The Triumph of International Law: The Clash of Ideas That Shapes International Law

Book Section

Chapter 5

The Triumph of International Law: The Clash of Ideas That Shapes International Law

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Abstract

International law has never been more relevant. It touches every corner of the globe and it even extends beyond Earth's atmosphere and into space. It regulates relations between states, between states and their populations, between states and international organization, and between any combination of these actors. The international system is a multi-level juggernaut juggling multiple communities, multiple loyalties and multiple legitimacies.

In this Chapter, I will talk about the two broad intellectual ideas that have shaped the international order since World War II. They have also brought it at a tipping point, where these two ideas are trying to force a change that they cannot fully accomplish. The result of this could be a long-term status quo, an impulse for renewed regionalisation of international relations and a decline in transregional relations.

1. Introduction

International law has never been more relevant, but it is also at a tipping point. After the firm conviction that a liberal world order[1] was coming into existence in the 1990s and early 2000s, things stalled by the end of the 2010s. Freedom House, a USA-based NGO, has tracked the state of freedom in the world for the past 40 years. In its 2020 report[2] it marked the fourteenth year in which more countries declined in their freedom rankings than improved. It is not just the 'usual suspects' of Russia, China or Saudi Arabia contributing to this state of affairs. Countries that were previously thought of as having completed their liberal democratic transformation, like Hungary or Poland, are experimenting with a system of illiberal democracy[3] where, while there may be regular and somewhat free elections, the system can certainly not be described in any sense as liberal. They cannot be considered liberal because they have purposefully eroded the foundations of a liberal state, such as certain equality rights, like gender equality, LGBTQ+ rights, or minority rights, as well as the systemic guarantees usually found in liberal democracies, like independent media or courts.

[1] Daniel Deudney and G. John Ikenberry, 'The Nature and Sources of Liberal International Order' (1999) 25 *Review of International Studies* 179; G. John Ikenberry, 'The End of Liberal International Order?' (2018) 94 *International Affairs* 7.

[2] Freedom House, 'Freedom in the World 2020: A Leaderless Struggle for Democracy', (Freedom House 2020), <https://freedomhouse.org/sites/default/files/2020-02/FIW_2020_REPORT_BOOKLET_Final.pdf> accessed 02 October 2020.

[3] Fareed Zakaria, 'The Rise of Illiberal Democracy' (1997) 76 *Foreign Affairs* 22.

But this essay is not about the domestic changes[4] that have happened across the globe, although they are connected. This essay is about the changes that occurred in the international system, to which the rise of populism and illiberal democracies are partially a reaction. It is about three possible scenarios: the first where the international system will revert to a system of great power politics, something akin to the 19 Century post-Congress of Vienna system[5] with modern style governance attached. The second scenario is a truly liberal international order, where the status of the individual, their liberty, rights and the satisfaction of their needs, will be a guiding principle of a global public order. Finally, there is a third scenario where the current state of 'neither here nor there' may continue for some time, but the structural legitimacy problems in the international system *for liberal democracies* will persist and continue to create problems for the domestic balance of powers set up by liberal constitutions.

So, what are these legitimacy problems? In short, the current system of global governance gives the executive branch of national governments mechanisms to circumvent domestic deliberation and accountability. It alters the balance of liberal constitutional protections in favour of the executive.[6] For illiberal democracies and outright authoritarian regimes this is not a problem, they are not really concerned with accountability, representation and voice. But for liberal democracies, it is. In order for liberal democratic countries to safeguard their domestic constitutional balance, they will need either to make the international order reflect liberal democratic values, or re-shape it so that they have veto power if not control, over the governance of world affairs. This is not an easy thing to accomplish given the urgent need to tackle existential threats to humanity such as climate change or nuclear proliferation.

Unfortunately, liberal democracies may no longer have the hard or soft power to bring either of those scenarios into being and, consequently, we may be headed for a longer status quo: a situation where things continue as they are, and where neither vision of the international system has enough support to become the new international order. A frozen international law if you will. By this I do not mean that substantive norms will not change, they will, but rather I mean that the norms that create the fundamental shape of the system, the basic rules of the game, will not change simply because no one side has enough power to change them. In this prolonged status quo, things continue to function much as they do now, albeit with less focus on issues such as rights and democracy, and more focus on issues such as security, free trade and possibly climate change. There will be incentives to maintain and deepen regional political and economic organizations. However, there will be a difference of the types of regional arrangements that will be created or strengthened. The European Union/European Community as well as the Council of Europe models will fall out of favour, and the Association of East Asian Nations (ASEAN) centred around China or the new Eurasian Economic Union centred around Russia will be the blueprints of this new regionalism. There will still be ongoing trade relations or security cooperation between the regions – there will not be a return to a Cold War type of scenario. Nevertheless, it will be a far cry from the liberal world order that early liberal scholars advocated for[7] and what liberal democracies need.

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[4] For more on the current challenges that democratic systems face see: Jamie Bartlett, *The People Vs Tech: How the Internet Is Killing Democracy (and How We Save It)* (Random House 2018); Yascha Mounk, *The People Vs. Democracy: Why Our Freedom Is in Danger and How to Save It* (Harvard University Press 2018); David Runciman, *How Democracy Ends* (Profile books 2018).

[5] For one account of the Congress of Vienna (Concert of Europe) system *see* Henry Kissinger, *Diplomacy* (Simon & Schuster 1994) 78 – 103.

[6] For a good account of how this is the case within the EU, but that also applies to global governance *see* Andreas Follesdal and Simon Hix, 'Why There Is a Democratic Deficit in the EU: A Response to Majone and Moravcsik' (2006) 44 *JCMS: Journal of Common Market Studies* 533.

[7] For an example of this line of thought *see* Jeffrey L. Dunoff and Joel P. Trachtman, *Ruling the World?: Constitutionalism, International Law, and Global Governance* (Cambridge University Press 2009); Jack Goldsmith and Daryl Levinson, 'Law for States: International Law, Constitutional Law, Public Law' (2009) 122 *Harvard Law*

That said, to get to where we are and chart a course of where we are going, it is useful to know where we started. The current affairs are a result of the push and pull of two strands of thought, classicist ideal and a liberal ideal of international law. Simpson has called these strands the 'two liberalisms', as they are both a version of liberalism, one procedural/formal/neutral, the other one substantive.[8] Consequently, I will first write about the classic international law master narrative – the short, simple story that we tell ourselves about how the system works. I will then describe how this narrative fails to account for the mounting changes through the words of those who have been alarmed by the changes, lamented its change, or rebelled against the new upstart order in the last 50 years. I will then present the narratives that pushed for creating a substantive liberal world order, intensifying after the end of the Cold War. It is these two forces, the classical and the progressive, that have shaped the current system. In closing, I will give an outline of the possible ways in which the current dilemma can be resolved.

There is one more caveat: in writing about these issues I have had to paint these narratives and events in broad brush strokes. They span decades and some of the things that the voices I present here have said would happen did not happen nor, with hindsight, were likely to happen. What I try to present here are broad examples of schools of thought that have shaped the current system. Consequently, the arguments presented lose their nuance, or they seem obvious. But they are, the justifications, fears or arguments of their generation, at times repeating the arguments from a different generation, trying to make them succeed when the conditions for that success have long passed or were yet to emerge.

2. The Master-narrative of the international system

So, what is a master-narrative? It is a short simple story about how the system works. All legal systems have a master-narrative and it produces the self-conception of what the actors do in the system – what their role and purpose is. It is a story about the system itself; 'a governing underlying narrative that each legal system tells itself – more and less openly – about why it is constructed the way it is, why it operates as it does, and why this makes good sense.'[9] It paints the system in broad and simple brush strokes (the UK's parliamentary sovereignty; the USA's balance of power with checks and balances; Germany's cooperative federalism) and mostly it is unaware of the paradoxes contained within it – or chooses to ignore them. After all, human beings can live with quite a lot of cognitive dissonance.[10]

Klabbers calls this master-narrative the theory under which international lawyers operate, regardless of whether they see the international system as 'a tool for states[persons]', as the 'handmaiden of global capitalism', or a 'hope for the poor and oppressed'.[11] It is a set of 'ideas

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Review 1791; Stéphanie Hennette-Vauchez, 'Constitutional V International? When Unified Reformatory Rationales Mismatch the Plural Paths of Legitimacy of ECHR Law' in Jonas Christoffersen and Mikael Rask Madsen (eds), *The European Court of Human Rights between Law and Politics* (Oxford University Press 2011); Jan Klabbers, 'Constitutionalism Lite' (2004) 1 *International Organizations Law Review* 31; Jan Klabbers, Anne Peters and Geir Ulfstein, *The Constitutionalization of International Law* (Oxford University Press 2009); Martti Koskenniemi, 'Constitutionalism as a Mindset: Reflections on Kantian Themes About International Law and Globalization' (2006) 8 *Theoretical Inquiries in Law* 9; Mattias Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and Beyond the State' in Jeffrey L. Dunoff and Joel P. Trachtman (eds), *Ruling the World?: Constitutionalism, International Law and Global Governance* (Cambridge University Press 2009); Susan Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (Oxford University Press 2000).

