab and Bevers (2006), *supra* n. 35.
40. *Ibid*., at. 93.
41. *Ibid*., at. 131-135.

2.3. The Rule of Law, *Stare Decisis* and Rules of Import

The rule of law is another component concept of public law and public authority since an important aim of public law is to limit the powers exercised by public authorities, *i.e.* entities that have an effective on individual freedom and autonomy. Therefore, the concept of the rule of law or *Rechtsstaat* and public law are inseparable. The rule of law concept has historically had three interrelated but distinct 'clusters of meaning'[42]; (a) government limited by law, (b) formal legality and (c) rule of law and not of men,[43] all notions indispensible to the public law concept. Due to the terse nature of the statutes of the *ad hoc* tribunals, they were faced with a daunting problem: how to build a judicial system that will be based on the rule of law. The only guidance they had was that their rulings were to be based on crimes that had become part of customary international law before the onset of the conflicts to which their mandate relate.[44]

For the tribunals, what the rule of law was most linked to was achieving predictability and consistency of its rulings. The ICL tribunals have a distinct advantage over other international tribunals in this regard given the structure of the systems themselves, *i.e.* they are all organised in a hierarchical structure with trial chambers and an appeals chamber as a final instance. This hierarchical structure has allowed for a specific feature in international law to develop – *stare decisis*.[45]

Stare decisis is by no means a given in a judicial system; it is a specific judicial doctrine that has developed in some but not all common law systems, namely, in the United States and the United Kingdom. It is a specific judicial doctrine[46] and as such it is created and maintained by courts,[47] which is the case also for the *ad hoc* tribunals. Faced with a mounting case law and a fragmented system of trial chambers who could arrive at conflicting opinions for the same crimes, the ICTY and consequently the International Criminal Tribunal for Ruanda (ICTR) adopted the doctrine of *stare decisis* – a doctrine designed to achieve consistency and predictability on a systematic level.

The issue was decided by the *Aleksovski* Appeals Chamber judgment.[48] In this case, the ICTY's Appeals Chamber had to consider the issue of whether every

42. B.Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (2004), at 114.
43. *Ibid*.
44. *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, presented 3 May 1993, UN Doc. No. S/25704, paras 34-36.
45. *See* the claim by Dapo Akande regarding *stare decisis* as a feature of the ad hoc tribunals, D. Akande, 'Sources of International Criminal Law', in A. Cassese *et al*. (eds.), *The Oxford Companion to International Criminal Justice* (2009), at 53.
46. R.J. Kozel, 'Stare Decisis as Judicial Doctrine', 67 *Washington & Lee Law Review,* at 411 (2010).
47. For a historical development of *stare decisis see* F.G. Kempin Jr., 'Precedent and Stare Decisis: The Critical Years, 1800 to 1850', 3 *The American Journal of Legal History*, at 28 (1959).
48. *Prosecutor v. Zlatko Aleksovski*, Appeals Chamber Judgment IT-95-14/1 24 March 2000 (hereafter the *Aleksovski appeals chamber*).

decision arrived at by a trial chamber or any other court for that matter "has no binding force [in international law] except between the parties and in respect of that particular case"[49] or whether as a matter of practice highest courts as well as international courts follow its previous judgments. Using comparison of various different national and international courts, the ICTY's Appeals Chamber came to the conclusion "that the principles which underpin the general trend in both the common law and civil law systems, whereby the highest courts, whether as a matter of doctrine or of practice, will normally follow their previous decisions and will only depart from them in exceptional circumstances, are the need for consistency, certainty and predictability" and that "[t]his trend is also apparent in international tribunals." It also concluded that "that need is particularly great in the administration of criminal law, where the liberty of the individual is implicated."[50] However, the basic principles of public law were not the only determinative authorities invoked by the Appeals Chamber – it also invoked its founding document the ICTY statute and its structural element of having both Trial Chambers and an Appeals Chamber, its text and its purpose arriving at "the conclusion that in the interests of certainty and predictability, the Appeals Chamber should follow its previous decisions, but should be free to depart from them for cogent reasons in the interests of justice."[51]

