Humanisation and the Normative Evolution of International Society.

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Summary

Humanisation arguments make the claim that the weight of legalised international human rights norms has shifted the normative foundations of international relations from a focus on the state to a focus on the human. This thesis argues this statement to be inflated. While the dissipating effects of human oriented normativity can be seen in myriad strands of international law, to make the claim of normative revolution is to engage in an act of overreach. Both analytic and normative claims inform this argument.

The analytic claim centres on disputing the foundational charge of Humanisation that the normative foundations of international relations have indeed undergone a 'paradigm shift'. It maintains this claim is overinflated and that the basis for this over inflation lies primarily in the theoretical scaffold that Humanisation theorists have used to supplement their claims. Whilst Humanisation places new stakes in the theoretical ground, these arguments tend to read a picture of international society from the letter of the law rather than the practices that both constitute international society and are embedded within it.

Humanisation's normative claim that the nascent human-oriented normativity they read into international law holds enough purchase to urge a structural transformation of the international legal order towards a manner closer to domestic law shall also be disputed. Whereas Humanisation argues for the desirability of this structural transformation of the international legal order, away from horizontality and towards a hierarchy, this thesis argues the opposite. It maintains the structure of the international order ought to remain horizontal, guarded by sovereign equality and state consent to international law.

This thesis does this by broadening the theoretical frame of reference that Humanisation uses to support its claims. In so doing, this thesis articulates a novel theory as to how Humanisation may be read as normative evolution rather than revolution.

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Prior to starting a PhD, I could never understand why academic authors could say on completion of a piece of work such as this, they had more questions than answers. I understand why now. The simple plodding along of words masks the inner tension that comes with choosing a side and displaying one's academic identity for all to see. In helping me arrive at my own academic identity, I would like to thank Cardiff University's School of Law and Politics who have nurtured me since an undergraduate. I am eternally grateful for all that has been done for me.

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Introduction

This thesis concentrates on the 'Humanisation' of international law. The headline claim of Humanisation is the argument that the normative foundations of international society has shifted from a focus on state security to a focus on human security. This claim is made as a result of the realisation of individual subjectivity into an international legal order which previously only recognised the legal personality of states. The argument made throughout this thesis is that despite making vital theoretical advances in noting how humanitarian claims through law in particular can drive forward an account of global justice, the theoretical implications release the purchase arguments could have. This thesis then seeks probe both the analytical and normative claims which Humanisation has made thus far and how these may be reinterpreted through broader forms of theory. To that end, there are three principal tasks which this thesis is engaged in. No one part speaks to each task in its entirety but rather these three themes are weaved throughout each of the three parts which structure this thesis.

1) To make explicit the connections between arguments concerning the Humanisation of International Law and contemporary International Political Theory and International Relations Theory: To this point, arguments I take to establish the Humanisation theoretical tradition gesture towards International Political Theory and provide significant headway in understanding how we can understand the tradition. Gerry Simpson, captures the problem well however in noting that in relation to political theories of international law of which Humanisation can be considered, "Why does it sometimes feel so thin?" (2018, p. 64). The theoretical pivot each Humanisation argument takes is towards normative individualism. This thesis argues that an alternate strand of non-individualistic constructivist thought can augment the discussion towards, and provide an alternate account of, the empirical development of Humanisation and the normative conclusions these work towards.

2) To adopt a position of immanent critique concerning Humanisation: There is much to be applauded for the empirical articulation and normative elaboration of the components of Humanisation thus far. Most importantly is the argument that what drives forward arguments about justice in international politics in both theory and practice lie at the intersection of humanitarian and human rights norms in international law. However, the manner in which these are conceptualised, I argue, results in the relinquishing of the practical purchase these may have. The conclusions of arguments drawn from this empirical base argue for a realignment of the normative core of international law and international relations more broadly. (away from state sovereignty and towards the needs of humanity). This moves to the further argument of structural revolution to the international legal order (away from horizontality and towards hierarchy). Where this thesis injects an original line of argument is in recognizing how the same motivating forces which lead to these conclusions can be recast in a manner that is both more philosophically legitimate and politically appropriate. By taking seriously the international political environment to which the ethical derivatives of the legal embellishments at the heart of Humanisation are to apply, the argument seeks to stand upon more secure foundations. To do so, this thesis applies insights from 'practice theory' to some of Humanisation's core concepts such as *jus cogens.*

3) To Illustrate how normative evolution occurs in a horizontal system of international order: The nub of the argument here is that a more appropriate argument is that normative evolution can and does occur, but this needs to take heed of the horizontal structure of the international legal order and the sovereign equality of states. In doing so, the results are argued to have more philosophical legitimacy and practical purchase 'in the real world'. I argue here that important normative developments that speak to the same broad desires of Humanisation concerning the increased protection of the individual have occurred and may continue to occur under conditions of heterarchy rather than hierarchy. In sketching how this is so this thesis seeks to bridge arguments of the Humanisation of International Law with non-individualistic forms of International Political Theory resulting in a more defensible

thesis of the normative development of international society than the crucial articulations of Humanisation that have gone before.

Two phrases overshadow this thesis and provide both the route into the critique I shall articulate and give direction to the route out of the problems I seek to shed light upon. Furthermore, they provide an entering wedge to the unexploited connections between International Law and International Political Theory which making explicit is one of this thesis's primary tasks.

The first is the remark made by Theodor Meron, the progenitor of the Humanisation on international law argument, that "Humanisation has succeeded, at least rhetorically" (2006, p. 86). There is much to be desired in Meron's experience-based argument owing to his time as a Judge at both the International Criminal Tribunal for Yugoslavia (ICTY) as well as the International Criminal Tribunal for Rwanda (ICTR). His experience here laid the foundation for the Humanisation theses to follow. Indeed, I shall attempt to resurrect some of the fundamental insights he articulated concerning the customary nature of human rights norms that are obscured by later articulations of the same trend. However, despite the academic eloquence of the theses he produces, the casual remark highlighted above underwrites one of the analytic conclusions this thesis arrives at. This being that the practical impact of the Humanisation argument is felt more in the textbooks than it is on the ground. This is the entering wedge of the analytic argument at work here which disputes the broader claim of Humanisation in articulating a 'paradigm shift' in international relations.

To that end, the second overshadowing remark is that of Peter Sutch in the argument that "There are no shortcuts to global justice" (Sutch 2000 p.231). Rather, the hard yards must be completed. The emphasis on legal normativity that Humanisation has thus far honed in on, despite being a crucial stake in the ground in outlining the foundations of the emerging *oeuvre*, focuses unduly on what the law says over what the law does. Michael Walzer outlines the political theorists' concerns regarding the risk of this with most eloquence in the quip that "The lawyers have constructed a paper world, which fails at crucial points to correspond to the world the rest of us still live in" (1977, xxi). This focus on the letter of the law is the philosophical shortcut that I argue inhibits the practical purchase

that Humanisation arguments thus far have sought. As shall be expanded upon later, Humanisation makes the argument that it is legal normativity which is the driving force of the normative evolution of international society. Yet in explaining the force of these factors external to the institutional setting to which the normative questions arise robs the argument of practical authority in articulating the state of play of global justice and in guiding our thinking as to what to do next. This opens for the more normative discussion that this thesis also engages with in questioning whether, as the Humanisation argument posits, the international order ought to engage in structural transformation.

I introduce here the three central texts I take as offering the most erudite articulations of Humanisation in international law. Ruti Teitel '*Humanity's Law'* (2011) argues for there to be a teleology to international law that has caused a 'paradigm shift' in the normative foundations of international law towards the protection of humanity over that of the state (2011, p. 8). Meron's '*The Humanisation of International Law*' offers the argument that human dignity is the touchstone around which the 'homo-centric' focus of post-1945 international law can be explained (Meron 2006, p. 6). The effect of which has shifted international law "From an inter-state to an individual rights perspective '' (2006, p. 9), and away from bilateralism towards a focus on community interests (2006, p. 247). Thomas Weatherall's argument in *'Jus Cogens'* (2015) takes Meron's argument and runs with it. 'Human dignity' is elevated from being the 'common nucleus' from which human rights and humanitarian norms stem (Meron 2006, p. 6), to being the key concept argued to resolve the theoretical conundrum of the concept *of jus cogens* in international law. *Jus cogens* being 'higher' norms which bind without consent, the effect of the argument then being that such norms sit atop a normative hierarchy that and indicative of the structural transformation of the international legal order. In each articulation, the empirical foundations of their thesis are drawn from the broadening of the human rights and humanitarian international legal regimes whilst emphasising their "symbiotic relationship" (Meron 2006, p. 7). The conclusions which follow are great. Paradigm shifts, the priority of community interests, and the argument of an authoritative conception of *jus cogens* which urge international responses are not small diversions on the path of international law. They are fundamental redirections. Each speaks to hierarchy over heterarchy in international law.

There is however a sense of overreach in these normative conclusions. At the same time as a 'new' normative order is articulated, many of the 'old' problems continue to reoccur. Credible reports of genocide in the Xinjiang region of China have been supported by parliamentary declarations in both Canada (Scherer 2021) and the United Kingdom (Reuters 2021). In Belarus (Human Rights Watch 2020) and Hong Kong (Amnesty International 2019), protestors have reportedly been tortured for expressing their desire for lives lived in the context of strengthened democratic norms.

The use of force also, when it occurs, continues to remain an action that centres more so upon the realisation of political goals then as an act in the name of humanity. The recent and ongoing act of aggression committed by Russia in Ukraine is particularly important here. Following the act of aggression, President of the Russian Federation Vladimir Putin addressed the Russian Federation couching the use of force in the language of a "special military operation". This itself following the annexation of Crimea in 2014 justified in the same speech in the following terms: "We had to stop that atrocity, that genocide of the millions of people who live there and who pinned their hopes on Russia, on all of us" (Putin 2022). The language of humanity is utilised in a way that illustrates the truth to the statement of Carl Schmitt:

> The concept of humanity is an especially useful ideological instrument of imperialist expansion, and in its ethical-humanitarian form it is a specific vehicle of economic imperialism…whoever invokes humanity wants to cheat (2007, p. 54).

As the above illustrates, there is a distinct rhetorical pull to the claim of humanity, and this stretches in two directions. The first concerns the use of such language in the way outlined above that seeks to justify action by appeals to comforting metaphysics. The second is that it outsources the theoretical basis which can account for the emergence of a broad Humanising trend with critical effects on the conclusions which follow. Indeed, the brief examples above are the entering edge which concentrates on the disconnect between rhetoric and reality than Humanisation as has thus far been constructed would permit. Such cleavages are indicative of a general paucity of theorising regarding Humanisation as an

example of ‘political theory of international law’. The theories begin and end with a statement of the centrality of the individual to international affairs in which varying monikers of humanity are employed as an anchor to the wider theory. The realisation of individual subjectivity taken as evidence of that presupposition. This development in the law is presented as part of the inevitable tide of history rather than constructed and negotiated by the actors of international society. While stylistic in their approach, the tendency is to imagine international law as somehow having a fully formulated conception that is wholly at the exterior to the international system to which it applies and is the standard to which the interior is to be judged. This evades the way in which law is negotiated in the circumstances of ideological contestation and implies a level of homogeneity that the practice ‘on the ground’ reveals to be lacking. These approaches have tended to foreground liberal cosmopolitan accounts of ethics and backgrounded the wider societal norms in which these norms exist. Whilst being crucial articulations as to the state of play of global justice, the broad implications which follow from their arguments deserve both analytic attention and normative consideration which this thesis attempts to engage. In doing so, it attempts to point it towards broader ways of conceiving the normative development of international society.

Where indeed Humanisation is commendable is for its distinctly contemporary articulations of international justice and a rich degree of integration to the operative norms of international society. The normative individualistic approach at their heart however skews the importance of individual subjectivity over broader societal norms to detract from this. Such a conception has fidelity to those oriented by western theoretical registers with a focus on the individual but creates distance between its account of international society’s ethical development and non-individualistic societies when posed in universal terms. In this regard, this thesis seeks to offer a corrective to these forms of theorising and articulate broader accounts of political theory and how these relate to the accounts offered by Humanisation thus far. This is of particular importance for Humanisation as a distinct scholarly approach has been attracting increased attention in the contemporary era. By seeking to expand its theoretical horizons, this thesis articulates alternative means of theorising the emergence of the humanitarian ethic at the heart of Humanisation and to cement its place as a theoretical bridge between the scholarship of International Relations,

International Law and International Political Theory while offering a critical review of the tradition as it currently exists.

Doing so is not mere academic folly. The substantive issues Humanisation focuses upon concern core issues in international relations such as the use of force, and in their normative prescriptions, tend to open up the means in which such force may be used in the name of humanity. Accounts of international order change need to be robust; their articulations need to be borne out in practice in order to ground the necessary legitimacy that Humanisation's normative prescriptions move towards. If the international order is to open itself up to more consensual forms of normative creation which in turn licence more muscular approaches to rights protection, these necessarily must be seen as legitimate to the entire international community to which it is to apply. By overexerting themselves in reaching their normative prescriptions by focusing on theory over practice, Humanisation may risk the fertile ground for a genuine account of international ethics that a focus on their more communal construction may provide. Addressing this is one of the ends to which this thesis is directed.

The debate hinges on whether the recognition of individuals as subjects of international law in their own right (as subjects of international law *jure suo*), rather than mere secondary objects of international law, is one of systemic evolution or revolution. The former recognises that under the influence of individual subjectivity international law has indeed matured to consider extra-state interests that are shared collectively, in so doing expanding the scope of international law that nuances the exclusiveness of states whilst still recognising their primary subjectivity. The latter argues that individual subjectivity has ushered in a wholescale revolution. Claims regarding the very availability of justice to individuals through international courts, the universality of the human condition and the decline in reciprocity provide the foundations of the argument that sovereignty and the connected notion of state security as the *grundnorm* of international society has been displaced by a wholly more human oriented one (Trindade 2014).

The basic contention of the Humanisation of international law is then one that considers the interweaving of humanitarian and human rights norms in the post 1945 period to have had and continue to have a transformative impact upon numerous areas of international law and with it the normative foundations of international society (Tzevelekos

and Lixinski 2016, p. 343 - 344). To an extent, Humanisation as an empirical phenomenon is easily recognizable. The 'orthodox' position of international law that admitted only state subjectivity has been rolled back as a matter of positive international law. Individuals are now recognised as either full or partial subjects (Kjeldgaard-Pederson 2018, p. 3). It is the degree to which this empirical element has in contributing to the distinct normative conclusions which I argue to be overstated. In so doing, risking the potential force that Humanisation's core tenets may contribute to when faced with the tough questions of international politics.

The broader field of vision that this thesis seeks to describe then imputes more wide-ranging fields of both social and moral normativity as they exist in the international political space. It is also more cognizant of the risk of 'liberal backsliding' (Adler 2019) that presents a risk to the foundations of the argument of a shift in the normative focus of international law towards that of the individual and away from the state. To that end, it does not take evolutions in practices of international law for granted or as the authoritative harbinger of a broader social consensus in international society on the primary importance of the individual. Rather it takes seriously the argument that there is an ethical authority to the practice of international law in providing "...a common normative language…" (Wheeler 2004, p. 191). It accepts that building on this, humanitarian and human rights within this broader international legal order claim a degree of authority in guiding our thinking about the problems within this common realm (Beitz 2009). However, in this recognition of the broader normative landscape of the international legal order, the normative conclusions arrived at are cushioned by the landscape to which these are to apply. This does not dispute the Humanisation thesis *in toto*, rather it reimagines it. In attempting to articulate a more defensible background theory, it seeks greater applicability to the social conditions in which the norms are to apply so that when the tough questions of international politics are asked, we have a greater chance in answering them.

Humanisation in Context

Humanisation makes a set of distinct theoretical claims concerning the normative effects that individual subjectivity has pressed against the international legal order – a legal system that was traditionally the sole preserve of states. This section seeks to give a brief outline to the historical and political context from which these emerged.

The core historical event which underwrites claims of a 'paradigm shift' in international law occurred with the end of the Cold War. Prior to this however, legalistic innovations which spoke to the emergence of communal values within the international legal system were articulated that Humanisation arguments also make use of. The *Barcelona* judgment above is one such instance. The International Law Commission (ILC) fleshed this out in the argument that there exists:

> …. a number, albeit a small one, of international obligations which, by reason of the importance of their subject matter for the international community as a whole, are – unlike the others – obligations in which fulfilment all States have a legal interest (1976, p. 99).

Such *erga omnes* obligations, obligations owed by all, are generally taken as being the theoretical counterpart to the doctrine of *jus cogens* (peremptory norms) (Tams 2007). These were introduced into positive international law through Article 53 and 64 of the Vienna Convention on the Law of Treaties (1969). Article 53 reads:

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognised by the international community of states as a whole from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character (United Nations 1969, p.18).

Article 64 in turn reads, “If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates” (1969, p. 22).

Both articles are taken as indicative of what the ILC long mused as expressive of higher norms and values of the international community which depart from the traditional view of state consent as the sole legitimator on international law (Weatherall 2015, p. 4).

It was the end of the Cold War though that saw that saw this idea move away from the textbooks and to the fore of political and legal discourse. Critical moments in this period include the conflicts in the Balkans, Sierra Leone, Darfur, Lebanon and Libya.

Each of the central authors taken as forming the emerging Humanisation tradition bolt their arguments onto key moments of political and legal crises and the legalistic responses which emerged from these. Theodor Meron’s ‘*The Humanisation of International Law*’ (2006) presents a historically robust account of the development of international law towards the direction of humanity in scholarship and jurisprudence. The headline claim concerns the dissipating influence of human rights on International Humanitarian Law and International Criminal Law. Outlining the historical chronology of this, Meron notes:

> Human rights had a major influence on…the jurisprudence of courts and tribunals and the work of international organisations. This trend started at Nuremberg and has continued through such ICJ cases as the *Nicaragua* case and the *Nuclear Weapons Advisory Opinion* and the jurisprudence of the ad hoc criminal tribunals for the former Yugoslavia and Rwanda (Meron 2006, p. 3).

The ad hoc tribunals are taken as representing a rebuttal to the “…legal inaction…” in the face of mass atrocities which came before:

> The end of the Cold War, the spread of democracy and greater super-power cooperation in the Security Council, have encouraged a greater willingness to investigate crimes committed by previous regimes (Meron 2006, p. 91).

The crowning achievement of such cooperation came with the establishment in 1998 of a series of conferences which led to the adoption of the Rome Statute of the International Criminal Court (ICC) (Meron 2006, p. 93). Indeed, the establishment of this underwrites much of Ruti Teitel's assertion in '*Humanity's Law*'. There Teitel argues for the existence of paradigm shift as the ICC in part heralds a new normative system focused on humanity as the prime subject of international law and international relations (2011).

Multiple elements feed into this claim and build on Meron's original argument concerning the emergence of individual subjectivity evidenced through the establishment of the ad hoc tribunal and the ICC (Teitel 2011, p. 32). Where Teitel extends beyond Meron is in tracing how this subjectivity was used to justify actions in international politics prospectively and retrospectively. To unpack this, where Meron looks primarily at the doctrinal evolution of bodies of international law post-hoc, Teitel considers how individual subjectivity is used as a legitimacy key to unlock acts of intervention. She notes how claims to human protection serves a discursive function to become "…a new language of politics" (2011, 94). In relation to the use of force in Afghanistan for instance, Teitel notes how the language of justification strayed away from state centric-discourse and instead was couched in the language of humanity. "More specifically, justifications invoked the liberation of the local peoples and the need to protect human security" (2011, p. 111 - 112).

What was needed to cement claims of a new humanised order through law however was a broader institutional development and an event which catalysed this. The first piece of this came with the 2005 World Summit Outcome Document outlining an international Responsibility to Protect (R2P). R2P applies first to states in their own domestic affairs in relation to their citizens. Failing this, it moves to the notion of a shared responsibility amongst the broader international community. In the same year as *Humanity's Law* publication – 2011 – the second piece of the puzzle was laid with United Nations Security Council Resolution 1973 authorising states to take "…all necessary measures…" to protect citizens in Libya (2011, p. 3).

Thomas Weatherall's picks up on this. Whereas appeals to humanity had primarily focused before in IHL by limiting the means and methods of fighting and therefore was concentrated *in bello*, the use of humanity as a justificatory rationale *ad bellum* in areas

such as Yugoslavia, Afghanistan and Libya heralded a new age in international relations. Indeed, for Weatherall in *Jus Cogens* (2015), increasing rights and duties attached to the individual as a subject of international law *jure suo* have been a feature since the delineation of the Nuremberg principles. The fleshing out of the human rights regime and the increasing prominence attributed to ICL has only served to strengthen this (Weatherall 2015, p. 199). The use of force in Libya is then taken as crystallising this through the invoking of peremptory authority of Crimes Against Humanity and War Crimes entailing *erga omnes* responses. In doing so, it cemented the arguments which came before by conceptualising an international legal order in which peremptory norms act as the constitutional ligaments of a human centric order that resembles the hierarchical structure of domestic law.

These moments of legal and political development provided the context for the arguments to come. The intricacies of the ICTY in the shadow of the Cold War and state succession for instance necessitated the fleshing out of the normative permeation of humanitarian treaties where state consent did not and could not apply. This reflects a broader trend within the arguments of Humanisation theorists in the mutual contention that what were hitherto conceptualised as separate areas of law rather have a common core that jurisprudence can only capture though a unified language of humanity. Examples such as the War on Terror and the long-term occupations as seen in the dispute between Israel and Palestine have prompted consideration not just of humanitarian rights but human rights in muddled contexts which sit on the verge of war and peace. Positions such as that in the *Advisory Opinion of the International Court of Justice on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (*The Wall)* (2004) for instance make clear that despite claims of IHL operating as the sole applicable *lex specialis*, the provisions of IHRL continue to apply (2004, p. 48 - 49). In tandem, the establishment of a normative system in ICL that centres upon individual accountability under the Rome Statute furnish the claims of a legalised international community in which individuals who commit grave offenses may be credibly considered as sitting outside its normative limits.

On top of this historical contextualisation, there is a theoretical thread which runs through each conception of Humanisation briefly mentioned above. In each account there is a

teleological argument at work which crosses the theoretical threshold from the jurisprudence of courts and tribunals towards political understandings of international relations. This interlinking thread is part of the reason why the authors of note here may be considered as being a part of a theoretical approach in and of themselves.

To unpack this, writing towards the jurisprudence of international courts concerning humanitarian norms in an early indication of where his and other arguments would progress, Meron argues:

> The teleological desire to solidify the humanizing content of the humanitarian norms clearly affects the judicial attitudes underlying the 'legislative' character of the judicial process. Given the scarcity of actual practice, it may well be that that, in reality, tribunals have been guided, and are likely to continue to be guided, by the degree of offensiveness of certain acts to human dignity; the more heinous the act, the more the tribunal will assume it violates not only a moral principle of humanity but also a positive norm of international law (1987, p. 361).

This idea of a teleology to international law that bends towards a focus on humanity expressly underwrites 'the interpretive turn' of Teitel. She identifies a human oriented teleology to strike a path through "…the narrow strait between the Scylla of difference and the Charybdis of universalism" (2011, p. 170). In a context in which multiple claims to international law's authority are voiced, a search for a 'rule of recognition' is needed that is answered through a focus on the individual. Political conditions play an important role here. Post-World War Two decolonization, post-Cold War state breakdown and post-9/11 'War on Terror' have each prompted consideration as to the balancing of state vs human oriented interests and it is the latter which is taken to constitute the "…ultimate interest" (Teitel 2011, p. 43). The next step of the argument is that this teleological conception drives forward the notion of a paradigm shift (2011, p. 11). Here, teleology moves form a guiding idea of the work of tribunals towards underwriting of a more solidarist understanding of the normative mores' international society (Teitel 2011, p. 203).

This is as much a philosophical claim as it is a legal one. To return to Meron, in arguing for a teleological momentum underwriting the jurisprudence of international courts, "The 'ought' merges with the 'is', the *lex ferenda* with the *lex lata"* (1987, p. 361). This normative individualistic approach is made most obvious from the off in Weatherall's argument where the uncritical assumption is that the motivational driver of *all* of international law and politics is the good of the human being (2015, p xxxix). Human dignity is used here as shorthand for a moral conception of international law grounded in the centrality of the individual:

> …the ability of the individual to act in accordance with the categorical imperative, which is to formulate and apply universal laws, is the source of the respect owed to human dignity in both its and its outward respects; put differently, human dignity is, at once, the subject and object of respect. This ability to exercise reason according to the categorial imperative is the capacity for morality (2015, p. 39).

Human dignity here serves as a structural imperative then that is taken as the purpose of *all* law (Weatherall 2015, p. 41). The argument is illustrative of the front and back end of the teleological underwriting that each primary Humanisation argument employs. The individual is the centre of the moral universe to which all purposes ought to attend to.

What the above has sought to briefly tease out is the historical and theoretical context in which the claims of Humanisation emerged. Placing the primary authors in such political and historical context, the varied claims of paradigm shifts, domestication and individuation of responsibility in the shadow of the Cold War are understandable. Both legal and political elements have fed into this. The former in terms of the jurisprudential fleshing out of international law. The latter in terms of the political environment which cleared the way for many of such moments to occur. Fernando Teson captures the mood of this moment best in

the argument that, "…new times call for a fresh conceptual and ethical language. A more liberal world needs a more liberal theory of international law" (1998, p.1).

There is then a lot that is worthy of study concerning the Humanisation *oeuvre.* It contains both analytic and normative claims and brings with an approach to theorising global justice which is jurisprudential in its origins but political in its conclusions. The primary accounts explored here make important arguments and their prescriptive conclusions are eminently plausible. However, upon deeper consideration, problems arise. Each speak to the politics of a distinct period. Yet they do so by looking through a telescope upon a particular moment in history. It is then of vital importance that the claims Humanisation makes are fleshed out and investigated.

To that end, the roadmap of the thesis is as follows. Part One is split into two sections. Section one aims to give an exposition to the core claims of Humanisation. It does so firstly by introducing Humanisation before outlining its novelty. Discussion then moves to consider the central vehicles that are argued to have driven human-oriented normativity to the heart of the international legal order. Having set this out, discussion shall then move to explore the fundamental positions that constitute Humanisation as a distinct tradition. The final part of the section moves to consider the affinities between Humanisation and Constitutionalism.

Section two aims towards an analysis of some of Humanisation's core positions and presuppositions as they arose through the previous exposition of Humanisation. The discussion shall bring in an array of voices from International Law scholarship but also International Relations Theory and International Political Theory. The section will canvass points of critique which arise from the previous exposition and end on considerations regarding the use of force.

Part two moves towards an explicit focus on International Political Theory (IPT). It first justifies Humanisation's relevance to IPT before charting a course through traditional IPT through to contemporary constructivism before arriving at a discussion of how the recent 'practice turn' in international theorising sheds new light on the central claims of Humanisation.

Part three seeks to build on the insights that emerge towards the end of part two by fleshing out how the insights of practice theory apply to three critical areas of the Humanisation *oeuvre* in *jus cogens,* reprisals and Common Article Three of the Geneva Conventions. In doing so it completes the normative claims of this thesis that the gestures towards hierarchy in international law ought to be resisted by demonstrating how normative evolutions can still occur under conditions of structural equality.

The conclusion shall restate these moves and the heart of the argument made. It shall sum up how the primary tasks this thesis sets itself are completed and restate how the broadening of the theoretical reference retains Humanisation's normative goals in a more politically and philosophically defensible manner.

Part One

The purpose of this part overall is to give an overview of both Humanisation as it has arisen in scholarship as well as outlining the entering wedges of critique and concern which surround these. To do so, it is split between two sections. The first aims for an exposition of Humanisation and its core claims, the second works towards an analysis of these.

The expositional element of section one begins by introducing the concept of 'humanisation' as phenomena of law regarding the interplay of legal regimes and how 'Humanisation' as a theory born from international law scholarship elaborates on this. Discussion then moves to consider the novelty of Humanisation before outlining how this connects with a deeper history of international law, the effects of which can still be seen today. What are taken to have animated the arguments of a paradigm shift in the normative foundations of international relations are then explored in order to help the exposition at work. This section and the next, which concentrates on the three primary theoretical claims which construct Humanisation, are the primary parts of expositional element of this section. The final part of this section shall then consider how these relate to the broader theoretical perspective of Constitutionalism.

The second section works towards an analytical critique of Humanisation's core claims. It engages with the arguments surrounding Humanisation and its affinities with Constitutionalism. It then moves to explore some of the broader theoretical positions and presuppositions within the Humanisation argument made so far. In order to flesh out the concerns that are articulated throughout this section, discussion shall end by exploring Humanisation's claims as they relate to the use of force.

Section One

1.1A: Introducing Humanisation

The central claim of Humanisation theorists is jurisprudential. It is the charge that the emergence of individual subjectivity within international law has animated a key change within the international legal order (Kolb 2013, p. 33- 46). The normative focus of international law is argued to have shifted away from its inter-state origins which privileges the state and towards a focus on 'humanity' (Meron 2006). The fleshing out of three areas of positive law - International Humanitarian Law (IHL), International Human Rights Law (IHRL) and International Criminal Law (ICL) - are argued to have animated this (Teitel 2011, p. 145). The *interlocutory decision* of the *Tadic* case before the International Criminal Tribunal for the Former Yugoslavia (ICTY) outlines this with the most lucidity. There the court argued, "A state-sovereignty oriented approach has been gradually supplanted by a human being-oriented approach' (1995, p. 35).

The empirical base from which Humanisation draws are such jurisprudential elaborations of a normative thread which run through IHL, IHRL, and ICL and centre upon claims of humanity. These primarily occur in international courts and tribunals. An early example comes from the *Corfu Channel Case (Corfu) (*1949). There, the International Court of Justice (ICJ), in considering obligations of Albanian authorities in relation to the use sea mines affecting innocent passage, argued:

> Such obligations are based not on the Hague Convention of 1907, No.VIII, which is applicable in time of war but on certain general and well recognised principles, namely: elementary principles of humanity, even more exacting in peace than in war… (ICJ 1949, p. 22).

Latterly, in the *Advisory Opinion* of the *Legality of the Threat or Use of Nuclear Weapons (Nuclear Weapons) (1996),* the same thread was expressly pulled upon:

> It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and "elementary considerations of humanity" as the Court put it in its Judgment of 9 April 1949 in the Corfu Channel case… that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law (1996, p. 35)

The argument of the universality of humanitarian norms gestured to above are given greater clarity by Judge Mohamed Shahabuddeen writing in regard to the Genocide Convention following state breakdown in Yugoslavia and the hostilities which followed:

> The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, such its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm the most elementary principles of morality. In such a convention the contracting states do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes, which are the *raison d'etre* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions (Application of the Convention on the Prevention and Punishment of the Crime of Genocide 1996, p. 635).

Judge Christopher Weeramantry struck a similar tone:

> Human rights and humanitarian treaties do not represent an exchange of interests and benefits between contracting States in the conventional sense...many of which are concerned with the economic, security or other interests of states. Human rights and humanitarian treaties represent, rather, a commitment of the participating States to certain norms and values recognized by the international community…The Genocide Convention…transcends State sovereignty (Application of the Convention on the Prevention and Punishment of the Crime of Genocide 1996, p. 646).

Such claims are only half the story, however. This thesis concerns itself not only with Humanisation as a practice within the law which the passages above relate. It is also concerned with Humanisation as a distinct theoretical *oeuvre* which takes such materials as the source for further theoretical claims and blends international law with international political theory towards a distinct account of global justice. In doing so, the arguments I take as establishing Humanisation ground broader theoretical claims concerning the nature and direction of global justice more generally. Such claims move away from pure jurisprudence and towards International Political Theory (IPT). Though what is needed, this thesis contends, is a broader array of such theories than has so far been deployed by Humanisation theorists.

In particular, this thesis focuses primarily on three central texts which are taken to represent this with most clarity. These being Theodor Meron's *The Humanisation of International Law* (2006), Ruti Teitel's *Humanity's Law* (2011), and Thomas Weatherall's *Jus Cogens* (2015). What marks these out as distinct is the focus put upon the impact of legalised human oriented norms and the effect this weighs upon the broader international legal order. Though they are not the only place in which such theories are flirted with nor the notion of the humanisation of international law taken as the legal fusing of IHL, IHRL and ICL, and the effect of this upon state sovereignty classically conceived are gestured towards. Indeed, this thesis looks across multiple theoretical domains in which such arguments are gestured towards and so brings in a more holistic account of Humanisation as it features across International Law scholarship, IPT and International Relations Theory.