[8] Gerry Simpson, 'Two Liberalism' (2001) 12 *EJIL* 537.

[9] Mitchel de S. O. l'E Lasser, 'Judicial (Self-)Portraits: Judicial Discourse in the French Legal System' (1995) 104 *The Yale Law Journal* 1325; Mitchel de S. O. L'E Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (Oxford University Press 2009); Mitchel de S. O. l'E Lasser, 'Transforming Deliberations' in Nick Huls, Maurice Adams and Jacco Bomhoff (eds), *The Legitimacy of Highest Court's Rulings: Judicial Deliberations and Beyond* (Cambridge University Press 2009) 37.

[10] Chapter nine, Arrow of History, in Y.N. Harari, *Sapiens: A Brief History of Humankind* (HarperCollins 2015).

[11] Jan Klabbers, *International Law* (Second edn, Cambridge University Press 2017), 4.

and assumptions about what the function of international law is.'[12] When it comes to the international system, the key assumption is the centrality of states. International law is generally thought of as a bundle of norms governing international relations – and not all international relations, but the relations between states. The buying and selling of goods by private entities that cross borders is an example of international relations, but it is not governed by *public* international law, because it does not have a public component.

Probably the most obvious place where we can find the master-narrative of international law is in the story of its sources, where the assumption about the centrality of states is key to their structure and validity. The international system is seen as a system of anarchy, as opposed to hierarchy – there is no central legislator and no central authority that can perform the law-making and law application functions typically found in national legal systems. Consequently, all sources of international law must be traced back to the consent of the states. Therefore treaties, custom, and general principles of law are sources of law; judicial decisions and the writings of scholars, on the other hand, are subsidiary means for determining the rules of law.[13] The feature that divides them is that the former are created by states, while the latter are reports of the existence of law already created by states. An international court cannot be a source of law – cannot create law, merely discover it in the actions of states.

International courts and commentators go out of their way to show that an international norm is a product of state consent. The traditional account says that international treaties are negotiated and drafted by state representatives, and states are the only legal actors that can be parties to them, whether by signature or ratification.[14] International treaties are where state consent is most clearly visible, as the process to their conclusion is a lengthy one and the final instruments of consent quite formalised. The situation is similar with international custom, which represents consistent general practice (of states) coupled with *opinio juris*, the belief (of states) that the practice is accepted or required as a matter of law.[15] Since the creation of custom is a gradual process, international law has built in a safety valve, the persistent objector rule, whereby a state that observes the creation of a custom can object to the custom's application to itself and can thus 'block the formation of rights [and obligations] vis-à-vis others'.[16]

Consequently, international law has created a convenient rule of thumb regarding the freedom of states to act, first underlined in the PCIJ's *Lotus* case,[17] a dispute about whether Turkey could extend its jurisdiction to cover crimes committed against its nationals abroad. The PCIJ, by the deciding vote of the president of the court, said that international law

> leaves them … a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.[18]

In essence, the *Lotus* principle is a handy heuristic device: states are free to act unless there is a prohibitive rule preventing states from taking that action or a mandatory rule that they must follow requiring a specific action in a specific situation. In the case of the *SS Lotus*, Turkey was entitled to prescribe extra-territorial criminal jurisdiction in its criminal code; however, it

[12] ibid.
[13] Article 38 of the Statute of the International Court of Justice.
[14] Articles 11 – 15 of the Vienna Convention on the Law of Treaties.
[15] Klabbers, *International Law*, 31 – 34; but also see Malcolm N. Shaw, *International Law* (Cambridge University Press 2008).
[16] Klabbers, *International Law*, 34. But also see the, *Fisheries (United Kingdom v. Norway)*, Judgment of December 18th, I95I: ICJ Reports 1951 116, 139.
[17] PCIJ, *The Case of the 'SS Lotus'*, Series A, No. 10, September 7th, 1927.
[18] ibid, 19.

was prohibited from exercising its jurisdiction on another state's territory without that state's permission.[19]

3. The Fear of a Changing World

3.1 Lamenting Change in International Law

International lawyers are, or were, by nature a bit traditionalist. It should not come as a surprise for a profession that collates decades, sometimes centuries of examples of state practice in order to determine what the law is. This is to say not that international lawyers were not at the forefront of radical change in thinking about the nature of the international system, either in the past[20] or in the present,[21] but that our praxis has not changed much when wearing the international lawyer's hat.[22]

Nevertheless, change we do, and much of the argument in this Chapter is about the current situation that is the result of the struggle between the two main thoughts in international law. The first line of thought sees international law as law created by states and for the purpose of regulating their relations, while the second sees it as an extension of liberal law and politics, constraining power while allowing the individual to live free. This section will outline some of the arguments for the first view by presenting the protagonists' fear of the second.

3.2 The Fear from the Bench

The *Lotus* principle might be the high-water mark of the classical account of international law, and the last 50 years have seen changes that have upended this classical account of the centrality of states. An early indication of the change that was to come to international law, as well as the reasons why it needed to change, was the ICJ's 1951 Advisory Opinion on reservations to the Genocide Convention.[23] The Genocide Convention was the brainchild of Raphael Lemkin, who started advocating for the criminalisation of the destruction of an entire group while WWII was still raging.[24] With the conclusion of the drafting of the Genocide Convention and the final vote in the UN General Assembly, his vision was at the cusp of being realised, when several states attached reservations during its signing and ratification, to which other states objected. The UN General Assembly asked the ICJ a number of questions on the consequence of the reservations and objections to the Genocide Convention's membership. The case was argued at the time when the UN was coming into its own, getting increasingly involved into issues of peace and security, having established its functional subjectivity with the ICJ's *Reparations for Injuries*[25] advisory opinion. It was also a time when what came to be known as the Iron Curtain[26] was beginning to take shape across Europe. There was a sense of great hope for a peaceful future, as well as gathering clouds imperilling that future.

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[19] ibid, the *Lotus* type reasoning has found its way in several major international judgments, most notably the *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1.C.J. Reports 1996, 226; and the *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, ICJ Reports 2010, 403.

[20] Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1879-1960* (Cambridge University Press 2002).

[21] See the citations in *supra* footnote 7.

[22] Martti Koskenniemi, 'Letter to the Editors of the Symposium' (1999) 93 *The American Journal of International Law* 351.

[23] *Reservations to the Convention on Genocide*, Advisory Opinion, ICJ. Reports 1951, 15.

[24] Philippe Sands, *East West Street: On the Origins of" Genocide" and" Crimes against Humanity"* (Vintage 2017).

[25] ICJ, *Reparation for injurie suffered in the service of the United Nations*, Advisory Opinion: I.C.J. Reports 1949, 174.

[26] Winston Churchill made a reference to an Iron Curtain descending between what later became the Warsaw Pact and Western Europe in his speech at Westminster College in Fulton, Missouri in 1946.