The terseness of the Statutes of the *ad hoc* tribunals presented them with another problem – how to turn a few articles giving broad definitions of the crimes at stake into concrete, workable criminal law definitions. Nothing in the *ad hoc* statutes or the accompanying documents, unlike the ICC, gave any indication as to what would be the *mens rea* and *actus reus* requirements of, for example, the crime of rape, even though rape as such was specifically mentioned. The path that the *ad hoc* tribunals took was one of borrowing definitions already present in other branches of law, more specifically international human rights law. It is not the subject of this article to show how the tribunals constructed their own statutes using authorities outside of their narrow realm, but to point out the unmistakable dilemma that ICL has had to face and that is on the one hand its closeness of purpose and shared identity with international human rights as the rules of law designed to protect individuals[52] but on the other hand the need to establish itself as a separate and distinct branch of law.[53] The way it achieved this 'threading of the needle' was to specify rules under which this import and exchange can take place by highlighting the similarities and differences between its neighbouring regimes. For example, while importing and refining the definition of torture found in international human rights law, the ICTY Trial Chamber in the *Kunarac* case[54] highlighted the key structural differences between those two bodies of law that "the role and position of the state is completely different in both regimes;" that human rights aim to curtail "the abuses of state over its citizens [and] state sponsored violence," where "the state is the ultimate guarantor of the rights protected."[55] On the other hand "humanitarian law aims at placing restraint on the conduct of warfare," where "the role of the state is, when it comes to accountability, peripheral" and "[i]ndividual criminal responsibility does not depend on the participation of the state."[56] Moreover, 'international criminal law [...] is a penal law regime"' which "'sets one party, the prosecutor, against another, the defendant" while in human rights law "the respondent is the state."[57] Consequently, any import of norms from one field of law to the other has to be done carefully so that "notions developed in the field of human rights can be transposed in international humanitarian law only if they take into consideration the specificities of the latter body of law."[58]

These perceived structural differences in the two bodies of law later shape the debate regarding the importation of a definition of a certain crime, like the crime of torture. Again in the *Kunarac* case, the ICTY Trial Chamber found that UN Torture Convention[59] is only an 'interpretative aid' and because its definition of torture "was meant to apply at an inter-state level"[60] and not as part of a penal law regime. Consequently, a court "must identify those elements of the definition of torture under human rights law which are extraneous to international criminal law as well as those which are present in the latter body of law but possibly absent from the human rights regime,"[61] namely, "those which are addressed to states and their agents and those […] which are addressed to individuals."[62] By employing this reasoning, the *ad hoc* tribunals did something very specific to any constitutional system – it defined the terms of the relationship that it would have with other legal systems and that relationship is one of engagement and adaptation with other regimes. It is the hallmark of pluralism, a substantive feature of the constitutionalisation narrative that has been highlighted by the majority

49. Art. 59 of the ICJ Statute.
50. *Aleksovski Appeals Chamber judgment*, para. 97.
51. *Ibid.,* para. 111.
52. D. Robinson, 'The Identity Crisis of International Criminal Law', 21 *Leiden Journal of International Law*, at 925 (2008).
53. For a good overview of the dilemma that ICL faces *see* L. Grover, 'A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court', 21 *European Journal of International Law,* at 543 (2010).
54. *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, IT-96-23-T& T-96-23/1-T Trial Chamber Judgment, 22 February 2001 (hereafter the *Kunarac Trial Chamber judgment*).
55. *Ibid*., para. 470.
56. *Ibid*.
57. *Ibid*.
58. *Ibid*., para. 471.
59. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, *Treaty Series*, vol. 1465, p. 85.
60. *Kunarac Trial Chamber judgement*, para. 482.
61. *Ibid*., para. 488.
62. *Ibid*., para. 489.

of scholars writing on this topic.[63] One can see the modalities of this approach if one compares the way the *ad hocs* have engaged with 'foreign' law with the way in which the International Court of Justice (ICJ) has handled judgments and law coming from other courts. While the ICJ has been dismissive of the rulings of the ICTY on international armed conflict and state responsibility, the *ad hoc* tribunals have been quite engaging with, what from a regime perspective can be called, foreign law, arguing the merits of substantive notions rather than dismissing them on a procedural basis.[64]