Indeed, in broader International Law Scholarship (ILS), the phrase 'Humanisation' is included in both theory and practice, though in a rather unrefined manner. David Kennedy for instance makes note of the ICRC's *raison d'etre* being to 'humanise' war but does not elaborate upon the specifics of what this means in practice (2004, p. 267). Samuel Moyn defines humanisation as the process of minimising civilian casualties, yet this too fails to capture the full extent of the debate (2019). A more rounded conceptualisation is found in Anne Peters contention that "The ongoing process of a humanisation of sovereignty is a cornerstone of the current transformation of international law into an individual-centred system" (2009, p. 514). These accounts edge closer to a more holistic interpretation but neglects to mention what is involved in the process. Robert Kolb builds on these by contending the humanisation of IHL to run parallel to the 'positivation' of HRL in creating a regime of optimal protection during armed conflict (2013, p. 47). Vera Gowlland-Debas and Gloria Gaggioli term this 'normative convergence' citing the express references to human rights in the Additional protocols of the Geneva Conventions in support (2013, p. 78). Each of these capture elements of the broader Humanisation argument yet do not do so fully. A more holistic definition comes from Lucas Tzevelekos and Vassilis Lixinski in considering humanisation as the interweaving of humanitarian and human rights norms in the post-1945 period (2016, p. 343-344). Judge Antonio Trindade considers the effect of this when defining humanisation as the process of the attachment of international legal rights to the individual *jure suo* – as legal subjects in their own right. As will be expanded upon in later passages, this is considered an 'emanation of human conscience' in line with natural law thinking whereby moral principles articulated through the language of humanity are projected into conventional and customary international law (Trindade 2013, p. 69).

What this brief survey above illustrates is that Humanisation has been applied in various ways. On the one hand, it speaks to how in the process of war fighting in particular, standards which cohere around the individual are of increased importance. Such standards then filter down to influence a broader conception of human security focused on the protection of the individual (Teitel 2011, p. 105). On the other hand, it is used as a shorthand explanatory motif regarding how sovereignty and the society of states have become impacted by the normative force of such norms. The normative focus of the international legal is argued to have shifted from a focus on the state to a focus on humanity and individual constituents.

Legal protections afforded to the individual under the broad influence of human rights affecting general international law are key to Humanisation (Meron 2006) (Weatherall 2015) (Teitel 2011). With differing emphasis, the central claim is that a mutually reinforcing, sophisticated and pervasive legal system that combines IHL with the influence of human rights has reoriented the normative focus of international law and given conceptual clarity in the doctrine of ICL (Kolb 2013, p. 35-46). "In the long prevailing statist model, the international rule of law was grounded primarily on the inviolability of existing state borders" (Teitel 2011, p. 50). A particular conceptualization of security came from this in which the internal life of the state is secured by maintaining external security. From this, a centrality of state centric reasoning with an emphasis on non-intervention and pluralism flow. For Humanisation theorists, the burgeoning authority of human oriented legalised norms shifts the dial to refocus the international legal orders normative optic upon a focus on human security instead.

What runs through Humanisation then is the argument that there is a common denominator running through the three corpuses of positive in IHL, IHRL and ICL. This common denominator has important consequences in terms of the contribution to discourses of global justice that Humanisation proposes. This being that the dissipating effect of the concepts such as the notion of being a 'protected person' under IHL has reoriented the subject and measure of global justice in terms to focus on human (the subject) and their protection (the measure). On this, Teitel writes:

> …international humanitarian law has moved from the traditional view of recognizing states duties to protect their own citizens to a view that there is a need to protect all those in the global community. To the extent that humanity rights have been recognized under the law, the enforcement such rights – such as the right to the protection of human security – along with human rights that were articulated and enforced, first and foremost, at the state level, can and does occur *beyond the state* (Teitel 2011, p. 150 emphasis in original)

Key to this is the notion of the interconnectedness of international society in which the glue that holds it together is international law. The impact of this in the conceptualisation of a global community is critical to the Humanisation argument. It underwrites the claims of a humanised global constitution to be explored in the pages below in which the traditional divide between the public and private in terms of domestic and international relations is collapsed.

The essential claim here is that there is minimum threshold of human oriented normativity that underwrites an account of global justice which provides for a 'minimum' of notion of human security and a 'thicker' account which conceives of duties beyond borders (Teitel 2011, p. 164). Such duties beyond borders may be exercised through the use of force if needed. This is a key shift and indicates the interdisciplinarity that Humanisation poses with International Political Theory and International Relations Theory. In the former, this division is given theoretical gloss in the consideration of the depth and extent of duties and the identity to whom these attach to. In the latter, the division between the inside realm of the state and the outside world of the international is the core theoretical dividing line. Where accounts of a 'moral minimum' or 'thin universalism' have traditionally cohered around a respect for pluralism with a focus on the state, the effect of humanisation is considered to evolve this. A more solidarist account comes into view with a thicker account of universal legal ethics centred upon the individual. "Global justice emerges as *global judgement*" (Teitel 2011, p. 143 emphasis in original) as acts are deemed offensive to humanity as a whole and the perpetrator deemed *hosti humanis generis* – an enemy to all mankind. International law here works as a form of judgment in which offending agents are simultaneously engaged in the same normative universe yet are constructed as offenders against in a hierarchical order (Graf 2021).

1.1B: The Novelty of Humanisation

The novelty of Humanisation as a distinct theoretical tradition comes from the basis of its claims. It blends the empirical claim concerning the interweaving of humanitarian and human rights norms in the post-1945 period (Tzevelekos and Lixinski 2016, p. 343 – 344) with the

further normative claim that this has worked a "…revolutionary change upon many of the classic rules of international law" (D'Amato 1998, p. 101). By way of an example, the classically state-centric character of IHL is displayed in the manner in which collective responsibility traditionally operated. A breach of IHL by one state necessitated remedies by that state to the victim state. "Individuals seldom benefitted from such arrangements" (Meron 2006, p. 2). This is markedly different from the individual oriented focus that exists under the normative system established under the Rome Statute for the International Criminal Court (ICC). Article 1 of which establishes jurisdiction over *persons* rather than *states* for gross violations of "…the most serious crimes of international concern…" (ICC 2011, p. 2). Human security is now argued to trump state security.

Crucially, this change is made by developments internal to the international legal order. The following statement from *Kupreskic vs Prosecutor* before the International Criminal Tribunal for the Former Yugoslavia (ICTY), the historical progenitor of the ICC, is perhaps the clearest articulation of the motivation behind this:

> 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…The underpinning of this shift was that it became clear to states that norms of international humanitarian law were not intended to protect state interests; they were primarily designed to benefit individuals *qua* human beings. Unlike other international norms...compliance with humanitarian rules could not be made dependent on a reciprocal or corresponding performance of these obligations by other States. This trend marks the translation into legal norms of the 'categorical imperative' formulated by Kant in the field of morals; one ought to fulfil an obligation regardless of whether others comply with it or disregard it (Kupreskic 2000, p. 202-203).

What makes Humanisation a worthy area of study is the manner in which such arguments concerning the normative dimensions of international relations that are the theoretical bread and butter of IPT are establishing a firm foothold in International Law

Scholarship as Humanisation uses such material as its source. The central point here concentrates on the empirical base from which Humanisation draws. This represents a more tangible and norm-oriented form of theorising concerning normative international relations which have traditionally couched their appeals to metaphysical forms in their appeals to humanity (Boucher 2009, p, 1). By moving in this direction, space is opened up for a wider conversation concerning the nature and direction of global justice more generally that draws in a wider array of perspectives. However, in order to fully realise this potential, conversations ought to cross both scholarly boundaries and reflect the array of differing positions within these.

This is of critical importance for as the passage above illustrates, the tendency of Humanisation thus far has been to ground their arguments on the centrality of the individual which in turn dictates the direction of their normative prescriptions. Theodor Meron's argument in for instance offers the argument that human dignity is the touchstone around which the 'homo-centric' focus of post-1945 international law can be explained (Meron 2006, p. 6). The movement within international law from collective responsibility towards individual responsibility mirrors the neo-Kantian argument of the moral priority of individuals in international affairs that is typically associated with cosmopolitan IPT scholarship. Thomas Weatherall's argument takes Meron's argument further towards the argument that international law has come to realise its cosmopolitan foundations. 'Human dignity' is elevated from being the 'common nucleus' from which human rights and humanitarian norms stem (Meron 2006, p. 6), to being the key concept argued to resolve the theoretical conundrum of the concept of *jus cogens* (peremptory norms which bind without consent) in international law. Ruti Teitel argues for there to be a teleology to international law that has caused a paradigm shift in the normative foundations of international law. In this latter instance, neo-Kantianism is replaced with neo-Grotianism. The effects are the though same in fashioning the argument that there is a moral community of humanity enjoined under law who enjoy superiority over the affairs of states. In each conceptualisation, "Respect for states is merely derivative for respect for persons" (Teson 1998, p. 1).

On the one hand then, the empirical basis of Humanisation then cleaves open a distinct line of argument which shelves some of the "…lingering metaphysics…" (O'Neill 1996, p.31) of traditional appeals to universality in favour of a positivist grounding in international

law. On the other, the immediate pivot back to such forms of theorising that Humanisation has thus far engaged in have a theoretical underwriting that emphasises the "…signature individualism…" of liberal international thought (Graf 2021, p, 2). The normative individualistic approach at their heart skews the importance of individual subjectivity in relation to broader societal norms as of sovereign equality and consent in international law. Such arguments have fidelity to those oriented by western theoretical registers with a focus on the individual but creates distance between its account of international society's ethical development and non-individualistic societies when posed in universal terms. The effect of this is to bake in certain normative conclusions that Humanisation makes. This being primarily an automatic privileging of the individual as the primary unit of moral concern form the start. This feeds into claims of the collapsing of the division between international and domestic justice, of a 'paradigm shift' in international relations *in toto* (Teitel 2011), the licensing of 'hierarchies of humanity' reminiscent of Europe's colonial past which delineated between the 'civilised and the 'uncivilised' (Fassin 2012), and a general broadening of *ad bellum* permissions through a mix of humanitarian intervention and international law enforcement arguments.

Humanisation has further novelty in recognising that in terms of international law, "Something is changing" (Scharf 2019, p. 588). The International Law Commissions (ILC) Articles of State Responsibility for instance notes that the relations of states may no longer be articulated in purely bilateral terms (ILC 2001, p. 32). The nub of Humanisation goes beyond this, however. Central elements which inform the Humanisation thesis such as the fleshing out of the concept of Crimes Against Humanity (CAH), the emergence of obligations *erga omnes* (obligations owed to the international community as a whole), and arguments concerning peremptory norms (*jus cogens)* in international law each feed into the claim of a paradigm shift in the international legal order. They coalesce around claims of a human centric international order established through law that extend beyond complex multilateralism and towards forms of value centricity in a constitution like manner.

The judgement in the *Case Concerning the Barcelona Traction, Light and Power Co., Ltd* (*Barcelona*) gives a glimpse into the emergence of this. There, the International Court of Justice (ICJ) argued that:

> …In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another state in the field of diplomatic protection. By their very nature, the former are the concern of all States. In virtue of the importance of the rights involved, all states can be held to have a legal interest in their protection; they are obligations *erga omnes*.
>
> …Such obligations derive, for example, in contemporary international law from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination (ICJ 1970, p. 32).

Yet as Christian Tams notes, writing on the emergence of the concept of obligations *erga omnes* in signalling such value commonality outlined above, "As often, the reality is neither so clear nor so bright" (Tams 2005, p. 3). Repeated failures of the international community to respond to humanitarian catastrophes such as genocide in Cambodia in 1979 and Rwanda in 1994 "…makes solemn proclamations of a core of fundamental values ring hollow" (Tams 2007, p. 3).

Sitting alongside this inaction, a more worrying trend is in ascendance. This being the deliberate use of the language of humanity in giving political and theoretical succour to acts of power. The use of force by a US-led coalition in Iraq in 2003 (Graf 2021, p. 115) and more recently Russia's invasions of Crimea in 2014 and wider Ukraine in 2022 both involved the use of the language of humanity.

What gives Humanisation teeth as a theory then also gives it an air of authority in its further normative claims. In opting for a positivist basis towards a more norm governed approach, there is greater accessibility to the argument overall. This itself links up to developments in contemporary IPT to be surveyed in later chapters. Yet the pivot thus far has been to theories of international law and ethics with their own particular histories. Indeed, in its

philosophically embellished iterations, Humanisation draws heavily upon theories articulated in the early pre-modern period such as those by Hugo Grotius (Teitel 2011) or Immanuel Kant (Weatherall 2015) (Teson 1998). In this regard, the Humanisation argument is not an entirely novel academic practice but is rather indicative of international law coming full circle.

Hersch Lauterpacht for instance conceives Grotius's *De Jure Belli ac Pacis* as being directly purposed towards the 'humanisation' of conduct in war (1946, p. 12). Lauterpacht recalls Grotius proclamation that:

> Fully convinced ... that there is a common law among nations, which is valid alike for war and in war, I have had many and weighty reasons for undertaking to write upon this subject. Throughout the Christian world I observed a lack of restraint in relation to war, such as even barbarous races should be ashamed of; I observed that men rush to arms for slight causes, or no cause at all, and that when arms have once been taken up there is no longer any respect for law, divine or human; it is as if, in accordance with a general decree, frenzy had openly been let loose for the committing of all crimes (cited in Lauterpacht 1946, p. 12).

Yet Lauterpacht develops the charge that despite Grotius's noble intentions in articulating a law of nations that paid particular attention to the claims of global community of individuals, what he gave shape to was one that negatively impacted any attempt to 'humanise' conduct in the midst of conflict. Lack of restraint towards the 'barbarous', the taking and killing of captives, the massacre of all those in a given territory, the pollution of water, the use of assassins and the destruction of all property of the enemy are all practices that a Grotian conception licences (Lauterpacht 1946, p. 12). Rather than as a synonym for progress with which Grotius's name is typically invoked (1946, p. 19), for Lauterpacht, the perverting effects under the guise of 'humanising' conflict in *De Jure Belli ac Pacis* means it "...ought to disappear as a mere ornamental item in reading-lists" (Lauterpacht 1946, p. 52).

Hathaway and Shapiro echo this. Despite the moral world created by Grotius as one 'teeming' with individual, state and corporate rights (2017, p. 23), the Thucydidian principle

of ‘might is right’ gave credence to acts of war that conflicts with the humanising shadow Grotius’s figure is said to cast over international law:

> The core idea that animated the Old-World Order, as he explained it, is simple but powerful: War is a legitimate method for sovereigns, and their chartered trading companies, to enforce rights against one another. The right to wage war, to conquer and seize booty, to destroy anything that is necessary to win all derives from this basic function of war (Hathaway and Shapiro 2017, p. 28).

A concern that underwrites this thesis is that Humanisation of new risks repeating the same mistakes of old. The language of war undergoes a semantic change to that of law enforcement with “…Special Forces acting as quasi-permanent military police” (Moyn 2022, p. 9). Arguments of Humanisation concerning an international community scaffolded by international law then moves the conceptual dial from war to global policing (Graf 2021). From there, it is a short step for the weight of this collective humanity to be pressed against those deemed offensive to its normative parameters. As Teitel notes, “Law enforcement processes that operate on the person uniquely render the individual the subject of both rights and responsibilities, in the globalizing regime” (2011, p. 72). The U.S. practice of characterizing militants as ‘unlawful combatants’ is one such example of this. Suspected militants are judged to be outside of normative confines of a humanised world order and lose their status as equal individuals in a global political space. The U.S. practice of ‘signature strikes’, the use of kinetic force on such individuals based on certain defining characteristics associated as terrorist activity but whose identity is unknown is another example (Heller 2013, 89). There are significant revisions of classical norms of international society at play here in revising the traditional principle of the moral equality of combatants. In both, the language of ICL enforcement underwritten by a human centric international legal order overshadows any broader political objectives which may be in play.

Herein lies a problem. The move towards a global community united by law with the theoretical availability at least of more humane methods to deliver kinetic force dilutes the claim of engaging in unjust wars. In individuating responsibility, acts of force move from the

language of war to the language of policing. Whilst the focus on the individual as the beginning and end of a universal ethical world is theoretically seductive, such effects deserve discussion. By moving to the argument that this is fleshed out through law, the pursuits of particular objectives may hide their political motivations behind the veneer of humanised legal normativity. International cosmopolitan police action replaces a vernacular of power politics, but their effects may be the same.

The primary novelty of Humanisation then is in its offering of a legalised norm governed route into arguments concerning questions of normative international relations. This accessibility in offering a space from which dialogue may emerge from a shared starting point in legalised norms is a crucial step towards a shared account of international ethical normativity. On the road out however, we encountered many of the problems that have dogged international politics of old. The shared space from which Humanisation emerged has become enveloped within political theories which can give theoretical succour to projects of international power. The following section shall outline in greater depth how this route in became established before a discussion of how Humanisation adds its own theoretical gloss to these.

1.1C: Animating Humanity

As the foregoing has sought to make clear, particular political and legal instances have occurred which has resulted in individual carving out a place as both a subject and object of international law in their own right (Trindade 2014). The purpose of this section is to sketch how differing accounts of Humanisation posit such a key change to have occurred by sketching out the vehicles through which reorientation has been animated.

Doing so shall draw attention to the specific arguments of those considered to offer the most thorough account of Humanisation as they appear in the scholarship of International Law (Theodor Meron's '*The Humanisation of International Law*' (2006), Ruti Teitel's '*Humanity's Law*' (2011) and Thomas Weatherall's '*Jus Cogens*' (2015)). The key underlying thread here is the manner in which notions of protected persons have expanded beyond

attributing protections to protected persons based on status as citizens of a state and towards one based on an individual's 'humanity'. In effect, the net of protections is conceived as being released from being woven to the state and rather operates independently of the state.

This is argued as occurring through three broad indices. The first traces the elements of universality gestured towards in IHL through the Martens clause and the effect of IHL and the international legal order *in toto* coming under the 'wing' of human rights (Meron 2006). The second argument is substantially related to the first in drawing from IHL but finds its source in the extension of protections animated by the elevation in status of Common Article Three (Teitel 2011). The third comes in the form of universal and non-derogable protections associated with norms of *jus cogens* injecting moral considerations into a formally positivist international legal system (Weatherall 2015).

The first thread animating this development are the gestures towards universality found in IHL. IHL is of particular importance for the claims made throughout the genre. Within IHL, individuals were protected due to status, as either a combatant or non-combatant, undergirded in the traditional interstate nature of war, by reciprocity between sovereigns (Teitel 2011, p. 105). The notion of being a 'protected person' cleared the way to claim certain rights and protections as well as access to essentials such as food and medicine during conflict. The changing nature of conflict, from interstate to intrastate, has allowed for the generalization of such protections. In turn, an evolving understanding of what is to count as a threat, away from a basis in violent conflict and towards broader economic and societal threats has broadened this further (Teitel 2011. P. 140). In sum, the notion of a 'protected person' moved away from a being episodic to the context of conflict and towards a more universal and societal understanding.

To unpack this, in broad historical terms, IHL is a combination of 'Hague' and 'Geneva' Law. The former generally offered protections to protected categories as of '*hors de combat*' alongside limitations on the means and methods of war. The latter offers more human-centric protections as the nature of war changed principally due to the rise in non-State actors and increase in civil wars. The protections within these may be conceptualised as realising in positive law the 1868 St Petersburg Declaration's pronouncement that determined for the first time that the means and methods of war are not unlimited (Darcy 2014, p. 185). For David Kennedy, the very semantic evolution towards the term IHL and away from 'laws of

war' is indicative of a broader focus of such law as it has come to be utilised in broader environments (Kennedy 2004). "Essentially, IHL shifted at least partially from 'military' law to 'humanitarian' law (protection of war victims): this humanitarian law opened itself to human rights law" (Kolb 2013, p. 46). Indeed, it was only in the 1970's with the drafting of the Additional Protocols to the Geneva Conventions that the term 'International Humanitarian Law' was coined. The consolidation of these strands for Amanda Alexander is taken to represent a semantic transition that puts the humanitarian needs of civilian victims prior to the prerogatives of the fighting parties, at least on paper (Alexander 2015, p. 110).

The historical provenance of IHL though remains rooted in being laws of war. Henry Shue gives what is perhaps the frankest account of the motivation for their codification:

> The purpose of the laws of war is to constrain the 'shit' when the 'shit' happens: when armies are assaulting and attacking, the laws of war specify firm limits" (2016, p. 434).

The effect of this was a broad canon of protections that protected enemy persons but failed to protect a state's own nationals (Meron 2006, p. 33-34). Whilst elements of universality were gestured towards in the Hague and Geneva conventions, they were largely limited by its interstate origins.

As is evident in Shue's formulation, the laws of war were directed towards the army of a State. The contemplation of universal standards based on principles of humanity drawing on elements of natural law were first offered with the inclusion of the Martens Clause in the Fourth Hague Convention (1899) (Meron 2006, p. 28) (Cassese 2000, p. 188). The clause reads:

> Until a more complete code of laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection of the empire of the principles of international law, as they result from the usages established between

> civilised nations, form the laws of humanity, and the requirements of public conscience (cited in Meron 2006, p. 17).

Debates concerning the effect of the clause have argued from one end of the spectrum that the clause constitutes a source of law. From the other end of the spectrum, the import of the clause is relegated to having the effect of rejecting *a contrario* arguments – as limited to the rejection of arguments which consider the lack of legal regulation as giving authority to act in a certain way (Cassese 2000, p. 187). The middle ground position is one that emphasises the interpretive import of the clause, "It argues for interpreting international humanitarian law, in case of doubt, consistently with the principles of humanity and the dictates of public conscience" (Meron 2006, p. 27).

Furthermore, in emphasising this normative element, the clause supplies the ground for an increased reliance upon *opinio juris* over *usus* (state practice) (Cassese 2000, p. 187). This trend of the promotion of *opinio* is one of the cornerstones of the account of Humanisation offered by Meron (2006) and was particularly prominent in the furnishing of customary norms in the ICTY (Boucher 2009). Its continued relevance is demonstrative of the common thread of humanitarian normativity that has animated accounts of Humanisation and is conceptualised by Cassese as an engine for the normative development of international law (2000, p. 189-190). The account of Humanisation given by Meron in particular places central emphasis upon "The rhetorical and ethical strength…" of the language of the Martens Clause in driving the humanitarian normativity that has shifted international law away from collectivism and towards individualism (2006, p. 9). The clause has then matured alongside the fleshing out of concepts as of 'crimes against humanity' and 'acts that shock' informed by the content of human rights documents as the UDHR to give additional weight to humanitarian protections (Meron 2000, p. 94). Indeed, its status as a customary norm is paramount in combining with the treaty-based rights of human rights treaties in maturing what may be considered as civilised usages, the laws of humanity and the public conscience beyond their treaty-based confines to extend universally (Meron 1998) (Meron 2006) (Teitel 2011). Furthermore, its moralising tone and forward-looking perspective provides a potentially powerful counter to the legal argument of *non-liquet* that any act not covered by law is therefore legal (Meron 2006, p. 28).

Yet its dual reading also sews the seed of doubt. Meron argues that the notion of public conscience embedded in the clause can be read one of two ways. The first as an elaboration of public opinion which shapes the conduct of a party to the conflict. The second, as elucidating *opinio juris*. Both aspects of the dictates of public conscience have been recognized by diplomats and judges (Meron 2000, p. 83). The first relates to a wide net of public opinion whilst the second connects the Martens Clause to customary law by integrating public opinion as a key in fashioning *opinio juris*.

The second animating thread concerns the manner in which IHL and IHRL can be seen to have 'levelled' their protective capacity. If IHL may be conceived of operating in the context of war, IHRL operates in the context of peace. IHRL lays down rules which bind governments in their relations with individuals. The common principle of human dignity articulated as the normative hook for both these legal regimes enjoins them in a mutual system to provide a blanket of protections in times of both war and peace. Here, the customary status of Common Article Three CA3) of the Geneva Conventions (1949) is the vehicle for increased protections through the interplay of human rights and the customary status in IHL of CA3. CA3 reads:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ' hors de combat ' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilised peoples.

(2) The wounded and sick shall be collected and cared for… (International Committee of the Red Cross 1980, p. 35-36)

The outlining of fundamental protections to be expected in the context of non-international armed conflicts (civil wars, insurgency, outbreaks of mass violence) are illustrative of a commonality between the normative core of IHL and IHRL (Meron 2006, p. 7). The establishment of prohibitions on grave breaches and universal criminal jurisdiction indicate the urge to develop a corpus of norms that reach beyond the interstate level to provide protections directed to the individual internationally (Meron 2006, p. 7). These protections run along two broad indices. The first are the substantive protections based around bodily integrity found in (1) (a) (b) and (c). Article (1) (d) is more procedural in its protection. Guaranteeing the right to due process in conflict has seeped into the regular discourse of international law and is the opposite side of the coin of individual responsibility given form with most clarity in the statute of the ICC. In so doing, establishing increased judicial protections, and importantly in this regard, a distinct route through which to access judicial justice. Both Meron and Teitel place heavy emphasis on the manner in which the customary status of CA3 extends the corpus of protections at domestic and international

levels (Meron 1987) (Teitel 2011). Its status reaches beyond the parameters of armed conflict to apply to persecution within the state that may not rise to the level of civil war and submits 'exceptional circumstances' to more 'regular' forms of enforcement (Teitel 2011, p. 46 -64). Crucial here is the manner in which normative jurisdiction is established by its subject, the person, the protection of which is taken to be the *grundnorm* in the 'present humanity-based scheme' (Teitel 2011, p. 55).

Furthermore, the common thread of humanity may be seen in practice in the manner in which the CA3 is linked to the otherwise vague and indeterminate phrasing that permeates much humanitarian scholarship in the term 'elementary considerations of humanity'. The International Court of Justice (ICJ) in *Nicaragua* gives substance to this:

> Article 3 which is common to all four Geneva Conventions of August 12, 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called "elementary considerations of humanity" (ICJ 1986, p. 218).

Here the type of normative permeation articulated in the *Nuclear Weapons Advisory Opinion* outlined earlier regarding the fleshing out of concepts through the interplay of IHL and HR returns. Similar pronouncements were made in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. The case centred on the IHRL and IHL obligations of Israel in relation to its own citizens and those under formal occupation. The problem was of 'dual application' for IHL applied to West Bank and Gaza strip while IHRL protections related to the protection of the individual vis a vis their government. The ICJ argued:

> More generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights (2004, p. 178).

The *Tadic interlocutory decision* makes the related point that further aids the jurisprudential development of 'elementary considerations of humanity':

> Indeed, elementary considerations of humanity and common sense make it preposterous that the use by States of weapons prohibited in armed conflicts between themselves be allowed when States try to put down rebellion by their own nationals on their own territory. What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife (1995, p. 64). □

The rapprochement of human rights and IHL driven by human dignity as their common denominator is modelled with clarity in the two Additional Protocols of the Geneva Conventions and in the Statute for the ICC. The norms within each being 'indistinguishable' from human rights. "International Humanitarian Law/ Law of war and their institutions have become central to the protection of human rights" (Meron 2006, p. 41). For Teitel, this is indicative of the expansive scope of protection that results from a new humanity focused international discourse and coalescence of IHL, HRL and ICL to plug any gaps in the law's protection. Humanisation's normative permeation attached to the individual subject collapses the traditional dichotomy in terms of the applicable *lex specialis* to globalise legal protection.

The third vehicle through which humanity has been animated is perhaps the clearest illustration of this impulse in introducing peremptory norms of international law in the form of *jus cogens. Jus cogens* are norms which need from which no derogation is permitted and

bind even without consent. As a concept, they emanate from the Roman law as contractual obligations from which parties may not contract out of (Weatherall 2015, p. 3). "As a legal concept, the notion of *jus cogens* is regarded to be universal: it is found in all major forms of domestic legal order" (Weatherall 2015, p. 3). Their purpose is the safeguarding of the overriding interests of the international community as a whole (Orakhelashvili 2006, p. 46). As such, they are 'peremptory norms' which are universal and non-derogable. Questions of their exact scope are myriad (Orakhelashvili 2006, p. 66). Alexander Orakhelashvili distils this down to a dichotomy between structural (systemic) norms and substantive norms. The former are those inherent within the international legal order as of *pacta sunt servanda* and consent whilst the latter evolve more into more justice-oriented concerns as of the protection of fundamental human rights (2006, p. 44-66). Weatherall's typology of norms of *jus cogens* evolves the substantive dimension through a linking with the concept of human dignity as the anchor in *opinio juris* (2015). Both articulations, structural and substantive, distil the idea of fundamental norms in the international order akin to that found in the domestic. The Humanisation thesis contends the authority of substantive norms are atop the normative hierarchy and so have animated a shift in the international order. The particularity of *jus cogens* to Humanisation in this regard is the manner in which the place of such norms in the global normative hierarchy is cemented by a substantive grounding in the protection of human dignity. To that end they are conceived as injecting into a positivist international order a corpus of moral norms centred upon the individual that traditionally finds home in discourses of natural law. They have then animated a change in the international legal order by being the vehicle through which moral considerations centred upon human dignity into a positivist legal order (Weatherall 2015).

The purpose of this section has been to delineate how the shift in international law's normative orientation have occurred. It has done so by outlining three vehicles which have aided that end. The first being the manner in which IHL gestured towards universality link up with evolving conceptions of human security. The second being the interplay between human rights norms and the customary status of CA3 and their combination towards forming an outer shell to the international legal order to prevent gaps in the law's protection from spilling

over. The third is the invocation of peremptory norms concerned with the wellbeing of human dignity.

1.1D: Constituting Humanisation

The purpose of this section is to build on the argument regarding how Humanisation uses an accessible normative base in international law to build its theoretical arguments. In doing so, it serves to aid the exposition of Humanisation began above by alluding to how the arguments construct an image of a humanised international constitution. This language of 'constitution' is deliberate in two respects. In the first is used to convey how Humanisation has a set of certain constitutive positions and source material which help to construct the tradition. The second is that there is already a body of scholarship in the form of Constitutionalism which has many affinities with Humanisation that shall be explored in the next subsection. The emphasis here is then on the first of these and is organised in the following. The focus first shall be in relation to how we conceive of international society there is the argument that the unique characteristic of the outside realm of the international has been replaced by a model that is closer to the internal realm of the domestic (Walker 1993). Secondly, this feeds into the argument of a paradigm shift in the normative foundations of international relations *in toto*. Thirdly, these combine to provide the lineaments of a new humanised international 'moral minimum'. The distinct element of Humanisation theorists of International Law is the combination of the empirically informed argument concerning the increase of humanitarian and human rights-based normativity as a moral addendum to the purely constitutionalist argument. The headline claim that the burgeoning of human oriented legal norms provides the foundation for an authoritative new 'moral minimum' in international affairs that has shifted from a focus on the state to a focus on the individual.

Domesticating the International

Judge Weeramantry in his Separate Opinion to the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* argued:

> In its ongoing development, the concept of human rights has long passed the stage when it was a narrow parochial concern between sovereign and subject. We have reached the stage, today, at which the human rights of anyone, anywhere, are the concern of everyone, everywhere" (1996 p. 647).

The claim above is indicative of the outward ripple effect that human rights normativity is said to have had on international society to collapse the idea that the inside realm of the state and the outside of international society are two disconnected entities. Yet, the "inside/outside" (Walker 1993) distinction between the domestic and the international is foundational for International Relations and IPT scholarship in two opposing respects. The first is that it represents a fundamental division that must be understood in the articulation of theories. The work of Hedley Bull is instructive here. Bulls '*The Anarchical Society*' represents the tension between the urge to develop institutions directed towards the goal of international justice as it rubs up against the fundamental and structuring role of the sovereign state and the prioritising of international order (1977). From this, state autonomy ought to be upheld and the inside/ outside distinction continue to structure differing normative horizons as they survey the domestic against the international. The second is that the distinction between the two represents a practical and theoretical roadblock that needs to be overcome. The early work of Charles Beitz in *Political Theory and International Relations* is indicative of this second form of reasoning (1999). For Beitz, sovereignty and state autonomy, the fundamental normative complex which necessitates the distinction between the inside and the outside, could only be upheld if they realised certain epistemological qualities concerning the fulfilment of individual needs. In that regard, he argues state autonomy cannot be upheld. The building up on sovereign autonomy from individual autonomy for Beitz does not hold. "States are not like individuals; they do not have a right to have their 'personalities' respected" (Brown 1992, p. 116).

Where Humanisation comes in here is in the rearticulation of both the place of the division in the contemporary theoretical landscape and what can be argued to collapse the distinction. The approaches above place the division in the land of the socially and morally normative. Humanisation however speaks to legalistic innovations. Before the ICTY in the *Tadic interlocutory decision* for instance, the following was voiced:

> It follows that in the area of armed conflict the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned. Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted "only" within the territory of a sovereign State? If international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight (1995, p. 35).

The very question was asked in part due to the changing nature of war as internal conflicts in the wake of the end of the Cold war saw a dramatic increase. The impact of this builds upon the levelling of IHL as it was 'drawn' towards the direction of IHRL (Meron 2000, p. 244). It is the argument that the normative regimes which govern the distinction between non-international armed conflicts (NIAC's) and international armed conflicts (IAC's) had lacunae in their capacity to institute physical protection. Collapsing these distinctions was thus a primary concern for the *ad hoc* tribunals instituted in the wake of the Cold War.