Given this context the majority tried to take the middle line. The ICJ said that the nature of the convention in question, as well as the goal of 'extensive participation of conventions of this type has given rise to a greater flexibility'[27] in treaty making. The universal principle that the Genocide Convention protected, the fact that the 'Convection was manifestly adopted for purely humanitarian and civilizing purpose', that the 'contracting States do not have any interests of their own'[28] led the ICJ to conclude that '[i]t is inconceivable that the contracting parties readily contemplated that an objection to a minor reservation'[29] should result with the diminished membership of the Convention. It also concluded that the states did not intend 'to sacrifice the very object of the Convention in favour of a vain desire to secure as many participants as possible.'[30] Consequently, '[t]he object and purpose of the Convention thus limit both the freedom of making reservations and that of objecting to them.'[31]

The dissenting judges did not agree with the ICJ's assessment, either on the ambiguity or the trajectory of recent treaty making rules and practice, or on the reason for changing them. They restated the law then in place, namely that '[t]he consent of the parties is the basis of treaty obligations.'[32] This applies regardless of the nature of the convention or the number of its participants. Should a state make a reservation, that state is not considered to be a party to the convention until all of the other parties at the time agree to that reservation. Otherwise, the treaty loses its integrity and devolves into a bundle of bilateral relations depending on which states accept which reservations. Should states wish to make a more flexible arrangement regarding the reservations regime, they can specify it in the convention itself during the negotiating period.[33]

The way that the dissenting judges argued for their conclusion is very telling - they relied heavily on international law's basic assumptions and put the consent of states centre-stage. For example, they looked at past treaty-making practice, giving example after example[34] of the centrality of state consent to treaty obligations and to the integrity of the treaty, especially in the practice of the League of Nations. Furthermore, they consistently referred to the intentions of the parties, refusing to entertain that as a World Court they might have a different role than as vehicles for the parties intentions, refusing to entertain arguments regarding the speciality of the Genocide Convention or the specific moment in time of post WWII world re-construction.[35]

On the law and practice of treaty-making they were right. Moreover, they were right on the consequences of the opinion when they said that they have a

> difficulty in finding a criterion which will establish the uniqueness of this Convention and will differentiate it from the other humanitarian conventions which have been, or will be, negotiated under the auspices of the United Nations.[36]

Yet, the Genocide Convention's treaty making process became the norm for the way that most of the important multilateral conventions were drafted in the last 50 years.[37] While being right on the law, the dissenting judges were wrong regarding their timing because they could not

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[27] ibid 21.
[28] ibid 23.
[29] ibid 24.
[30] ibid.
[31] ibid.
[32] *Dissenting Opinion of Judges Guerrero, Sir Arnold McNair, Read, Hsu Mo*, *Reservations to the Convention on Genocide*, Advisory Opinion, I.C.J. Reports 1951, 15, 31 – 32.
[33] ibid 37.
[34] ibid, 32 – 42.
[35] ibid, 46 – 47.
[36] ibid, 47.
[37] José E. Alvarez, *International Organizations as Law-Makers* (Oxford University Press 2005).

see an international order beyond an international regime which had states as its central actors.

In 1975 another quiet revolution was taking place at the European Court of Human Rights (ECtHR). For Europe, 1975 saw the finalisation of a two-year process of negotiation between the Warsaw Pact and NATO members regarding peace, security, and cooperation in Europe. This resulted in the signing of the Helsinki Final Act 1975, a mostly political document which proved to be 'a turning point in the Cold War.'[38] Crucially, it confirmed the obligation of states to respect human rights as inherent of a person's human dignity and especially 'the right […] to know and act upon [ones] rights and duties'.[39] This provision was used by dissident movements in the Warsaw Pact countries to resist communist oppression, such as the network of national Helsinki Committees and the Solidarity movement in Poland. The 1970s was also the period when the enthusiasm for rights litigation and rights discourse was maturing and where the examples of the Warren Court's bold decisions were becoming more accepted in the public's mind.

This is the background against which the case of *Golder v UK*[40] was argued. The ECtHR was asked to decide, among other things, whether Article 6 protected the right of access to courts. The problem for the ECtHR was that even though the European Convention on Human Rights (ECHR) had several provisions dealing with what happened once one managed to get to a court,[41] the right to go to court was never specified by a single provision. Consequently, the ECtHR had to improvise and said that

> It would be inconceivable … that Article 6 para. 1 should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings.[42]

While it might have been inconceivable to the majority, the dissenting minority certainly could conceive of such a thing, and this is largely due to the way that they saw their place and function in the international system. Judge Fitzmaurice was the most open in the explanation of his motives. He said that

> There is a considerable difference between the case of 'law-giver's law' edicted in the exercise of sovereign power, and law based on convention, itself the outcome of a process of agreement, and limited to what has been agreed, or can properly be assumed to have been agreed.[43]

For him, in the latter instances a greater 'interpretational restraint' was required where a 'convention should not be construed as providing for more than it contains'.[44] Consequently, the only inferences that could be made as to rights or norms outside of what was expressly provided in the convention were inferences that were necessary for the operation of those rights or norms. Therefore, 'the necessary, and the only necessary inferential element lies in the assumption […] that legal proceedings of some kind have been started and are in

[38] Philippe Perchoc 'The Organization for Security and Co-operation in Europe (OSCE)' The European Parliament, PE 628.219 – September 2018, 2.
[39] Article 7 of the Helsinki Final Act 1975.
[40] ECtHR, *Case of Golder v UK*, (Application no. 4451/70), 21 February 1975.
[41] This includes what the characteristics of a court are (ie independent, impartial and established by law), Article 6(1) and 6(2) of the European Convention for Human Rights.
[42] *Golder v UK,* para 35.
[43] *Separate Opinion of Judge Sir Gerald Fitzmaurice, Golder v UK,* (Application no. 4451/70), 21 February 1975, para 32.
[44] ibid.

progress,'[45] and not that there is a wholesale guarantee of the right to access to court. Moreover, when speaking for the proper function of the ECtHR in the Convention system he said that

> it is for the States upon whose consent the Convention rests, and from which consent alone it derives its obligatory force, to close the gap or put the defect right by an amendment, - not for a judicial tribunal to substitute itself for the convention-makers, to do their work for them … [otherwise] freedom of action will have been impaired.[46]

It is not that Judge Fitzmaurice was a pejorative legal formalist strictly wanting to adhere to the letter of the Convention – if anything, his reasoning was motivated by a sense of protecting the continued existence of the ECtHR when it was just starting to gain acceptance. At the time, most member states had a time-limited declaration accepting the individual complaints mechanism, which was usually renewed every three years. Fitzmaurice made his concerns plain in his dissent, saying that it was necessary 'to bear in mind not only that [Article 6] is a provision embodied in an instrument depending for its force upon the agreement - and indeed the continuing support - of governments'.[47] In addition, it was also 'an instrument of a very special kind'[48] – a human rights convention that only had the American Convention on Human Rights, as a companion. Moreover, Fitzmaurice argued that human rights conventions 'have broken entirely new ground internationally, making heavy inroads on some of the most cherished preserves of governments in the sphere of their domestic jurisdiction or domaine réservé'.[49] What Fitzmaurice was talking about was the possibility to lodge individual complaints and '(in effect) sue [one's] own governments before an international commission or tribunal, - something that, even as recently as thirty years ago, would have been regarded as internationally inconceivable.'[50] Judge Fitzmaurice was writing in 1975, referring to the period of shortly after WWII, regarding something that is so ubiquitous in liberal democracies today the we do not pay too much attention to its existence.

Consequently, these and similar considerations 'could justify even a somewhat restrictive interpretation of the Convention', but nevertheless, they 'positively do demand, a cautious and conservative interpretation'[51] of the ECHR. For Fitzmaurice, this is especially true of unclear or uncertain provisions 'where extensive constructions might have the effect of imposing upon the contracting States obligations they had not really meant to assume, or would not have understood themselves to be assuming'.[52] Therefore '[a]ny serious doubt must … be resolved in favour of, rather than against, the government concerned.'[53]

Judge Fizmaurice's fears that expansive interpretation would alienate states did not come to pass. States continued to engage with the ECtHR and to renew their declarations accepting individual petition before the court. Should the majority have heeded his advice, the international system would have looked quite different than it does today. Unlike the dissenting judges in the ICJ's advisory opinion on the Genocide Convention, the dissenting judges in the *Golder* case were aware of, even astonished at, the changing nature of international law. Verdross for example, another dissenting judge in *Golder*, was an early champion of the notion of peremptory norms in international law and the idea of an international community, and in his writings on *ius cogens*, included basic human rights as one them.[54] It was not that the

[45] ibid para 34.
[46] ibid para 37.
[47] ibid.
[48] ibid para 38.
[49] Ibid.
[50] ibid.
[51] ibid para 39.
[52] ibid.
[53] ibid.
[54] Bruno Simma, 'The Contribution of Alfred Verdross to the Theory of International Law' (1995) 6 *EJIL* 33.

dissenting judges were sceptical of the need for states to observe and protect human rights, it is more that they were, in some way, classicist in their view of the fundamental assumptions of international law, and they saw the change happening before their eyes as too rapid. It is for this reason that they did

> not consider it permissible to extend, by means of an interpretation depending on clues, the framework of the clearly stated rights and freedoms. Considerations of legal certainty too make this conclusion mandatory: the States which have submitted to supervision by the Commission and Court in respect of 'certain' rights and freedoms 'defined' (définis) in the Convention ought to be sure that those bounds will be strictly observed.[55]

Ultimately, their decision meant that it was states, their intentions and rights that were at stake here, and states are thought to be jealous in guarding their prerogatives. If individuals were to participate in this space, they need to be patient and wait a bit longer, at least that's what they though.