3. Liberalism in the Foreground

As the international relations scholar Bass has successfully argued, the progenitor of contemporary criminal trials, the Nuremberg tribunal, was borne out of a fierce debate within the Roosevelt administration over the best way to handle the post-war transition of Germany.[65] One of the options on the table was the infamous Morgenthau plan of turning Germany into a 'pastoral state' with little to no heavy industry and sustaining itself on agriculture. Previous talk also included the summary execution of between 50,000 and 100,000 top German officers and Nazi officials. The Morgenthau plan was fiercely opposed by the then Secretary of War, Stimson, who proposed and finally convinced Roosevelt's successor, Truman, to pursue a far more liberal approach to dealing with the Nazi atrocities of World War II, a set of criminal trials for the highest ranking Nazi officials. Stimson's success is that much greater given the spectacular failure of the post World War I trials of German and Turkish officers.[66]

This approach was decidedly liberal in its inception; it was premised on the conviction that the proper response to the war's atrocities was not 'naked', 'baseless' retribution but retribution tempered by law and justice. The individuals at trial would not be subjected to retribution just because they happened to lose the war but because they violated international law and treaty commitments. It is an approach that is firmly rutted in the belief of individual freedom and individual responsibility for one's actions, in the belief of rationality as a guide for human actions – even illegal ones – quite contrary to the notion of collective responsibility and the concomitant taint of nations, which is more in line with a Romantic view of the world.[67] This liberal world view plays a double role in international criminal law, both on the side of the subjects of protection – dignity, individual autonomy, bodily integrity and human rights in general – as well as on the side of those responsible for it presupposes rational individuals acting with reasons amicable to liberal rationality subjected to normal criminal law constraints. As such, the approach taken in dealing with mass atrocities of this kind is to put the people involved through a thoroughly liberal criminal procedure.[68]

It is in this context worthwhile to explore the values that the ICL regimes protect. In a seminal piece on the subject, *Identity Crisis*,[69] Darryl Robinson charts the problems that the international criminal tribunals were and still are facing while interpreting their respective statutes. The basic problem is simple; on the one hand, international criminal tribunals are committed to the liberal ideal of procedural criminal justice epitomised in the principles of *nullum crimen sine lege* (no crime without law) and *in dubio pro reo* (when in doubt for the accused), while on the other hand, stands their commitment to human rights liberalism espousing an expansive protection of victims of atrocities, which has led to an expansionary interpretation of the crimes defined in the statutes. In a sense, this is a clash of liberalisms; on the one hand, the commitments to a liberal criminal justice system with legality and predictability at its centre and on the other hand, the ever growing need to extend the protection of individuals in times of conflict[70] bringing in fears of substantive (rather than procedural) justice.[71]

Furthermore, it is not just any human rights that are protected, but a very specific liberal take on rights that is in question. Certainly, political rights are mainly in the focus for what ICL protects is the notion of dignity as related to bodily integrity, right to life and individual autonomy. The case law of the tribunals is littered with references to such ideals. For instance, in the *Furundžija*

63. For instance these authors in some form or another talk about a pluralist constitutional order Jeffrey L. Dunoff and J.P. Trachtman, 'A Functional Approach to International Constitutionalization', in J.L. Dunoff and J.P. Trachtman (eds.), *Ruling the World? Constitutionalism, International Law and Global Governance* (2009); Jan Klabbers *et al*., *The Constitutionalization of International Law* (2009); Kumm (2009), *supra* n. 5; Wiener (2012), *supra* n. 12.
64. Compare the *Prosecutor v. Dusko Tadić*, Appeals Chamber judgment, IT-94-1-A, July 15, 1999 (hereafter *Tadić* Appeals Chamber judgment) with *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43 in relation to state responsibility and imputability, but also *see* Kumm (2009), *supra* n. 5, regarding the change of paradigm towards cosmopolitan constitutionalism and the substantive engagement that it requires.
65. G. Jonathan Bass, *Stay the Hand of Vengeance: the Politics of War Crimes Tribunals: with a New Afterword by the Author* (2000).
66. For a more detailed account of the historical events that lead to the creation of the Nuremberg tribunals *see ibid*.
67. For a more in-depth discussion on individual versus collective responsibility of nations, *see* G.P. Fletcher, *Romantics at War: Glory and Guilt in the Age of Terrorism* (2002); K. Jaspers and E. Basch, *The Question of German Guilt* (1947).
68. On the challenges that international criminal law is facing regarding its liberal ruttes in securing legality and consistency in interpretation *see* Grover (2010), *supra* n. 53. On the problems that a liberal framework of issues such as command authority and scientific rationality *see* T. Kelsall, *Culture Under Cross-examination: International Justice and the Special Court for Sierra Leone* (2009).
69. Robinson (2008), *supra* n. 52.
70. Especially *see ibid*. at 928 and specifically footnote 14 which goes to say: 'A.M. Danner and J.S. Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law', 93 *California Law Review* 75, at 81-89 (2005), have suggested that a human rights approach to interpretation, favouring large and liberal constructions, is inapposite to ICL. This [Robinson's] article agrees with that observation and supplements it by pointing out other modes– including substantive, structural, and ideological assumptions – by which human rights liberalism can undermine criminal law liberalism.'
71. Grover (2010), *supra* n. 53, at 550-563.