We may see this illustratively in the preliminary objections voiced in the *Tadic interlocutory decision* before the ICTY. The argument from the defence was that as no international conflict existed of which rules of IHL could apply, the ICTY lacked *ratione materiae* jurisdiction. In response, echoing the argument made in *Nicaragua* that Common Article Three (CA3) was the 'minimum yardstick' applicable to both international and non-

international armed conflicts, the Prosecutor maintained that the term 'laws or customs of war' applies to both internal and international armed conflict (1995, p. 22):

> Laws or customs of war include prohibitions of acts committed in both international and internal armed conflicts. Indeed, common Article 3 is clear evidence that customary international law limits the conduct of hostilities in internal armed conflicts…The fact that acts proscribed by common Article 3 constitute criminal offences under international law is also evident from the fact that the acts within common Article 3 are criminal in nature. They are similar in content to acts prohibited by the grave breaches provision, which clearly entail individual criminal liability (1995, p.23).

Similarly, in relation to the scope of IHL, the *Appeals Judgment* in *Kunarac* contends "There is no necessary correlation between the area where the actual fighting is taking place and the geographical reach of the laws of war" (2002, p. 57). Furthermore, *Kunarac* makes note on the second strand too in considering the nature of conflict:

> The laws of war apply in the whole territory of the warring states or, in the case of internal armed conflicts, the whole territory under the control of a party to the conflict, whether or not actual combat takes place there, and continue to apply until a general conclusion of peace or, in the case of internal armed conflicts, until a peaceful settlement is achieved. A violation of the laws or customs of war may therefore occur at a time when and in a place where no fighting is actually taking place (2002, p. 57).

This extension of protective norms of IAC's to NIAC's for Meron was 'compelled' by the outward ripple effects of human rights law normativity and the broader acceptance of human rights as matters of international concern (Meron 2006, p. 93). Underwriting this norm borrowing is the argument that a 'symbiotic relationship' (2006, p.7) exists between IHL and

HRL united around a common nucleus in the 'principles of humanity' (2006, p. 6). The *Judgment* in *Furundzija* gives the clearest expression of this mutuality. There the ICTY heard that human dignity is "...the basic underpinning and indeed very *raison d'etre* of international humanitarian law and human rights law" (1998, p. 183). Parallel content between IHL and IHRL can then be seen in the protection of the right to life, freedom from torture and arbitrary arrest along with prohibition of discrimination on grounds of race, sex, language, or religion (Meron 2006, p. 45). For Weatherall, this commonality in normative core encapsulates a holistic international '*ordre public*' whereby the cross fertilisation of IHL, IHRL and ICL plug any gaps, the development of an international common morality realised through a universal legal framework (2015, p. xxxvii). For Weatherall, an *aut de judiciare* (an international public order) has replaced *raison d'état* (reasons of state) (2015, p. 1).

To unpack this, a common value oriented public order of states has replaced an interpretation of independent states operating in an international state of nature that is red in tooth and claw. This argument is made available to Weatherall through an identification of *jus cogens* as rooted in a liberal conception of human dignity operating as peremptory norms and giving rise to obligations *erga omne*s - obligations owed to all mankind. The weight of pressure exerted by human rights and a foundational principle of human dignity has shifted international society towards an image reminiscent of civil society: For instance, in relations to breaches of *jus cogens* such as torture, a general principle of accountability is argued to have emerged underpinning an obligation to extradite or prosecute (Weatherall 2015, p. 383). It is the generality of this principle that is important here. "This aspect of international law represents a marked contrast to state interests and the international community concerned exclusively with mediating bilateral relations" (Weatherall 2015, p. 433-434). The result of this being a recasting of how sovereignty works through the incorporation of moral norms via positive international law in the image of *jus cogens* as higher interests of a cosmopolitan international community (2015, p. Xxxviii - 100). The development of such norms moves to a conception of an international community which in recognizing core norms embodied through *jus cogens* shifts the dial of the international interconnectedness closer to that of the domestic:

> Like constitutional law, *jus cogens* substantively enshrines basic requirements of human dignity and represents the highest level of stratified hierarchy. Procedurally, peremptory norms are resistant to repeal and prevail over conventional law (Weatherall 2015, p. 450)

In a similar manner, for Teitel, the interpretive fusing of the three area of positive law underwrites the claim that international law has been changing in its means and methods of operation that brings it closer to that of the operation of domestic law (Teitel 2011, p. 187):

> The reinvigorated humanitarianism of humanity law sparks a rethinking of the prevailing basic categories and distinctions in international legal and political order - such as international/ national, public/ private, and war/ peace divisions (Teitel 2011, p. 110).

The 'Great Divide' is being eroded as the inside realm of domestic considerations are increasingly exported to the 'outside' realm of international politics (Chinkin and Kaldor 2017, p. 37-85). We can see here some of the deep theoretical connections between international law and IPT regarding a shared terrain that considers the relationship between the state and the human agent and how these either are or are not impacted by notions of proximity and borders that shall be explored in more depth in the next section. In this instance, a distinct conceptualisation of the international realm that is closer to the domestic comes into view. As Gerry Simpson notes, "...the international feels more like some national political spaces: a polity in which there is a quite thick and lawful order" (2018, p. 62).

This collapsing of the public and private realms through law and the argument of the emergence of a common legal conscience in turn moves to further arguments concerning the reach of legality and the identity of the state and international society. As Weatherall makes clear:

> If the purpose of the state, in the most basic sense, is to promote the wellbeing of its members, then it is conceivable that the international community of states should be oriented in this common purpose: the wellbeing of individuals who constitute the community of mankind residing in its political subdivisions of states (Weatherall 2015, p. 28)

The contention then is that the humanising intent of the law has come to wrap around international society in full to a form a distinct element in the formation of a humanised international constitution. It makes available the contention that a common international public conscience has replaced a conception of states as atomistic elements occasionally bumping into each other in an unbounded space. In turn, this makes available more muscular approaches to rights infringements as notions of state autonomy are relegated in the face of community interests (Teitel 2011, p. 82).

Paradigm Shift

The preceding argument filters into the broader and more fundamental argument that is common to all theorists of Humanisation. This is the claim of a paradigm shift in the normative foundations of international society. At the surface level, a paradigm shift can be observed. “In classical international law, States were the only subjects of international law, individuals were considered mere objects' ' (Meron 2006, p. 303). This claim is made in a number of ways with a number of consequences.

Meron’s headline claim related to a paradigm shift is that international law has shifted from bilateralism and towards a focus on community interests (2006, p. 247). The driving force of this are ‘principles of humanity’ (2006, p. 6) given a normative scaffold via the invocation of human dignity as the source norm of the United Nations Declaration of Human Rights (UDHR) (1948). The pull of human rights explains the ‘homo-centric focus’ of

subsequent Geneva Conventions and Additional Protocols illustrative of this renewed normative focus (Meron 2006, p. 6).

Meron outlines the history behind this paradigm shift in the following terms:

> Because of its inter-State, reciprocity-based origins, the law of war has, traditionally, protected enemy persons, but not nationals of a State from their own government. Although this paradigm still prevails in some respects, it is changing by means of a process by which the application of the law of war is being assimilated to human rights, a system which addresses the responsibility of governments vis-a-vis populations over which they exercise power, authority or jurisdiction, regardless of nationality. Segments of the Geneva Conventions and Protocols, for example, now apply to the relations between a State and its citizens, especially in internal conflicts" (2006, p. 33-34).

The effect of this being the 'attenuation' of sovereignty (Meron 2006, p.7) as international law develops a more 'humane face' (2006, p. 1). This is established via "the inroads made on the dominant role of reciprocity; the fostering of accountability; the formation, formulation and interpretation of rules" (2006, p. 1). The two bodies of law, united by a common nucleus around 'principles of humanity' mutually reinforce one another by plugging gaps in the protection provided by the other (Meron 2006, p. 6).

The thrust of Meron's thesis concerns the manner in which the normativity of human rights expands to affect the application of humanitarian law. It is the customary nature of such norms which is the anchor for this expansion. The recognition of customary norms in international human rights instruments affects through interpretation parallel norms of IHL (2006, p. 4). Norms that have benefited from this mutual enriching of humanitarian and human rights norms include the guarantees of due process in law, the prohibition of torture, prohibition on arbitrary arrest and prohibitions on discrimination on grounds of race, gender and religion (Meron 2006, p. 6).

The traditional reciprocal nature of bilateral agreements to be reconceived as human rights instruments entailing objective obligations *erga omnes* to the international public community as opposed to specific obligations derived from bilateral treaties illustrate the shift further (2006, p. 249). The shift is reflected in the commentary of the Draft Articles of States Responsibility which refer to the secondary rules of international law governing conditions of breaches of primary obligations. The Articles posit that States are responsible for breaches, and that:

> They apply to the whole field of international obligations of states, whether the obligation is owed to one or several states, to an individual or group, or to the international community as a whole (International Law Commission 2001, p. 32).

There is here an emergence of community interests on an international scale which have come to be reflected in the notion of obligations *erga omnes* (Meron 2006, p. 247). Whereas bilateral agreements coupled an obligation with a corresponding right, the emergence of human rights treaties strained this. Obligations though primarily entail the responsibility of the state. These:

> ...arise from those substantive rules of conduct that prohibit what has come to be seen as intolerable because the threat it presents to the survival of States and their peoples and the most basic human values (International Law Commission 2001, p. 112).

The Draft Articles in determining that responsibility is allied with international obligations rather than coupled with the breach of a subjective right made *erga omnes* 'more viable' by establishing such obligations as the concern of the community of states. Meron contends that:

> Without the damage requirement, a State may promote observance of human rights norms through actions brought before international tribunals to vindicate the rights of persons who are not its nationals (Meron 2006, p. 249).

The shift from bilateralism to community interests has concomitant effects upon the enforcement of international law, as has the increasing tendency to focus enforcement upon individuals. The typically state-centric character of international law was matched in its state-centric enforcement; the resolution methods within the UN Charter for matters of international peace and security are one such instance. The contemporary trend of international law is one that apportions more responsibility upon international organisations alongside increased individual criminal responsibility under the establishment of the International Criminal Court. The move to community interests and innovations in state responsibility concerning obligations *erga omnes* in theory widens the scope of those capable of claiming the right to enforcement. in turn this offers a window as to how the international legal order's normative foundations are articulated as having shifted.

Teitel articulates the clearest claim of a paradigm shift:

> The normative foundations of the international legal order have shifted from an emphasis on state security - that is, security as defined by borders, statehood, territory, and so on - to a focus on human security: the security of persons and peoples (Teitel 2011, p. 4).

There has been a 'fundamental transformation' in contemporary political discourse (Teitel 2011, p. 51). "The leading element in the transformation is a humanitarian legal regime with a greater reach" (Teitel 2011, p. 34). Teitel argues that there is a teleological trajectory evident to the international legal order in which post-Cold War, a Grotian moment is witnessed as States turned to international law as a prospective means for settling disputes rather than as a purely retroactive means to settle scores (2011, p. 105 – 138). This is taken as part of a broader normative reordering, tipping the balance of the international order away

from a focus on the state and towards a focus on 'humanity'. It is through crimes against humanity that this is seen most vividly. The concept 'encapsulates' the paradigm shift by expressing an inviolable status to be attached to the individual. The maturation of international criminal tribunals in turn work to define the boundaries of this new society by judging acts to be on the side of humanity or against it.

An expanded humanitarian regime under the umbrella term 'humanity law' redefining the international order away from a normative focus on state security and towards human security is in the driving seat of this. The humanity norm at the heart of this obtaining to the protection of persons and peoples has evolved in scope from IHL which privileged a connection to the state to latter universalistic conceptions of rights in IHRL and responsibilities in ICL. The shift is evidenced in increased reference to discourses focused on the protection of the human rather than the state in international affairs and in the legitimation of action. Such action itself has become highly defined with a highly legalised system. The confluence of humanity norms shifting the normative optic of international relations has a further paradigm shift in the approach to conflict:

> …are constitutive of the emerging global order, in part, by serving a central discursive function…while this language also becomes, at the same time, a new language of politics. An expanded humanitarian discourse ultimately contributes an alternative basis for global governance, where the concept of the rule of law takes the form of a law-enforcement-based approach to conflict resolution (Teitel 2011, p. 94).

The force of these claims evolves to contend that as the proper subject of international relations is the individual, the meaning of security in both war and peace have changed (2013, p. 13). Tracing the evolution of humanity law, the customary status of CA3 combines with the UDHR to promote a spectre of protections in times of both war and peace. The individual is released from their status as a recipient of rights as a civic individual and rather as a subject of a universal community. The normative conclusions from this are that in the deliberations of political action, that which privileges humanity is to take precedence. To

surmise, “Sovereignty is no longer the self-evident foundation of international law” and “That the new discourse is constructed more along humanity law lines” (Teitel 2011, p.10).

For Weatherall, the shift is declared as the result of the translation of the philosophical principle of human dignity into positive law via the UDHR and subsequent articulations of *jus cogens* which pull upon this:

> The doctrine of *jus cogens* is an expression of the evolution of the international community as a legal community, one regulated by a defined structure of norms and forces captured by the concept of international constitutional law (2015, p. 53).

By articulating the basic unit of concern as the individual and alongside the argument that *jus cogens* represent the common good, the international legal order shifts from a foundation in state security and places a foothold in the concerns of humanity. The contention here is that the force of customary international law in conjunction with such a principle elevates a corpus of norms to the status of *jus cogens*. These being prohibitions on slavery, piracy, war crimes, crimes against humanity, aggression, genocide, torture, apartheid and terrorism (2015, p. 200-241).

It is not so much the content of these norms which is of primary importance here but the structural effect that canonising these norms as having the status of *jus cogens* has. Weatherall posits that despite remaining within the formal bounds of the state system (2015, p. xxxix), their effect is that an international social contract has emerged to produce an individual oriented ‘...international *ordre public*…’ with the effect of recasting the function of sovereignty (2015, p, xxxvi). In this regard:

> Sovereignty is no longer conceived to represent absolute freedom in the internal and external affairs of the State; rather it is understood to be delegated by the individuals within its borders and contingent upon responsibilities owed to them…Consequently,

> in contrast to the dictates of classical sovereignty, the State can no longer be considered an independent 'metaphysical entity' or a 'discrete political world'. Rather, the contemporary international community is defined by interdependence and interconnection through which the actions of one State affect all the others, and elements of public order have evolved accordingly to mediate this developing social space (Weatherall 2015, p. 449).

This evolution was made manifest largely by the acceptance of the norm of sovereignty as responsibility (Weatherall 2015, p. xxxix) and the subsequent integration of human dignity as the animating normative underpinning of *jus cogens*. The nub of Weatherall's argument here is that a cosmopolitan law has emerged to solidify a global civil society as Kantian cosmopolitanism is given legal gloss in the form of peremptory norms that commit to *erga omnes* obligations:

> …cosmopolitan law is conceived to express the common values of the international community in such a way that its violation in one place is felt everywhere, a construction echoed by the general legal interest in the performance of obligations *erga omnes* arising from peremptory norms. The premise of cosmopolitan law, as the final phase of lasting peace everywhere, is similarly reflected in *jus cogens* directed towards the universal protection of human dignity as the means to advance the peace and security of mankind (Weatherall 2015, p. 451).

The combination of these factors creates an international public order which reflects a substantive value dimension in the protection of individuals shifting the notion of sovereignty as autonomy. The paradigm shift links up to the aforementioned domestication of international society.

<u>New Moral Minimum</u>

This section seeks to bridge the preceding sections and articulate how they converge into an argument for a new 'moral minimum' cemented by responding to claims of humanity.

For Teitel, the paradigm shift outlined above is evidenced by the increased reference to discourses focused on the protection of the human rather than the state in international affairs and in the legitimation of action. Such action itself has become highly defined with a highly legalised system. This legalisation lays "...the basis for a constitutive international society" (2011, p. 378). The force of these claims evolves to contend that as the proper subject of international relations is the individual, the meaning of security in both war and peace have changed (2011, p. 13).

There is then for Teitel a minimal substantive core inherent in the international legal order." The notion of human security reflects this minimum substantive morality" (Teitel 2011, p. 156 - 157). This in turn underwrites a new language for policy making "…its constitutive principles, processes and values" (2011, p. 15).

The force of the argument starts to reveal itself here. As Teitel notes, "Humanitarian legalist discourse offers an alternative set of principles and values for global governance" (Teitel 2011, p. 35). We may see here the broad changes to the structure of the international order under the weight of these. For instance, Teitel posits:

> The heart of the problem is the continued adherence to state consent as the exclusive indispensable source of legitimacy, even when it comes to legal developments in the area of human rights. In the extreme state-centric approach, the authority of international law - whether via customary law or via treaty - continues to depend on ex ante agreements among states": (Teitel 2011, p. 173).

Furthermore, "The transformation in the international humanitarian law regime represents a shift not merely to an expanded legalism but also to a new and distinctive discourse of justice" (Teitel 2011, p. 64). Other foundational positions that structure the international order come under this critical gaze include the separation of *jus ad bellum* and *jus in bello* (2011, p. 73 - 165). In a similar vein, Weatherall argues that the international

community has matured in its process of socialisation to consider the erosion of traditional constitutional norms of the bilateral model as of consent. For Weatherall, the state ought to be viewed instrumentally, as means to fulfilment of human subjects which loses its sovereign rights in the face of inadequate protection of its citizenry (2015, p, 456).

What underwrites these arguments is the furnishing of the claim that the legalistic embellishment of human oriented norms merely reflects a more basic 'moral minimum'. The claim is that such a minimal rule:

> ...serves no particular interest, expresses no particular culture, regulates everyone's behaviour in a universally advantageous or clearly correct way…This is the standard philosophical view of moral minimalism: it is everyone's morality because it is no one's in particular, subjective interest and cultural expression been avoided or cut away (Walzer 1994, p. 7).

The argument laid out is that under traditional conceptions, such minimal social morality was fleshed out through norms that speak to a pluralistic interpretation of international society with the stressing of norms of non-intervention, self-determination and consent (Walzer 1994). Such an understanding is argued to have been surpassed. There are myriad ways in which this claim is made which begin to show the interdisciplinary potential of Humanisation. For Teitel:

> Humanity law - as a basis for a universal, global rule of law - depends on a discourse and structure of claims-making that has become the *lingua franca*, surpassing while also encompassing human rights law and norms (2011, p. 205-206).

In arguing that human oriented normativity of international human rights has moved to being international politics *lingua franca,* they reflect a foundational social morality which moves the dial in terms of international ethics. The fusing of the strands outlined above

furnish the claim that human rights are now a matter of international concern (Meron 2006, p. 93). Such norms are found in general treaties that lay a minimal base of community values rooted in the protection of the human (Meron 2006, p. 187).

The procedural nature of international law in which international action is constrained primarily by the norm of consent is then considered outdated in the face of contemporary threats and under the weight of claims that rest on a human rights foundation. Rather, the normative momentum of human rights and an understandable surface level desire for a wider bracket of permissible humanitarian supplied by the international legal order is argued to offer a blueprint for a new conception of international order. By arguing for a shift in focus, the international legal order is argued to offer a blueprint for a new international society. "It reframes the problem of global justice in terms of the human, so that the core measure of justice begins with and concerns human protection" (Teitel 2011, p. 14).

The statist foundations of international law are then jettisoned in favour of a focus on 'persons and peoples' that offers a new set of procedural guardrails for the operation of international law in staking out its new ethical ground. In essence, by moving to a focus on the priority of human security, forms of legal procedure born from an equilateral multilateralism are jettisoned. It is the *grundnorm* status attributed to humanity which is key to these efforts. They are then given argumentative force in neo-Kantian style through the argument that internal and international justice are synonymous and the problems therein may be quelled by differing forms of international law enforcement.

What the arguments above fold into is the argument that the legalised humanity norms that are the theoretical lifeblood of Humanisation are the constitutive norms of a newly emerged global order that is conceptually closer to the domestic model. Such norms contrast with purely moral accounts of a universal humanity and instead conceive of an order amongst political communities through international law in which the human is the central normative focus. This theoretical position maps onto a broader debate within ILS in the form of Constitutionalism. Both Humanisation and Constitutionalism focus on principles transforming the international legal order (Kochi 2020, p. 487-488). For instance, the notions of sovereign equality and reciprocity are taken as such constitutional features of the Westphalian model

whereas the protection of humanity is taken as the core constitutional feature of a 'humanised' international legal order. Discussion now turns to consider how Humanisation and Constitutionalism may be considered theoretical relations.

1.1E: Constitutionalism and Humanisation

Constitutionalism seeks to articulate the emerging construction of a set of ordering values, hierarchy and bases of legitimacy in the international order (Scicluna 2021, p. 87). Constitutionalism has a longer scholarly provenance than Humanisation though only really came to prominence post-Cold War era as legalisation, the rise of novel international actors in the legal process such as individuals and the increased salience of national and international matters needing regulation (2009, p. 4). As such, Constitutionalism may be seen to offer a more robust backdrop from which to pitch the central ideas of Humanisation. Indeed, Humanisation may be taken as one cog amongst many that Constitutionalism examines in moving the international legal order towards a more unified, constitutional, whole.

Conceptualising the claims of Humanisation in this way offers a useful way of engaging with the emerging tradition of Humanisation's broad structural claims and the ethical scaffolding erected around these. Each press to outline the manner in which constitutional principles grounded in individual rights operate on multiple levels (Besson 2017, p. 234). In articulating these claims, both pull upon the increasingly socialized and legalized international relations towards their accounts of an international juridical conscience that emphasises communal values through law. As Antonio Trindade, whose work straddles both Constitutionalism and Humanisation, articulates: "...basic considerations of humanity…" are "...permeating distinct chapters of International Law" (Trindade 2013, p. 393). Pitching Humanisation in this manner also offers insight to the critical literature surrounding these claims which posits features such as the international legal systems decentralisation alongside the pluralist organisation of the state system as providing limits to which Humanisation may run to (Tzevelekos 2013).

Jan Klabbers makes the distinction between two varieties of Constitutionalism: normative and empirical. Normative approaches set out a view of Constitutionalism as a project which seeks to realise ideals of justice and delineates how these may indeed be realised. Empirical Constitutionalism traces the sociological process of increasing interaction between legal orders (Klabbers, Peters and Ulfstein 2009, p. 4-8). In both, a sovereignty piercing effect of international law is broadly justified by emphasising a deeper normative reality in which state consent is relegated and international law's capacity to realise human interests are foregrounded. For instance, Besson emphasises the concept of 'transnational legality' of IHRL aside the charge that constitutionalism has moved beyond a grounding in state consent. Rather, legitimacy is argued to be found in the overlapping domestic and transnational human rights regimes which articulate minimal standards (2017, p. 236-237).

Kumm fashions a similar argument to Klabbers in the distinction between 'Big C' and 'small c' constitutionalism. 'Big C' constitutionalism emphasises the self-governing nature of States. There is scepticism of projects for global constitutionalism to which Humanisation has hitherto been a part, expressed in the writings of the 'New Sovereigntists'. Emanating from the USA, they dispute the background ethical position regarding the notion of universal justice that the ICC is taken to attempt to underwrite, and without which makes illegitimate any attempt of an international body to usurp national legislation (Brown and Ainley 2009, p. 233). Posner and Goldsmith serve as an example here in their argument of the ephemerality of international law and its irrelevance when conflicting with *raison d'état* (2005). Kumm defines Big C constitutionalists of this sort in the following terms:

> They believe that constitutional rhetoric is used to cover up what they see as a significant normative problem with recent tendencies of international law: the increasing divorce of international law from the legitimating anchor of state consent (Kumm 2013, p. 608).

What may be inferred about the density of the connections that constitutionalism posits on a 'Big C' reading is limited. The legitimacy hinge for autonomous self-governing units

continues to be the consent of states akin to that of individuals in the domestic model of the social contract (2013, p. 607-609).

Small c' constitutionalists rather conceptualise the international legal order as an autonomous order above that of States (2013, p. 609). The 'fact' of international interdependence (Kumm 2013, p.612) moves to the consideration that 'small c constitutionalism' furnishes the legitimacy of a cosmopolitan global constitution. This exists above that afforded by state consent as traditionally construed and hinges upon human rights, the rule of law and liberal democratic principles (2013). Whereas typical cosmopolitanism regards there to be a universal moral community with political communities superimposed on top, the argument here differs in the claim that this community exists by the virtue of law which takes a normativity of its own akin to Humanisation. Rather than rooting the argument in foundational moral virtues that work from the top down, it is the empirical fact of human oriented treaties in a state of international interdependence which is of primary importance.

Anne Peters offers an example of 'small c Constitutionalism' in arguing the status of humanity as the '*alpha* and *omega*' of sovereignty. Empirical developments such as the Responsibility to Protect (R2P) are postulated as evidencing a reversal of the state-agent relationship as typically construed. The argument put forth is that a historical teleology is observable that places humanity at the core of justifications of sovereignty, the discursive reconfiguration of sovereignty from right to responsibility being the culmination of a welcome trend in which the principle of sovereignty is ousted as the '*Letzbegrundung*' (first principle) of international law. "A humanized state sovereignty implies responsibility for the protection of basic human rights and the state's accountability" (2009, p. 513). The image of international society that Peters draws from this is muddled. On the one hand, humanisation has instituted broad alterations in the international legal order. Sovereignty has been limited not only by the development of independent principles of human rights but by the broader notion of sovereignty in the service of humanity. What is meant by this is that sovereignty has been reconfigured along two accounts. The first is that external state sovereignty (the presumption of equality qua other states and with that the principle of non-intervention) requires justification. As a matter of legal status, this aspect of external sovereignty is traditionally considered as having an all-or-nothing status. States under international law are

equally legally sovereign. The second being an extension of the notion of sovereignty as responsibility as endorsed by R2P. Sovereignty on this account retains its foundational legal status but is limited by the concept of humanity as entailing the protection of rights and the accountability of the state (Peters 2009). The international legal system is still one marked by state-subjectivity with the value of humanity occupying the place of the new *grundnorm*. On the other hand, despite the assertions of the transition to a humanised regime and the connected notion of global solidarity, Peters continues to be disciplined by the practical mechanisms of the state centric international community, such as the UNSC, as the fallback for remedial action (2009).

The affinities between Humanisation and Constitutionalism are then clear to see. They are both taken to be a 'practice' and a 'cognitive frame for scholarly inquiry' (Kumm et al 2017, p. 2). Each note the mutual subjectivity of differing *lex specialis* and posit a degree of normative permeation to follow from this. They are each articulations of the manner in which we may conceptualise a legal scaffold encasing the international order to the effect of forming a constitutional whole. Humanisation may then be taken as a project of global constitutionalism. Both have emerged in response to the post-cold war political and legal international environment. In addition, both offer accounts which trace the empirical uptick in human centric norms in the post-1945 era and slip into arguments of the normative sort in postulating these to be an indication of the inevitable realisation of certain justice goals in the international legal order. Similar to both Constitutionalism and Humanisation accounts is a rights-based normative agenda that seeks extends protections further than the fact of jurisdiction would permit. There is a shared theoretical commitment grounded in the construction of a rights based international society that extends protections extraterritorially and moves to claims of universality through the assertions of the purchase this rights-based account of an international constitution holds.

Furthermore, both contend large scale alterations are justified on the basis of arguments concerning the maturation of communal norms. In both Constitutionalism and Humanisation, the weight of argument positing the need to move to a less consent-based system of international law making is significant. In regard to Humanisation, further alterations to the tapestry of longstanding norms are probed. For instance, the longstanding

principle of the moral equality of combatants is questioned as *jus ad bellum* concerns regarding the justification of war seep into *jus in bello* principles (Teitel 2011, p. 36). These are significant alterations which probe into the deep structures of international society and some of its fundamental tenets regarding sovereign equality, the foundations of international law and the conceptualisation of the international community's identity. Articulations in both fields of scholarly inquiry then need to be precise and have the necessary social legitimacy behind them in order to have purchase in both the scholarly discourse and practices of international relations.

Section Two

This section aims towards an analysis of some of Humanisation's core positions and presuppositions as they arose through the previous exposition of Humanisation. Discussion first concentrates on the claim that human oriented international law operates akin to constitutional law in domestic society. This brings with it an array of voices from International Law scholarship but also International Relations Theory and International Political Theory. Discussion shall then move to explore the key positions and presuppositions which run through accounts of Humanisation made thus far.

1.2A: A Constitution for Humanity?

Constitutionalist arguments have brought accounts of international legitimacy which seek to integrate international law with broad references to human rights, sovereignty, democracy, solidarity and power (Wiener et al 2012, p. 1). Such references are as at home in the arguments of Humanisation as they are in Constitutionalism style arguments. Yet rather than evincing increasing homogeneity, Martti Koskenniemi emphasises how these are rather a reflection of the 'fragmentation' of international law as established legal hierarchies become substituted for functional regimes. Such specialisations as human rights law and international criminal law 'institutionalise' the priorities of their field. "As a result, political conflict will often take the new form of conflict of jurisdictions" (Koskenniemi 2011, p.334- 335). For Koskenniemi, we must recognise how the surface upon which the game of international law is played is not neutral but is underpinned by discourses of power (2011).

Buchanan alternatively terms capacity for fragmentation rather more optimistically as evincing a 'high degree of modularity' (2013 p. 210). The compartmentalised nature of the international legal system evinces a capacity to change. "Because it is not thoroughly unified, it is possible to change some parts of it without having to change the whole thing" (2013, p. 211). The weight of such principles underwrites the claim of Buchanan regarding

the need to shift those areas of law which do not furnish the individual as its primary subject (2013, p. 275).

What is important here is how the same set of principles used in both Humanisation and Constitutionalism provoke differing analytical responses. From one end of the spectrum, there needs to be a conscious recognition of the particularistic origins of international law and the manner in which it is not just important what the law says, but what the law does and to whom these benefits. On such a view, politics and power are deeply entrenched into the deep structures of international law. From the other end of the spectrum, the fleshed out individual subjectivity that marks Humanisation and Constitutionalism is evidence of the truth of liberal cosmopolitan proposition (Weatherall 2015). The primary fault of the international legal system is its gearing towards problems of a state-centric system and so needs to be "…altered significantly…: (Buchanan 2013, p. 274).

What justifies assertions of the kind Buchanan moves towards in striking similarity to Humanisation is the theoretical grounding from which such theories spring. Both Humanisation and Constitutionalism may be seen as grounded in a liberal optimism which seeks to trace the shifting nature of sovereignty under globalisation and adopt a common substantive focus on the individual subject in international law (Kochi 2020). Such a starting point in normative individualism was particularly in fashion in the immediate post-cold war period. Fernando Teson makes the point with most lucidity and it is worth recalling it at length:

> Liberal theory commits itself to *normative individualism*, to the premise that the primary normative unit is the individual, not the state; thus it can hardly be reconciled with the statist approach. The end of states and governments is to benefit, serve, and protect its components, human beings; the end of international law must also be to benefit, serve, and protect human beings, and not its components states and governments. Respect for states is merely derivative of respect for persons. In this way, the notion of sovereignty is redefined: the sovereignty of the state is dependent upon the state's domestic legitimacy;

> therefore the principles of international justice must be congruent with the principles of internal justice (1998, p. 1 emphasis in original).

This moves to assertions of global protection for the individual. The historical notion of crimes *hosti humanis generis* typically attributed to a relatively small corpus of acts such as piracy and aggression takes on a wider conceptualisation. They entail a wider substantive focus on the individual through the prism of Crimes Against Humanity fleshed out through the Rome Statute. At the same time, they narrow the focus of accountability with potentially destabilising results. The mobilisation of a language of humanity and inhumanity, on the inside or the outside, are mobilized politically to underwrite the use of force and create a hierarchy *in bello* (Graf 2021, p. 171). For example, in a 2011 speech justifying the U.S. practice of targeted killings, John Brennan, the chief counterterrorism advisor to President Obama, spoke of such kinetic force employment as occurring only in "Badlands" (Moyn 2022, p. 286).

Meron's assertion of IHL and HRL's common denominator in the principle of human dignity, Weatherall's connection between peremptory norms of *jus cogens* with human dignity and Teitel's tripartite formulation of humanity law forming the grounds of an emerging solidarist international society are each indicative of this conceptual broadening. Vetterlein and Wiener critique the background assumptions which feed into this as assuming the existence of a liberal community already in place (2013, p. 87). Doing so neglects the process of normative construction in relation to the international community and the varied roles that both states and individuals play within this. Kumm's argument of a 'cosmopolitan turn' in global constitutionalism is demonstrative of this (2013) (2014).

Such a cosmopolitan turn can be seen in the gestures towards Humanisation seen in IPT. Allen Buchanan for instance, in terms which echo the exposition above, agues:

> It has been said that human rights are a global moral *lingua franca*. More accurately, international human rights law is the universally accessible *authoritative* version of the global moral *lingua franca*. This branch of international law is not just employed

> as a powerful instrument for realising moral values; in addition, compliance with its norms is widely thought to be morally obligatory. Especially in its embodiment in the core documents international human rights law provides a uniquely salient global standard to which various parties – from international to domestic judges to NGO workers to protestors against tyrannical governments or opponents of the rapacity of global corporations – can appeal (2013, p. 7 emphasis in original).