3.3 The Fear of Change in the Eyes of Scholars

Judges were not the only ones who recognised and protested at the changing nature of international law. Scholars also bemoaned the messiness that the new approaches to international law brought to the issues of the validity of norms – the boundary between law and non-law. Prosper Weil's seminal argument warning about the growing 'relative normativity in international law'[56] exemplifies this lament.

Weil, writing at the beginning of the 1980's, and mindful of the sharp ideological divides that exist between the capitalist West and the communist East, starts his argument by giving an account of the nature of international law. In this account he described international law as 'an aggregate of legal norms that dictate what its subjects must do (prescriptive norms), must not do (prohibitive norms), or may do (permissive norms)',[57] and its functions – 'governing international relations'.[58] The nature and functions of international law are 'interdependent' – the 'emergence of international law as a "normative order" is said to be due to the need to fulfil certain functions' and it will not be able to fulfil these functions unless 'it constitutes a normative order of good quality.'[59] That is the crux of the matter for Weil since 'without norms of good quality international law would become a defective tool.'[60] His prime targets in the paper are soft law and *jus cogens*, which through their operation blur the normative threshold[61] between law and non-law.

He explains that soft law can take the form of reports, resolutions or other similar documents created by international organizations. Some soft laws are a product of inputs by states via voting mechanisms by state representatives, resolutions, and this sociologically can be 'an expression of trends, intentions, wishes, [and] may well constitute an important *stage* in the process of elaborating international norms; … However, such mechanisms do not constitute the formal source of new norms.'[62] Just because certain prescriptions are repeated in multiple resolutions, they cannot become hard law any more than 'thrice nothing [can] make

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[55] ECtHR, *Separate Opinion of Judge Verdross, Golder v UK,* (Application no. 4451/70), 21 February 1975, para 4.
[56] Prosper Weil, 'Towards Relative Normativity in International Law?' (1983) 77 *The American Journal of International Law* 413.
[57] ibid 413.
[58] ibid.
[59] ibid.
[60] ibid.
[61] ibid 415.
[62] ibid 417, emphasis in the original.

something.'[63] This matters because it undermines what international law is for which is: 'to ensure the coexistence – in peace, if possible; in war, if necessary – and the cooperation of' different entities in a pluralistic society which live in a system of anarchy.[64] International law, according to Weil, has two functions in this system: to 'reduce anarchy through the elaboration of norms of conduct enabling orderly relations to be established among sovereign and equal states', and, in tension to the first, 'to serve the common aims of the members of the international community.'[65]

Moreover, for Weil, the necessity for international law to fulfil these functions did not change or diminish after WWII and 'there could be no grater error than to contrast 'modern' […] with 'classic' international law.'[66] In that sense, international law's functions continue to be as they ever were, 'an instrument for the regulation of pluralistic, heterogeneous society.'[67] Consequently, if international law was to maintain its double function it wold have to remain neutral and positivistic. Neutral because it needed to be impartial in a pluralistic international order. Consequently, it was 'necessary for that system [of norms] to be perceived as a self-contained, self-sufficient world'[68], separate from a specific system of normativity, such as religious morality, or a specific ideology (at the time when Weil was writing the dominant ideologies were communism and capitalism). And it needed to be positivistic because it required to maintain the distinction between *lex lata* (the law as it exists) and *lex ferenda* (future law/law that should be) if it wanted to remain a 'neutral coordinator between equal, but disparate, entities'[69]. And for Weil, positivistic meant keeping the centrality of voluntarism, of basing international norms on the consent of the states. Especially

> [a]t a time when international society needs more than ever a normative order capable of ensuring the peaceful coexistence, and cooperation in diversity, of equal and equally sovereign entities, the waning of voluntarism in favour of the ascendancy of some, neutrality in favour of ideology, positivity in favour of ill-defined values might well destabilize the whole international normative system and turn it into an instrument that can no longer serve its purpose.[70]

Weil was writing in July1983, adapting a previous version written in the French language in 1982. When Weil was writing, the USSR had invaded Afghanistan three years prior, and the United States was starting to increase its assistance to the Mujahedeen fighting them. In March of that same year US President Ronald Regan announced the Star Wars program, a proposed missile defence system that would, if successful, jeopardise the perceived stability of the Mutual Assured Destruction (MAD) doctrine for a nuclear war. It was a time of heightened tensions between the two dominant nuclear-armed blocs, NATO and the Warsaw Pact, 'a time when international society [needed] more than ever a normative order capable of ensuring the peaceful coexistence, and cooperation in diversity, of equal and equally sovereign entities'.[71] He saw the rise of instruments that had no tangible norms to them but were strewn with aspirational political language that did not allow for easy, or even difficult, understanding of what norms they were trying to create or specify. This language of politics, of aspiration, found in documents that did not embody norms, but were somehow legal at the same time, was not the language of law as he knew it and if it took over it would jeopardise international law's purpose – to maintain coexistence in a plural society. He was fearful that 'the waning of voluntarism in favour of the ascendancy of some, neutrality in favour of ideology,

[63] ibid.
[64] ibid 418.
[65] ibid 419.
[66] ibid.
[67] ibid 419 – 420.
[68] ibid 421.
[69] ibid.
[70] ibid 423.
[71] ibid 423.

positivity in favour of ill-defined values might well destabilize the whole international normative system'.[72] It is just that this plural society was a society of states, and he could not distance himself far enough to see beyond the intellectual trope of statehood, the inside/outside divide, rather than, for example, imagine a more cosmopolitan system where statehood is but one factor in global relations and just one criteria in participating in rule-making.

3.4 The Fear by National Governments

The wish for a return to days gone by of classical thinking about the international system did not end in the 1980s nor with the coming of the new millennium. On March 13, 2012 an unusual event occurred. The President of the ECtHR, Sir Nicholas Bratza, gave evidence before the UK Parliament's Joint Committee on Human Rights on the topic of human rights judgments.[73] Between the time that Weil published his fears and when this session of the Joint Committee convened, both Weil's fears of blurring the normative threshold and Judge Fitzmaurice's apprehension of the expansion of power and reach of the ECtHR were realised. Judges made law and resolutions and other soft law became instrumental in creating international norms and institutions. The UN Security Council created no less than three international criminal tribunals which accelerated the creation of international criminal norms and more than twenty international tribunals were in operation, their dockets and influence increasing daily.[74] Sir Nicholas was asked to give testimony regarding the controversy over the UK's commitment to upholding ECtHR judgments following the prisoners' voting rights cases[75] and in the preparation of the coming Brighton declaration on the future role of the court.

The committee began with a soft question: whether Sir Nicholas, as the President of the ECtHR, saw much benefit to be gained by the continuation of dialogue between the court and the different parliaments of the member states of the ECHR. Sir Nicholas, whilst being supportive of dialogue between the court and national parliaments, admitted that 'when one speaks of dialogue, one more naturally refers to exchanges of views and ideas between the Strasbourg Court and judges of the national courts.'[76] With his opening answers Sir Nicholas established one of his prime defences against most of the objections that the ECtHR's detractors in the UK Parliament would pose – we are no different in the way that we use law, the way that we interpret, and the way that we reason from any other national high court. The reason for this was that 'national judges are natural partners in the sense that their role is […] essentially the same as ours—namely to interpret and apply the Convention rights.'[77]

For the detractors, this was the main issue since for them the ECtHR is quite different from a national high court – it is an international court. Echoing the concerns of Judges Fitzmourice and Verdross, Dominic Raab (currently the Foreign Secretary) asked: since 'Article 32 of the Convention mandates the Court to "interpret" and "apply" rights set out in the Convention [w]hich article mandates the Court to update those rights to reflect its view of societal changes?'[78] Follow-up questions did not go any better, after Sir Nicholas' explanation on the similarity between national courts and the ECtHR. Mr Raab again asked that if Sir Nicholas 'accept[s] there is a creative function [of the ECtHR then] can I put it to you that there is a

[72] ibid.
[73] House of Commons, House of Lords, Joint Committee on Human Rights, *Human Rights Judgments*, 13 March 2012, Sir Nicolas Bratza and Erik Fribergh.
[74] Cesare PR Romano, Karen J Alter, and Yuval Shany (eds) *The Oxford Handbook of International Adjudication*, (Oxford University Press, 2015), 4 – 26.
[75] While there have been a number of cases against the UK regarding prisoners' voting rights, *Hirst v. the United Kingdom (No. 2) (Application no. 74025/01)*, Grand Chamber Judgment, 06 October 2005 and *Greens and M.T. v. the UK (application nos. 60041/08 & 60054/08)*, 11 April 20011 are the judgments that started a chain reaction of litigation against the UK in front of the ECtHR.
[76] House of Commons, House of Lords, Joint Committee on Human Rights, *Human Rights Judgments*, 13 March 2012, Sir Nicolas Bratza and Erik Fribergh, HC 873-iii, Q137.
[77] ibid.
[78] Q139.