Trial Chamber judgment, the Chamber emphasised that "[t]he essence of the whole corpus of international humanitarian law as well as human rights law lies in the protection of the human dignity of every person" and that this "principle of respect for human dignity is the basic underpinning and indeed the very *raison d'être* of international humanitarian law and human rights law" which has "become of such paramount importance as to permeate the whole body of international law."[72] This permeation goes centrally to the purpose of international law itself, which due to the "absolute nature of most obligations imposed by rules of international humanitarian law reflects the progressive trend towards the so-called 'humanisation' of international legal obligations."[73]

In its liberal origins, ICL has left itself unable or unwilling to offer protection to human beings who suffer not as a direct consequence of war, but of the very liberal distinction of public and private actions since for something to fall under the rubric of an international crime it has to have been committed by individuals who are somehow connected to an organisation, a state or a government-like group that exercises state like authority. Again it is individuals and not groups that are the perpetrators; it is just that they have to be connected to a government like entity. Otherwise it would not be possible, for instance in the crime of genocide, to distinguish between a deranged individual that wants to kill all members of the Jedi religion in Australia (a lone genocider as it were) that is caught waiting in the shadows of an alley for her first victim and a government or rebel group that has a plan or policy to exterminate all members of the Jedi religion in Australia;[74] one is a mad serial killer, and the other is a genocide waiting to happen.[75]

But it is not only the fact that ICL has a particular internal problem with distinguishing between certain serial killers and people who commit genocide, but it has a particular blind spot when it comes to actions that happen through market forces.[76] ICL does not have a response to events where government distributed farm subsidies for the production of ethanol from corn causes an increase of poverty and food insecurity to the point of raising the instances of starvation due to rising food prices.[77] A debasing of dignity, of real mental and physical suffering due to starvation is not within the scope of ICL simply because the mechanism by which the rise in food prices and increase in food insecurity is due to the impersonal market mechanism. In a liberal framework of limited government and protected individual autonomy, the high volume of individual choices to sell foodstuffs for ethanol production and the aggregated individual choices of buying ethanol for fuel via the impersonal power of the market cannot be criminal even though the incentives can be government induced and the results more lethal and bring about more suffering than the wars for which some tribunals have been established. It is so because the free individual choice and individual autonomy, even the one that leads to disastrous consequences for others through environmental degradation, is what is to be protected and the only protection worth considering is protection from direct government or group intrusion and not the invisible hand of the market.

Furthermore, ICL is but one way in dealing with past atrocities, the other obvious one being truth and reconciliation commissions, yet it has managed to seize a good chunk of the resources in dealing with mass atrocities with limited local success. International criminal trials have been accused of being too costly,[78] that the trials take too long, that the end result may not be the determination of truth but a show trial,[79] and with limited involvement of the local communities that have gone through these traumatic events. As a privileged discourse – the discourse of fighting impunity – it siphons time, money and energy from other ways of transitional justice mechanism at the same time leaving less space for victims of atrocities. As such it is a part of the humanitarian hegemonic discourse[80] that draws resources 'to the centre from the periphery' and "is a 'universal' idea of what counts as a problem and what works as a solution [that] snuffs out all sorts of promising local political and social initiatives to contest local conditions in other terms."[81] As a dominant discourse about what to do in cases of atrocities, it can deny legitimacy to projects and efforts of reconciliation that are not built around the discourse of individual responsibility, judicially established truth and penal sanctions, which, in all likelihood, no amount of expanding mechanisms of victim involvement[82] will cure. This is so because ICL is