Working from a similar theoretical register to Buchanan, Charles Beitz makes the claim that:

> Human rights are the constitutive norms of a global practice whose aim is to protect individuals against threats to their most important interests arising from the acts and omissions of their governments (including failures to regulate the conduct of other agents) - the purpose of which is to bring the conduct of the domestic governments into the purview of 'legitimate international concern' (Beitz 2009, 197).

More shall be made of these in positions in the following pages. The purpose here is to briefly note how the arguments of Humanisation as an element of constitutionalism has an interdisciplinary potential. It also draws attention to the manner in which the arguments are built broadly from the letter of the law. Yet doing so obscures the rhetorical force of such norms.

Indeed, whilst Humanisation makes the claim of rhetorical success (Meron 2006, p. 86), such conclusions are wholly not shared by others in the relevant literature. Tzevelekos for instance argues that while Humanisation has potential in developing towards a notion of humanity as a truly shared *grundnorm*, the trend has been 'somewhat inflated' (2013, p. 63), a symptom of 'legal short-sightedness' exemplified by assertions of a paradigm shift. Rather, "The humanisation of international law is gradually revealing its limits and actual dimension" (Tzevelekos 2013, p. 63).

Humanisation is taken as a source of change, but it is one of systemic evolution rather than systematic revolution and to take the position of the latter is premature. Rather

than amounting to the fundamental *grundnorm* of international society as Peters posits, the rise of human subjectivity is just one of a mixture of ingredients of the constitutionalisation of international law which still retains its state-centric character (Tzevelekos and Lixinski 2016, p. 345). To be truly reflective of its normative assertions, this would entail "...the end of the world as we know it" (Tzevelekos 2013, p. 75). It would require elements of Kantian cosmopolitanism, a more centralised organisational structure, more robust judicial enforcement and heightened legal powers to individuals and nonstate actors. As a theoretical response to the introduction of individual subjectivity then, the humanising intent needs to be reconciled with the 'structural characteristics' of the international system. These being decentralisation, sovereign equality and the preservation of state sovereignty (Tzevelekos 2013, p. 73-75).

These facts of the international system then are taken to reflect the basic features of its main actors, states, and the ultimate recourse such actors have in exercising authority over a given area. That said, Tzevelekos argues Humanisation offers a rather more tangible approach to understanding the dynamism of the international legal system that the cumbersome approach of constitutionalism misses in understanding contemporary alterations to the international legal system (2013, p. 76). The contention made by Tzevelekos, both independently and in later work with Lixinski, is not that certain constitutional features aligned with the humanising ethic have not appeared in the constitution of the international legal order. Rather, it is that these features do not have the force to transcend the structural imperatives of what may for shorthand be referred to as the Westphalian legal order. In short, the argument is one of a recognition of evolution within the international legal order rather than revolution. It argues that in recognising these advances one should not lose sight of the foundational features of the international system (Tzevelekos and Lixinksi 2016, p. 345).

More nuanced positions such as this take note that "Something is changing" (Scharff 2019, p. 588). Yet they dispute the argument of rupture and revolution in which politics and law are immunised from each other impacting the normative foundations of international law. Michael Ignatieff posits that to imagine a world of human rights as somehow severed from the politics between states is naive (2005, p. 35). John Laughland too voices concern regarding the proposed universality and immunity from political forces of human rights

doctrine due its essentially politically constructed nature (2002, p. 55). Holbrook advances on this to note the concern regarding the specific practice of humanitarian intervention that if a permissive norm were to evolve, it would mainly be in service of the already powerful (2002, p. 142 - 143). Where these positions differ is in noting human rights having emerged to press upon state sovereignty a critical legitimating interlocutory force while denying the force of the charge that this amounts to a revolution on the normative foundations nor the structure of that order.

Jean Cohen argues persuasively in this regard that we should proceed with caution when contemplating arguments which conclude in the undermining of sovereignty (2012). For Cohen, arguments of this sort which diminish state consent to international law as part of a radical project. The theoretical diminution of the core organising principle of sovereign equality by appeals to cosmopolitanism, human rights or human security mask deeper political desires:

> Relentless attacks of the principles of sovereign equality coupled with the discourse about 'rogue' and 'failed' states, 'preventive war', the 'war on terror, ''unlawful enemy combatants', etc., are useful for neo-imperial projects of great- or super-powers interested in weakening the principles that constrain the use of force and deny them legal cover or political legitimacy when they violate existing international law (Cohen 2012, p. 3).

Further adding that:

> If we assume that a constitutional cosmopolitan legal order already exists which has or should replace international law and its core principles of sovereign equality, territorial integrity, non-intervention, and domestic jurisdiction with "global cosmopolitan right" we risk becoming apologists for neo-imperial projects (2012, p. 24).

This does not amount to a denial of the importance of individual subjectivity within law nor its normative effects on sovereignty typically construed. Nor does it move to an argument of wholescale revolution, noting instead that individuals are subjects but not the authors of international law (2012, p. 24). What follows is the defence of a 'dualistic' international order (2021, p. 313). An order which retains a pluralistic core whilst acknowledging the emergence of cosmopolitan elements within it. Though it denies the charge that these cosmopolitan elements should dictate the future direction of international law's evolution and our political responses to global crises.

Cohen advances to posit a form of 'low intensity' constitutionalisation (2012, p. 20). Such constitutionalisation should not mirror that of the domestic (2012, p. 311), but rather take heed of pluralism as a fact of the international system. The international legal system is not 'monist' enough in its values or purposes for this to be a conceivable path forward (2012, p. 314). Rather, sovereign equality must be upheld as a legal principle with global governance institutions, in particular the UNSC, shedding its 'activist' disposition in its selective enforcement of "…humanity law…" (2012, p. 310).

The basic idea for Cohen then it to harness the constitutive elements of the UN Charter in upholding sovereign equality and non-intervention. Rather than mirroring the domestic system, "The project of constitutionalisation of the UN Charter system should not aim for this" (2012, p. 311). The reason for this is the difference in purpose and composition of the two systems. Insights form IRT literature give broader insight to help unpack this.

For Terry Nardin, whose work straddles both IRT and IPT, to conceptualise international society as a mirror of the domestic is to confuse the specific underpinnings of the relationship. For Nardin, whereas a domestic society can be conceptualised as a 'purposive' relationship that is akin to John Rawls's claim of such societies being a 'cooperative venture for mutual advantage' (1971, p. 4), such an association does not carry to the level of international society. "In short, to judge purposively is to refer to outcomes or ends, while to judge practically is to invoke recognised principles or rules" (Nardin 1992, p. 20). For Nardin, it is the practical understanding of this underlying relationship that should be emphasised when speaking of international society and international law.

Such an understanding emphasises the specific character of international law. Nardin distances himself from theories like that voiced by Humanisation theorists which seek to impute on international law the same conditions deemed necessary in domestic legal systems. Doing so is, according to Nardin, a confusion of the necessary and contingent features of law. Features such as legislation and enforcement that are readily apparent in the domestic are contingent features of law, but they are not necessary (1983, p. 115-132). It is this specific character that prompts consideration on the nature of the association at the heart of international society for which Nardin believes should be correctly deemed as based on authoritative practices and conceived as a 'practical' over a 'purposive' relationship. The distinguishing element is whether the conditions prescribed by the rules are formal and to be observed regardless of their effect in realising a certain end or whether they are useful for the realisation of certain ends (Nardin 1083, p. 8). 'Practices' to this end do not prescribe a goal but they may aid its pursuit, they are rather 'directions' or 'constraints' (1983, p.7) of which there are two types: instrumental and authoritative which map on the purposive and practical dichotomy. Purposive association is based on instrumental practices that orientate action towards the realisation of a unifying purpose. Practical association rather is a relationship of authoritative practices to be observed regardless of the outcome. The basis of the practical relationship is that it is unity of actors who are otherwise engaged in differing and potentially incompatible purposes (Nardin 1983, p. 9).

Humanisation rests on the fundamental presupposition that international society may be conceptualised as a 'purposive' international society, as "...joined in a cooperative venture to promote common ends" (Nardin 1983, p.5). This reading of the nature of international society has a significant impact. It enables and legitimises means and methods to protect these common ends, most notably a loosening around humanitarian intervention. While both Humanisation and Constitutionalism trace the manner in which a dense network of legal connection makes power accountable, they also licence the use of power too. The alternate means of conceptualising international society as a practical association is one that sheds notions of common purpose and instead places emphasis on the conception of international society upon authoritative procedural rules found in customary law (Nardin 1983). The connection to Humanisation again here relates back to

the dichotomy of purposes outlined in the UN Charter between the affirmation of state sovereignty and the protection of human rights and the distinction between structural and substantive peremptory norms (Orakhelashvili 2006). If indeed international society can correctly be identified as purposive, the weight of Humanisation claims gains additional purchase. If not, it points to the need for more to be done and for alternative ways in which we may conceptualise the normative development of international society that recognises the restraining role of the state and sovereignty (Walker 1993).

The purposive conceptualisation of international society is though the dominant means of conceptualising the foundational association of international society and is reflected in the theoretical scaffolding supporting Humanisation. The dominant voices in these fields have been those of a liberal cosmopolitan approach (Tzevelekos 2013) (Tzevelekos and Lixinski 2016) (Kochi 2020). They have sought to orient the direction of global relations in a manner consistent with liberal principles and towards common goals. These include but are not limited to individual human rights, the rule of law, capitalist markets, cosmopolitanism and liberal democracy (Kochi 2020, p. 487-488). Whilst the purposive conception holds purchase in regard to explaining the character of certain kinds of international association, it lacks the theoretical resources to account for international society as such (Nardin 1983, p. 310).

For Nardin, "We cannot simply assume that the effort to establish civil institutions in the society of states will necessarily strengthen and improve international law" (Nardin 1983, p. 149). Doing so is to overlook the sort of pluralism that represents a fundamental difference between domestic and international society and the legal systems that follow. Such fundamental 'rules of recognition' to use Hart's term as they have been expressed through humanisation miss the key element that it is acceptance by the members of the community that determines whether a rule is valid (Nardin 1983, p. 157). Where Humanisation may miss the mark in this regard is attributing the 'authoritative determination' of the import of legal norms in the pronouncements of judges akin to the domestic legal system and evading looking at the broader social legitimacy that is formed through acceptance of and practice around a norm. Nardin attributes this to the mistaken assumption that the international and domestic legal system are 'sufficiently analogous' (Hart 2012, p. 231) to consider that the form of the latter should be applied to the former

with authoritative judgements found in the conclusions of judges. Yet the necessary and imperative role of States, as both the primary actors and subjects of this system, makes such a conclusion out of step to the broader society to which it applied. To this end, Nardin contends the idea of a fundamental rule of recognition that Humanisation imputes as being located as rooted in the claims of humanity needs to be jettisoned. Rather, we need an account in which legitimacy derived from the specific practices of the society to which the law applies - international society. The necessity of this is due to the absence of an independent criterion to adjudicate on the validity and legitimacy of claims. Rather, the focus is on the actual acceptance of those rules and the manner in which consistency and uniformity rely upon the maintenance of consensus as markers of the law and the system's validity (Nardin 1986, p. 166-176).

The takeaway from Nardin is the claim that "The law serves rather than limits" (Nardin 1983, p. 95). In the specific circumstances of international society, the authority of international law lies not upon certain value-based judgments as to the content of rules but on the authority of international law in toto' "Acknowledgment of the authority of international law is not to be confused with approval of its particular content" (Nardin 1983, p. 220). Rather, it must be remembered that:

> The society of states is not itself a state, and therefore judgments concerning the existence and prospects of legal order within it must take account of the specific character and circumstances of that society (1983, p. 148).

Travelling from a different direction but towards the same destination, Martti Koskenniemi is equally critical of what he sees as the 'liberal desire' to escape the abyss of international politics by replacing it with law (2011, p, 37). Koskenniemi questions what he regards to be the liberal impulse to escape international politics through international law that Humanisation contends to be desirable. The desire to import the liberal principles of the enlightenment "...and their logical corollary, the Rule of Law…" onto the international stage as they are applied in the domestic being one based upon a mistaken assumption that such principles may hold universally as they do in the domestic state (2011, p. 36).

Remaking international law and politics in the image of liberal domestic societies does not resolve any potential debates, instead it moves them into the realm of law. “As a result, political conflict will often take the new form of conflict of jurisdictions” (Koskenniemi 2011, p. 335). Consider for example the separate opinions of Judge Kreca and Judge Bennouna in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro). The purpose of which is not to draw any substantive conclusions but to illustrate the manner in which legal argument has an internal politics to it. Debate hinged upon the degree of intent. For Kreca, the notion of intent implies specific knowledge of the intent to commit genocide of which there were none (2007, p. 470). For Bennouna, to do so seems frivolous:

> ... it is rare for a State bluntly to proclaim its intent to destroy, in whole or in part, an ethnic, cultural or religious group or to disclose its knowledge that such a crime was going to occur or to admit to having committed it” (2007, p. 323).

Rather the intent has to be inferred from the actions of states, with Bennouna citing the ongoing financial, military and political assistance of the Serbia and Montenegro to the paramilitary army under charge of Mladic before, during and after the massacre at Srebrenica (2007 p. 363). The former takes a practical approach to the rules whereas the latter takes a more consequentialist and purposive interpretation of the actions.

The thrust of Koskenniemi’s argument concerns the argumentative structure of international law, the ‘reasons internal to the ideal itself’. International law seeks to elucidate the content of the rule of law and is a refutation of the idea of laws immunity from politics. International law, rather than representing a ‘flight’ from international politics (Koskenniemi 2011, p. 37), oscillates between ‘apology and utopia’, caught between fidelity to state practice as well as pointing toward normative goals in order to ground its legitimacy. For International law to have purchase rather than representing a ‘flight’ from international politics (Koskenniemi 2011, p. 37) it needs to seek a path between verifiable state behaviour and normative ideals. In staking out a middle ground, “the two requirements cancel each other out” (2011, p. 39). Thus, leading to a valid justification as to

the substance of law that neither comes close to state behaviour as to be an apology for power nor being so far removed from the realm to which it is to apply as to be considered utopian.

What Koskenniemi draws attention to is that international law is not a neutral surface. Rather it has an internal politics to it and that interpreting acts of international bodies such as the ICJ or the ICC as authoritative statements of the nature of international society is to engage in ideology by overlooking "...the routine of hegemonic politics that leads to their adoption" (2011, p. 14). By moving to a conception of international law as akin to that of domestic society is to think of international law instrumentally and to make it a "...disposable tool for power' (2011, p. 241). The properly construed normative substance of the law is muted as the indeterminate language of legitimacy is foregrounded.

The difficulty is the subjectivity of these terms. One may invoke terms of humanity and the 'good' but it is the filling out of these concepts that is difficult. To decide upon such a value is to already colour the determination in one way or another towards a particular interpretation in which "In the end, which language will prevail is simply a question of power" (2011, p. 326). Whilst the language of humanity is compelling then, it is the practical outcomes of the language that empowers the already powerful and in taking the facts of the international system as right turns into an unwitting apology for power that is the problem (Graf 2021).

What both Nardin and Koskenniemi draw attention to then is the specific nature of international society and how arguments of liberalising the international rule of law is to confuse the specific underpinnings of this relationship. In doing so, the law risks moving from being a regulatory mechanism for cooperation between states to a potentially unwitting apology for power. Discussion now turns to explore the claim of a paradigm shift in greater detail.

1.2B: Paradigm Shift or Overreach?

The concern here is whether the statement of a paradigm shift, from state to humanity (Teitel 2011), "From an inter-state to an individual rights perspective" (Meron 2006, p. 9) or from *raison d'état to an aut de judiciare* (Weatherall 2015) can be supported. This feeds into broader theoretical concerns with Humanisation as it currently exists in that linking the practical dimension of Humanisation with political theories that centre upon the individual alienates those States without such a liberal underpinning in terms of accounting for true ethical universality. Further, in elevating the moral dimension of Humanisation above the circumstances to which the norms apply, the resulting picture of the place of normative evolution of international society is skewed.

Here I borrow from John Tasioulas to consider the manner in which the language of Humanisation may have become marked by 'conceptual overreach':

> This occurs when a particular concept undergoes a process of expansion or inflation in which it absorbs ideas and demands that are foreign to it. In its most extreme manifestation, conceptual overreach morphs into a totalising 'all in one' dogma. A single concept – say, human rights or the rule of law – is taken to offer a comprehensive political ideology, as opposed to picking out one among many elements upon which our political thinking needs to draw and hold in balance when arriving at justified responses to the problems of our time (2021).

The Humanisation thesis position regarding the reorientation of international law towards the human person potentially commits conceptual overreach by attributing to the rule of law a humanitarian *grundnorm* which is then raised to the level of evidencing a universal ethical standard. The very argument of a paradigm shift brings forth a language that seeps into broader discourses which can itself be seen as indicative of the type of overreach that Tasioulas voices concern over. It may also be seen in the emphasis placed on the end of the Cold War as heralding a new age in international affairs. It is to these ends which this discussion now turns, focusing first on arguments of a post-Cold War 'new age' before focusing on the theoretical claims of Humanisation regarding a paradigm shift.

As discussion of Humanisation and Constitutionalism explored, the end of the Cold War is taken as the turning point in which a human oriented normativity is argued to have come alive. “Everything seemed to fit like a hand in a glove” (Kratochwil 2014, p. 169). A decisive shift was argued to have occurred whereby the only ‘universal value’ which the East and West could agree on during the preceding years had shifted from ‘order’ to ‘humanity’ (Dunne and Staunton 2016, p. 46). For Fernando Teson, it was the birth of a new time that called for fresh conceptual and ethical language that minimised the state and promoted a neo-Kantian reading of the centrality of the individual in international law (1998, p. 1- 38). For Christian Tomuschat, it opened the door to a “…definitive new equilibrium…'' to emerge that Cold War politics had laid a carpet of power politics over (1999, p. 162).

This type of conceptual overreach is not new to international legal thinkers. Koskenniemi contends Hersch Lauterpacht and others to have correctly identified the mitigation of pure sovereignty under the influence of globalisation:

> But they were wrong to believe that this would lead into a cosmopolitan federation. When the floor of statehood fell from under our feet, we did not collapse into a realm of global authenticity to encounter each other as free possessors of inalienable rights...As our feet hit the ground, we found no Kantian federation but the naturalism of Pufendorf and Hobbes - powerful actors engaged in strategic games with their eye on the *Pareto optimum* (2011, p. 345).

Such positions speak less to arguments of revolution and more to those which stress evolutions. Whereas claims like that of Anthony D'Amato that human rights impacted a “…revolutionary'' change on the classic rules of state oriented international law (1998) are argumentatively appealing, they carry a sense of wholeness that the complexity of international relations denies.

Indeed, with the vantage point of history such claims seemed to overstate the extent of change. For Nicole Scicluna working from a constructivist perspective within International

Relations Theory, it looked less like revolution and more like evolution. It was not the end of history in which the 'old game' of power politics had been immunised by a new international rule of law (Scicluna 2021, p. 326). From IPT, R.B.J. Walker argues whilst the dissolution of the Cold War gestured towards a new order, it looked suspiciously like the old. The players of 'the game' may have changed, but the old rules were likely to remain (1993, p. 2).

In a similar vein of argument, Nardin contends in relation to the argument of a new set of post-Cold War guiding principles:

> The frequent invocation of such principles (of abstract justice) - under the name of God's will, natural law, human rights, utility, or social justice - as an alternative to law is a sign not of the flourishing of the rule of law but its decay (Nardin 2000, p. 106).

Whereas argumentative recourse to claims of a humanity carry a certain weight, the 'frequent invocation' of such terms for Clark et al it is indicative of a deeper crisis. Writing in relation to IHL from which Humanisation theories spring, "The laws of war are on the verge of crisis" (Clark et al 2018, p. 331). There is a 'grand bargain' underlying the laws of war in which humanitarian constraints are accepted in return for the legalisation of conflict and the legitimation of all non-prohibited action in line with the Lotus principle (2018, p. 321). Essential to this bargain was that States accept the laws restrictions as long as it enables the use of force in situations where it is legally permissible and that the military objectives tied to such acts were compatible with the adherence to the law (2018, p. 328 - 329). This bargain is fracturing as differing conceptions of the laws of war, the acceptable bounds of violence, and the normative foundations of the law of war are being eroded. Contrary practice by key actors in the Islamic State, Russia and the U.S. are taken as clear and present danger for the institution of legalised warfare with attendant effects on the rule of law underpinning it. The novelty of their critique lies in the manner in which IHL is subjected to examination not on notions of compliance or effectiveness, but in the key of legitimacy: as the background reasons for which compliance is indicative of (2018, p. 325). Diminishing

compliance in the laws of war then is only the surface layer of the problem as a 'looming crisis of legitimacy' waits around the corner (Clark et al 2018, p. 326) as the intersubjective understandings which underpin this 'grand bargain' are eroded as IHL and the interests of conflicting parties are seen as incompatible (Lamp 2011, p. 242).

The incompatibility is manifest in the discourse surrounding IHL that has shifted. In this they follow Hedley Bull's assertions that the failure to accept principles as binding or obligations as valid is indicated by appeal to differing and potentially conflicting principles (1977, p. 33). Indeed, by posing the vocabulary of humanity as "above sovereignty" (Koskenniemi 2011, p. 318), a new discourse of international relations and law has emerged that moves from thinking about rules as formal complexes to informal regimes that pertain to specific issue areas. From this, a collapsing of the distinction between rule and regulation has emerged in which similar shifts in discourse away from a narrative of formality of government processes in the administration of international law towards looser forms of governance. An informality in the types of norms and methods of accountability is at issue here that envelopes new forms of governance including mechanisms for reporting and discussion. Each of these steps develops into the use of the normative vocabulary of legitimacy overriding that of legality "…to ensure a warm feeling in the audience" (2011, p. 323).

The point Koskenniemi draws is that in the articulation of international law, in a world in which "Words are politics and vocabularies are manifestos", the emergence of a new discourse empowers new speakers (2011, p. 329). By emphasising notions of legitimacy and illegitimacy, humanity and inhumanity, it is to licence a new set of authors with an air of authority over the substance and authority of law (Koskenniemi 2011, p. 318-324).

What this overreach results in is the pivot to a rights-based normative discourse that David Kennedy considers a broadening of Clausewitz's canonical assertion of war as the continuation of politics by other means. War is now the continuation of law by other means (Kennedy 2006, p. 47). As international political life has become increasingly legalised, warfare has been reproduced as lawfare, as a conflict of jurisdiction and the attempt to wield power through law (Kennedy 2006, p. 13). Kennedy delineates ten 'pragmatic concerns' which deserve unpacking (2006, p. 8). These are:

1) The dominance of rights language as the only vehicle for emancipatory possibility: The concern here regards the manner in which in terms of institutional strategies, the dominant vocabulary has become couched in the terms of rights. “The human rights movement suggests that ‘rights’ rather than people taking political decisions, can bring emancipation” (2006, p. 22). This may in turn have unintended consequences for strategies at the local level as emancipatory projects must be expressed in the language of rights as legal standards distort other projects which may have more local cultural, economic, and political purchase. Furthermore, it clouds other vocabularies - those of duty, responsibility and collective commitment (2004, p. 8 - 10). Here, the liberal emphasis on human rights accounts for the focus on the individual yet Kennedy doubts whether the language of rights is the appropriate vehicle for the universal emancipation that it posits.

2) The narrowing of the scope of problems: Harms are bracketed as occurring on an index between the state and the individual and neglects broader problems as of the allocation of economic resources and the inequalities of a global capitalist system. Kochi and Scicluna echo these points in regard to the underlying power dynamics produced by a Western led capitalist system and posits that liberal-cosmopolitan approaches miss a critical point in that a focus on rights masks deeper class based and normative struggles (Kochi 2020, 497) (Scicluna 2021). Furthermore, by foregrounding the notion of rights as legal standards makes their achievement an end in itself whilst leaving aside the background conditions which makes these rights have genuine purchase. The establishment of a law or court is not the end but rather a signal of normative intent to which practice needs then to conform (Kennedy 2006, p 10-12).

3) The generality of Human Rights: Here the idea is carried that human rights are too abstract in their ideas of people, politics and society and convey an image of an idealised individual that can lack fidelity to the variety of human life. As an

'emancipatory vocabulary' they exist outside the realms of political, cultural and ideological difference and lead to binary positions. Foremost amongst these being the victim vs oppressor narrative in turn offering a particular playbook with seemingly readymade answers that brackets other modes of action (2006, p. 13-15). This is visible under Teitel's conception with the traditional norm of combatant equality becoming reconstructed along a continuum with increased moral worth attributed to those deemed to be on the side of humanity (2011, p. 35).

4) The problem of Particularization: Here, the idea of a shared life is blunted once people conceive themselves as rights holding individuals. Diversity is downplayed once the individual is privileged above the community. Doing so places the role of the state in defending these rights a safer footing than what many who pursue the emancipatory rhetoric wish to permit (2006, p. 14-16). The state becomes the conduit for realising human freedom through a discourse of rights and legal entitlements, strengthening the state rather than diminishing its power

5) International laws relationship to western liberalism: The tenets of western liberalism have left its mark on the ideology, ethics and political discourse of rights (Boucher 2011). The grafting of a universal emancipatory discourse in the mores of a particularistic foundation in 19th and 20th century western liberalism obscures 'humanity's appreciation' of other forms of life (Kennedy 2006 p.18). "The urgent need to develop a more vigorous human politics is side-lined by the effort to throw thin but plausible nets of legal articulation across the globe" whilst unequal levels of development between the 'west and the rest' neglects differing hierarchies of priority and need (Kennedy 2006, p. 20).

6) The language of human rights promises more than it can deliver: "Human rights promises a way of knowing - knowing just and unjust, universal and local, victim and violator, harm and remedy - which it cannot deliver" (2006, p. 21). The focus on legalistic rights-discourse narrows the range of possibilities and abstracts from the particular conditions in which questions of justice arise and need to be resolved. The

focus upon rights as being legal rights promises a vocabulary for justice that is outside of politics yet can only ever be resolved through politics once normative contestation has been resolved. In addition, “In particular, the human rights movement fetishizes the judge as someone who functions as an instrument of law rather than as a political actor”. This sort of political immunity for Kennedy is “... not a plausible description of judicial behaviour - given the porous legal vocabulary with which judges must work and the likely political context within which judges are asked to act” (Kennedy 2004, p. 22). The core contention here regards the language of rights as conveying a false sense of neutrality which, when used in tandem with arguments for intervention leads to an unwarranted sense of confidence about such politically, morally and legally complex issues. The purported universalism robes itself as the only available pragmatic response to injustice - as a redemptive practice against the forces of evil. The language of rights boils down complex, and often local, problems to easily manageable answers upon a model of overconfident universality.

7) The regime of human rights does more to produce and excuse violations than to remedy them: Rights treat the symptoms rather than the illness whilst vague and conflicting norms cleave open space for political manoeuvrings to legitimate more injustice than it eliminates. Kennedy argues that “This is particularly likely where human rights discourse has been absorbed into the foreign policy process” (Kennedy 2006, p. 25). In broad terms, the argument that the U.S. makes for fighting is largely couched in the language of defence of the values of the UN Charter in terms of the spread of rights and democracy is set against the backdrop of extrajudicial killings and torture in Guantanamo and Abu Ghraib.” Far from being a defence of the individual against the state, human rights have become a standard part of the justification of the external use of force by the state against other states and individuals” (Kennedy 2006, p. 25). Moyn makes a similar argument in regard to how under the guise of making war more ‘humane’, the U.S. in particular has engaged in ‘forever wars’. More precise methods of force delivery are at work and so pay lip-service to the increased influence of human rights, but their use have been greatly expanded. Citing the timeframe of the Obama administration, Moyn references the

use of special forces operations across 138 nations, with the use of force occurring in 13 of these (2022, p. 284).

8) The bureaucratization of humanitarianism: As human rights have become professionalised and bureaucratized in law, there is a tendency to take the words of lawyers over other, legitimate, actors. Kennedy argues this encourages an overestimation of the profession's idealism over realpolitik.
   The practical concern from this 'professional arrogance' is the movement towards 'irresponsible intervention' - the professionals arguing in the margins about the correct manner in which to address rights violations are often disconnected from the fora in which troubles emerge. A belief in the 'nobility of human rights' offers a readymade answer to the question of remedying rights abuses: intervene. The language of rights then gives the '...well-intentioned intervenor…" an illusion in the promise of a set of universally applicable standards which define and legitimate intervention (Kennedy 2006, p. 30-31).

9) Human rights strengthen bad international governance: Positioning a right as an institutional development places important issues of social justice in the hands of ineffective international actors. It is not enough to establish a right as prohibiting forms of action if practice continues largely unabated (Kennedy 2006, p. 31).
   Brunnee and Toope form an argument of this sort with particular importance to Humanisation in examining the status of prohibitions of torture that shall be unpacked in greater detail in pages to come. For now, it is sufficient to say that in regard to torture, despite the Torture Convention prohibiting such action, official action shows considerable distance between rhetoric and reality (2010).

10) Human rights promotion can promote negative politics in particular contexts: The use of the language of protecting human rights has been used to strengthen repressive states and initiatives, legitimate war and religious repression. So too, they can be 'tone deaf' in particular local contexts (2006, p. 31-33).

What both Kennedy and Koskenniemi then speak of law as a language of technical expertise (Kennedy 2006) (Koskenniemi 2011). Indeed, for Kennedy "Humanitarianism begins as an impulse - and becomes known as a practice" (2004, p. xiv). Humanitarianism becomes professionalised in the work of international lawyers, political scientists, rights groups and activists (Kennedy 2004, p.xv). International law then becomes the surface upon which argument takes place (Koskenniemi 2011).

Recent statements of ICC prosecutor Fatou Bensouda regarding the role of UK soldiers in Iraq on the question of involvement with war crimes illustrates this politics of international law. In December 2020, Prosecutor Bensouda stated, despite having found and 'confirmed' evidence of the involvement of UK soldiers in war crimes, torture and sexual violence, the involvement of civilian and military structures in their commission, and a failure of authorities to investigate properly:

> Nevertheless, the outcome of the more than ten year long domestic Iraq Historical Allegations Team/ Special Police Legacy Investigations process, involving the examination of thousands of allegations, has resulted in not one single case being prosecuted to date: a result that has deprived the victims of justice (2020, p. 4)

Adding, in regard to the failure of the investigations undertaken by UK authorities to prosecute criminal claims, that:

> At the same time, the fate of criminal inquiries contrasts with the large number of civil claims resolved either before the High Court, where the evidence was challenged and tested, or through out of court settlements. These have involved claims with respect to hundreds of victims alleged to have suffered conditions of detention and mistreatment amounting to inhuman or degrading treatment. Other public inquiries, commissioned reviews and policy mechanisms have concluded that practices which occurred during the early rotations of UK military deployments in Iraq fell below the required standards of conduct (2020, p. 4).

The inference being the standards of treatment warranting civil resolution would be equal to those that warranted the unprosecuted criminal claims. Such statements come off the back of a 2017 report which reached the conclusion that it was reasonable to believe UK involvement in war crimes including 1071 allegations of torture and 52 allegations of wilful killing (International Criminal Court 2017, p. 43). Yet, due to the complementary basis of the court outlined in greater depth below, that the UK instigated proceedings through the Iraq Historical Allegations Team was enough to meet their formal obligations and serve to nullify any legal recourse the ICC could engage.

Further effects of the 'professional language' of an epistemic community of international lawyers can be seen in the 'yawning gulf' (Scicluna 2021, p. 320) between the legal and theory and practice through the prisms of universal jurisdiction and the removal of state immunities. Both carry with them fundamental ideas of universality and equality. Indeed combined, they could lay the foundation of a genuine form of international criminal jurisdiction in theory. Practice however is lacking.

Firstly, the concept of universal jurisdiction is central to Humanisation. It maintains that through the normative interweaving of IHRL, IHL and ICL the most egregious offences as of torture, genocide and slavery are prohibited and claims of breach heard before international courts, in particular the International Criminal Court (ICC). Indeed, the signing of the Rome Statute in 2003 signalled a definitive move forward in terms of international criminal justice in this regard. Violations of breach of humanitarian law were no longer solely in the gift of the judgement of the United Nations Security Council (Boucher 2009, p, 327). It was the end point of the thread that started at the International Military Tribunal and weaved its way through texts such as the Genocide Convention (Teitel 2011, p. 4). A literal reading would support this position. The Preamble is clear in "Recognizing that such grave crimes threat the peace, security and well-being of the world" and in:

> Affirming that the most serious crimes of concern to the international community as whole must not go unpunished and their effective prosecution must be ensured by

> taking measure at the national level and by enhancing international cooperation (2011, p. 1)

In this regard, the language echoes that of the Responsibility to Protect (R2P) that concerns the ceding of sovereign responsibility to the international community when unable or unwilling to protect the citizenry of a state. In pursuit of this, Article 5 outlines:

> The Court has jurisdiction in accordance with this Statute with respect to the following crimes:
>
> The Crime of Genocide
>
> Crimes against Humanity
>
> War Crimes
>
> The Crimes of Aggression (2011, p. 3).