fundamental difference with the common law?'[79] In another question Mr Virendra Sharma (MP) asked '[d]o you accept that there are serious questions about the separation of powers and democratic accountability raised by the doctrine of the living instrument?[80]'

To all and more of these questions, Sir Nicholas's answers were similar: 'just like the development of the common law, our development has equally been incremental';[81] the living instrument doctrine 'means simply that when interpreting Convention rights you accept that those rights evolve with a change in time and with a change in social conditions';[82] or that '[i]t does not seem to me that the interpretive exercise that we carry out is different in substance from the role of national courts, either in developing the common law or indeed in updating statutes, …, to make them fit modern conditions';[83] and that 'safeguards are there to prevent any rapid and arbitrary development of the Convention rights.'[84]

It was not a discussion destined to convince either side, for they were talking from two different assumptions about the changing nature of the Convention, of the ECtHR, and of international law. This is well demonstrated in Letsas' paper *Two Concepts of the Margin of Appreciation*.[85] When talking about the margin of appreciation doctrine as adopted by the ECtHR, Letsas differentiates between two concepts of the doctrine: the substantive and the structural. The former encapsulates some form of a formal or substantive rights theory which includes a notion of conditional deference to other co-equal branches of the system, while the latter understands it as a 'feature of a supranational judicial system, designed to balance the sovereignty of the Contracting States with the need to secure protection of the rights embodied in the Convention.'[86]

In the former case, the methodologies that the ECtHR uses are constitutional rights methodologies, the most obvious being the proportionality test, a doctrine developed in Germany and a staple of the German Constitutional Court,[87] and its main use is as a tool for balancing public interest with individual rights. In the latter case, the structural approach, a decision of an international court is a zero sum game: any extension in the norms that the international court can interpret and apply is a sovereignty loss, (while it would be a power gain in the international institutions' ledger), one that has to be justified using the original consent of the states to be bound by such a system and especially by such rules of the game. Consequently, Raab's question as to '[w]hich article mandates the Court to update those rights to reflect its view of societal changes?'[88] None or all of the articles depending on your starting assumptions. For the former, the substantive argument, this is all part of the background assumptions of what a court does – especially an apex court conducting constitutional or rights review. For the structural approach, the living instrument doctrine is an overreach and an over ambitious use of power by an unaccountable international institution, disregarding the original terms of the agreement and trampling on state consent and national sovereignty. The same

[79] Q141.
[80] Q142.
[81] Q140.
[82] Q139.
[83] Q140.
[84] ibid.
[85] George Letsas, 'Two Concepts of the Margin of Appreciation' (2006) 26 *Oxford Journal of Legal Studies* 705; but also see 'George Letsas, 'The Margin of Appreciation Revisited: A Response to Follesdal' in Adam Etinson (ed), *Human Rights: Moral or Political?* (Oxford University Press 2018), 268 – 309.
[86] ibid 720.
[87] Generally see Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 *Columbia Journal of Transnational Law* 73.
[88] House of Commons, House of Lords, Joint Committee on Human Rights, Human Rights Judgments, 13 March 2012, Sir Nicolas Bratza and Erik Fribergh, Q139.
Joint Committee on Human Rights, *Human Rights Judgments*, 13 March 2012, Sir Nicolas Bratza and Erik Fribergh, Q139.

argument in 2012 as the ones Fitzmaurice and Verdross made in 1975, more than 37 years ago.

Before I go on to describing the present situation of the international system and the predicament in which international law finds itself, I will first outline another, also somewhat unsuccessful, intellectual thought that drove the change in the international system. The system finds itself in its present predicament because two intellectual forces pushed it in opposite directions: one, reactionary, hoping to freeze international law in its classical form, and the other trying to transform it into a version of 'humanity's law'.[89]

4. The Hope of Humanity's Law

It was not long after WWII started that the hope for humanizing the international system emerged. Raphael Lemkin and Herch Lauterpacht were writing their treatises on post-war visions of international law, and Lemkin's vision of a special international crime of Genocide[90] became a reality, when the UN opened the Genocide convention for ratification in 1948. Which brings us to the other dissenting opinion[91] in the ICJ's advisory opinion on reservations to the Genocide Convention. The first group of dissenters saw the majority opinion as an extension of judicial power and an impermissible abandonment of the centrality of state consent to the creation of new international law. On the other hand, Judge Alvarez saw it as an unsatisfactory and timid half-step. He did not mince words about his vision of the future of international law, the proper role of the UN and the ICJ in this new environment, and the place of conventions and state consent in this new law-making dynamic.

After summarising the majority's opinion he went on to say that 'in the future, we shall be forced to abandon traditional criteria, because we are now confronted with an international situation very different from that which existed before the last social cataclysm.'[92] Consequently, 'it is necessary that the Court should determine the present state of law in each case which is brought before it and, when needed, act constructively in this respect';[93] 'constructively' in this sense means law-making when necessary. He explains that doing otherwise would 'fail to understand the nature of international law, which must always reflect the international life of which it is born, if it is not to be discredited'[94], a living law if not a living instrument. Furthermore, the proper method or mode of thinking for the ICJ was that of 'domestic constitutional law'.[95] Therefore, when 'upon a revolution, a new republican political *régime* establishes itself in the place of a monarchy, it is obvious that both old and new institutions must at once be applied and interpreted in conformity with the new *régime*.'[96]

Moreover,

> There are stronger reasons why the same course should be followed in regard to international law. After the social cataclysm which we have just passed through, a *new order* has arisen and, with it, a *new international law*. We must therefore apply and interpret both old and new institutions in conformity with both this new order and this new law.[97]

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[89] Ruti G. Teitel, *Humanity's Law* (Oxford University Press 2011).
[90] For a good overview of the two viewpoints between Lauterpacht and Lemkin see Philippe Sands, *East West Street*.
[91] *Dissenting Opinion of M. Alvarez*, *Reservations to the Convention on Genocide*, Advisory Opinion, ICJ Reports 1951, 15.
[92] ibid, 50.
[93] ibid.
[94] ibid.
[95] ibid.
[96] ibid.
[97] ibid 50 – 51.

Judge Alvarez was of course talking about WWII when he referred to a social cataclysm, the first time that nuclear weapons were used against other human beings. He goes on to limit his approach and argues that not all international conventions should be subject to this approach, only 'multilateral conventions of a special character'[98] such as those that establish international organizations, those that are deemed to establish public order like conventions that determine the territorial status of states, those 'which seek to establish new and important principles of international law', and those that 'regulate matters of a social or humanitarian interest with a view to improving the position of individuals.'[99] The difference between these types of conventions and 'normal' ones is that 'they have a universal character; they are, in a sense, the *Constitution* of international society, *the new international constitutional law*.'[100] Moreover unlike other conventions which are more reciprocal in nature, '[t]hey are not established for the benefit of private interests but for that of the general interest; they impose obligations upon States without granting them rights'[101].

Judge Alvarez also saw a crucial symbolic meaning behind the way that these new types of conventions were negotiated and concluded, by a majority vote in the UN General Assembly, compared to other 'normal' conventions. He saw this as the embodiment of the ideas of 'international organization, of the interdependence of States and of the general interest'.[102] Equivalent to a parliament but on a global scale, he saw this principle as a vehicle for a global democracy, where the votes in the General Assembly would represent a sort of general will in the spirit of Rousseau – 'national sovereignty has to bow before the will of the majority by which this general interest is represented.'[103] The General Assembly was, for Judge Alvarez, simply fulfilling a legislative function when voting on these types of conventions. Consequently,

> These conventions must be interpreted without regard to the past, and only with regard to the future. Nor must they be interpreted in the light of arguments drawn from domestic contract law, as their nature is entirely different.[104]

For Judge Alvarez, their nature was to become the constitution of international law.