72. *Prosecutor v. Anto Furundžija*, IT-95-17/1-T, Trial Chamber Judgment, 10 December 1998, para. 183 (hereafter the *Furundžija* Trial Chamber judgment).
73. *Prosecutor* v *Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipovic, Dragan Papic, Vladimir Cantic*, Trical Chamber Judgment, IT-95-16-T, 14 January 2000, para. 518 (hereafter *Kupreškić* Trial Chamber Judgment).
74. For the census problems that followers of the Jedi movement have created in the Australian census go to? <www.theage.com.au/national/census-wont-count-jedis-or-pastaferians-20110727-1i0m9.html> (last visited 4 September 2012).
75. For a discussion on the need to have the criteria for plan or policy as part of the elements of the crime of Genocide *see* W.A. Schabas, 'State Policy as an Element of International Crimes', 98 *The Journal of Criminal Law and Criminology*, at 953 (2008).
76. T. Barkawi, 'A Comment on Peters and Nagy: The State in Critical Perspective', in J. Crawford and S. Nouwen (eds.), *Select Proceedings of the European Society of International Law* (2012), Arguing the current international law blind spot regarding its liberal and free market assumptions.
77. For one aspect of food prices and its effects due to ethanol subsidies *see* <www.bbc.co.uk/news/business-18858444> (last visited 4 September 2012).
78. D. Terris *et al*., *The International Judge: an Introduction to the Men and Women Who Decide the World's Cases* (2007) at 160-164.
79. Koskenniemi (2011), *supra* n. 8 at 171-197.
80. D. Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (2004).
81. *Ibid*. at 10 speaking about the humanitarian and human rights movement in general, of which international criminal law is a part.
82. For a short overview of the victim participation model currently in existence *see* M. Findlay, 'Activating a Victim Constituency in International Criminal Justice', 3 *International Journal of Transitional Justice*, at 183 (2009).

tied down to values and conceptions where the centre stage is either the contest between the prosecutor and the defendant with an umpire in between and/or a process of establishing a *legally* verifiable truth and outcome – guilty or not guilty. It will remain a judicial process for establishing a judicial or judicially verifiable truth for if it were to allow for any other kind of establishment of truth, of the truth narrative of the victims or of the truth narrative of the defendant, it would not be a liberal criminal process but a show trial.[83] By this, I do not mean to say that it is a process where no truth is established, but that the truth that is being established is the truth expressed in legal terms, where rape is

> the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim.[84]

It is certainly not the single most humiliating event in the victim's life, but a penetration of a sexual nature, one of many that has been perpetrated as part of a government or group policy or plan of which the person in the dock was either a cog, a crank shaft or not involved. It allows for no other conclusion. As all narratives, it privileges some, neglects others and suppresses others still. It is, in short, hegemonic. It "always consolidates some hegemonic narrative, some understanding of the political conflict which is a part of the conflict itself."[85] Moreover, to "focus on individual guilt instead of, say, economic, political or military structures, is to leave invisible, and thus to underwrite the story those structures have produced by pointing at a scapegoat."[86] Finally, ICL "is a weak and vulnerable strategy to cope with large crises: the more we insist on its technical character, the more we look away from its role in strengthening one narrative over others, and the more the trial will ratify the hegemony of that power on whose shoulders justice sits."[87] Aside some words that I would not use in the last few sentences, scapegoat being one of them, I agree with Koskenniemi's analysis – in the Gramscian and Laclaunian themes of hegemony, ICL is hegemonic, and it is hegemonic because it has been successful in capturing the structure of the discourse through which legal and political claims are being made to address a factual situation, a mass atrocity. In the next section, I will attempt to unpack this notion of hegemony and demonstrate its normality and, therefore its futility as a critical concept.

83. Koskenniemi (2011), *supra* n. 8 at 171-197.
84. *Kunarac Trial Chamber judgment*, para. 460.
85. Koskenniemi (2011), *supra* n. 8 at 234.
86. *Ibid*., at 235.
87. *Ibid*. at 235.