Yet the preamble also makes clear "…that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions" (2011, p. 1). As the case of the UK's involvement in potential war crimes makes clear, a state party can investigate crimes within the ICC's remit and hence meet their formal obligations of investigation, whilst also fighting shy of bringing the force of law down upon those implicated in the crimes. This comes at the additional cost of the necessity of state consent. Article 125 (2) makes clear, "This statute is subject to ratification, acceptance or approval by signatory States" (2011, p. 56). Current non-member states include Syria, China, Russia, and the United States. Scicluna's charge then that universal jurisdiction as a concept has a higher degree of symbolism than practical importance appears entirely credible. It is rather more indicative of the 'cosmopolitan vision' of global justice which despite garnering widespread acceptance, is only occasionally used (2021, p. 296).

Nevertheless, for Weatherall, the peremptory status attached to norms of *jus cogens* that overlap with crimes within the ICC's jurisdiction underwrite the claims of an *aut dedere aut judiciare* (Weatherall 2015, p. 376):

> Universal jurisdiction constitutes a juridical principle distinct from other bases of jurisdiction - territory, nationality, protective, and passive personality - that permits States to assert jurisdiction over claims in their absence. As it arises in customary international law, the principle of universal jurisdiction permits any states, absent other bases of jurisdiction, to prosecute individuals for violations of peremptory norms (Weatherall 2015, p. 376).

In theory, the institution of a court with international authority charged with material jurisdiction over the gravest crimes committed by individuals would operate as a legal sinew that binds the world. In practice however, the record of universal jurisdiction is 'patchier' (Scicluna 201, p. 295). As the above illustrates, there are particular 'backdoors' built in which both limit the competency of the court and restate the foundational nature of consent in international law. Most notable, that of 'complementarity' which privileges national jurisdictions and leaves prosecutions in the hands of the state.

This effect of complementarity in privileging the national over the international can also be seen in the workings of other documents that are constitutive to the Humanisation argument. In the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment (UNCAT) for instance, territoriality and nationality take precedence. Article 5 (1) for instance requires states to exercise jurisdiction over acts of torture committed on their territory or by nationals and Article 8 sets out rules facilitating the extradition of suspects for the state they are found either to the state of the national harmed or the state in which the torture was committed. Article 6 of the Genocide Convention too makes clear that persons accused to be tried by a competent tribunal of the state in the territory of which the act was committed. In each, despite flirting with the notion of universal jurisdiction, such jurisdiction is secondary to the primary role of states and national jurisdictions.

Secondly, Tzevelekos draws attention to concerns regarding the role of state immunities. Accountability of individual actions regardless of any nexus to the state that previously upheld immunities even in the face of mass atrocities is a cornerstone of the Humanisation ethic (Trindade 2014). Indeed, Weatherall contends the removal of *rationae personae* immunities in relation to high-ranking state official as indicative of a broader dynamism in international law that is displacing the traditional principle of '...*par in parem non habet imperium;* between equals no power' (2014, p. 284). Also, in relation to immunities, Teitel places great emphasis upon the manner in which Common Article Three (D) of the Geneva Conventions in guaranteeing the right to due process in conflict has seeped into the regular discourse of international law. In so doing, establishing increased judicial protections and importantly in this regard, a distinct route through which to access justice (2011, p. 38-41).

Yet contrary to this, the European Court of Human rights in *Al-Adsani v, the United Kingdom* argues such access may be diverted, if necessary, to promote "...comity and good relations between States' ' (Al-Adsani vs UK 2002). The case in particular concerned the ability of a dual British/ Kuwaiti national tortured in Kuwait following the Gulf War and hinges on the ability of the victim to bring proceedings against the Kuwaiti government being prevented on the grounds that the Kuwaiti government was entitled to sovereign immunity. That such a decision was justified in reference to the fostering of comity between States, it is then difficult to arrive at the conclusion that the law was not in this case trumped by the political.

The concerns delineated above then casts a critical eye over the rights-based narrative that lies at the heart of Humanisation and serves to underwrite a particular epistemic community. This ought to be taken seriously in assessing the nature of international society's normative development and the related conclusions weigh upon arguments for institutional reform. This is especially so as Humanisation in its differing elaborations often fall back upon a theoretical rather than empirical grounding. Meron (2006) and Weatherall's (2015) contention that human dignity serves as the anchor for an expedited form of *opinio juris* over state practice is particularly relevant. Teitel's teleological conception also carries the idea that a historically inevitable process that is disconnected from the circumstances in

which questions arise is unfurling towards an almost Fukuyama-esque sense of the end of history (2011).

1.2C: Paper Worlds

Humanisation as thus far considered offers an account of international society that is overtly law centric. The letter of the law is the key variable that contributes to arguments regarding humanitarian aligned areas of law that are emancipated from the cut and thrust of international politics remodelling international relations from the inside. What the law shouts, politics will echo.

Walzer captures the risk of this succinctly: “The lawyers have constructed a paper world, which fails at crucial points to correspond to the world the rest of us still live in '' (2006, p. xx). For instance, consider Meron’s claim that:

> The principle of humanitarian restraints has been of growing importance, especially in normative developments and in the elaboration of new standards, but, regrettably, less in the actual practice in the field, which remains cruel and bloody, especially in internal conflicts (Meron 2006, p. 2).

In similar tones is the argument that:

> Judges, scholars, governments and non-governmental organisations are often ready to accept a rather large gap between practice and norms without questioning their binding character (Meron 2006, p. 3).

The roots of this track back to the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua)* (1986). There, the traditional dual

requirements of state practice and *opinio juris* in the formation of international law was reworked with greater weight afforded to the subjective element in *opinio juris* over the objective element of state practice:

> Without formally abandoning the traditional dual requirements (practice and *opinio juris*) for the formation of customary international law, the tendency has been to weigh statements by governments, the ICRC, and intergovernmental organisations both as evidence of practice and as articulation of *opinio juris* (Meron 2006, p. 3).

The methodology here resembles that seen in the human rights field in privileging normativity over verifiable state practice. The image that results is however questionable. In privileging the opinions of judges and gavels over verifiable state behaviour the purchase of law is relieved as it tacks closer to the utopian. Two elements of discussion follow from this. The first goes to the core of International Relations as a discipline. The second concerns what such a methodology says about the subjects to which it meant to apply.

On the discipline of International Relations, E.H. Carr argued that a 'mature' science of its study "…must be based on elements of both utopia and reality" (1939, p. 93). For Carr, such a science would edge forward the development of the international order by guiding feasible political action by combining empirical and normative inquiry in a manner attentive to both morality and power (Reus-Smit 2008, p. 55). Carr wrote:

> The illusion that priority can be given to power and that morality will follows, is just as dangerous as the illusion that priority can be given to moral authority and that power will follow (1939, p. 98).

Echoes of this this argument can be heard in Koskenniemi's argument concerning the structure of international legal argument concerning the appropriate path that international law must take in order to avoid being either an unwitting apology for power or

falling into utopia (2011, p. 33-62). In both, the argument boils down to the position that meaningful action based on a proper understanding of international society as a particular form of association that requires specific attention to its features. The best way to do this is to chart a course that is bounded in its normative aspirations yet critical of an overemphasis of might as right. The failure to do so is of considerable importance considering the contention that the failure of international law to stake out this middle ground prior to both World War One and World War Two upon the faith that international politics could be inculcated by law was critical to the conflicts breaking out (Hathaway and Shapiro 2017, p. 101 - 278). In privileging the subjective element of *opinio juris* and relegating state practice, we skate too close to the utopian in the projection as to what the law indeed is.

The second element concerns what this method of methodology speaks to. Privileging the subjective element of *opinio juris* over that of state practice is par for the course for human rights tribunals. Yet:

> In applying humanitarian law, these bodies often lack law of war expertise. They tend to reach conclusions which humanitarian law experts find problematic. Their very idealism and naivete are, however, their greatest strength (Meron 2006, p. 8).

The concern here however is what this speaks to in terms of the structure of the international legal order and its core ordering principles under the UN Charter of sovereign equality and internal supremacy (Cohen 2012, p. 8). One of the central charges of Humanisation theorists concerns a common normative nucleus across the bodies of IHL and IHRL augmenting this. For Weatherall, this is via the concept of human dignity propelling a corpus of humanising norms atop a normative hierarchy. For Teitel, this is found in the argument that the mutual subjectivity of HL, IHRL and ICL falls short of a "formal fusion" but has enough mutuality to be considered a "framework" (2011, p. 6). For Meron, it is that both IHL and IHRL share a common denominator in the 'principle of humanity' (2006, p. 6). They are however different forms of law. IHL regulates activities between wars 'human instruments' (Walzer 1977) based on legal and moral equality whereas HRL applies to unequal parties:

> Derived as it is from the mediaeval tradition of chivalry, it guarantees a modicum of fair play. As in a boxing match, pummelling the opponent's upper body is fine; hitting below the belt is prescribed. As long as the rules of the game are observed, it is permissible to cause suffering, deprivation of freedom, and death…Human rights laws protect physical integrity and human dignity in all circumstances. They apply to relationships between unequal parties, protecting the governed from their governments (Meron 2006, p. 8).

By moving IHL closer to a model of HRL, the formal equality established between equal contestants' risks being overtaken by a model of formal asymmetry. This is an example of the unintended hierarchy that Humanisation risks instituting. The broad concern is that the moral equality of combatants is an indication of a broader normative ordering of states as inhabitants of a heterarchical social order. By erecting divisions, distinctions and hierarchy here, this fundamental norm is reinvigorated along the lines of their fidelity to concerns of humanity. The particular concern is the instituting of inequality between combatants in war. By moving to methodology that is founded on a system of asymmetry, the same condition risks being repeated as the ordinary structural conditions of conflict. Gestures to this are made through theorists of the Humanisation of international law. Teitel argues for instance that the traditional *in bello* norm of neutrality between parties and their separation from *ad bellum* claims is of limited purchase (Teitel 2011, p. 36). Rather, a system of asymmetry is founded on the basis of a human oriented 'moral minimum' which has drawn its base from the empirical uptick in human rights norms. By conceptualising combatants through this methodology, not as equal participants but as unequal enemies, we repeat the inequality between the citizen and the state at the international level that human rights law institutes. Just as the state can bring its power to bear on its citizens, the path to bringing the combined weight of humanity to bear on individuals across the globe becomes shorter. In turn, this attaches to the neo-Kantian argument that international justice and domestic justice are synonymous (Teson 1998) and fleshes out the argument that the purpose of the state and the purpose of the international community are aligned in

the promotion of the wellbeing of individuals (Weatherall 2015, p. 28). And to that end, the resources of such a community should be directed.

The effects of this can already see the effect of this in the responses to the attacks of September the 11th by the United States, broadly conceptualised as the 'War on Terror'. The expansion in the use of drones to deliver kinetic force sits alongside the claim that the United States had the authority to deliver such power wherever needed (Moyn 2019). This isn't humanitarianism, it is the unwitting apology of a humanitarian leviathan. The US practice of designating all military age males in a strike zone as combatants is one such example of the increased power exercised in the name of humanity. The rearticulation of combatant status based not an agents 'direct participation in hostilities' to a basis in having a 'continuous combat function' is another (Melzer 2009). The result of both is an uptick in the use of force.

To combine the two. By skating too close to the normative aspirations of judges in the privileging of *opinio juris*, international law risks falling into utopia. It removes the purchase it has as a distinctly authoritative system of normative order that is crucial even more so at the level of international than it is domestic. The effect of such is to create a romanticised image from the paper world of law that lacks fidelity to the cut and thrust of international politics. By articulating the foundation of this as being found in the texts, treaties and jurisprudence of international law, the sense of solidarity is overstated in the picture it paints of global justice. Such an image is then used to licence the expansion of the use of force. The other side of the coin is how in building a paper world, we create paper tigers.

1.2D: Paper Tigers

The problem with curating a romanticised image of the world based on the texts of international law cuts two ways. It can both unintentionally licence the expansion in the use of force (Reus-Smit 2005) as well as license the creation of paper tigers. These 'paper tigers'

are concepts which seem strong on paper but fail to be meaningful when put to work. Notable here is the concept of Responsibility to Protect (R2P).

The report which gave birth to the concept took in its sights the legitimacy of humanitarian intervention:

> Its central theme, reflected in the title, is "The Responsibility to Protect", the idea that sovereign states have a responsibility to protect their own citizens from avoidable catastrophe – from mass murder and rape, from starvation – but that when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states (International Independent Commission on Kosovo 2001, p. VIII).

The headline claim of the report is that in the face of international atrocities:

> Where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect (2001, p. XI).

Weatherall's argument places a high stock price on this and considers its invocation via UNSC resolution 1973 to be a 'Grotian moment' for the international legal order (2015, p. 409 - 430), heralding R2P's 'coming of age' (Morris 2013, p. 1271). UNSC 1973 authorised the use of '…all necessary measures…' to protect the civilian population (2011), Its very invocation was taken as representing a *fait accompli* that cemented the argued paradigm shift towards an individualistic direction (Weatherall 2015).

The moral overtones are hard to dispute. When a state is manifestly failing to protect its citizens or deliberately engaging in actions which are designed to target their population, we ought to do something. Where a critical injection comes in here is the means

in which the normative ought is made manifest in practice. In combining humanitarianism with international liberal legalism, the same concerns regarding the unintended experiments with legal hierarchy that Reus-Smit articulated go further. What Frederic Megret considers an 'interventionist toolkit' (2012, p. 21), emerges as the normative thread which strings together R2P, and the ICC converge to give legitimacy to acts of intervention. They combine to move towards the argument that States have positive obligations to act in the domestic affairs of others and replacing the traditional focus on negative obligations fleshed out through the notion of non-intervention.

It is the underwriting of political pursuits of power under the guise of humanitarianism and given legitimacy through the institution of law which is important here. R2P may be considered at once both a paper tiger and as the essential element in normative underwriting of a humanitarian leviathan. For Buchanan for instance, it underwrites the manner in which increased humanitarian obligations are given to a 'coalition of democratic states' giving *ex poste* and *ex ante* legitimacy to acts of intervention (2010). Yet its track record on the ground in comparison to the words on paper reveals fundamental disconnections.

The history of R2P reveals its nature as a paper tiger. It took ten years from articulation in the report of the International Commission to authorisation in UNSC 1973. Despite yearly reports that document the times in which the Responsibility to Protect have 'informed' resolutions combining to catalogue 71 specific instances, a more critical look at these reveals fundamental failures. Former UN Secretary General Ban Ki Moon for instance opined that "...the next test of our common humanity…is here - in Syria" (United Nations 2012). In that regard, it manifestly failed. The UNSC has been gridlocked by the veto wielding of China and Russia to the point that popular media has pronounced the death of R2P (Reiff 2011). Whether or not the principle has decisively been laid to rest is questioned by Ramesh Thakur (2013 p. 61). But that even the most vociferous defenders of the principle such as Gareth Evans (who indeed contributed to the original report) considered whether or not its time has come and gone point to fundamental anxieties with it (2012). For Simon Adams however, the ongoing turmoil in Syria in which a UN Human Rights Council inquiry attributed 20 chemical weapons attacks in the Syrian Arab Republic to

government forces, R2P has shifted from a 'responsibility' to protect to a 'failure to protect' (Adams 2015).

One of the many elements of Humanisation that make it worthy of critical discussion then is the manner in which different accounts on the nature of the international system derive from the same referential object as exemplified above. In arriving at her conclusion, Peters draws particular attention to the development of R2P as set out in the 2005 World Summit Outcome Document as a mechanism in the nuancing of sovereignty. Yet as Megret contends, to look at the manner in which R2P operates, as adopted by the General Assembly, vesting primary responsibility to the state with ushering international action only in the case of domestic inaction which itself depends on the willing support of other states, 'R2P is an ode to sovereignty' (Megret 2011, p. 20). Both Peters and Megret here understand sovereignty as having a dynamic character. It is though the source of R2P's force that moves each to differing conclusions. Peters takes the instantiation of R2P as it appears in text as central whereas Megret takes R2P's 'symbolic validation' through the General assembly and the practice around its operationalisation as more pertinent. This then feeds into the conclusion of reaffirming the foundational role of sovereignty in a statist conception of international society (Megret 2011).

A different approach is found in the work of Jutta Brunnee and Stephen Toope's 'interactional account' (2010). Brunnee and Toope draw particular attention to the way the practice surrounding a norm is central to its legitimacy. The instantiation and codification of norms is not sufficient to establish such as having the necessary force that Peters attributes to it. What is needed to secure the norm is a substantive practice of legality surrounding it - what Brunnee and Toope term the 'inner morality' of law. Drawing on the legal theory of Lon Fuller, the central thrust of argument is that law is a social practice that must appeal to the agents to which it is directed by creating a set of 'relatively stable expectations' (Brunnee and Toope 2010 p. 24). It is fidelity to the 'internal morality' of law which for Fuller, and Brunnee and Toope by extension, establishes legal legitimacy and aids its compliance pull:

> If the internal morality of the law is not fulfilled, if the conditions are not met, then the process of law creation, be it though legislation, adjudication or negotiation, is fundamentally flawed and, we will argue, lacks distinctive legal legitimacy (Brunnee and Toope 2010, p. 25).

It is indeed this internal morality that distinguishes legal norms from other types of norms and consists of generality, promulgation to those whom it applies, non-retroactivity, clarity, non-contradiction, not asking the impossible, constancy and congruence between rules and official action' (2010, p. 6). In direct reference to R2P, Brunnee and Toope assert that such a practice of legality, defined broadly in terms of fidelity of practice to the 'inner morality' of the norm, to be lacking (2010, p. 324). Rather:

> On balance, and given the potentially fundamental importance of the challenge to sovereignty contained in the responsibility to protect, it is difficult to dismiss the Outcome Document as mere 'cheap talk'. The stakes were too high, and the implications fundamental. Some states worked hard to modify and limit the concept through its various interactions. These efforts suggest that at least some states believe that the responsibility to protect actually means something.

However:

> Our analysis of the status of the responsibility to protect is that it remains only a candidate norm in international relations. Much work needs to be done before it can be plausibly considered a binding norm of international law (2010, p. 339)

The point of attention here is that both Peters and Brunne and Toope examine the same concept, R2P, yet both arrive at differing conceptions on the force such norm exerts. For Brunnee and Toope, R2P is a mere 'candidate norm' in which despite having a clear

history of norm entrepreneurship, there still remains 'considerable doubt' as to the status of the norm2010, p. 324). Indeed, despite the norm being formally endorsed, the potential impacts it has upon the 'structural imperatives' of international law and international politics, that of international anarchy, presents a limit to the ability to construct stable expectations required to form a distinct category as a legal norm from maturing sufficiently (2010, p. 337). Yet for Peters, the norm is the culmination of a teleological process that grounds the individual at the heart of international relations. Not only is the norm accepted under Peter's analysis, but it is also of such weight that it heralds a new understanding of the constitutional structure of international society with humanity as its *grundnorm* (2009).

To restate the arc of this and the previous argument concerning the construction of a paper world, building an image of the world on the letter of law fails to map on to the complexity of international society. In doing so, constructing remedial measures such as R2P, which despite having notable intent, do more on paper than they do in the 'real world'. In articulating an image of the world, it is equally important to consider not just what the law says, but what the law does.

1.2E: Consent, the Foundations of International Law and Sociological Legitimacy

The section above outlines the issues thrown up by the perspective form which one approaches international law. At the same time in which claims of a Humanised society are made, claims of the frailty of the international order are on the rise. On the one hand, the highly institutionalised nature of international relations binds both states and individuals into a Humanised global order. On the other, alterations in the balance of power with particular emphasis on China's emerging economic and political clout are the foundations of arguments of the demise of the liberal order which underpins the claims of Humanisation. Allen Buchanan for instance considers the notion that we have witnessed the golden age of human rights and are on the cusp of decline as an increasingly powerful China emerges as

the sole superpower with grave consequences for the human rights regime more broadly. As he posits:

> China is perhaps unique among the powerful states in explicitly repudiating the basic idea that undergirds the system of international legal human rights, namely, that it is right and proper and indeed morally necessary for international law to regulate the internal affairs of states (2013, p. 303).

More concerning for the liberal inclined theorists of Humanisation are the recent interventions of bellwether states of the international order concerning consent to the core treaties that underwrite Humanisation's argument. In doing so they reveal difficult truths of the broader international legal order. The United Kingdom has flirted with breaking international law 'in a limited specific way' concerning relations with the European Union (Pierce 2021). Later down the line, private members bills have been introduced which seek "...to make provision for an application to the Council of Europe to withdraw from the European Convention on Human Rights and the introduction of a British Bill of Rights." (UK Parliament 2022). In a similar manner, the withdrawal of the United States from the Paris Climate Accord was presaged (Kemp 2017) before the formal withdrawal of their consent from the 2015 accord (Tollefson 2017). For Jutta Brunnee, the latter of these examples should come as no surprise (2008). Despite the lofty normative ambitions of International Environmental Law, the argument of common human oriented interest lacks fidelity to the foundational structures of international law. In part, this explains the gap between words and deeds in this field (Brunnee and Toope 2010). Indeed, this gap is indicative of the sort of motivating force for arguments which seek to erode the fundamental role of consent in international law that shall be surveyed below.

An argument that broke out in the ICJ in *Reservations to the Convention on the Prevention and Punishment of Genocide* illustrates the issues with the role of consent in international law. There the question concerned consent through the notion of reservations. Recall that for the Genocide Convention:

> The first consequence…is that the principles underlying the Convention are principles which are recognized by civilised nations as binding on States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the co-operation required 'in order to liberate mankind from such an odious scourge' (ICJ 1951, p.7)

Further, in the *Advisory Opinion* on *Reservations to the Convention on the Prevention and Punishment of Genocide (Reservations*), the International Court of Justice stated as follows:

> The origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (1951, p. 12).

The ripple effects of this normativity are fleshed out in more detail through reference to the 'object and purpose' of the treaty:

> The object and purpose of the Genocide Convention imply that it was the intention of the General Assembly and of the States which adopted it that as many States as possible should participate. The complete exclusion from the Convention of one or more States would not only restrict the scope of its application, but would detract from the authority of the moral and humanitarian principles which are its basis. It is inconceivable that the contracting parties readily contemplated that an objection to a minor reservation should produce such a result. But even less could the contracting parties have intended to sacrifice the very object of the Convention in

> favour of a vain desire to secure as many participants as possible. The object and purpose of the Convention thus limit both the freedom of making reservations and that of objecting to them. It follows that it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation (1951, p. 24).

The question concerned whether a reserving state may still be considered bound to the convention if the reservation is rejected by others. The joint dissenting opinion in the Reservations case brings to the fore what the 'purely abstract' nature of the questions that prompted its consideration shields, namely, the role and understandings of States (McNair et al 1951, p. 31). Prior to the request for an *Advisory Opinion*, the Secretary General was in receipt of eighteen reservations made by eight States. The reservations coalesced around the removal of jurisdictional immunities of public officials, the jurisdiction of domestic tribunals, extradition, the jurisdiction of the ICJ in such matters and in regard to the 'colonial clause' (the extension of the Convention to any overseas territories under a signatory's responsibility). Pertinently, each of the reservation making states lodged a reservation in relation to Article IX in regard to the compulsory jurisdiction of the ICJ. McNair et al in their dissenting opinion draw particular emphasis upon the fundamental role of consent as the basis of treaty obligations in such matters. The multilateral nature of such conventions "...must not obscure the fact that the legal basis of these conventions, and the essential thing that brings them into force, is the common consent of the parties" (1951, p. 32).

Furthermore, the mechanics of the dissenting opinion lie in the manner in which the Genocide Convention was negotiated. No express modifications to the standard practice regarding reservations needing the consent of all parties and the reserving states' non-party status until such consent produced was made. States negotiated on the belief "that...they contracted on the basis that the existing law and the current practice would apply in the usual way to any reservations that might be proposed" (McNair et al 1951, p. 41-42). It is this element of politics within the law that Humanisation rather shields away from, the focus on abstract considerations removed from the actual practice of states presenting an idealised image of the law and the process which have led to codification. Furthermore, it

illustrates the disconnect between the opinions of Judges on such matters and the view of States. McNair et al draw attention to the manner in which the sort of legal evolutions made by designating reservations as applicable only in relation to the object and purpose of the convention and that each State were to appraise the admissibility of reservations from such standpoint to have 'no legal basis' (1951, p. 42). On that point McNair et al are clear:

> It must be remembered that the representatives of the governments which negotiated this Convention were in complete control of its machinery, of its procedural clauses, and were free to insert in the text any stipulations in the matter of reservations which seemed to them to be suitable. They refrained from doing so… (1951, p. 43).

What this draws attention to is the kind of after the fact reasoning employed by the proponents of Humanisation thus far as to the normative intent of those who featured in the construction of its core documents. The actual negotiating governments adopted no such procedure along the lines of the compatibility of reservations along the lines of object and purpose and negotiated on the assumption that the prevailing norm of unanimous consent to reservations to be applicable (McNair et al 1951, p. 43). The idea of reservations as applicable only to the degree that they are in line with the object and purpose test was Judge made after the fact. To impute to States a new rule was to mark a significant shift from what States negotiated.

Tellingly, McNair et al draw their dissenting opinion to conclusion in noting the price of sacrificing the integrity of the Genocide Convention as a legal instrument at the altar of universality. While noting that States have indeed contracted towards humanitarian ends that tend to the 'common welfare of the international community' mitigating the sovereign power of individual States, attention is drawn towards the manner in which the Convention is to function. The Convention, as a legal instrument producing binding obligations between States, is argued to have more practical applicability if the conventional practice of admitting reservations only when consented to by all parties is retained:

> In the interests of the international community, it would be better to lose as a party to the Convention a state which insists in face of objections on a modification of the terms of the Convention, than to permit it to become a party against the wish of a State or States which have irrevocable and unconditionally accepted all the obligations of the Convention (McNair et al 1951, p. 47).

Theoretical arguments concerning the role international law plays in the international order and its core ordering principles such as those outlined above are not new. What is new with Humanisation is the manner in which theoretical attacks are being combined with these towards the argument for wholescale change in the multilateral and 'equalitarian' international legal order that consent preconditions (Reus-Smit 2005). Christine Chinkin and Mary Kaldor for instance make note of how:

> The primacy of state-sovereignty as embodied in the requirement of consent weakens the international legal system, for instance, through the absence of compulsory jurisdiction before the ICJ and the scarcity of other adequate enforcement measures (Chinkin and Kaldor 2017, p. 80).

The charge is that the foundational norm of consent is preventing international law from catching up with the demands of the legally infused ethical discourse that surrounds Humanisation, leaving a sense of 'dissonance' between the formal structure of Westphalian international society and 'everyday experience' (2017, p. 37). Similarly, Teitel contends that in contemporary discussion about international law's legitimacy, state consent is "the heart of the problem…" (2011, p. 173). Buchanan too argues that a developing moral momentum to the theory of international law's legitimacy erodes the fundamental standing of consent (2013).

In short, the argument here is something within this corpus of norms which move to the contention that they roll back the foundational norm of consent. "Humanity law implies

a different ordering of the sources of legitimacy" (Teitel 2011, p. 171) "As establishing state consent becomes less important …" especially in relation to customary international law (2011, p. 272). The cumbersome and bureaucratic nature of international law underpinned by norms of equality and consent is not efficient in the face of human oriented claims and is in the process of revision.

Yet there is also concern regarding this. For Orakhelashvili, the norm of consent is a peremptory systemic norm (2006, p. 66). Such ordering norms are deeply rooted to broader conceptions of social legitimacy fleshed out through the notion of sovereign equality (Reus-Smit 2005). It is this broader social legitimacy that gives the international legal order any purchase at all. Despite their earlier articulations of the roadblock that state consent can be, Chinkin and Kaldor recognise this and argue that sociological legitimacy must be present to give international law a modicum of force. Speaking to the issue of compliance they argue that it is the legitimacy of the authority from which laws emanate and of reproduction of values that are inherent to the rules as opposed to being shared values of states which are exercised within distinct communities of practice (Chinkin and Kaldor 2017, p. 91).

Arguing from a different theoretical starting point in the realm of IRT but towards a similar destination, Christian Reus-Smit argues that in relation to consent, the norm only has authority as states recognise a prior obligation to observe the norm of *pacta sunt servanda* (Reus-Smit 2003, p. 615). Reus-Smit locates this as part of the 'sociological' face of obligation which argues for the recognition of an underlying social relationship from which rules and norms are built on top (Reus-Smit 2003, p. 595-596). What is at the heart of Reus-Smit's account then is a need to ascertain the 'social validity' of international law (2001, p. 611).

This 'social validity' concerns perceptions of a wider socially oriented account of legitimacy attached to what he terms the 'equalitarian order'. The equal status of States in the international in this order holds water because despite its inefficiencies, it has shown itself to be remarkably resilient to alterations as they occurred in international society (Reus-Smit 2005, p. 72). Underpinning this are certain 'fundamental institutions', "…elementary rules of practice that states formulate to solve coordination and collaboration problems associated with coexistence under anarchy" (Reus-Smit 1999, p. 14). The fundamental institutions of the modern states system are multilateralism and contractual

international law (1999, p. 131). Such institutions are conditioned by a deeper layer of constitutional meta values. In the modern states system, there are three of these. The first is sovereign legal equality, the second refers to the same 'basket' of rights that applies to each state, the third are restrictions on the use of force (Reus-Smit 2005, p. 71). Despite a certain subset of governance rights being granted to the Permanent Members of the UNSC, the equalitarian legal regime is fleshed out through norms of self-determination and consent.

The nub of the argument Reus-Smit makes is that this system of order is the unique underpinning of modern international society. The 'legislative' norm of procedural justice underpins two further points:

> First, that only those subject to the rules have the right to define them and second, that the rules of society must apply equally to all citizens, in all like cases (Reus-Smit 1999, p. 129).

The specific underlying conception of equality amongst citizens and equality amongst states is particular to both the modern state and is reflected in the broader norms of international society. The very invocation of equality amongst citizens of states and amongst states is a rupture from forms of absolutism which preceded it (Reus-Smit 1999).

The force of this theoretical insight is felt with most clarity 'on the ground' in terms of the use of force. Here, it is the wider effects which Reus-Smit draws attention to in terms of sociological legitimacy, the notion of having the right to rule and the international legal order. Injecting a hierarchy of humanity into the international legal system spoils the hard-won grounds of sovereign equality and the multilateral underpinning of the foundational relationship (2005). Despite the rhetorical attractiveness of the argument of being considered 'authoritatively' on the side of humanity (Buchanan 2013, p. 7), the broader sociological risks this carries are wide ranging. In implementing a 'liberal hierarchy' in relation to the use of force, an "…unintended yet disturbing…" convergence appears as

liberal internationalism merges with the central policy prescriptions of the Bush Doctrine (Reus-Smit 2005, p. 72).

Procedural norms as of consent under such a reading are not mere ornaments from a past period of international law which are to be disposed of. They are indicative of a broader social dimension of international law in which rules have force because they correspond to deeper ordering values which structure that community. Foremost amongst these in terms of international law being sovereign equality and consent in international law.

This section has ought to tease out arguments concerning consent form both an empirical and theoretical perspective. In relation to the first, that the US can withdraw from the accord and the UK introduce private member bills which seek a future withdrawal from the European Convention on Human Rights reveal the foundational role of consent in the current state of play. In regard to the second, where Humanisation suggests the diminution of consent towards more hierarchical forms of international legal ordering then, taking a broader sociological perspective draws attention to the role that consent plays as a key indicator of legal legitimacy. These accounts suggest that we need to harness this and recognise what consent does. They argue we can still use the division between civilised and the uncivilised that gestures of a legal hierarchy move to, but more as a moral stick to poke and prod states into compliance rather than a fundamental division in the international legal order. The claims to move to a less consensual form of international law are understandable at first blush, but the effect on order as an empirical condition and on the equalitarian structure of international law are too great.

1.2F: Judgement and Hierarchy

As noted above, the corollary to arguments concerning an erosion to the norm of consent and sovereign equality is the construction of a hierarchical system of international order. Indeed, Humanisation arguments explicitly and implicitly gestures towards hierarchy, both in terms of international law and in terms of the equal ordering of states as legal condition.

Arguments of a system of 'multilevel' governance for instance filter across accounts of Humanisation which make reference to the state system whilst engaging in arguments which relativise this.