Judge Alvarez's vision did not fully come to pass, but the next forty years saw gradual developmental milestones towards that future. As Judge Fitzmaurice noted, slowly international human rights conventions, some under the UN auspices and some under regional arrangements, came into existence. More and more states signed up to them, and a large number also accepted the optional individual complaints mechanisms that Judge Fitzmaurice tried to preserve with his dissent. The International Law Commission worked on preparing a statute of an international court dealing with international crimes,[105] work that later fed into the drafting of the International Criminal Court (ICC). No less important, the world decolonized, at least legally if not economically, expanding the number of states that made up the international system. Where once was a small club of 51 states pre-1945, there are now more than 193. A world of 51 states can run on interpersonal diplomacy, a world of 193 runs on rules and bureaucracy. Or it breaks down.

It was not until the fall of the Berlin Wall that hopes of a new international system picked up full steam again. For example, in 1992 Fukuyama published his book *The End of History*,[106] where he explored a possible future world order which, because of the end of humanity's last

[98] ibid 51.
[99] ibid.
[100] ibid (emphasis in the original).
[101] ibid.
[102] ibid 52.
[103] ibid.
[104] ibid 53.
[105] See the *Report of the International Law Commission on the work of its forty-sixth session* (2 May-22 July 1994), UN Doc. No. A/49/10, *Draft Code of Crimes Against the Peace and Security of Mankind*, para 23 – 209.
[106] Francis Fukuyama, *The End of History and the Last Man* (Free Press; Maxwell Macmillan 1992).

ideological struggle between liberal capitalism and communism, would be largely liberal capitalist, with a few holdovers; major ideological conflicts wold be very unlikely, while there still might be small conflicts or trade wars.[107] For him, the struggle to define what it is to be modern was over.[108] At the time when Fukuyama wrote his book, there was a general sense that this was the period when the world would become more open, more secure and more democratic, and there was some evidence to support this enthusiasm in the Freedom House annual reports, which showed large increases in freedom across the world in the 80's and 90's.[109]

For instance, in the same year, 1992, Thomas Franck published '*The Emerging Right to Democratic Governance*', arguing that a new emerging law was 'rapidly becoming […] a normative rule of the international system'.[110] He argued that governments were increasingly coming to the recognition 'that their legitimacy depends on meeting a normative expectation of the community of states', and that that expectation was that 'those who seek the validation of the empowerment patently govern with the consent of the governed.'[111] Franck believed that in the changing order of the post-Cold War world, democracy was 'becoming a global entitlement' of individuals, one that 'will be promoted and protected by collective international processes.'[112] He envisaged that the right to democratic governance (within states) would become a 'requirement of international law, applicable to all and implemented through global standards'.[113]

Franck was talking about the trend of international efforts in spreading democracy after a period of fierce ideological contestation over the proper form of political and economic systems. These efforts were not only championed by powerful democratic nations, but by international organizations like the UN, as part of their transitioning mechanisms from conflict or crisis to peace and stability.[114] Moreover, as Franck saw, these norms were gradually being cemented into international treaty or customary norms through human rights treaties and courts, as well as activities on the part of the UN in peacekeeping and peace enforcement actions. Where Weil saw the rise of soft-law instruments as a threat to international law, Franck saw those same instruments ushering a new way of domestic governance, one that had the potential to bring about a stable and long-lasting democratic peace.[115] In essence, he envisaged the reversal of the 1944-45 Dumbarton Oaks compromise on membership in the UN and the global community as dependent only on the peaceful intentions of a state, irrespective of its choice of economic and political system.[116] Soon, only a democratic system would be an acceptable system of national governance and the UN would not be so ambiguous as to a state's domestic make up. He was not that far off the mark. For instance, states declared in the 2005 World Summit's final resolution that they 'reaffirm[ed] that democracy is a universal value based on the freely expressed will of people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives' and also affirmed their

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[107] For picking up on the ideas of Huntington and how it reflected thinking of the international order see Marjan Ajevski, 'Post-National (International) Law at the End of History' (2016) 4 International Politics Reviews 45.
[108] Francis Fukuyama, 'The History at the End of History' *The Guardian* (London, 3 April 2007) <https://www.theguardian.com/commentisfree/2007/apr/03/thehistoryattheendofhist> accessed 02 October 2020.
[109] Freedom House, Freedom of the World Data and Resources, <https://freedomhouse.org/countries/freedom-world/scores> accessed 02 October 2020.
[110] Thomas M Franck, 'The Emerging Right to Democratic Governance' (1992) 86 *American Journal of International Law* 46, 46.
[111] ibid.
[112] ibid.
[113] ibid 47.
[114] ibid 87 – 88.
[115] The idea of a democratic peace started with Kant who argued that, for structural reasons, constitutional democracies do not go to war with each other, although they do go to war with other countries, Immanuel Kant, *On Perpetual Peace - a Philosophical Sketch* (Richer Resources Publications 2012); Kant's original inspiration does seem to still hold true – democracies do not go to war with each other, the only exception being Finland and the Allies in WWII.
[116] See more *in* Simpson, 'Two Liberalisms'.

'commitment to support democracy by strengthening countries' capacity to implement the principles and practices of democracy'.[117]

The decade and a half following Franck's article saw major developments towards his vision: the number of signatories of human rights conventions grew, as well as the number of democracies. The ICC was negotiated and established in 1998, following a slew of several *ad hoc* or hybrid international criminal tribunals. Universal jurisdiction was seen as more readily acceptable, albeit still politically sensitive.[118] States were more willing to recognise the concept of humanitarian intervention into another state(s) territory under certain circumstances.

I will take the example of humanitarian intervention, or more specifically the Responsibility to Protect (R2P) principle to illustrate this point. Following NATO's intervention in Kosovo in 1999, a debate about its legality started to gain traction. The Independent International Commission called it 'illegal, but legitimate':[119] a necessary violation of state sovereignty for the purposes of preserving life and preventing international crimes. While armed intervention was nothing new in international relations,[120] Article 2(4) of the UN Charter specifically prohibited member states from using in their international relations 'the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the UN'.[121] While this prohibition was one of the cornerstones of the post-Second World War consensus, the rise in non-international conflicts and in the capability of certain states to respond quickly to mass human rights violations put a strain on that consensus.

As a response, Canada hosted an International Commission on Intervention and State Sovereignty whose report, 'The Responsibility to Protect',[122] outlined the possibility of an emerging exception to the Article 2(4) prohibition. The report was not universally welcomed, especially by countries in the global South.[123] Nevertheless, the UN picked up the report and, in the lead to the UN World Summit 2005, the Secretary General made an effort to make states accept some of the principles of R2P. While in the summit outcomes the states did not accept intervention as a principle, they did affirm the obligation of states to protect their populations from mass atrocities.[124]

This was enough for the Secretary General to continue working on the issue, and in 2008 the Secretary General issued a Report on implementing R2P which constructed the obligations of states towards individuals in three pillars: '[p]illar one is the enduring responsibility of the State to protect its populations, … [p]illar two is the commitment of the international community to assist States in meeting those obligations, and [p]illar three is the responsibility of Member States to respond collectively'[125] in cases where states do not meet the responsibilities of pillar one. Of course, the Secretary General also made it clear that the proper procedure for carrying out R2P was through the UN and especially the Security Council.[126]

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[117] World Summit Outcome, UN General Assembly Resolution, UN Doc. A/60/L.1, 15 September 2005, para 136.
[118] Máximo Langer, 'Universal Jurisdiction Is Not Disappearing: The Shift from 'Global Enforcer' to 'No Safe Haven'universal Jurisdiction' (2015) 13 *Journal of International Criminal Justice* 245.
[119] The Kosovo Report: Conflict, International Response, Lessons Learned, Independent International Commission on Kosovo, (Oxford University Press, 2001), 4 assessing the NATO air campaign, but also see Koskenniemi 'Constitutionalism as a Mindset'.
[120] For a good overview of the law on the use of force including in situations of humanitarian intervention see Christine Gray, *International Law and the Use of Force* (Oxford University Press 2018).
[121] Article 2(4) of the Charter of the United Nations.
[122] Report of the International Commission on Intervention and State Sovereignty, December 2001, <http://responsibilitytoprotect.org/ICISS%20Report.pdf> accessed 02 October 2020.
[123] Gray, *International Law and the Use of Force* 175 – 176.
[124] UNGA, World Summit Outcome, UNGA Resolution, (15 September 2005), UN Doc. A/60/L.1, para 138 – 140.
[125] UNSG, Implementing the responsibility to protect Report of the Secretary General to the General Assembly, (12 January 2009) UN Doc. A/63/677, para 11.
[126] ibid.