4. Inescapable Hegemony and Post-National Narratives

To understand the current meaning of the word 'hegemony' or 'hegemonic', we need to go back to the assumptions under which this notion of hegemony works. This notion of hegemony works within the world view of anti-formalism or anti-foundationalism, a world view that challenges 'foundationalis' thought, *i.e.* thought based on a conception of Truth (with a capital T) that mirrors the world[88] and offers and independent check on our actions, notions, words and deeds.[89] It claims that we can know the world unmitigated and independent of our beliefs, based on unbiased evidence and through a scientific method of inquiry.[90] Anti-foundationalism broadly claims that there is no conception of the world that is not already tainted by the particular biases of the local and the historical and that all current discourses are projected within a certain, local, historical structure of belief about what the world is and how it works. In anti-foundationalist thought, universalism is a non-starter; it does not exist independently of a historically placed discourse and if it is achieved, and I stress the word *achieved*, it is achieved only for a moment in a specific historical and cultural period and, consequently, not at all universal, at least not in the terms that foundationalists' claim. There is no capital T truth, but truth understood and seen as truth only within the particular sets of beliefs, world views, paradigms, narratives.[91] In this sense, all narratives are local; they stand as the opposite to Truth: since where there is no capital T truth, there is only a narrative, and more specifically, someone's narrative. And this is where we come to hegemony, for hegemony is presented, in its purely descriptive (formal as opposite to substantive) form as a point of view that presents itself as representing a universal point of view and, if successful in its presentation, privileges one set of values and side-lines, suppresses, neglects, has a blind spot to other points of view, other value systems, other cultures and histories, in short, other narratives. It is hegemonic because it succeeds in marshalling the power of a legal and political system for its own agenda. In Koskenniemi's words:

> In political terms, this is visible in the fact that there is no representative of the whole that would not be simultaneously a representative of some particular. 'Universal values' or 'the international community' can only make themselves known through mediation by a state, an organisation or political movement. Likewise, behind every notion of universal interna-

88. For instance *see* R. Rorty, *Philosophy and the Mirror of Nature* (1979); R. Rorty, *Objectivity, Relativism, and Truth* (1991).
89. Also *see* the opening chapter in S. Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1989).
90. Koskenniemi (2011), *supra* n. 8 at 296-299.
91. B.Z. Tamanaha, *Realistic Socio-Legal Theory: Pragmatism and a Social Theory of Law* (1997).

> tional law there is always some particular view, expressed by a particular actor in some particular situation. This is why it is pointless to ask about the contribution of international law to the global community without clarifying first *what* or *whose* view of international law is meant. However universal the terms in which international law is invoked, it never appears as an autonomous and stable set of demands over a political reality. Instead it always appears through the position of political actors, as a way of dressing political claims in a specialised technical idiom in the conditions of *hegemonic contestation*. (emphasis in the original)[92]

As I noted previously, ICL certainly fits the bill; it is a specific liberal response to atrocities, and as such especially combined with a human rights mindset, de-legitimises governments and movements (amnesties and forgiveness for example) that do not comport with the value and belief system that it espouses. The same can be said about constitutionalisation and especially about constitutionalism, for it too sees the world and proscribes for it institutions and measures of legitimacy that have a particular liberal value set. Constitituionalism and its particular public law and public authority iteration puts individuals at the centre with public law presenting a limitation on public authorities in order to preserve a very liberal idea of individual rights and individual autonomy. It does this under the belief that individual rights and the protected individual autonomy that they bring about is a universal good, respected and cherished across the world oblivious to the fact that, at least for the moment, all of the 'consumers' of the Rome Statute are part of a regional system that has in the title of its preeminent human rights convention the word Peoples' rights, rights of groups and communities with and without states and not just as nations.[93]

However, calling it hegemonic does nothing to add to the critical project for, under these starting assumptions, any narrative that succeeds it will be no more and no less hegemonic just differently so. It will be hegemonic because in a world view of no universals, of competing narratives, of as the Gershwin song goes "I say tomato you say tomato"[94] there will always be different narratives vying for the privileged position of being the dominant discourse, the master-narrative. Sticking to this formal view of hegemony leaves us with no critical foothold, for as any formal, abstract description, it either does not exist since it will already be tainted with background structures of belief and values (and therefore not formal at all but substantive) or if it remains formal it will not be able to resist any imposition of content (since the emptiness of substance is its claim, it is merely descriptive) and can and will be marshalled in any political project. It either cannot exist because for its existence to be possible it needs a structure of belief, a world view through which the words can project their meaning (hegemony = bad, evil, oppressive). And if it does exist in its purely formal realm, then it cannot resist any imposition of substance for even the most, to us, abhorrent regimes, the Taliban, the North Korean dynasty, the Spanish inquisition, the Neo Nazis, can use it to claim that the narratives that oppose it, and oppose it for good reasons, are blind to their world view, to their values, to their narratives and that the measures used to suppress such narratives are in themselves hegemonic for they will speak from a partial, partisan position that has pretences to impose its value system on the world views that it sees as abhorrent.