To be sure, Humanisation arguments make reference to the state system. For instance, Weatherall notes how "*Jus cogens*, while individual-oriented, occupies a state-based legal framework" (2015, p. 444). Similarly, Teitel pays lip service to the ongoing role of the state. "From a humanity law perspective, states remain important actors, in terms of rights or prerogatives and duties or responsibilities" (Teitel 2011, p. 148). Yet this is now complemented by new importance to claims by persons and peoples. Sovereignty is relativised under the claims of humanity leaving the relationship between classic understandings of interstate relations and that of humanity "…tense and unresolved'…" (2011, p. 11).

Of particular relevance here is the claim that this development is one reminiscent of a return to the origins of international law (Teitel 2011, p. 37). Hathaway and Shapiro conceptualise this previous era as the 'old world 'order in which states were in possession of a carte blanche authority to wage war to right any legal wrong (2019, p. 46). The concern that is specific to the task at hand is in the rearticulation of the normative force of international law in the service of humanity reinvigorates this with an added dimension. The effects surpass those of the sort which orient concerns in the direction of the potential ephemeral imposition of an alternative political order by only the materially strong. Rather it is in the unintended curation of an open-door policy in which any and all can bolt their political objectives onto the rhetorical force of claims of humanity as a legitimate justification for the use of force. In combination with the construction of an international legal hierarchy, this creates a two-tier system of international order staked out in terms of 'humanity'.

What then feeds into the arguments which relativise sovereignty and implicitly construct an international hierarchy? Core to Humanisation is the role of judgement through law and the articulation of humanitarian premises across myriad international organs. It is this role of judgement that is crucial. Indeed, the notion of crimes against humanity are a central hook in the Humanisation oeuvre in expressing an inviolable status to the individual subject which transcends the state (Teitel 2011, p. 58). Judgement around

which becomes central to a larger normative reordering in which the law becomes imperative in outlines the boundaries of social judgement towards a blueprint for a global minimalist political morality (Teitel 2011, p. 50-51). Crimes against humanity come to occupy a place as the 'cardinal ordering value' (Teitel 2011, p. 51). It draws a fundamental distinction between "...permissible politics…" and in that very act describing the 'other' as "...outside our own "humanity" and opposed to it" (Teitel 2011, p. 51).

This new morality is one which makes a stark distinction between those on the side of humanity and those against it. The concept of crimes against humanity is critical to this. This however does not speak to progress but redress. It is a model of international order that maps onto systems of international order based on domination. This much is conceded by Teitel in the argument that "Humanitarian legalist discourse offers an alternative set of principles and values for global governance" (Teitel 2011, p. 35). The 'juridical revolution' (Teitel 2011, p. 47) provides the foundation for the 'normative blueprint' that Humanisation roots and makes the fundamental distinction between those on the side of humanity and those against it. It is seen in the argument that rearticulates Carl Schmitt's friend/ enemy distinction in legalised dress.

We see again here how the model of international justice is coming close to that of the domestic. In the same way that legal judgements in a domestic society establish normative parameters acting as guide rails that seek to regulate individuals in a state of competitive cooperation, international criminal law in tandem with IHL and IHRL does the same. As Teitel notes, "In international criminal law, the otherwise elusive world community comes to recognise itself in the act of judging that someone is outside its bounds, beyond its normative limits" (2011, p. 199).

The same sort of methodology used in international human rights tribunals noted earlier can be seen to have a crucial effect here. In working on a premise of inequality between parties, between the state and citizens, the same structural inequality is being repeated at the international level which risks being institutionalised. By moving to a condition of international liberal legalism which drawing upon domestic analogy and hinging upon the neo-Kantian claim of the inseparability of international and domestic justice, we do no more than affirming our own "self-congratulatory" conception of the right type of international community (Koskenniemi 2011, p. 178). We may see this in the manner in in

which the IMT for instance concentrated solely on axis crimes whilst side-lining those of allied powers such as the carpet bombing of Dresden (Tomuschat 2006). Similarly, the ICTY has been robustly critiqued for having an overwhelming number of defendants from Serbia whilst excusing many of the crimes committed by Bosnian, Croats and NATO forces (Scicluna 2021, p. 288). Whilst Teitel for one claims then that the combination of legal normativity and judicialization offers the '...promise of a normative language that seems to be beyond the fray of conventional political struggle" (Teitel 2011, p. 36), we see rather a selectivity which contributes to certain narratives of events.

The act of judgement, in seeking to authoritatively decide those considered on the side of humanity or not, therefore creates a certain narrative of events. The very standing of law inoculates critique as indeed it does promise a language deemed to be above that of politics (Teitel 2011, p. 36). As Kratochwil notes however, "law" is treated like a "revelation" that is exalted above all mundane doubts. Law is not only a mode of arguing with norms that always points beyond law, but it also contains, supposedly "the answers" that will become obvious if we allow ourselves to be guided by "law's spirit" or "integrity" rather than by its mere letters. In this way, it seems, we can enter the "kingdom of ends": and escape the" agora of politics" (Kratochwil 2014, p. 137).

The very act of judgement erects distinctions that are fatal to the equalitarian order outlined by Reus-Smit. The coalescence of Humanisation's claims come to the fore here. In arguing for a paradigm shift in the normative foundations of international society, our attention is set towards the claims of humanity. The shared subjectivity of international law moves to the argument that remedial measures that suit the domestic shall similarly suit that of the international. This is given support by the argument that the law concentrated upon reflects a more fundamental value dimension that clears the ground for assertions of states being on the side of humanity or against it. The concern here is that doing so does not contribute to the humanising ends sought, but rather heralds a return to the 'old international order'. Distinctions made between those on the side of humanity and those who press against it is then reminiscent of the statute of the *Institut De Droit International* of 1873, an 'international' treaty which included only European nationalism but carried the idea of the 'juridical conscience of the civilised world' (Koskenniemi 2011, p. 264). The distinction between the civilised and the uncivilised born from this paved the legal way for

acts of intervention and colonialism on the charge of bringing those deemed uncivilised up to standard.

When we consider the claims here in conjunction with the broader normative conclusions concerning relaxations of the use of force and of the erection of a 'coalition of democratic states' (Buchanan 2010) with the responsibility of providing *ex-post* and *ex-ante* justification for acts of intervention, we see the same conditions come to life. By arguing that the human subject is the authoritative standard of international justice and propelled by the moral and legal certainty of being on the side of humanity, the normative foundations of the extension of the use of force are established. However, as the above seeks to make clear, there is a disconnect between the rhetoric of Humanisation and the reality on the ground. We can see this gulf between legal theory and legal practice in terms of universal jurisdiction and immunities. It is also evident in how the crown jewels of humanisation institutional developments carry a bark louder than their bite. At the same time, we have seen how the foundational role of consent is alive and well in the actual practice of international law. What then explains the overreach between the claims of humanity and the loved reality of international political life that this chapter has sought to make clear? The answer I argue resides in the theoretical scaffold that Humanisation theorists have wrapped around their positions. It is to this which discussion now turns.

1.2G: Overreach and Outsourcing

The argument that shall be defended here is that Humanisation represents a distinct tradition in international legal and political thought that articulates a distinct understanding of justice drawing its tenets from humanitarian concerns. Yet the limited theorising as has thus far occurred cashes in too heavily on the side of the legal at the expense of the political. In so doing they reach too far in their normative conclusions concerning the shift to a more human oriented and solidarist understanding of international society. This is argued to be in part due to the outsourcing of the philosophical foundation from which the theories of Humanisation spring. This occurs along two dimensions. The first is the focus on normative individualism in outlining distinctly liberal articulations of jurisprudentially

embellished accounts of global justice. The second is that this is indicative of a broader trend in international law and IPT which buffer their philosophical accounts with reference to constructs such as natural law or in the ethical groundings of cosmopolitanism. The concern is that these, both individually and in conjunction with one another, bring with them particular histories which speak less to universalism and more to political particularism.

A focus upon the individual outsources these ethical propositions from outside the international legal and political realm to which the conclusions are then to apply. For instance, Weatherall grounds his account of *jus cogens* from a starting point of normative individualism:

> Law is an expression of the goals and values of society and, as such, the institution of law is an instrument through which a community promotes its common good. The essential premise of normative individualism is a variation of this truism, which holds that the fundamental purpose of law is the good of the individual (Weatherall 2015, p. 447).

By foregrounding the individual at the heart of law and international society, it is then a short step to argue that the elucidation of the concept of 'human dignity' through constitutional documents and in the *opinio juris* of particular judges in particular courts is enough to place such norms atop a normative hierarchy. The understanding of human dignity here is one that speaks to a liberal account in which individuals have internal and pre-social individual agency deserving of external respect to be realised through law (2015, p. 41). The image of the world again is drawn from the letter of the law. Perhaps the best example of this concerns the inclusion of the term 'human dignity' as a general principle of law in the constitutions of Syria, Cuba, Russia, Côte d'Ivoire, China, the Democratic Republic of Congo (2015, p. 47).

This example is the entering wedge of the more general concern that the theoretical fallback upon liberal-cosmopolitan approaches that can be seen to run through Constitutionalism and Humanisation. Kumm's assertion below illustrates this:

> Only a cosmopolitan state—a state that incorporates and reflects the global legitimacy conditions for claims to sovereignty in its constitutional structure and foreign policy—is a legitimate state (2013, p. 605).

Matched with this, the dominant voices within IPT which Humanisation uses as a scaffold have been of a neo-Kantian cosmopolitan position. The liberal and cosmopolitan approaches both inherit and echo elements of natural law and natural rights which ground their accounts of universality of ethical prescriptions on an account of the homogeneity of the human form (Kochi 2020b, p. 490). Together, they inform an account of a global Humanisation in which the rights of the individual are the key constitutive norms (Kochi 2017). The work of Buchanan and Peters is instructive here to demonstrate the mutual ground between these approaches. Both working from differing scholarly registers, the former in political philosophy and the latter in international law, they arrive at remarkably similar conclusions regarding their common focus on the deep structure of the international order. On both accounts the argument is made that the strength of communal norms with their focus located on the individual to be of sufficient weight to urge the international system to jettison the state consent model of international law towards more consensual models (Peters 2009) (Buchanan 2004). Peters articulates the motivation of this which itself echoes Buchanan's (2013) muting of cosmopolitanism's urging for a global cosmopolis in the following manner: "The idea is not to create a global, centralised government, but to constitutionalize global, polyarchic, and multilevel governance" (2009b, p. 404).

Kochi charges liberal cosmopolitan accounts as paying inadequate attention to deep antipathy amongst post-colonial and non-liberal states concerning how neo-liberal free markets have deepened existing inequalities:

> They overlook the ways in which decades of neoliberal social and economic policies have caused resentment to inequality and impoverishment and thus of how an antidemocratic politics has emerged in relation to this (Kochi 2020b, p. 488).).

The central concern here is that constitutionalism's account of rights-based justice clouds other perennial issues and results in a skewed and myopic idea of 'global justice' (Kochi 2020b).

Similarly, Scicluna draws attention to the protection of neoliberalism in the global economic order as an instance of constitutionalism protecting western dominated capitalist free trade and entrenching inequality between the global north and south (2021, p 88). Furthermore, the cosmopolitan approaches have been blindsided by the sort of nationalist sentiments that have driven key political events such as the election of President Trump and the vote for the United Kingdom to leave the European Union encapsulated in the drive towards vaccine nationalism in the wake of the Covid-19 pandemic. These suggest broader issues with the liberal cosmopolitan account of the ethical development of international society as it is relayed in the constitutionalist literature which hold purchase to Humanisation also.

Indeed, Kumm et al, in a recent editorial in Global Constitutionalism consider 'The end of the 'West' and the future of Global Constitutionalism' (2017). The election of President Trump, the UK's Brexit vote, the increasing surge of newly invigorated nationalist right-wing politics under the moniker of the 'alt right' alongside fractures in key multilateral institutions as of NATO and the World Trade Organisation each prompt a reconsideration of the faith placed in constitutionalism as an autonomous practice. In it, the authors argue that despite these events that are crucial to the Western led international order, "The end of 'the West', if it were to occur, would not imply the end of Global Constitutionalism" (Kumm et al 2017, p. 2). Rather the argument is made that Western commitments to human rights, international law, pluralist and open liberal societies hold strong enough purchase to survive any predicate or realised decline of the 'west'. The global spread of western centric constitutionalist ideas in free markets, rights, and democracy have been exported globally.

Rather than precipitating a collapse akin to that of communism following the demise of the Soviet Union then, these ideals are taken to hold firm.

The purchase these ideals have is taken to be evidenced in the manner in which the institutional connections that bind states into a global constitution are 'hard wired' into the dense network of 'constitutional' treaties and organisations. Furthermore, "The alternatives that exist take the form of a motley configuration of ideologies and power structures that are unlikely to form the basis of stable new coalitions or significantly expand their appeal…" (Kumm et al 2017, p. 3). The diagnosis is then one that continues to uphold the idea of a global constitution premised on western ideals even if the configuration of power on the global stage were to alter. This is rather an optimistic diagnosis that puts the cart of western liberal cosmopolitan ideals before the global political horse. It is further illustrative of the faith placed in the autonomy of such ideals as somehow severed from the cut and thrust of international politics. Indeed, their argument about the purchase of western ideals of democracy and human rights as they have been exported is shored up in reference to Myanmar's first free and fair elections in 2015 and the transfer of power from a military to a civil government (Kumm et al 2017, p. 3). Recent events show this rather to be hope forlorn, the transition of power from the military to the civil being a 'mirage' (Strangio 2020). The full extent of this misplaced hope in the pacifying power of globalising liberal norms came to fruition in 2017 as feuds between the Myanmar military and the militant group Arakan Salvation Army in the Rakhine state region escalated. An independent fact-finding mission under the authority of the UN Human Rights Council report as early as September 2018 found consistent patterns of widespread human rights abuses and violations of IHL committed principally by the Myanmar security forces. "Many violations amount to the gravest crimes under international law" (United Nations Human Rights Council 2018, p.1). These foreshadow the instituting of proceedings before the ICJ brought by the Republic of The Gambia against Myanmar on the charge of Genocide committed in the Rakhine region in November 2019. In addition, a military coup in February 2021 is reported to have killed 800 unarmed civilians (Mitchell 2021). This small example should give significant pause for thought regarding the progression of Humanisation. To this point the manner in which Humanisation is articulated, it is done so as a teleological inevitably (Teitel 2011) (Meron 2006) (Trindade 2021) or as the contractual realisation of a nascent capacity to recognise

one another's dignity through law (Weatherall 2015). By foregrounding liberal accounts of agency and reading reality from the letter of the law, the conclusions of theorists are baked in and in turn feed into pronouncements which, as R2P shows, act more like paper tigers than as indicators of fundamental political redirection.

As well as this individual account of agency in the background of the theories, there is also a fallback on accounts of natural law. Indeed, it may be considered that Humanisation can be seen as a secularisation of natural law. They both espouse a doctrine of law and morality as deeply entwined and directed towards the good of the individual. With the severing of the individual legal subjectivity from the state, alternative grounding is required. For Peters, a 'neo-natural law' paradigm offers this in providing a frame of reference that exists beyond the state (2016, p. 25). Similarly, Trindade postulation of a movement towards a 'new *jus gentium'* as one that integrates governing common principles across the entire spectrum of international law is a reimagination of natural law in the era of humanisation. The invocation of *jus gentium* is deliberate for it carries the idea of a plurality of subjects united through a '*societas gentium*'. In a manner akin to the social contract theory of Kant and Rousseau, this unity "...could not possibly be derived from the 'will' of its subjects, but rather based on a *lex praeceptiva*, apprehended by human reason" (Trindade 2020, p. 9). Such law is typically regarded as immutable, absolute and imprescriptible. Human positive law is independent, "...but the principles from which they are concluded are sacrosanct" (Boucher 2009, p. 70).

There is a distinct historicity to natural law. In the theories of Suarez, Vitoria, Grotius and Gentili a common thread is apparent that speaks to a conception of a naturally existing moral law which exists independently of the positive law. These principles of natural law are discoverable by the application of reason, but their author was believed to be God. The exact contours between the relationship between natural and positive law differ between their differing conceptions. The contention of a commonality of general principles that are constitutive of a broader common humanity is retained. As the modern states system emerged in Europe, natural law was related to the emergent Law of Nations as a unifying edifice that arched over the plurality of States to bind together a universal society. Universality was read from the generality of principles excavated by the application of

reason to combine the jus gentium with *jus humanae societas* - concerning all human relations (Trindade 2020, p. 11).

This historicity then is one tightly bound both to the emergence of the Western State system and the cultural mores of the time. Greek and Roman stoic thoughts regarding individuals' innate dignity and combined with Christian visions of a divinely authored order to ground further the idea of universality and immutability in regard to international law. It is then a doctrine 'deeply rooted' in Western thought and history (Boucher 2009, p. 42) and has a "...vital historical role…" in explaining the emergence of the European states system (Bull 1977, p. 171). Natural law, natural rights and human rights then are deemed to have a 'common ancestry' from this context (Lauterpacht 1945, p. 9).

The connection to Humanisation is this. Humanisation exploits theoretical holes in positivist international legal theory regarding the use of extra-legal variables to explain laws authority. Kelsen's *grundnorm* and Hart's rule of recognition each explain the core constitutive element of law's validity to be external to 'the law'. Humanisation plugs this gap in arguing this to be filled by humanity considerations. Indeed, as positive law gradually revealed its limits regarding the protection of individuals, recourse has been sought in a more fundamental set of principles that ground the centrality of the individual. Teitel for instance contends her 'Humanity's Law' to be a normative middle ground between positive and natural law: "...it presents a value system that mediates natural and positive law, the public and the private, the state and what lies beyond the state" (Teitel 2011, p. 33). For Meron, the role of natural law is more closeted, there are only 'antecedent roots' of natural law in contemporary humanisation. They linger in the background of his arguments concerning a historical teleology of international law and the ongoing influence of the Martens Clause in keeping law apace with technological developments in the midst of war (2006, p. 17-18). Each articulation rests on the fundamental presupposition that there are standards discoverable through reason which concern the wellbeing of the individual and are engaged at a level autonomous to that of the positive actions of States. They are indicative of forms of neo-Kantian practical reasoning in which the object of such reason is to abstract from the particular towards the articulation of universal principles. Humanisation and natural law then share an affinity in articulating fundamental standards that enjoin individuals in a common society. Where there is a difference is in the source of

such rules. Natural law of old conceptualised the knowledge of such as attainable through acts of reason towards working out the principles of action from divine authorship. Humanisation attempts to secularise this, backgrounding metaphysics and foregrounding the density of institutional rules directed towards the individual as indicative of a capacity in the law which the application of reason draws towards the conclusion of the protection of the human as the international legal order's telos. Divine authorship is relegated whilst the essential core of universal principles discoverable through the application of reason is retained.

Weatherall gives the clearest articulation of the reliance on natural law (2015). Indeed, it is the explicit basis of his doctrine of *jus cogens* that they emanate from an inward and outward conception of human dignity. Inwardly, this is the notion of an individual having dignity in his person for the mere fact of being human. Externally this is articulated as the agent acting upon the inward capacity towards others in treating them as autonomous agents worthy of the same degree of respect that dignity grounds. Weatherall's particular theoretical scaffolding for this is drawn from Cicero and Kant. Cicero provides an articulation of human dignity whilst Kant's categorical imperative is taken as the animating value towards norms connected with such dignity being universal and non-derogable. Both Cicero and Kant articulate transcendental capacities to their work from which Weatherall draws upon for his articulation of *jus cogens* norms. There is a notion in both of a universal moral community subject to moral principles which transcend the particular. The capacity for reason is key to this and is argued to be a universal trait imbued by our own nature. As this is innate in the individual, universal laws of nature, a universal moral community and universal obligations flow from this. Here, the particularism of natural laws foundation may begin to be teased out. The notion of human dignity in Weatherall is, as aforementioned, drawn from the stoic tradition as articulated by Cicero. Yet there is a distinct religiously inspired metaphysics which linger in the background of this which Weatherall does not place distance from. In Stoic thought, "We are all children of God, and those who fail to follow their own reason come to have an awareness of this truth" (Boucher 2009, p. 29). For Kant too, whose categorical imperative is related to Cicero's conception of the term, a rational lawgiver who gives the world a metaphysical substance and rationality brings with it the idea of a perfect individual capable of reasoning towards

the same ends. Through the exercise of reason, we are capable of acting morally, that is, in line with the categorical imperative. This then connects to the idea of peremptory norms in international law and hence the declaration in *Furundzija* that we have witnessed the construction of a Kantian kingdom of ends through law. The concern in this specific instance is that Weatherall does not explicitly place distance between the distinctly western laden and religiously infused conception of human dignity that is generated from Cicero's and the contemporary iteration borne out through *jus cogens*. For instance, the idea of human dignity having a dual quality - inward and outward - has fidelity to those societies with a grounding in western Christendom but conflicts with the idea of the human in Islamic societies. For example, the division between the Dar al-Islam (house of Islam) and the Dar al- Harb (house of war) denotes a differing ordering of human worth based on affinity to Islamic doctrine.

The concern which arises from this is in the extent of universality in the ethical propositions that undergird accounts of Humanisation and link natural law of old to the liberal underpinnings of humanisation at present. The contemporary approach to Humanisation is one of a liberal cosmopolitan bearing. This is to 'echo and inherit' elements of natural law and a natural rights tradition in revolving sound an epistemic core concerning the universality of individuals as rights bearing agents of their own accord. Natural law and their derivatives natural rights (moral entitlements each has in virtue of their humanity) are the 'twin heritages' of the modern liberal and political regimes which in turn influence the contemporary liberal cosmopolitan account of global justice (Kochi 2020b, p. 490). As Brown notes:

> Liberal political theory, drawing on the natural law tradition, and certain aspects of mediaeval political practice, asserts that individual human beings have rights, and since the Second World War, a quite elaborate international human rights regime has been developed to give body to this proposition (Brown 2002, p. 7).

The effect of this is that the articulation of a seemingly neutral value system in natural law as Humanisation's guiding light is one that thinly hides from sight its

particularistic origins. As a system relied upon in situations of positivist pitfalls, it is articulated as affirming communal norms. This is of particular import for Humanisation for articulating universal standards as the anchor towards system change needs to be borne out in practice. Boucher delineates the historically negative effect of over exertion of standards expressed through the universal communal rhetoric at the heart of Natural Law:

> Born of European stock, when the Roman empire and then Christendom were the primary reference points to one's ultimate identity, other cultures were understood through the conceptual and moral framework provided by natural law and natural rights (2009, p. 2).

Such ideas then were the foundational apparatus for a set of standards of which to judge others masked in the language of universalism yet turned out to be "...almost without exception…. special rights…." (Boucher 2009, p. 2). Despite being offered in terms of universality, they were utilised conditionally as the theoretical scaffolding for the denial of rights and justify excursions into foreign territory as the moral, political and societal development when measured against such a standard were found to be lacking:

> The appearance of the universalism of natural rights is undermined in practice by what amounts to an imposition of European Christian standards of conduct and rationality" (Boucher 2009, p. 105).

The importance of this point being that natural rights, natural law and human rights have a commonality to them as being grounded in Western political thought and used as systems of inclusion and exclusion as opposed to universal standards of conduct. The language of law was used to give gravitas to the notion of divide between those deemed 'civilised' and 'uncivilised' and legitimised practices of conquest and colonialism (Fitzmaurice 2012, p. 841). The European 'civilising mission' as it crossed into the new worlds then was one which utilised European standards as the basis for recognition (Tarazona 2012, p. 917). Kennedy too notes how such ideas were the theoretical

undercurrents of seventeenth century just war theory which did more to delegitimize the enemy and justify the use of force than to inject any idea of just conduct during conflict (2006, p. 76). Epitomising this was the Berlin act of 1885 codifying the distinction between the civilised and the barbarous with the undergirding of such division upon the Christian tradition. It was indicative of the Christian idea of a "...hierarchically ordered cosmology…" (Boucher 1998, p. 192). Despite its universalising rhetoric conjuring images of universal brotherhood, the standards deemed internal to natural laws and discoverable through reason were used as theoretical weapons to justify the seizure of land and the waging of war. Whilst there is a distinctly contemporary edge to articulations of human rights as legal standards with communal values gleaned from this, "...the juridical approach to human rights is not free of a residue of natural law" (Boucher 2009, p. 312). Rather, they are expressive of a historical dialecticism in which natural law, natural rights and human rights are part of the same historical process as one turns into the other (Boucher 2009, p. 3).

The purpose of outlining these distinctions is to draw attention to the manner in which Humanisation has a fallback upon natural law as an attempt to ground its legitimacy in a deeper vision of universal standards, yet such a vision is itself one of restrained origin and with it has limited purchase as Humanisation moves to its universalist conclusions. Furthermore, it outlines how theories can give significant license to political actions in the international sphere.

1.2H: Contemporary Concerns, Historical Schisms

Contemporary concerns of a similar variety are expressed in literature associated with Third World Approaches to International Law (TWAIL). There is a deep scepticism in such an approach that takes a broader sociological perspective regarding the role of law in international society and its relation to the individuation of legal subjectivity. The dominance of liberal approaches to questions of international justice is critiqued for overexerting themselves in terms of the ontological primacy afforded to the individual over that of the community (Chimni 2012). On this point, Nouwen charges the dominant approach to justice as embodied in international criminal law to be an exercise of

monopolisation which masks deeper structural reasons such as extreme poverty and inequality (2012). Kochi echoes this in arguing such broader structural reasons for violence are bracketed whilst responsibility has become individuated. In so doing allowing states to evade responsibility for root causes whilst presenting an image of a just international society (2020). Furthermore, such approaches are critical of human rights supposed value neutrality and emphasise a historical narrative in which the post-1945 rights regime is a direct descendant of European colonialism in Africa (Mutua 2002). Such a perspective is not found purely in the works of scholars of the global south. Scicluna for instance argues human rights have developed in a three-tier fashion. Their theoretical elucidation, their appropriation by civil society actors and their reappropriation by western actors to serve as justification for intervention (Scicluna 2021, p. 237).

Nouwen posits the prevailing emphasis on international corrective justice of which Humanisation may be considered a part of to have their foundations in Anglo-American legal thinking which conflicts with the types of justice administered elsewhere in the globe, notably among the States of Africa. This is of particular import when considering the work of the ICC has been directed entirely towards cases involving African states. The focus in such states as Nouwen points to is more on restorative justice that aims for reconciliation and forms of distributive justice that inculcates the community in both act and restitution leading to reconciliation (2012, p. 333). The contours of justice in such societies are not the type of individual focused legal justice engrained with the humanising turn. Rather, accounts of justice are predicated upon more holistic forms of political and restorative justice which, while not meeting the standards of Anglo-American tradition, cohere more resolutely with the community to which they are to apply. Citing a north Ugandan bishop, Nouwen recites, “political solutions have never been found in the courtroom” (Nouwen 2012, p. 333). Alvarez makes a similar point regarding Rwanda and the ad hoc tribunal which followed, arguing that the focus upon resolution through law to be appropriate to the epistemic community of international lawyers involved in the trials, but lacks a certain applicability to the communities concerned. Put simply, “They have not paid sufficient attention to how international efforts are perceived by and affect local communities, institutions, and the national rule of law” (1999, p. 369). Rather, an expanded retributive justice regime needs to consider restorative justice in aiding the goal of political peace in the

context of a polity in which abuses may have occurred on both sides (Buckley-Zistel 2018, p. 155).

Chimni builds upon this and draws on deeper ideas about the interrelations between law, legitimacy and society whilst drawing attention to two differing ways of conceptualising legitimacy and their relationship with the rule of law. For Chimni, legitimacy is more than mere compliance with laws or through the exercising of material or normative power imbalances. Rather, legitimacy may be afforded to particular laws and the broader order in which they exist through the invocation of good public arguments. From this, two conceptions of the rule of law follow which shadow the thrust of Humanisation's paradigm shifting rhetoric neatly. Formal conceptualisations of the role of law posit a weak relationship between the law's legitimacy and principles of social justice. Rather, the rule of law is predicated upon procedural grounds such as principles as of due process (2012, p. 291). Central emphasis is placed upon the formal sources of law as articulated in Article 38 (1) of the statute of the International Court of Justice (1945). Substantive conceptions alternatively posit a deep relationship between the rule of law and its anchorage in a conception of legitimacy which draws upon substantive principles of justice as its basis (Chimni, p. 292). The former invokes the notion of order, the latter notions of justice. Here, the spectre of liberal theorising on international law returns once more as Chimni emphasises the decentralised character of international society. "In the absence of a world state, international law is not made by an elected world legislature but by the principal legal subjects of the law, states themselves" (2012, p. 293).

This is an important point that draws attention to the need to consider the relationship not just between legality and legitimacy through the prism of legal normativity whereby legality equals legitimacy. Rather, we need to construct an account that is sensitive to the societal context in which such norms are to apply. In this instance, the society of states remains one marked by plurality in which sovereignty, despite being pierced, continues to hold court as the central organising principle (Brown 2002)

The TWAIL approaches then urge consideration for a more expansive range from which to explore accounts of legitimacy that draw upon broader accounts than those embedded in the legal and rather look more towards society. There is indeed a deep connection between legality and legitimacy. The term 'legitimacy' being etymologically

derived from the Latin term *'legitim*us' (lawful), itself derived from *lex* (law)' (Arajarvi 2010). For Max Weber, the most common form of legitimacy is the belief in legality (Peter 2017). Yet there are broader indices of legitimacy that the dominance of liberal accounts of international justice masks. D'Entreves asks probingly in regard to the conflation of legality and legitimacy:

> Are we disposed to approve, and consider legitimate, any legal order as such, or shall we reserve our applause for that particular kind of order that is established in view of the attainment of certain goals, of the insurance of certain determinate values? Are we prepared to make of legality a fetish, thereby reducing legitimacy to the mere respect of the rules of the game, without any concern for the game itself, whatever its stake and whatever the consequences? (1963, p. 691).

When we account for the dominance of the liberal ethical underpinnings of this burgeoning body of humanitarian related law and the subsequent normative prescriptions regarding reform, this should give significant pause for thought. By overexerting accounts of solidarity read from the law, we risk implementing changes that are out of step with the broader society to which Humanisation's normative prescriptions apply. Legal normativity and broader societal normativity regarding the centrality of the individual in international affairs need to be in tandem in order to ground the necessary legitimacy that Humanisation's normative prescriptions urge.

Whilst not from a TWAIL approach, a recent intervention by Russian Foreign Minister Sergei Lavrov, prior to the use of Force by Russia in Ukraine, neatly encapsulates these concerns and gestures towards the more fundamental schisms in terms of the value connectivity that this thesis seeks to excavate (2021). Lavrov pours scorn upon the 'historical West' and critiques appeals to humanitarian rules as constituting a narrow-group appeal in which such rules are thrust upon all others. The rules-based system of the UN is praised but the process in which humanitarian as well as cybersecurity and data rules are formed in 'narrow groups' is critiqued for failing to engage with 'true' multilateralism. Rather than working towards rules with genuine universal purchase, "It turns out that with

its concept of "rules' ' the West would like to line everyone up according to its own line, in its own line" (Lavrov 2021).

Is there politics to this? Yes. *But that is the point.* International law is not autonomous to the political community in which it is articulated and exercised nor is it a politically neutral surface. A brief example regarding the ICC, taken as central to the humanisation programme, illustrates a politics of international law. In this instance, Article 8 (2)(b)(viii) prohibits:

> The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory (International Criminal Court 2011, p. 4- 5)

The focus on the individual in the latter half of the article conforms to the normative individualism inherent to the humanisation canon. Yet what this masks is the political process and lobbying by Arab states for its inclusion related to the long running conflagration with Israel. Despite consternation in the drafting process, the Arab states were ultimately successful, based partly on the desire of delegates to secure their support for the treaty. For Wheeler, this "...is a relatively clear instance in which politics in the conventional sense trumped legal argument" (Wheeler 2004, p. 165).

This isn't to fall into the realist critique of the ephemerality of international law. It is rather an expression of how, following Koskenniemi, law must remain autonomous enough from politics to not be considered utopian whilst staking close enough to be considered relevant. Constructivist literature that is deeply engaged with what may be considered as this co-constitutive element of international law and politics gives further body to this 'politics of international law'. Wheeler for instance contends for international law to be a 'common normative language'. It is indicative of a deeper layer of shared understanding which then structures the horizons of states in delineating what may be appropriate reasons for action (2004, p 190 - 191). International law on Wheeler's view should not be perceived

as a fixed set of rules but rather as a process of deliberation which either licences or constrains certain forms of action. Reus-Smit advances on this to consider the way international law is an element in a broader interstitial model of political reasoning which combines to animate a 'feedback' effect between international law and politics (2004).