This brings us to Humanity's Law, the phrase that Ruti Teitel coined to describe the direction in which she saw international law move in the 1990s and 2000s. She argued that because of the developments in international human rights and their enforcement through international courts through individual petitions, the developments in humanitarian and international criminal law, and the rise of transitional justice as a peacebuilding mechanism, international law is moving away from the standard account of what the *subject* that it is supposed to regulate is, and who is it actually designed for. She observed that there was a 'growing interconnection without integration' in a world where 'power is exceptionally fragmented and disorganized – [… or put differently] very complexly diffused.'[127] In this structure, humanity's law 'affords a language and a framework that [is] capable of recognizing the claims and interests of multiple actors in preservation and security, both individual and collective.'[128] It strives for 'a basis for legitimacy that is derived from humanitarian values and concepts of humanity rights and human security.'[129]

Unfortunately, it was not to be. In the previous two sections, I portrayed the two broad forces that have dominated the development of international law and the international system since WWII. While it was becoming obvious that the international system would no longer be the small club of European or Western states, for the classicists, there was no reason to believe that international law could not continue to strive towards its classicist ideal, a system of states with a clear inside/outside division where it is up to the state how it organises its domestic affairs. Coexistence, 'in peace, if possible; in war, if necessary'[130] in a pluralistic society was the aim; normatively neutral law was the means to achieving that aim (regardless of how impossible it might be to have actually 'neutral' international law).

For reformers, the classical inside/outside division was exactly the problem for it meant that the full extent of the Holocaust committed against German Jews and other German groups Germany's territory would not be a crime, while a war of aggression (a breach of sovereignty) would. The London Charter setting out the International Military Tribunal is the perfect example of this tug of war between the two: Article 7 lists the crimes as: a) Crimes against peace, b) War Crimes, and c) Crimes against Humanity where the a) and b) were regarding the 'war of aggression', and c) were 'committed against any civilian population' including one's own. The Judge Alvarezes of the world gradually eroded the 'inside', created normative systems where human beings became the centre of protection, and gradually wanted to displace the power of the state governments, by diffusing power outside and inside. Their idea was to reform the world towards a more broadly liberal model.[131] The classicists resisted it all the way, believing that there was something worthy in a system that prioritised artificially constructed entities over human beings. It is this tension between reformers and detractors that created the current international system. So, what does it look like now?

5. Where We Are Now - the Rise of Global Governance

Weil's lament regarding the blurring of normative thresholds in international law was largely correct and, if anything, has accelerated in the new millennium. The openness, the rising interconnectedness and interdependence of the world, the breadth and depth of cross-border and international regulation merely accelerated that process by creating the need for less formal, more expedient law-making (or more properly, norm-making) processes. In their seminal piece Kingsburry, Krisch and Stewart talked about the rise of what they termed Global

[127] Teitel, *Humanity's Law* 216.
[128] ibid.
[129] ibid, 217.
[130] Weil, 'Towards Relative Normativity in International Law' 419.
[131] Guy Fiti Sinclair, *To Reform the World: International Organizations and the Making of Modern States* (Oxford University Press 2017).

Administrative Law (GAL).[132] GAL is a response to a new phenomenon, global governance: a messy and chaotic stew of actors, norms, and pathways of law-making and law application.

So, what is global governance? Unlike the clean story of the international system and international law, global governance does not start with the state as being the main or even at times the most powerful actor. It actually sees a multiplicity of actors, whom Kingsburry et al call subjects – they are both the addressees of legal norms and their creators.[133] These actors operate in different formal or informal arrangements. These can take the form of outright international administration such as the UN Security Council or it its ancillary bodies and affiliated organizations, or they can also take the form of transnational networks based on informal communication and cooperation around common issues such as the Basle Committee, which coordinates monetary policy or banking regulation across the global economy. Another model of governing a specific area are the distributed administration networks, usually taking the form of a network of regulators that create and enforce regulation transnationally using a formal framework as a basis for their operation, a good example being environmental agencies working under the framework of different environmental target setting treaties. The forms of governance does not end there, we also have intergovernmental-private administration, which are hybrid bodies that 'combine private and governmental actors'[134] to regulate a certain aspect of transborder activity, for e.g. the internet address protocol and the assigning of internet names, which is handled by a non-governmental body[135] that includes government representatives. Finally, and not least importantly there are outright private bodies that regulate transborder economic activity such as the International Standardisation Organization or the Anti-Doping Agency which regulate certain aspects of global activities but whose governing members are mostly private organizations impacting mostly private companies or individuals such as athletes.[136]

This increase in actors as subjects of international law requires a shift into the way that we analyse states and their actions in the increasingly complex international system. In 2004, Anne Marie-Slaughter pioneered the term disaggregated states,[137] urging us to '[s]top imagining the international system as a system of states – unitary entities like billiard balls or black boxes—subject to rules created by international institutions that are apart from, 'above' these states.'[138] Rather we should be thinking about the world as a 'world of governments' with legislative, adjudicatory and implementation branches that interact both 'with each other domestically and also with their foreign and supranational counterparts.'[139] States are still 'crucial actors, [b]ut they are 'disaggregated'[140] and they interact with each other not only through their foreign affairs ministries but also through 'regulatory, judicial, and legislative channels.'[141]

However, it is not just that the different layers of this disaggregated state interact with the layers of other states or international institutions (e.g. international courts, or international organizations). Entities that in the classical narrative of international law had no place or standing suddenly become powerful actors on the international stage. It also represents the

[132] Benedict Kingsbury, Nico Krisch and Richard B Stewart, 'The Emergence of Global Administrative Law' (2005) 68 *Law and contemporary problems* 15; Nico Krisch and Benedict Kingsbury, 'Introduction: Global Governance and Global Administrative Law in the International Legal Order' (2006) 17 *EJIL* 1.
[133] Kingsbury, Krisch and Stewart, 'The Emergence of Global Administrative Law' 23 – 25.
[134] ibid 22.
[135] The Internet Corporation for Assigned Names and Numbers (ICANN)
[136] Kingsbury, Krisch and Stewart, 'The Emergence of Global Administrative Law' 20 – 23.
[137] Anne-Marie Slaughter, *A New World Order* (Princeton University Press 2004).
[138] ibid 5.
[139] ibid.
[140] ibid.
[141] ibid.

'breakdown of the classical separation model for dealing with international affairs.'[142] In the classical narrative, states were able, at least legally, to close off their internal order from the international. States' gatekeeping tools allowed them to close their internal legal and political system from direct interaction with the proverbial 'outside', a strict binary of internal and external.

But that is no longer the case; in the same way as international subjects have changed – there are more entities that can create norms transnationally than the standard account allows – so have the pathways through which the 'outside' can pierce the bubble of national sovereignty.[143] International human rights courts like the ECtHR are early examples of this. In his testimony, Sir Nicholas was quite open regarding this when he specified that national courts are the natural partners of the ECtHR. The ECtHR over decades of work (that in most cases did not require a systemic legislative overhaul) had created a network of courts where its judgments were implemented by national courts, bypassing the traditional gatekeepers of Foreign Office ministers, ambassadors or parliaments.[144]

This has altered the traditional calculation regarding the legitimacy of law-making. In the classical system, all international law rested on the presumption of – tacit if not explicit – state consent. This worked well for democratic states with substantive rule of law because they could legitimize what came from the international system through their constitutional mechanisms. But once states were no longer the only or even the main norm creators, democratically legitimizing those norms became increasingly difficult. This does not represent such a big problem for the executive branch (although the prisoner vote controversy in the UK offers a counter example), since they mostly gained power vis-à-vis the other branches of government,[145] but it certainly presents problems for individuals. As an example, following the September 11 attacks on the US and the responses to it, individuals could be put on a terrorist sanctions list created at the UN Security Council level (in which only 15 states sit) and implemented through global regulatory networks without the possibility for review, judicial or otherwise.[146]

There have been many proposals to fix the perceived legitimacy deficit of international law, that we can broadly put into three main categories: GAL, global constitutionalism and cosmopolitanism. Most of them draw inspiration from domestic legal institutions of democratic rule of law states. GAL borrows from administrative law concepts like transparency, procedural participation, reasoned decisions, possibility for review with substantive standards in place like proportionality, means-ends rational basis tests, and legitimate expectations.[147] Global constitutionalist scholars, on the other hand, borrow from substantive constitutional concepts like rule of law, human rights, subsidiarity and complementarity, and checks and balances,[148] making public autonomy the main ordering principle of a plural international system.[149] Some even call for the modelling of international law on the fundamental concepts of national public