But, of course, that is not what the narratives now in contention over the international political system claim, for at the centre of each claim is the hope that if their description/construction of the world is accepted everybody will be able to go about their own business and no one's world view will be sidelined. At least that is the hope that comes with projects such as pluralism and fragmentation for what they hope is that through a pluralist or fragmented world, space will be created for all narratives to flourish.

Let us take for example a recent defence of pluralism as a way to organise the world order, Niko Krisch's *Beyond Constitutionalism.*[95] In his book, Krisch argues for a pluralist post-national world order where the world is organised in a blurred separation of layers of normative orders that are not organised by a single overreaching set of norms like a constitution.[96] Nevertheless, these divergent normative orders that have differing sources of authority are still entwined in a post-national world order that has at its core the protection of individual public autonomy which provides 'an anchor'[97] to this world order. As such, a narrative that offers a 'break'[98] from the current international law master-narrative, it still cannot distance itself from the very liberal notion of the protection of individual and, albeit public, autonomy. It is not surprising, for what Krisch's pluralism entails is world order that is populated with much the same actors as before – states, international organisations, regimes – just that now rather than promoting a framework tied down to general international law as a possible world constitution it provides a framework that ties its actors to a floating substantive notion, floating since it is not specifically mentioned in any international source of authority but rather is part and parcel of the assumptions of what human and constitutional rights are all about. It is the slightly more European or German version of the humanisation of international law or

92. Koskenniemi (2011), *supra* n. 8 at 221-222.
93. *African Charter on Human and Peoples' Rights*, Concluded at Nairobi on 27 June 1981 and especially *seeThe Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, African Commission on Human and Peoples' Rights, Comm. No. 155/96 (2001).
94. *See* more in S. Fish, *The Trouble With Principle* (1999) and especially at 19-33.
95. Krisch (2010), *supra* n. 2.
96. *Ibid*., at 69-78.
97. *Ibid*., at 70.
98. *Ibid*., at 14-26.

the *pro homine* approach that other scholars[99] and judges[100] promote, but Kirsch's approach shares with these approaches the same basic assumption: that a world order is or should be underpinned by and safeguard the very Enlightenment achievement of thinking of human beings as rational individuals with their own bubble of autonomy where freedom, free will and so on can exist.

Do not get me wrong; it is not the notion of individual autonomy or its different iterations that I criticise in this article, but the notion that we can have a world order or any organising narrative that does not privilege some and exclude others from the legitimate, rational (rational within a specific world view and hence irrational to others) decision-making processes. In the purely formal, descriptive realm of Gramscian hegemony, any narrative – even the one presenting itself as a counter-narrative – will be hegemonic, *i.e.* it will be hegemonic if successful and until that time it will be a hegemonic narrative in waiting.

But surely some would say that a purely descriptive narrative would escape the offence of being hegemonic. For instance, if we were to keep to a descriptive narrative of the way that the current world structure is – to say that the world is fragmented into many different regimes and states, that those entities follow different sources of authority and have differing views on the proper alignment of world order and that they inevitably either clash or support each other or a combination of the above. Certainly a narrative of this nature holding itself in the purely descriptive (for now let me acknowledge that that is a possibility) form will be completely useless, beyond the realm of point scoring (now they clash now they support each other) and will have nothing useful to say on how to manage the inevitable encounters that ensue. The moment that a narrative ventures outside of its descriptive realm and tries to asses certain conditions, events and structures as good or bad, it loses its descriptiveness since something can only become 'good', 'worthy', etc. through the lens of a specific world view, a specific narrative.

Consequently, even though the philosophy of 'I say tomato, you say tomato' is true we cannot call the whole thing off. We are stuck on this piece of rock and are forced to deal with each other and unless a divine, universal perspective becomes available to us, a point of view from everywhere and nowhere in particular then we are forced in managing through the world in a particular, historical and local point of view, our community's narrative. So long as we are in such an epistemological condition, we have no choice but to order the world, see things as right or wrong from a local and historical point of view. Furthermore, when this view at its core clashes with a differently but equally important core of another point of view, another narrative, we will have the choice of either using all the tricks up our sleeves to counter the other narrative or be persuaded by it (although choice is not really the right word at this point for we can hardly have a choice in what we believe for persuasion comes through a messy winding route) and adopt its view.[101]