For Scicluna, the intertwining of law and politics is evidenced in public reactions to the Iraq war and the international community's reaction to President Trump's unilateral recognition of the Golan Heights as part of the territory of Israel (Scicluna 2021, p. 317). In both, the political reactions of both and defined by the legal standing of their decisions. Interestingly, Scicluna develops her argument to emphasise how core international legal principles such as the prohibitions on the use of force and on targeting civilians have constrained the behaviour of states by defining the acceptable parameters of state action. Rebuking the narrative of a western led international order, Scicluna moves to consider the way continuity and change in the international realm can be more astutely articulated by shedding the monikers of a western status quo fighting a revisionist charge (2021, p. 320). Rather, a more nuanced picture emerges whereby:

> In the matrix of factors that influence decisions taken by state officials, the content of international legal rules and the likely consequences of violating them do not always feature prominently. But they do matter (Scicluna 2021, p. 323).

Citing the US-China trade dispute, despite failings in the resolution procedures the normative framework of the WTO remains the point of reference for engagement and suggests the grip of basic principles as of *pacta sunt servanda* still hold firm. The institutionalisation of international law is partly the reason for this and affirms the identity shaping capacity of international law as norms become internalised and continue to affect behaviour despite changes in material power. Scicluna goes on to consider the impact of BRIC countries and argues they may use the board parameters of the existing international order to curate a parallel order more hospitable to their needs (though they lack force at present):

> Changes in the global distribution of material power will inevitably affect the content of global norms, including international law. Yet this does not necessarily mean that international law will lose its legitimacy, especially given the extent to which it is already embedded in international institutions (Scicluna 2021, p. 324).

The point to which Scicluna directs our attention to is the deep affinity between matters of law and politics but also of the limits inherent within this drawn out by the 'yawning gulf' between international law on the books and international law on the ground (2021, p. 320). The animating question behind this is whether international law reflects a universal consensus upon values or interests (2021, p. 325). The central contention of Scicluna, that international law and international relations are entwined and mutually constitutive, moves towards a conception of international law and its relationship with value consensus and orderly relations in a complex manner (2021, p 317-325). International law and international relations are intertwined and so may not be attributed as wholly Western led nor as moving towards Eastern revisionism. Rather, non-Western states are vocally supportive of the core principles of non-intervention, territorial integrity and the prohibition of the use of force (2021, p. 325).

By drawing together the historical concerns articulated around natural law alongside more contemporary concerns, we begin to see how law and politics, far from being autonomous entities, are deeply entwined. More so, they are the entering wedge of broader concerns of the manner in which law may be used as a vehicle for exerting power rather than constraining its exercise and making those who wield it without due reason accountable. This is the case for the language of humanity has a specific rhetoric pull to it. The concern is that in becoming the international order's new *lingua franca*, appeals to humanity may rather mask a form of value imperialism through the back door. To make the concerns here more tangible, discussion turns to how Humanisation impinges on questions on the use of force.

1.2I: Humanisation or Humanitarian Leviathan?

The general claim of Humanisation is that the weight of claims of human oriented normativity affects both considerations of the use of force and considerations on the means and methods of war. The focus is on whether or not Humanisation's arguments as they impinge on the question of force do indeed 'reduce human suffering and protect human dignity' or rather the opposite. The question here is whether this is Humanisation or the creation of a Humanitarian Leviathan.

It is important to note that Humanisation does not aim for the pacification of conflict but for its 'humanisation' through the use of force in a human oriented direction. It seeks to use force in a manner which recognises the constraints that both human rights and IHL places upon actors (Teitel 2011, p. 217 - 225). Humanisation theorists then engage in arguments that map onto the schism drawn from Just War Theory between *jus ad bellum* - the justificatory rationale for the use of force and *jus in bello* - the means adopted in the course of war. The two are traditionally argued to be separate. Michael Walzer outlines the reason for these two realms being 'logically independent' in the following terms:

> The moral reality of war is divided into two parts. War is always judged twice, first with reference to the reasons states have for fighting, secondly with reference to the means they adopt (1977, p. 21).

Conventionalist Just War Theory of the sort outlined by Walzer stresses the *sui generis* nature of war as an institution embedded within the broader normative framework of international society from which critical distinctions follow. Most notably in terms of discussion here is the commitment to the norm of non-intervention save for the case of a supreme emergency (1977, p.251 - 268) and the moral equality of combatants. The commitment to non-intervention is drawn from the constituent members of international society, states, having lives of their own and ends in furnishing the crime of aggression as the cardinal crime in international society. For Walzer:

> The theory of aggression presupposes our commitment to a pluralist world…We want to live in an international society where communities of men and women freely shape their separate identities (1977, p. 72).

The moral equality of combatants is similarly grounded in the institution of international society in a manner akin to that of the 'equalitarian' international order that Reus-Smit places emphasis upon (2005). "The moral equality of the battlefield distinguishes combat from domestic crime" (Walzer 1977, p. 128). It is the specific realm of war as an institution which is itself embedded in the broader normative complex of international society that explains this moral equality.

This conventionalist argument draws heavily from the conventions of international law. Recourse to the use of force is bracketed as being lawful only in cases of self-defence or with approval from the United Nations Security Council. In this sense it follows Article 2 (4) of the UN Charter:

> All Members shall refrain in their international relations from 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 United Nations (1945, p. 3).

And Article 51:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under

> the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security (1945, p. 10 -11).

Humanisation's move towards the realm of just war Theory takes aim at both the 'logical independence' of *jus ad bellum* and *jus in bello* as well as the constraints on the use of force as they exist in the UN charter. Humanity law broadly supports an inclusion for the exercise of the use of force beyond the minimal conditions of self-defence and with UNSC clearance towards a humanitarian exception. Weatherall articulates this as a 'hybrid position' that permits the use of force in the name of humanity by expanding the notion of self-defence to include 'extreme humanitarian distress' (2015, p. 370). The legal and ethical scaffold erected around this claim is that the invocation of human oriented concerns prompts obligation *erga omnes* responses.

For Teitel, the weight of claims of humanity affects both considerations on the use of force and on the 'logical separation' between *jus ad bellum* and *jus in bello*. In terms of *jus ad bellum,* the individual has come to serve as the 'independent ultimate test' (2011, p. 42). "Such claims have spurred a demand for forceful intervention in 'humanity's' name, not in the name of the state" (Teitel 2011, p. 13). Considering in turn that underwriting the language of a paradigm shift is then contention that, "The leading element in the transformation is a humanitarian legal regime with a greater reach" (Teitel 2013, p. 35), we see the broadening of geographic and justificatory guardrails that once served to constrain war making:

> Humanity law, as we have seen, may well constitute not just a basis for constraining the use of force but also a course of justifications for moving to force - to various forms of interventionism, from judicial to military (2011, p. 218).

Teitel is careful however to attempt to circumscribe the effects. The notion of humanity law extends to issues of *jus in bello* also as:

> The commitment to the protection of persons and peoples requires that just wars be waged justly, in ways that are in keeping with the very humanity rights that inspire the use of force in the first place (Teitel 2011, p. 218).

Yet the fundamental distinction between *jus ad bellum* and *jus in bello* is collapsed. By arguing towards the regeneration of law in a human oriented manner, their 'logical separation' is argued to have limited purchase. Rather, the fundamental promise of neutrality (moral and legal equality of combatants) is jettisoned in a manner reminiscent to the origins of international law (2011, p. 36 - 37).

What this speaks to is a rupture to the equalitarian international order with special governance rights granted to a subsection of states as the use of force comes to be used in a manner akin to global law enforcement (Graf 2021). Here once again we can see the effect of the claim of the shared texture of international and domestic justice. From both a neo-Kantian (Weatherall 2015) (Buchanan 2010) and neo-Grotian perspective (Teitel 2011), the use of force is expanded. There is a sense in which the argument of Teitel recognise this in seeking to construct institutions to mitigate the abuse of the use of force. Yet there is also a sense here of attempting to close the stable door once the horse has bolted. We may indeed have an emergent international architecture to adjudicate on acts such as crimes against humanity as of the systematic killing of civilians, but by broadening the very basis in which force can be exercised, the potential in which such acts can occur are also opened up. As Smauel Moyn notes, "We fight war crimes but have forgotten the crime of war" (2022, p. 10). There may be more routes for individuals to seek justice internationally, but in giving greater theoretical recourse to the use of force in the first place, the effect upon individuals become more pronounced.

Meron recognises the pitfall of this:

> In an ICTY trial court judgement in 2000, Presiding Judge Antonio Cassese suggested that, as a means of inducing compliance with international law, the prosecution and punishment of war crimes and crimes against humanity before national and

> international courts offers a widely available and fairly efficacious alternative to reprisals. It is far from certain, however, that under present-day circumstances, belligerents subjected to the pressure of persistent attacks on their civilians and civilian objects would agree that the prospects of future prosecution are compelling enough to cause the violating States to cease and desist (2006, p. 13).

This is a particularly astute rendering of the difference between domestic and international justice in the critical realm of war. The arguments which seek to collapse this distinction miss the fundamental difference here and in turn licence the use of force in the name of humanity that has pronounced effects on the ground that this legally oriented discourse of global justice misses.

The theoretical scaffolds that the theories build their arguments from may once again be seen at fault. As has been outlined, the theoretical fallback of Humanisation thus far has been towards cosmopolitan forms of theory. To be sure, this occurs in degrees. For Weatherall, the Kantian philosophical fallback is explicit (2015). For Teitel, the norms of Humanisation are taken as specific to the context to which they have arisen, denying the conceptualisation of them as having an *a priori* nature and cleaving open some space between her position and full-blooded cosmopolitanism (2011, p. 146 - 175). Yet the argument of the closeness between international and national justice and the centrality of the individual in international affairs comes full circle to promote the same conclusions from a secularised perspective (2011) (Meron 2006).

Whilst Humanisation as shall be seen in the next section, may be seen to lower the theoretical divide between cosmopolitan and communitarian thought from which we can build bridges over, this does not resolve the intensity of debates about their practical implications. Indeed, just as Chris Brown charges cosmopolitan accounts as being 'shallow' in their practical implications concerning the readiness to licence form of intervention (2018, p. 56), the same sort of casuistry can be seen as littered throughout the Humanisation literature. Weatherall for instance, following Grotius's claim that "The final and most wide-reaching cause for undertaking wars on behalf of others is the mutual tie of

kinship among men" (cited in Weatherall 2015, p. 363) speaks to a broadening of the norm of humanitarian intervention in the following terms:

> The same idea of undertaking action 'on behalf of others' on the basis of basic humanity is reflected in the interests of the international community, expressed through *jus cogens* and given effect by obligations *erga omnes* (2015, p. 364).

The rhetorical pull of humanity is supplemented by international law's Latin *lingua franca* to create an air of emancipation from the arguments on paper and the effects on the ground. Furthermore, Allen Buchanan's claim that force ought to be used in the name of averting a temporarily distant harm and in the pursuit of 'forcible democratisation' is built from a similar mould (2010, p. 251). Buchanan's contention disputes the Rawlsian position on the lack of a human right to democratic institutions and cites the lack of female participation in the theocratic regime of the Taliban in Afghanistan (2010, p. 24). The combined argument privileges democratic states in their use of force for the aversion of distant harms and for forced democratisation of the sort which was used in the U.S.'s 'Operation Enduring Freedom' in Afghanistan. This evidences one of the wider concerns of this thesis in the monopolising of justice in cosmopolitan terms linking up with a hedonistic strand of humanitarianism that "...tempts us to hubris…" and convinced its acolytes "...that we know more than we do about what justice can be" (Kennedy 2004, p. xviii).

In a similar manner, the Grotian fallback has the same effect. States under a Grotian reading are regarded as elementary units of a larger moral order - territorial boundaries were not viewed as 'barriers to external moral assessment of political interference' (Beitz 1979, p. 71). Benedict Kingsbury articulates the effect of this seeking to achieve 'corrective justice, and not 'distributive justice' (2019, p. 221). The effect of which being that intervention is licensed to correct acts of injustice. Grotius makes the case in the following terms:

> …kings and those who are invested with a Power equal to that of Kings, have a right to exact punishments, not only for injuries committed against themselves, or their Subjects, but likewise, for those which do not peculiarly concern them, but which are, in any Persons whosoever, grievous Violations of the Law of Nature of Nations (2005, p. 102).

Both the neo-Kantian and neo-Grotian underpinnings then give philosophical succour to claims of more muscular approaches to forms of intervention in international affairs. They are both aligned in the understanding that what is right to do in terms of the dissemination of domestic justice is mirrored in the dissemination of international justice. The broad move to the judicialization of conflict through the broad increase in courts and human oriented treaties in the post-1945 era is taken to be the post-hoc realisation of the truth of their claims.

Yet the value of humanity, however abstractly defined, is not the only moral game in town (Walzer 2004, p. 7). Instrumental reasoning, if we do X then Y will occur, masks the complex nature of international politics especially as it converges around issues of force and humanitarian considerations. Walzer takes up this point in regard to the sort of "...risk free war-making" taken as a necessary feature of humanitarian interventions (2004, p. 16). Such an argument distorts the complex nature of *ad bellum* and *in bello* decision making and masks the 'morally necessary' action of putting boots on the ground. By moving towards a conception in which claims of humanity hang above as the authoritative harbinger of the legitimacy of acts of force, the complexity of moral and political decision making is glossed over. As Walzer notes, "To intervene or not? - this should always be a hard question" (2004, p. 67).

Whilst recognising the burgeoning authority that claims of humanity have, it is not certain that the institutional moves gestured towards meet the foundational claims of humanisation in attempting 'to reduce human differing' and 'protect human dignity'. Individuals caught in the crosswinds of conflict may have a greater degree of rights attached to them and indeed may have the capacity to exercise claims attached to these. But these are secondary to the fact that by broadening the argumentative avenues of *jus ad bellum*,

those very individuals are under a greater degree of threat. This attaches to the claim made throughout that Humanisation's claims of a paradigm shift and its effect on our conception of global justice reflect a paucity in theorising with crucial impacts in the real world. By gesturing towards the suitability of conceptualising international justice in domestic terms in a manner which rally around the priority of the individual in international affairs, the use of force becomes more permissible.

The claims above then speak less to humanisation and more the curation of a 'humanitarian leviathan'. Hobbes argues in relation to the strength of the power of the Leviathan:

> One person, of whose Acts a great multitude, by mutual Covenants one with another, have made themselves every one the Author, to the end he may use the strength and means of them all, as he shall think expedient, for their Peace and Common Defence (cited in Lauterpacht 1945, p. 4).

The concern articulated through this section is that 'the strength and means of them all' can be manipulated towards spurious claims voiced in the key of humanity. The following claim of Carl Schmitt is noteworthy here:

> The concept of humanity is an especially useful ideological instrument of imperialist expansion, and in its ethical-humanitarian form it is a specific vehicle of economic imperialism. Here one is reminded of a somewhat modified expression of Proudhon's: whoever invokes humanity wants to cheat. To confiscate the word humanity, to invoke and monopolise such a term probably has certain incalculable effects, such as denying the enemy the quality of being human and declaring him to be an outlaw of humanity; and a war can thereby be driven to the most extreme inhumanity" (Schmitt 2007, p. 54).

Where Humanisation overreaches here then is in the move to consider that the weight of claims move to a system of humanised normativity as the *grundnorm* of international law. On the one hand this moves to the contention that the actual process of war fighting can be done so in a more humane and ethical way. Yet in so doing, the avenues to which such force can be used are expanded, contributing less to any humanitarian motivations. Further theoretical issues arise also in the manner in which an erosion of the moral equality of combatants rolls back a broader conception of international equalitarianism as well as the ease in which such use force may be used. Such questions ought not to be easily answered. Doing so requires broader forms of theorising than have been used to scaffold Humanisation's analytic and normative claims and it is in that direction which discussion now turns.

Part Two

The central claim of this section is that Humanisation can work as an orienting concept that the scholarship of International Relations (IR), International Law (ILS) and International Political Theory (IPT) may cohere around. As the foregoing sought to make clear, Humanisation has thus far been considered almost entirely within international law scholarship. The purpose of this section is to develop on the claims which emerged as a result of the exposition of Humanisation in the previous section concerning the theoretical scaffold that Humanisation theories have used. As was argued, this is important in that theoretical foundations do a lot of heavy lifting in terms of the normative conclusions pushed towards regarding the broadening of the use of force. The section here explores how Humanisation fits with broader theoretical perspectives and moves to an account which stresses horizontality over hierarchy.

The steps of the argument here are a prior outlining of why Humanisation relevance to IPT before an outlining of IPT's traditional claims. Discussion shall then move to how the 'constructivist turn' turn in broader IR Theory has affected these traditional claims. An outlining of how these can be seen in a further related 'practical turn' as an aspect of constructivism shall then be engaged before illustrating how this can reorientate our understanding of compliance and obligation as it applies to *jus cogens.*

2.1: Why International Political Theory?

Why ought Humanisation, a theory which finds its feet in International Legal Scholarship (ILS), be considered worthy of study for IPT? Michael Walzer provides the best reasoning by accounting for political philosophy as an 'authoritarian business' (1981, p. 381):

> ...the truths discovered or worked out by political philosophers can be implemented. They lend themselves readily to legal embodiment. Are these the laws of nature? Enact them. Is this a just scheme of distribution? Establish it. Is this a basic human right? Enforce it. (1981, p. 382).

Both Humanisation and IPT have real world impacts and impinge upon the same fundamental question as to "What is international society?" (Jackson 1993, p. 271). The Humanisation argument thus far considered stakes the claim to have 'discovered' the truth of the international legal order as bending towards the claims of humanity. At first blush, this is an understandable position that the proliferation of the international human rights' legal regime in the post-1945 era would give support to empirically, as well as having a certain rhetorical pull to it. Yet as the preceding section sought to make clear, there are issues with this account as an articulation of fact. Furthermore, both the starting point and the conclusions of the Humanisation of international law argument are uncomfortable to many within IPT who argue from a non-individualistic grounding.

One of the central claims made throughout this thesis is that in neglecting forms of non-individualistic forms of political theory, Humanisation has thus far overextended itself in its normative prescriptions, which relieves it of purchase when applied to the 'cut and thrust' of international politics (Reus-Smit 2004, p. 1). Humanisation's broadest claims take too small of a view - they are not sufficiently 'disciplined' by the norms of international society (Sutch 2012, p. 4) and so leave their more strident claims as to the nature of justice and the institutional reforms these demand as bordering on the utopian.

The account of the normative development of international society needs to be precise in order to justify the sorts of changes that Humanisation pushes for in opening the international legal order up to less voluntaristic sources of law grounded in communal norms. If the account of international ethics which underpin Humanisation's normative assertions are borne out in practice, the argumentative weight towards reform shifts significantly. Accurately portraying the nature and development of international society that Humanisation is but one account of is then of fundamental importance. If the sort of community interests that anchor Humanisation can be seen to inhabit themselves in the realm of genuine universality, the claims for international legal reform carry a lot of weight. The perceived legitimacy of such is key.

Furthermore, IPT is concerned not only with how international politics 'hangs together' (Brown 1999) but is also engaged in the quest of studying "...the pattern as a whole, reaching for its deepest reasons" (Walzer 1994, p. 45). There is here a deeper history between IPT and Humanisation than the overt law focus has articulated. Indeed, it was in Andrew Linklater's *Men and Citizens* (1982) that the term 'humanisation' had its first flourish. There, Linklater combined Kantian and Hegelian concepts of the individual's capacity to realise their own freedom with Marx's historical periodisation to work towards a 'scale of forms' regarding social and political development and applied it to international political society. For Linklater, such a process is one of 'gradual realisation' of man's capacity firstly to recognise themselves as distinct from nature, secondly of their ability to create civil institutions and lastly of replacing the 'estrangement' from others towards a "...humanised, and therefore universal, community" (Linklater 1982, p. 165). For Linklater, to achieve this:

> The emphasis on foreign policy must shift from claims for freedom and equality to cooperative acts aimed at determining a more effective system of social rules. After universal recognition of sovereignty comes a consensus about how it is to be properly exercised (Linklater 1982, p. 194).

That Linklater combined the thoughts of Hegel and Kant is instructive as these two thinkers give general direction to the two broad camps within IPT of cosmopolitanism and communitarianism. The broad theoretical distinction is between cosmopolitan accounts which ground their arguments in the centrality of the individual and communitarian accounts which privilege the state, and it is towards these ideas that discussion now turns.

2.2: Humanisation and Traditional IPT

Both of IPT's primary theoretical camps have traditionally grounded their internationalist arguments in metaphysical accounts of human agency. The source of value informing these positions provides the foundational schism. Stanley Hoffman and David Fiddler conceptualise this schism in the following manner:

> Whoever studies contemporary international relations cannot but hear, behind the clash of interests and ideologies, a kind of permanent dialogue between Rousseau and Kant. Kant put forward an ideal of international organisation for peace that does indeed correspond to the categorical imperative of autonomy which survives in man's heart…Rousseau tells us, however that the very intercourse of nations breeds conflict; that it not possible to end such intercourse; that the only remedies are fragile mitigating devices (1991, p. lxx).

Both Rousseau and Kant bring to the table differing considerations of the possibility of international life as an empirical condition. For Kant, a 'kingdom of ends' was possible as a political condition as the outcome of all rational agents legislating towards a universal law (Sutch 2001, p. 42). For Rousseau, the fragmented nature of international politics and lack of an international 'general will' meant such Enlightenment informed ideals misconstrued the nature of international politics:

> The order of the state and the anarchy of international politics combine to produce a most dangerous concoction. Since war is more destructive than violence between individuals, is inherent in the international system, and tends to degenerate into appalling brutality, it represents the worst state of all for humanity (Hoffman and Fidler 1991, p. xviii).

IPT then has a focus upon the source of value to the individual in relation to the international. The importance of this is crucial in rendering the sort of international society we ought to strive for and the forms of theory which we can use to get there. Our judgments here structure the following assumptions and conclusions concerning international ethics (Reus-Smit 2004, p. 273).

For Kant, the starting point is individuals as autonomous moral agents, each of whom are capable of acting on principles that all others, regardless of politics or proximity, can share. Individuals are capable of acting upon the 'categorical imperative' that states, "Act only on the Maxim through which you can at the same time will that it should become a universal law" (Kant 1991, p. 67). The headline claim which falls form this for Kant is that:

> Since the earth's surface is not unlimited, but closed, the concepts of the Right of a state and of a Right of nations leads inevitably to the Idea of a Right for all nations (*Jus Gentium*) or cosmopolitan right (*Jus Cosmopoliticum*) (Kant 1991, p. 123)

The nub of the matter here concerns the metaphysical grounding of this contention in *a priori* moral arguments of the centrality of the individual in all affairs and the disconnect between these idealised ideals and political reality. Chris Brown elucidates that Kant's progression towards *Perpetual Peace* cannot be taken in isolation from his moral and political philosophy in general and of his specific conceptualisation of the individual's relationship with the state (1992, p. 39). Kant's moral theory articulates the individual as endowed with reason which "...gives order to nature rather than nature which reveals patterns to the mind" (1991, p. 30). The individual is capable of *a priori* reasoning and of

giving effect to moral principles that reflect demands of duty elaborated as the categorical imperative. This moves to Kant's political philosophy in the recognition that a public legal order be an accessible vehicle through which to recognise moral principles. “Morals provide the principles on which the political/legal order should be based” (Brown 1992, p. 31).

Moral principles find embodiment in the state engaged in giving effect to *Recht*. *Recht* is outlined by Hart as having:

> ...no simple English translation and seem to English jurists to hover uncertainty between law and morals, but they do in fact mark off an area of morality which has special characteristics” (1955, p. 2).

These special characteristics relate to the boundaries of legitimate coercion and are occupied by concepts of fairness, justice, right and obligation (Hart 1955, p. 2). In the boundaries of the state, *Recht* operates to give protection to individual autonomy, and it is only within such boundaries that the categorical imperative may be realised (Brown 1992, p. 32). The universality of the categorical imperative propels this to the claim that political order ought to be based on the rule of law on a global scale articulated in the Definitive Articles of *Perpetual Peace*:

> A constitution based on the civil right of individuals within a nation (*Jus Civitas*).
>
> A constitution based on the international right of states in their relationships with one another (*Jus Gentium*).
>
> A constitution based on cosmopolitan right in so far as individuals and states, coexisting in an external relationship of mutual influences, may be regarded as citizens of a universal state of mankind (*Jus Cosmopoliticum*) (cited in Brown 1992 p. 98).

The contemporary reading of these arguments concerns the universality of principles of justice in both form and in scope. Fernando Teson's '*A Philosophy of International* Law' for example (1998). There, Teson advances on the contention that the individual is the primary normative unit of concern and see's the realisation of this through the development of international human rights law:

> The Kantian thesis, then, is that a morally legitimate international law is founded upon an *alliance of separate and free nations, united by their moral commitment to individual freedom, by their allegiance to the international rule of law, and by the mutual advantages derived from peaceful intercourse* (1998, p. 2 emphasis in original).

The notion of a morally legitimate international law is key here and extends to the arguments of Humanisation. In both, the law derives its legitimacy not through political processes such as negotiation towards, and consent to, treaties. But rather upon the moral undertones of human focused international treaties. The cosmopolitan position see's human rights as the embodiment of rights the individual have *a priori* in virtue of their humanity. The common form of humanity mandates a commonality of rights and interests sufficient to make the claim of global solidarity between individuals.

The communitarian voice of Rousseau alongside that of Hegel denies the sort of *a priori* universalism that underwrites the basic cosmopolitan position. Rather, interests, identities, as well as the conceptualisation of rights (for example, as held authoritatively by the individual or authored by a higher power), are indicative of the agent's embeddedness in particular social relations. "The idea of human rights on this account has no legitimate claim to universal validity" (Brown and Ainley 2009, p. 225). The broader theoretical effect is in the rebuttal of the individual as the primary normative unit of international affairs in favour of the state.

This communitarian reasoning contends "The state is the actuality of the ethical idea" (Hegel 1952, p. 155). It is through the state that individuals come to realise their own

'self-consciousness', or 'essence' (Hegel 1952, p. 155). To put flesh on the bones of this contention: ethical life is the harmonious settling of self-conscious conceptions of the good in which legal rights and personality moral are synthesised through the development of the self via the family, civil society and lastly the state (Kierans 1992, p. 480). This moves to differing conceptions of the good internally and the importance of the state in underwriting differing conceptions of the good life.

For Hegel, the concept of a right not situated in the concept of a society is merely 'empty abstract freedom' (1952. p.214). From this, "International law springs from the relations between autonomous states" and in this sense actualizes rights rather than drawing down a conception of rights from some variation of universal will. The emphasis then is on the voluntary nature of international law:

> There is no Praetor to judge between states; at best there may be an arbitrator or mediator, and even he exercises his functions contingently only, i.e., in dependence on the particular wills of the disputants (Hegel 1952, p. 212).

We may see here how Humanisation arguments sit within the theoretical foundations from which IPT's central schism springs. In one direction, it may be seen to realise the cosmopolitan's foundation claim concerning the centrality of the individual in international affairs. The judicialization of international law supplementing the claim that international and domestic justice mirror each other. Yet it also draws a line of argument from the communitarians focus on foundational particularism and the stress that such a position puts upon the notion of consent between states to the broad swathe of human oriented treaties signed in post-1945.

Where the contemporary articulations of the Humanisation of international law differs from traditional IPT is with the diminishment of claims concerning the gradual development of a form of universal reason to reach consensus concerning the proper operation of sovereignty. Rather, the specification of overriding human oriented norms are articulated towards the same goal. It is here that a shared terrain is accessible for lawyers,

political theorists and IR scholars alike to converge. This maps on to broader developments within IPT that take influence from the broader developments in IR Theory more generally in relation to the 'constructivist turn'. It is in this direction that focus now turns. The argument will then develop to consider how the sub discipline of IPT has become more mainstream under the influence of constructivism, the influence of which may be seen in a latter 'practice' based approach. The headline claim that emerges is that gestures towards hierarchy and of the prominence of humanitarian concerns can be reconsidered in a more dualistic and dialectic fashion in a horizontal structure.

2.3: Towards Constructivism

Discussion here shall focus on the core of constructivist argument. A brief historical tour of how this emerged shall first be engaged in before an account of the particulars of constructivist thought is engaged in.

Dichotomies are useful tools in the armoury of academic inquiry. Cosmopolitanism or communitarianism, *lex lata* or *lex ferenda*, sovereignty or human rights. Each are shorthand articulations which indicate where we have positioned our academic foothold in whichever debate we are engaged in. They carry with them bundles of secondary background information which make such a division possible. Martin Wight's often repeated assertion of domestic politics being the realm of the 'good life' and international politics being that of 'survival' is one such example (Wight 1966). Each corresponds to a holistic conception of what one is in the face of another.

Yet such conceptual wholeness carries with it a degree of purity which doesn't seem to map onto the lived lives of individuals "...dumb as they are…" in domestic society (Habermas 1984, p. 27), let alone the interaction of states in international society. For instance, Alan James conceives of sovereignty as analogous to a moat that cuts off the state from external imposition (1999, p. 39). As a metaphor, it works. As an authoritative articulation of sovereignty however, it does not. Such a definition fails to capture the myriad

intricacies which impinge upon the state's identity and interests without necessarily crossing the drawbridge so as to directly impinge upon the state itself. Such approaches, broadly considered to be 'rationalist' in assuming rational actors and fixed meanings, seem increasingly unable to capture the complexities of international politics and fail in their theoretical attempts to explain this.

Linklater's *Men and Citizens* is an example of the early constructivist challenge to the rationalist theories of neorealism and neoliberalism (1982). Linklater delineates three interconnected propositions to be the basis of rationalist thought.

1) Individuated beings who are free and equal.

2) All in possession of the same capabilities. Immanuel Kant and Hugo Grotius are both considered to reside within this camp. Kant for being insensitive to cultural and historical variations on an individual's capacity for reason. Grotius for imputing a set of ethical beliefs that were immutable and universal (1982, p. 120 - 126). Both arguments stemming from a belief that" ...unchanging and essential human powers could be imputed to individuals in a state of nature prior to the formation of organised social life" (Linklater 1982, p. 124)

3) Individuals could satisfy these pre-social ends by contracting towards states (Linklater 1982, p 126).

The argument evolves to dilute the rationalist premise of a fixed human nature and instead advances a broader sociological conception in which identity, choice and development are developmental. This development includes normative as well as material factors (Reus-Smit and Price 1998, p. 260-263). Linklater on this understanding can be read as indicating the manner in which this social construction of knowledge has and is in the process of development from tribal societies through to political societies and lastly to

humanity. The sort of blunt divide in rationalist thought which underpins much of Humanisation ignores this sociological element.

For Frederich Kratochwil, this is ontological. The liberal argument of individual centricity built upon a universalist image is closely related to natural law in claiming the 'truth' as being a static entity (2014, p. 205):

> In former times one could still fall back on the natural order and determine, like Aristotle, the "end" or telos of each form of association, ranging from the family (reproduction), to the village (exchange), and to the polis enabling the 'good life' (Kratochwil 2014, p. 136).

Such arguments are taken as a form of disguised Kantianism whereby the "…cunning of nature…" reveals a plan towards enlightenment and the "…end of times…" that tempts us to think we have nothing more to do. The assertion of a teleologically undergirded paradigm shift is one such example. It is a "…metaphorical bus…" (Kratochwil 2014, p. 136) seamlessly travelling from a focus on state to a focus on the human, each side of the paradigm is fleshed out as though they are entirely self-referential and static.

Hence, when historical junctures such as the end of the Cold War occur, to argue they are indicative of a shift from one ontological grounding to another is straightforward. Teson's contention that with the fall of the Berlin wall, "A more liberal world needs a more liberal theory of international law" (1998, p. 1) is indicative of this sort of wholescale order shift. But this notion of a liberal world identity being a given that shall in turn flow down onto the interests of its constituent members lacks depth (Simpson 2018, p. 64). It takes no consideration of how interests and identities simply do not come pre-packaged with an ingrained capacity to affect state behaviour. Rather, they may be conceptualised as being deeply impacted by the interaction of social and historical circumstances.

Such a claim concerning this dynamic interactivity is then the domain of constructivist International Relations scholarship. The key which unlocks constructivist arguments lies in the notion of 'intersubjectivity'. This is the notion that arguments and

claims to truth do not occur in a vacuum but arise through processes of interaction and negotiation to constitute social reality. In turn these have a dispersing effect on human beings as well as states as to what can be seen as a valid claim to knowledge. The outward ripple effects of these in turn affect conceptions of identity and interest:

> The key claim is that interests are not simply 'given' and then rationally pursued, but that social construction of actors' identities is a major factor in interest formation" (Brunnee and Toope 2010, p. 13).

Emmanuel Adler broadens this definition:

> Constructivism is the view that the manner in which the material world shapes and is shaped by human interaction depends on dynamic normative and epistemic interpretation of the material world…Constructivism, unlike realism or liberalism, is not a theory of politics per se. Rather, it is a social theory on which constructivist theories of international politics - for example, about war, cooperation, and international community - are based. Constructivism can illuminate important features of international politics that were previously enigmatic and have crucial practical implications for international theory and empirical research (2005, p. 92).