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[142] Nico Krisch, 'Global Governance as Public Authority: An Introduction' (2012) 10 *International Journal of Constitutional Law* 976, 977 – 8.
[143] Laurence R. Helfer and Anne-Marie Slaughter, 'Toward a Theory of Effective Supranational Adjudication' (1997) 107 *The Yale Law Journal* 273.
[144] Anne-Marie Slaughter, 'Sovereignty and Power in a Networked World Order' (2004) 40 *Stanford Journal of International Law* 283.
[145] Follesdal and Hix, 'Why There Is a Democratic Deficit in the EU'.
[146] T-315/01, *Yassin Abdullah Kadi v Council of the European Union and Commission of the European Communities*, Court of First Instance of the European Union, 21 September 2005; C-402/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities, Judgment of the Court (Grand Chamber) of 3 September 2008; also see De Sena, P. and M. C. Vitucci, 'The European Courts and the Security Council: Between Dédoublement Fonctionnel and Balancing of Values' (2009) 20 *EJIL* 193.
[147] Kingsbury, Krisch and Stewart, 'The Emergence of Global Administrative Law' 37 – 42.
[148] Kumm, 'The Cosmopolitan Turn in Constitutionalism' 277.
[149] Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (1st edn, Oxford University Press 2012).

law.[150] Cosmopolitanism is less institution-focused and does not deal with suggestions for institutional change as such, but rather seeks a change in how we view the basis of the international system, centring more on individuals and their universal moral worth as human beings. Its emphasis on the universality of human rights means that cosmopolitans strive to reduce the differences between citizenship, residency and statelessness and work globally and nationally towards institutions that reflect those ideas.[151]

While all of these strains of thought offer, more or less, workable solutions to the international system's legitimacy problem, they do not have broad support. They represent an answer to the problems that global governance poses to functioning or aspiring liberal democracies, not to authoritarian or illiberal democratic regimes that do not put the rule of law, human rights, and widening participation of individuals in high esteem. Simply put, why would China or Russia want to embrace or even encourage global institutions and procedures that could be used to empower liberal groups domestically?

And this is the crux of the problem for liberal democracies: we are currently in an international system of global governance where the standard legitimization tools are no longer fit for purpose. The current system of global governance alters the domestic balance of powers towards the executive branch or towards private transnational actors, to the detriment of individuals. Even if all countries were democratic, it would still not resolve the tension since global problems will require global institutions to tackle them. At the moment, global institutions can bypass the traditional gatekeeping mechanisms found in constitutional systems and are overwhelmingly designed for participation by the executive branch. This can lead to the executive being able to: use this position to smuggle through unpopular, undemocratic, illiberal norms and policies from the international to the national system; be captured by private multinational corporations or other non-state actors to promote their interest; or a combination of the two. Global problems require global institutions to tackle them, but if constitutional liberal democracy is to thrive, global institutions will need to be open to global politics fought over a global polity. How this will look is yet unclear but there are a number of proposals on the table.[152]

The same does not apply to authoritarian or illiberal regimes – they do not have the same commitment to the rule of law, accountability, or human rights as liberal democracies. For them, empowering the executive vis-à-vis the courts or parliament is regarded as a useful feature, not a problem of the international system, certainly not one that needs fixing. Similarly, there are not private actors in illiberal democracies or outright authoritarian regimes in the same way that there are in liberal democracies, either legally or politically speaking. A multinational Chinese company is not really separate from the Chinese state in the way that Google or Apple are in liberal democracies. Google and Apple are regulated but separate from the US government, that is not so clear about the Chinese tech giant Huawei. Consequently, autocracies and illiberal democracies see the proposed changes as something to be resisted, something that could alter the power balance domestically, and they are unwilling to commit to changing the current makeup of global governance in a way that empowers individuals. So, what are the ways forward for liberal democracies?

[150] Armin von Bogdandy and Ingo Venzke, *In Whose Name?: A Public Law Theory of International Adjudication* (Oxford University Press 2014).
[151] Garrett W. Brown and David Held (eds), *The Cosmopolitanism Reader*, (Polity 2010).
[152] See for instance Anne Peters' contribution in the book Klabbers, Peters and Ulfstein, *The Constitutionalization of International Law*; but also see the writings of Bogdandy and Venzke eg A. von; Bogdandy et al (eds), *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer 2010); or Bogdandy and Venzke, *In Whose Name*.

6. The Long-Term Status Quo?

In his 2019 Hersch Lauterpacht memorial lecture,[153] Tom Ginsburg talked about the consequences of the economic rise of China and other authoritarian regimes around the world for international law and global governance. He envisioned that, due to their growing economic importance, China and other illiberal or authoritarian countries will have an increasing influence in the way that international governance operates. Namely, these types of states have an outsized preference towards governance structures that rely less on hard rules and more on flexible, and consequently more political, ways of handling international issues. Therefore, the wonderful web of international courts that has sprung up in the last three decades, especially those with constitutional and administrative type features,[154] will slowly be eroded by these actors. These countries will still have a need for hard rules in regulating economic matters like trade and foreign investment; but in most other areas, especially in humanitarian and human rights matters, they will slowly attempt to erode them. Therefore, human rights and humanitarian issues will be gradually relegated to regional governance arrangements that have a longer commitment to those values, such as the Council of Europe or the Organization of American States, which have the European and American Conventions on Human Rights respectively. The Association of East Asian Nations (ASEAN) or the new Eurasian Economic Union would be the model regional organizations of the future, rather than the European Union.

Ginsburg offers a sobering view of the future developments in global governance, but misses a couple of counterpoints. While China's GDP has surpassed the US and EU's individually,[155] it is still slightly more than half of them combined, let alone in combination with other liberal democracies like Canada, Australia and New Zealand. While China's GDP is projected to grow at a sustained above average pace, it is likely that it will slow down in the not-so-distant future. It is hard to see why liberal democracies would easily give up their benefits and protections, like an international order based on law, rules and rights, and accept a governance structure that erodes existing protections. Consequently, we might go into an era of a prolonged status quo, provided that liberal democracies manage to survive the current populist wave.

However, rather than having a liberal, open, and integrated international order, something that the humanity's law proponents argued for, we might end up with a more regionalized world, where regional organizations become the centres of organization and politics for that region. Global institutions like the UN will still matter, but they will matter in different ways: rather than promoting human rights and human security, they will promote stability, national security, and cooperation, but cooperation in trade or climate change, but may not emphasise climate justice. Liberal democratic states will try to insulate themselves from the effects of such institutions where they do not have the same or similar guarantees of voice, accountability, or review. Moreover, they might also try to re-balance the domestic constitutional mechanisms, thereby bringing more checks on the executive branch's foreign affairs powers, such as judicial review of concrete executive claims or actions.[156]

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[153] Tom Ginsburg, Hersch Lauterpacht Memorial Lecture 2019: 'Democracies and International Law: The Trials of Liberalism (Part 3)', (Lauterpacht Centre for International Law 14 March 2019), <https://upload.sms.csx.cam.ac.uk/media/2939251> accessed 02 October 2020.

[154] Karen J. Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton University Press 2014), where she categorises the 4 types roles that international courts can take: dispute settlement, administrative review, enforcement, and constitutional review, 3 – 31.

[155] OECD data as of 2016 available at <https://data.oecd.org/gdp/gross-domestic-product-gdp.htm> accessed 12 June19.

[156] In the UK, the *Miller* case curtailed the power of the UK Government to unilaterally withdraw from international treaties that affect human rights, which include the EU treaties - R (on the application of Miller and another) v Secretary of State for Exiting the European Union, [2017] UKSC 5; while in *Law Society of South Africa and Others v President of the Republic of South Africa and Others,* [2018] ZACC 51, the Constitutional Court of South Africa called President Zuma's actions – in cooperation with other member states of the South African Development

But on the whole, the current global order of governance without a government will continue – dragging along its legitimacy problems, since liberal democracies who see them as problems rather than benefits will not have the power to reform the world to their liking. Consequently, we might be headed towards a mid to long-term status quo in the global order. It will be different from the post-Second World War balance of powers between two powerful blocs, since the powerful actors will still have substantial interconnectedness, mostly in free trade, finance, migration and tackling human-made climate change. There will be much greater openness between nations than there ever has been in human history, but it will not be on liberal democratic terms. Sadly, Fukuyama's prediction of a future world order populated with liberal democracies will not come to pass. The opportunity for it was squandered by foreign adventures in the 2000s by the major liberal democracies. Although for while there might not be a great ideological struggle over what is the best political/economic order for humanity, there will be a struggle in liberal democracies over what is the best political/constitutional order for us as a people, a country or a continent.

Community (SADC) to strip the SADC court of its human rights jurisdiction – as 'unconstitutional, unlawful and irrational' (para 7) preventing his further participation towards ending the SADC court.