5. Conclusion

International Criminal Law and its different regime iterations certainly do have a significant number of constitutional features, from its public law foundations, separation of powers features, its rule of law commitment, to its human rights mindset. It is a particular narrative that comes with its own assumptions about rational individuals with individual autonomy and as such it is open to some and blind to other ways of dealing with atrocities or with other international regimes or states. Moreover it has managed to capture a significant part of the discourse of the international community so much so that conflicts and conflict resolution is structured around topics such as jurisdiction, plan and policy, attack, civilian population, combatant, proportional, reprisals, impunity, defendant, *mens rea*, *actus reus,* etc. As such, it does not admit topics such as forgiveness, reconciliation, restoration, community acceptance and community responsibility. It offers a specific and narrow response to set of events and it does so while beholden to a specific set of values, and, as such, is hegemonic.

However, it is this charge of hegemony that lacks coherence, at least in its purely descriptive form. It does not help in the critical project for it does not alert its reader to values, problems, blind spots that a specific narrative has. It merely says that the current narrative is the dominant one – the master-narrative – but it is incapable of critiquing it in any coherent way. For instance, here is Koskenniemi on the current international public law hegemony:

> Such a perspective too readily adopts the standpoint of the hegemon … a great power with a political and legal agenda to impose on the world. Looked from other points of view, however, the main problems of world order are not those the hegemon is obsessed with – use of force and national security – but economic problems, poverty being the most striking example, *i.e.* problems the hegemon usually casts as outside regulation by public international law. Yet it is important to see that as massive Third World poverty is sustained by the dealings of unrepresentative Third World governments with private transnational corporations, it is not unrelated to the international legal system that provides those governments with the competence to borrow funds from the international financial markets and to conclude concession agreements with Western companies against the

99. For instance *see* T. Meron, *The Humanization of International Law* (2006).

100. See for instance the various judgments by Judge Antônio Augusto Cançado Trindade in both the IACtHR and the ICJ.

101. *See* more in Fish (1997), *supra* n. 8 at 378-385; Fish (1999), *supra* n. 94.

> interests of their country and populations for decades to come. In this regard, the global public order – its principles of recognition of governments, binding force and non-intervention – is fully implicated in what can only be seen as a deeply unjust system of distributing material and spiritual values.[102] (footnote omitted)

Koskenniemi and I are in full agreement regarding the current focus of public international law and its many blind spots, but where we differ is in the futility of the adjective hegemonic. And the reason for that is that what does the critical work in this paragraph is not the categorisation of the United States as a hegemon, but the marshalling of evidence and issues to which the United States and its specific neo-conservative world view is blind to – by the invocation of the images of starvation, famines and poverty, facts on the ground that are seen as a product of a 'deeply unjust system of distributing material and spiritual values.' And they can only be seen as an unjust system by stepping out of that neo-conservative world view and critiquing it from a different one where the unjustness of it is plain for all see. Moreover, if Koskenniemi's critic were to succeed, the international public law system would be changed and would espouse different values than the ones it currently holds and as such it would privilege some approaches, such as debt relief, comprehensive labour standards, wider regulation on companies, freezing of financial markets to un-democratic illiberal regimes and be indifferent to others, such as sovereign equality, national security, free trade, etc., and it would think the privileged ones as just and the un-privileged ones as unjust. And the ones that do not share those values would think, for instance, that in this new public international law order, freedom has ceased to exist, that we are increasing the role of governments too much and that we are all on the 'road to serfdom'[103] and they would be able to say, with good justification, that they are living under a hegemonic world order that privileges alien views and viewpoints while blind to their own. It is a loop that keeps on going like a broken record.

It is in its current formal and descriptive form that hegemony loses its coherence as a critical concept and if we want it to have its critical bite, it has to be attached to substantive values and say specifically what hegemony entails, and why it is a bad thing. In a sense, it can only be useful as a concept if it is substantive, filled with content and honest about it being open to some and closed to other interests and values. Otherwise, as it currently stands, it is a rhetorical tool, an insult hurled at one's debating opponent so as to put her on the defensive and ill at ease. But a skilled debating opponent can easily hurl the same insult back and prove that her debating opponent will be no less of a hegemon were it to be in her place. It seems that, in its retreat to a formal descriptive, hegemony has managed to become our constant companion, one that we cannot get rid of, unless or until we find that universal perspective or we change the discourse.

102. Koskenniemi (2011), *supra* n. 8 at 238-239.
103. F.A. von Hayek, *The Road to Serfdom* (1944).