Constructivists in IR then posit that sovereignty is not self-referential but is rather more a socially oriented and dynamic construct (Thomson 1994, p. 13). Alexander Wendt's proclamation that "Anarchy is what states make of it" is the totem pole around which many constructivist arguments revolve (1992, p. 391). Anarchy for Wendt has never had a fixed meaning but is rather socially constituted by and constitutive of the actions of the members whirling around it. Divisions as of that between sovereignty and human rights still claim a place in this frame of theory, but less as duelling warriors and more as brothers in arms. They are mutually constitutive and engaged in what Adler refers to as the "...creative emergence of reality…" (2019, p. 47). Nicholas Onuf argues for this to be a project in which

we are each in a 'world of our own making' (1994, p.4). Under this reading, states, just as individuals, are constituted as dynamic social actors locked into a process of 'becoming' rather than 'being'. 'Being' means an unchangeable reality" (Adler 2019, p. 48). 'Becoming' rather emphasises the notion of "...substance in process" (Rescher 1996, p. 11).

To draw these threads together, the constructivist argument argues that what we take to be a legitimate claim in the name of human rights or a legitimate act in the name of sovereignty do not occur in a vacuum. Rather, they are a part of a broader social milieu in which 'social facts' made manifest by human agreement sit alongside 'material facts' (Adler 2005, p. 90-94). In this regard, constructivism sits as a bridge between rationalist approaches like that of liberalism and realism and idealist philosophies. It makes the argument that we understand material reality not through a singular and static frame of reference but is impinged upon by the interpretations we draw that are under the thumb of broader socially sanctioned understandings.

From this we can direct our understanding towards more nuanced understandings of normative change. The implicit argument of revolution and systemic change that lies in the postulation of a paradigm shift can be rearticulated. We can retain the core ordering principle of sovereignty whilst noting the increased purchase that human rights claims have upon the international legal order. As Sutch makes clear, "It is clear that contemporary international politics has moved away from the idea that whatever a state might do in international politics is perfectly legitimate" (Sutch 2001, p. 12).

Yet it is quite something else to say that this movement has shifted decisively to a system in which this amounts to a conception of international justice justifying "…pro-tanto reasons for action" (Beitz 2009). It is even more of a statement to argue that this conception of international justice can be seen 'authoritatively' in the realm of international legal normativity (Buchanan 2013, p. 7). Rather, a potentially more fruitful method of academic inquiry could seek to recognise the role that both state sovereignty and human rights can play whilst still retaining a fundamental notion that normative evolution can and does occur in international society.

In this regard, a corpus of non-cosmopolitan constructivist scholars whose work cuts across IPT, IR theory and ILS have cautioned against too strident conclusions regarding the

development of a humanised international order. Peter Sutch (2001) (2011) and Michael Walzer (1994) (2006) from IPT, Christian Reus-Smit (1999) (2001) (2005) and Emmanuel Adler (2005) (2019) from IRT, Frederic Megret (2016) and Marti Koskenniemi (2011) from ILS may all be seen as cautious transitionalists. They each recognise the momentum towards community values but emphasise the need for sociological legitimacy granted through the working out of the humanitarian considerations at the heart of Humanisation in practice. Their arguments note the manner in which human rights concerns have become constitutive for a state's legitimacy. Each place heavy emphasis on the notion that the legitimacy of a humanised international order needs to be worked out by the constituents of that society (states in an equalitarian order) rather than through liberal imposition. Each eschews the neo-Kantian claim of the mirroring of domestic and international justice whilst also recognising that genuine ethical normativity can arise in an international legal order guarded by norms of consent and sovereign equality.

Reus-Smit is clearest here in the argument that the 'moral purpose of the state' in contemporary international society is the augmentation of individual capacity (1999). Reus-Smit's argument uses the language of constitutionalism but moves beyond the international law focus covered previously which fixed their focus on purely legal norms. Rather, an ensemble of norms, principles and beliefs give shape and order to different conceptualisations of international society as they have occurred through history to construct a broader account of 'constitutional structures' (1999, p 6). Such an approach is interpretative in its approach in the linkage between intersubjective beliefs to distinct historical and cultural beliefs in regard to sovereignty (Reus-Smit 1999, p. 5-7). They are expressions of the underlying 'constitutional structure' and operate as a middle tier between these and 'issue specific regimes' as of the World Trade Organisation (Reus-Smit 1997, p. 557-559). A secondary, more imperative, form of structure that draws upon the 'moral purpose of the state' also regards the constitutive structure of international society. The moral purpose of the state connects with an 'organising principle of sovereignty' and 'norm of pure procedural justice'. Pertinent here is the norm of pure procedural justice that delineates correct procedures that legitimate states collectively formulate (Reus-Smit 1999). In contemporary international society, this norm is taken as being legislative in nature and emerges from the domestic practices of dominant states becoming embedded in the

practices of states and the constitutive structures of international society writ large (Reus-Smit 1997, p 567 - 568).

Reus-Smit develops the charge to argue that "...sovereignty has been justified with reference to a unique conception of the moral purpose of the state, giving it a distinct cultural and historical meaning" (1999, p. 7). This allows space for the dominant interpretation of state legitimacy in modern international society to be identified as related to the augmentation of individual capacity (1999, p.122-155). There is an internal focus on legislative procedural justice in a manner close to that of Thomas Franck (1995) that claims legitimacy for international law due to its focus on the equality in attachment to individual subjects and for it being the result of the conscious actions of the subjects to whom it is to apply (Reus-Smit 1999, p 9). Yet, there is a distinctive institutional rationality to the broader order of which this moral purpose is an integral part which pushes against the claim that such a purpose operates at the level of the international as it does at the domestic. Sovereignty remains central, but it is impacted by the broader corpus of intersubjective ideas and norms which give a constitutive foundation to differing epochs of international society. The charge made from this is that what gives contractual international law, of the sort of the UDHR, the ICCPR, the ICESCR as well the Genocide Convention their legitimacy is to be found in their fidelity to broader forms of 'social validity' in their construction. This social validity is found in the argument that international law is a "reciprocal accord" (Reus-Smit 1999, p. 131).

What is important here is the connection made to broader institutional rationality argued in the key of social validity and the concerns with the impact on international society which follow. There is a distinct and overriding sense of legitimacy drawn from the procedural legitimacy evidencing individual equality amongst states as the primary subjects in international society. This 'equalitarian regime' guards a broader conception of international legal legitimacy (Reus-Smit 2005). The equal ordering of states in terms of the international legal order can be slow and cumbersome, but in doing so it retains the necessary 'social validity' that both the individual norms and its undergirding system need in order to do any real work in giving legitimacy to norms of a legal, social or ethical nature.

In articulating international society in a manner which recognises this, we can meet Linklater's claim that:

> A more complete theory than rationalism will respond to the existence of social change and moral development by proposing an account of the emergence of universalism (Linklater 1982, p. 126).

To do so, constructivist stress the focus should be on finding accessible grounds, or 'shared understandings', so that we can gradually expand the boundaries of the moral community (Boucher 2009, p. 285 - 302). The focus should not be on erecting rigid distinctions between the inside and the outside, or between those on the side of humanity and those against it. Instead, the constructivist insight is that we must begin with the norms as they exist. The challenge then is to avoid the charge of being unduly conservative by incorporating both stability and change from a starting point of already existing norms (Boucher 2009, p. 291). This is less a task for IR theory than IPT however and it is there to which discussion now turns.

2.4: Constructivism in International Political Theory

Constructivism's application to IPT has brought to the fore key theoretical propositions that have seeped into the normative approaches of cosmopolitanism and communitarianism. The constructivist insight concerns the theoretical acceptability and relevance of theoretical precepts in order to give their arguments traction. The key theoretical predicate concerns the accessibility of the starting point of universalist ethical inquiries.

Onora O'Neill's argument below holds as an accurate description for the constructivist influence in IPT overall. It urges the direction of universal ethical reasoning towards one that 'filters out' any starting point which needs but lacks a metaphysical or empirical foundation (1996, p. 38):

> An adequate account of ethics will need not only convincing starting points but convincing ways of proceeding from those starting points, that is to say an adequate conception of practical reasoning. Ethical judgement may rest not on discovering ethical features in (or beyond) the world, but on constructing ethical principles (1996, p. 39).

Such 'starting points' include both sovereignty and human rights as mutually constitutive in an interdependent international community. For O'Neill, the interdependence of the international community urges an account of international ethics that is cosmopolitan in scope. The heart of the argument concerns how plurality and connection may lead to potential injury leading to a cosmopolitan categorical imperative to prevent this (Sutch 2001, p. 96). For O'Neill:

> If these considerations are convincing, they may have very significant and complex implications for justifiable intervention in the case of human rights violations beyond state boundaries, for the justice of legislation that selectively restricts boundary crossing, whether for asylum, travel, migration, abode, work, settlement or to take up citizenship, and for the justice of an economic order predicated on transnational economic intervention which lacks both transnational powers of taxation and transnational institutions to relieve poverty (1993, p. 86).

The basis of interconnection means that rights and sovereignty under such a conception are complementary and it here that there is shared space for constructivism's influence on communitarian thought may be seen also. For Mervyn Frost for example, they indicate a 'modern state domain of discourse' (1996).

This argument is important and deserves unpacking. The 'modern state domain of discourse' is considered 'the ordinary language of international relations' (1996, p. 109). The content of which is filled out by reference to 'settled norms' (1996, p. 111). Such norms

indicate a deeper layer of agreement and can be identified as requiring special justification if to be overridden or denied (1996, p. 105). Frost lists these as:

S1. The preservation of the society of states

S.2 State sovereignty

S.3 Anti-imperialism

S.4 The balance of power

S.5 Patriotism

S.6 Protecting the interests of a state's citizens

S.7 Non-intervention

S.8 Self-determination

L.1 International Law

L.2 *Jus ad bellum*

L.3 *Jus in bello*

L.4. Collective security

l.5. Economic sanctions (under specified circumstances)

L.6 The diplomatic system

M.1 Modernization

M. 2 Economic Cooperation

D.1 Democratic institutions within states

D.2 Human rights

What is distinctive to Frost's claim is that in answering '…pressing ethical question we encounter in international relations" such as how to respond to claims of genocide, not

just any answer will do (1996). Frost's insight, drawing on the work of Ronald Dworkin, is that the reasoning an agent employs is one that is determined by the practice in which they are participating. By listing the settled norms of the modern state domain of discourse, it allows the construction of parameters within which certain constraints create a set of *sui generis* standards inherent to the institution itself (1996, p. 93 - 97). From here, when seeking to answer a question with no shorthand answer it requires an inquiry to the "…background justification for the institution as a whole…" and to seek an answer that "…best accords with the settled rules of the institution'. "It is this background theory which allows a correct decision in hard cases" (Frost 1996, p. 97).

It is the argument that there is an area of agreement (a domain of discourse) that does a lot of the work here. The heart of the argument concerns the proposition that there is a distinct institutional logic to the 'modern state domain of discourse' that arises from the list of settled norms. However, crucially for Frost's argument is the claim that:

> On reflection, what is striking about the foregoing list is the primacy of the two items the list. Most of the other settled goods are in some way derivatives of them. Combining the first two items, it appears that the preservation of a system of sovereign states is the primary good. The majority of other goods mentioned imply a prior satisfaction of this good (1996, p. 112).

Answering difficult questions necessarily engages deep philosophical and political discussions on the nature of the institution in which they are engaged and the settled norms within. Doing so constrains the answer one may work toward for the answer must be one that 'best accords' to these background conditions and settled norms which upholds the centrality of state sovereignty and a statist international society. In cases in which the settled norms and background theory conflicts, Dworkin, following John Rawls, employs the 'intra-practice' device of 'reflective equilibrium' (1996, p.99). Reflective equilibrium involves a to and forth procedure in which an answer is arrived at by seeking a synergy between a myriad of settled norms and the background theory, in which some established settled norms may fall away into disuse. It is through this procedure that Sutch argues that such a

developmental communitarian argument can account both for the uncritical acceptance of norms that are a given in everyday life as well as allowing scope for the developing understanding of new norms (2001, p. 121).

What is important here is the contention that despite a lack of agreement concerning specific measures when difficult cases arise, an underlying constitutive structure can be seen that structures the boundaries of an acceptable answer. This disciplines both the starting point and the end point of discussion. Indeed, for Frost, "What people say in support of their actions thus gives us an indication of whether a given item is settled within a specified domain of discourse" (Frost 1996, p. 105).

This is observable through Operation Allied Force conducted by NATO air forces in Former Yugoslavia and its subsequent declaration as being "illegal but legitimate" (The Independent International Commission on Kosovo 2000, p.4) (IICK). In referencing the legal dimensions concerning non-intervention and UN Charter commitments regarding use of force only in response to an armed attack or with security council clearance, of which neither applied, the declaration of the IICK is explicitly built from the background conditions of states recognizing such rules. It is secondly, a statement that can be seen as a result of the process of reflective equilibrium in that such action was seen as a legitimate response by the international community due to fears of genocide by Serbian forces upon the Muslim population in Kosovo. The latter only makes sense in relation to the first if indeed the first is rooted in the idea of a state's system with the settled norms of non-intervention and treaty commitments against the use of force having efficacy. In addition, the determination of such action as legitimate for being premised on the protection of Muslim civilians in Kosovo is again only understandable if the domain of discourse is one rooted in the state system.

Furthermore, as Falk contends:

> Legality clarifies the core obligations relating to force, while legitimacy tries to identify and delimit a zone of exception that takes account of supposedly special circumstance (2005, p. 35).

The appeal to legitimacy is one that furnishes the state-centric system as it is an appeal of the special dispensatory element in justifying the overriding of non-intervention. Yet the legitimacy of the attacks speaks to an ongoing international dialogue contributing to the contours of legitimate state action. States were deemed legitimate in those circumstances to act and those upon whom the strikes were targeted were acting illegitimately. But it is the fact these strikes were episodic that is important. They were in response to acts which 'shocked the moral conscience' and stepped outside the formal boundaries of international law. In doing so they contributed to an ongoing discussion on the parameters of sovereign state action that sits in tandem with human rights concerns. Operation Allied Force strikes then matured the ongoing dialectic regarding rightful state action set and the normative import to be given human rights. Yet it does not allow the argument that the episodic priority in that instance serves to underwrite broader arguments of order shift.

Rather, they evidence how within the system already there is sufficient wiggle room to respond to such black swan moments whilst still retaining the fundamental nature of the association. In doing so contributing to the normative evolution of international society by shaping the parameters of socially sanctioned action in the international political space in a dialectic fashion.

Mentioning these here is meant to serve the simple purpose of drawing attention to the differing ways in which normative approaches to international ethics have been infused by constructivists urging accessibility. To determine what rights we have as individuals, as members of states and what we may legitimately claim in the name of the international community we must rely upon theoretical foundations which meet this test of accessibility.

To do so is to engage in a set of intersubjective norms that structure discussions and confine the boundaries of the acceptable:

> Thus, just as domestic communities help constitute the normative understandings of individuals within states, the community of states helps constitute normative discussion among states (Adler 2005, p. 7).

The point of both philosophical exercises then is to construct principles of justice that are typically associated with the particularism of a 'bounded community' at the international level. With the gradual deepening of human rights in the international public consciousness, the theoretical bias has been towards fleshing out how such rights are proof of the cosmopolitan account. In turn, these serve to undergird claims such as Buchanan's that human rights are the 'authoritative' *lingua franca* of international politics (2013, p. 7) and are akin to Humanisation in grounding claims of international legal order reorientation. The particularist response to this universalist charge has disputed the depth and breadth of genuinely shared substantive value affinity human rights are argued to demonstrate. This is not to say that action in the name of human rights and the international community may not occur, but as Walzer urges, depends on the construction of norms that are thin enough to be truly shared (1994). Sutch adds weight to this proposition:

> It is not a question of making everyone's conception of human rights consonant with the dominant western/ liberal conception of human rights but of acting only on those principles that are in fact shared (2001, p. 136).

We may see deep affinities between the projects of constructivist influenced IPT and of Humanisation then. Both are engaged in the task of plotting the normative identity of international society through accessible means and question how the values taken as immanent to these can be more authoritatively exercised. Furthermore, Humanisation as an area of scholarship is indicative of how IPT has become more mainstream and seeped into broader disciplines such as scholarship around international law. Whereas the division between the is and the ought, through the language of *lex lata* and *lex ferenda* in international law once indicated a hostility to such theorising, Humanisation illustrates how

such theoretical boundaries have been lowered. Discussion now turns to consider this in greater detail alongside an account of contemporary IPT.

2.5: Humanisation and Contemporary International Political Theory

Normative theorising on international law has been on quite the journey. For instance, in 1993 Terry Nardin, despite making the case for international law's relevance, nevertheless acknowledged that "It may seem odd…" to include it as an ethical theory itself rather than as a source of ethical judgement (1993, p. 12). Similarly, B.S. Chimni writing at the same time spoke of international legal theory as being situated in a theoretical 'wasteland' (1993, p. 1). "Something is changing '' however, and this extends to both theory and practice (Scharf 2019, p. 588). International law is said to have emerged into its 'post-ontological age' as debates to its reality have been overcome and questions instead focus on issues of legitimacy, efficacy and justiciability (Franck 1995, p. 6). For instance, the embeddedness of aspirational norms such as those outlined in the Universal Declaration of Human Rights (UDHR) in an increasingly complex, specialised and international normative regime has prompted consideration of the moral basis of the institution of international legal order as a whole (Buchanan 2013).

International jurisprudence is now commonplace. It is not however confined to legal scholars but is increasingly permeated by scholars of IPT. However, despite travelling from different directions towards a similar destination in considering the role of international law on the global basic structure, conversations often pass each other by.

Indeed, recall the contention that the nub of Humanisation is jurisprudential. If the claim that the normative momentum attached to claims of humanity has shifted the international legal order's *grundnorm* can be sustained, then this indeed shall be a paradigm shift. This is as much a political philosophical claim as it is a jurisprudential claim. However, the broader effects on international society are, from a political theory perspective, left hanging. The direction in which Humanisation's normative conclusions head in are left undernourished in terms of the consideration of their effects. Indeed, multiple effects

follow from the argument of a paradigm shift with seismic effects on international society more broadly. These include an erasure of the fundamental role of consent in international law, a collapsing of the distinction between domestic and international justice, and a far more muscular approach to claims of humanitarian injustice. Again, these are no small moves.

How could we know then if this claim can indeed be sustained? The claim to be developed is that the most impactful arguments with feet in both camps of IPT and IR theory as well as having fidelity to both cosmopolitan and communitarian approaches are coalescing around questions of practice. The idea behind practical approaches is that normative theory can have more critical purchase if it situates itself from the outset in the increasingly legalised institutions of international politics in the here and now. In relation to the global phenomena of the post-1945 human rights practice, concentration is set by the acknowledgement of a broad basis of consensus that individuals have rights, and these rights ought to be realised through international law (Buchanan 2013, p. 7). Such a practice is just one such practice nested within a broader interlocking milieu of practices in which sovereign orientated legal practices also operate. The question moves then to consider which practices ought to hold the most weight in guiding normative theorising about both the nature of international society and the direction in which conclusions from this may head.

The next subsection shall expand on the fundamentals of practice theory more broadly in greater detail. Here what is needed is understanding the headline claim that if we can distil the fundamental idea internal to the workings of a practice then we can use that to guide our theorising as to what to when questions arise within the practice and how best to maximise the values immanent to it. In essence, it seeks to evade the spectre of the charge of utopianism by binding itself to the actually existing institutions and practices of international society.

It is in the work of Charles Beitz (2009) and Allen Buchanan (2013) that such theoretical pursuits are most richly demonstrated in IPT. Despite analytical differences there are similarities in their steps of argument.

Firstly, is the claim there simply *is* a practice embedded in international law that coalesces around the protection of the individual and has become fundamental to world politics. There are several ways in which this point is fleshed out, most commonly in the contention that the legalistic rendering of human rights in international law has become the global *lingua franca*.

Secondly, the normative contention that this practice claims a *sui generis* authority in structuring how we think about human rights more broadly is made (Beitz 2009, p. 11).

Third comes the philosophical qualification of these two points. The force of the practice is not felt due to agreement on any under pre-theoretical, 'folk' (Buchanan 2013, p. 7) conceptions of the moral status of individuals that the international legal order is to realise. Rather, the practice exercises authority via the "...acceptance of a distinctive class of norms as sources of reasons - though not necessarily as decisive reasons - for an array of modes of action" (Beitz 2009, p. 9).

Fourth comes an identification of the constitutive documents of the practice. Both Beitz and Buchanan note the anchoring role of the UDHR, the ICCPR and the ICESR to which Buchanan adds the Genocide Convention (2013, p. 6). Beitz continues to list the Convention on the Elimination on all Forms of Racial Discrimination (CERD), the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), the Convention against Torture and other Cruel, Inhuman or and Degrading Treatment (UNCAT), and the Convention on the Rights of the Child (CRC) (Beitz 2009, p. 26). There is affinity here then with Humanisation is the argument that a canon of constitutive documents works to construct the practice.

The next move then is to consider the force to which these immanent ideas established press upon the international legal order. For Beitz, they collapse the distinction between domestic and international justice to make the violation of such rights as within the legitimate purview of external actors with the further claim that intervention may too be a legitimate response (2009). For Buchanan, the vocabulary of a paradigm shift is resurrected here in the claim that empirical developments of the sort identified by Meron. They:

> ...signal a transition from an international legal system whose constitutive, legitimising aim was peace among states to one that takes the protection of human rights as one of its central goals (Buchanan 2010, p. 71).

The normative claims which follow are wider ranging and pose broader reconsiderations of the international legal order itself. Considerations of the diminishment of the of state consent in international law, the assignment of clear obligations to act in certain scenarios to both states and non-state actors (Buchanan 2013, p. 280-288) bolt onto previous arguments concerning the makeup of the UN Security Council in permitting only democratic rights-respecting states (2004) and an injection of humanitarian intervention into the legitimate realm of *jus ad bellum* (2013). Again, this is closely aligned with the arguments of Humanisation.

Whilst the empirical foundations of these arguments may seem to be relatively unimaginative descriptions of simply 'what is going on in the world' without critical purchase, there are important philosophical moves in play. In emphasising the '*sui generis*' nature of the claims that run through the embellishment of human rights in the international legal order, both Beitz and Buchanan sidestep traditional critiques of cosmopolitanism such as its narrow argumentative foundations in the allocation of a universal form of human reason or its insistence on pre institutional natural rights. Rather, these norms are norms with important moral implications worked out for the specific circumstances of a society of states that have a dynamic quality to them (Beitz 2009, p. 122-127) (Buchanan 2010, p. 75). They are for Buchanan "...a deliberate and eminently reasonable response to the threats posed by the modern state" (2013, p. 267) and for Beitz as 'individual protections against standard threats' (2009). It is here that a degree of normative ground is ceded to the communitarian argument that normative standards arise in the context of communities with important institutional effects. Beitz and Buchanan consider the legalisation of international politics that the constitutive documents evidence as forming a *sui generis* international community in which human oriented norms are claimed to have the most purchase.

The paradigm in which these operate is juridical (Beitz 2009, p. 41). In recognising the particularities of association by law, members of such a system (states) accept a degree of 'normative discipline' in their mutual relations (Beitz 2009, p.211). There is mutual acceptance of the claim that, "The political structure of the world consists of a system of territorially defined political units, each claiming to exercise legitimate authority within its borders" (Beitz 2009, p. 129). This advances towards the need to interrogate internal alterations to this structure due to the ongoing developmental nature of both interests and their guarding institutions (Buchanan 2010, p. 89).

Public reasoning here is key. For Beitz, this public role is juridical in foundation yet political in implementation (2009, p. 41). The juridical foundation is fleshed out by reference to the broad sweeps of legalisation in international politics conditioning the outer edges of international toleration and supplying reasons for actions for agents of the international community (2009, p.39-42). Such action often takes the form of states acting individually or collectively which extend beyond the boundaries of treaty regimes (2009, p.41). What such an 'interference justifying' feature of Beitz's model speaks to is a broader rendering of human rights as matters of legitimate international concern (Beitz 2009, p. 123). They draw their basis from the definitive role of human rights in international practice as claims of transnational concern. They provide 'pro tanto' (2009, p. 115) reasons for external remedial action that may be either directed towards the satisfaction of the deprivation or indirectly as a means to help establish the conditions for such a deprivation to be realised in future conditions (2009, p. 121). Further, they augment cosmopolitan's traditional claims of the moral force of rights towards a more political direction. Legalised human rights become the fundamental standard of legitimacy in a shared and publicly available discourse (Buchanan 2010, p. 71). In short, they move from being purely moral claims to being politically sustainable legally embedded moral claims, the purchase of which we can see and measure in international society.

Crucial to the claims of Humanisation regarding a paradigm shift and normative ordering, this form of inquiry does not arbitrarily commit to a form of theoretical conservatism. Rather it argues that any answers given fit the institutional space to which they are to apply in a manner that mimics the formative argument of Frost (1996). Buchanan gives the clearest account as to the reasoning behind this:

> The justification of claims about the existence of human rights is not a once-and-for-all feat of abstract philosophical reasoning; it is an on-going process in which institutionalised, public normative reasoning plays an ineliminable role (2010, p. 5)

To restate the arc of the argument thus far. What these 'practical cosmopolitans' do in a manner akin to Humanisation theorists, is engage in the empirically informed yet normative argument concerning the roles, responsibilities, and reliability of institutions within the international legal order and their capacity to meet their immanent purpose articulated as becoming centred upon claims of humanity.

There are two principal steps to the argument made here. The first concerns the nature of philosophical theorising about human rights and the legitimacy of institutions. The second concerns how such theorising may be augmented. For Buchanan, the best route to this is social epistemological and involves comparison between institutional forms towards the most appropriate in realising the purpose of that institution (2010, p. 89). The nub of Buchanan's point here is that articulating human rights in legal rather than moral terms have an effect on the content of rights and the justification for their overarching institutional settlement. In turn, the normative development of international society through such a process matures our conception of the content of rights and norms and the institutional settlement which surrounds them.

To make Buchanan's point above more tangible we may look into his arguments concerning just war theory and the move to incorporate a more permissive norm of preventive self-defence -, defence in relation to a temporally distant threat rather than confined by circumstances of immanence. For Buchanan, traditional just war theory is "...comprehensive but mistaken" (2013, p. 252) and unjustifiably conservative (2013, p. 264). Focusing on the purely moral account that bars the use of force in all circumstances aside from imminent self-defence, what is termed the 'Just War Norm' (JWN) (2013, p. 250) is "...insufficiently empirical…" and "...arbitrarily incomplete…" (2013, p. 252). As outlined above, the solution for Buchanan is to integrate moral philosophy alongside institutional analysis. This embellishment of the institutional apparatus in conjunction with his earlier

injunction on the need for the incorporation of 'institutionalised public reasoning' moves to the argument for a more permissive norm in the face of 'new conditions' imposed by transnational terrorism (2013, p. 258). The concern that the malleability of claims underwriting this expanded use of force are mitigated by their institutionalisation:

> One can have one's cake and eat it, too, if a more permissive norm than the JWN can be properly embedded in an institutional arrangement that adequately reduces the risks that attend the inherently speculative character of the Preventive Self-defence Justification (Buchanan 2013, p. 259).

The core of Buchanan's point is that we may mitigate the risks of a more permissive norm on the use of force if properly institutionalised to provide checks and balances on state leaders. By institutionalising a more permissive norm in the face of new threats, state leaders will be required to articulate their actions in public forums and in publicly accessible terms. This institutionalist augmentation to traditional just war theorising has theoretical fidelity to the sorts of arguments offered by Teitel and Weatherall. Both sets of approaches seek to incorporate the increasing force of normative claims concerning the imperatives of humanity in an institutionally robust system. By providing publicly available norms centred around humanity claims we see the argument that the use of force can be pursued for the preservation of 'peoples and persons' (Teitel 2011, p. 35).

What the institutionalist augmentation of Beitz and Buchannan's traditional moral cosmopolitanism is indicative of is that cosmopolitanism has come closer to the style of argument of communitarianism in noting the communal context in which norms, including ethical norms, arise. One of the key elements of this has been the application of the concept of 'communities of practice' to IPT by Emmanuel Adler. Doing so has drawn the moral sting out of such approaches and replacing it with a more analytic edge (Adler 2005):

> Communities of practice cut across state boundaries and mediate between states, individuals, and human agency, on one hand, and social structures and systems, on the other. It is within communities of practice that collective meanings emerge, discourses become established, identities are fixed, learning takes place, new political agendas arise, and the institutions and practices of global governance grow. Communities of practice are not international actors in any formal sense, but coexist and overlap with them (2005, p. 15).

They are "...communities of the like-minded" (Adler 2005, p. 5) whose intra-community contestation aids the development, refinement, and embeddedness of knowledge which in turn congeals into practices 'in the real world'. What is important to the task here is how such communities can be conceptualised as edging the normative evolution of international society along a path grounded in international law. Fundamental to this is the notion of 'epistemic practical authority'- the claim that a fundamental principle has the authority to determine the subsequent distribution of rights, duties and obligations (Adler 2019, p. 3). Progress can and does occur within this state without changing the fundamental animating norm, social order revolution however, when there is a shift in what animating norm has this practical authority. To relate this to Humanisation, the claim is that the epistemic practical authority of the international legal order has shifted from hanging upon the principle of state sovereignty to hanging upon the principle of humanity.

To unpack this further, continuity and change can occur within a system in which the "...master mechanism…" of epistemic practical authority remains the same. This state of 'metastability' in turn creates the opportunity for 'bounded progress' to occur (Adler 2019, p. 5). Such progress is neither deterministic nor fixed, but "...contingent, partial, reversible and constituted through practice and politics in transactions" (2019, p. 276). Enlightenment ideas of a natural and teleological evolutionary progress couched with reference to the development of reason and the assumption of rational actors are diluted to emphasise instead the contingency of ethical practices to emerge and be retained in the international sphere. In short, it is not enough to 'talk the talk' by claiming fidelity to certain ethical values. One must 'walk the walk' by performing practices that acknowledge a 'common

humanity' (2019, p .5). It is then within practices and communities of practice that we find ethical normativity (Adler 2019, p. 270):

> Common humanity values are immanent to practise, particularly to its background knowledge, and to communities of practice, where they are learned, and through which practice spreads (Adler 2019, p, 267).

Performances are of particular importance here for they evidence the practical authority of the ideas around which communities of practice revolve. Under such a reading, values may 'appear' to be transcendental (2019, p. 266), but this is due to the repetition of practices and the reaffirmation of the background knowledge bound with them. Agents are bound by the "...repertoire of communal resources, such as routines, sensibilities, and discourse" within communities of practice (Adler 2019 p. 20). They are the hub around which "...meaningful social relations take place based on 'weak ties'" (Adler 2019, p. 113). A 'second, normative middle ground' is 'seized' here by the move of identifying ethical practices as immanent to communities of practice, their practices and constitutive background knowledge and fleshed out through "common humanity" values (Adler 2019, p. 276).

In a fashion to similar to Humanisation then, the arguments of Beitz and Buchanan broadly posit that the legal institutionalism of human rights norms indicate the development of the 'institutionalised public reasoning' of international society in an authoritatively human oriented direction through the spread of common humanity values. Their arguments reflect Frost's insight that ethical issues such as how to respond to human rights violations occur within a specific context (1996), in this instance the context being a legalistic international society of sovereign states.

Within this *rapprochement* however, concerns continue to arise. Whilst some degree of theoretical affinity can be seen in the increased settlement around the claim that communal and institutional contexts work as the collective base from which knowledge and standards, including ethical standards, arise, the tendency is to continue to push towards

structural transformations of the international order. In doing so, Beitz and Buchannan discount the broader institutional practices from which the very practice of human oriented international law is itself embedded and step outside what their 'institutionalised public reasoning' permits. They articulate the need for changes to the broader institutional system from which these very practices emerge in justifying the legal legitimacy of outside interventions (Beitz 2009) and coalitions of democratic rights respecting states as having increased governance rights (Buchanan 2004). There is however scope within a practice-based approach however to remedy this which is neither stifled in its normative prescriptions nor utopian in its aspirations. It is towards an understanding this and its relevance to Humanisation more broadly which attention now turns.

2.6: The 'Practice Turn'

As noted above, there has been 'practice turn' in IR theory (Bueger and Gadinger 2015, p.1). These feedback into the constructivist turn with further effects on IPT by 'transcending' the classic dichotomy between cosmopolitanism and communitarianism (Adler 2019, p. 266). What comes to the fore here is the notion of 'practices' as an offshoot of the communitarian argument that ethical standards emerge from within the context of communities. The headline claim here is such ethical standards, as well as standards of knowledge and culture, are identified through practices, their acknowledgement and negotiation (Adler 2019, p. 265 – 269).

Formulative theorists in this sphere such as Vincent Pouliot levy a critique against constructivism that reasoning around intersubjective understandings in the form of appropriate action or consequences of (in)action failed to recognise how the bulk of information form which this is formed by habitual action (2010). This does not however place practice theory as a competitor to constructivism but rather as a compliment to it. As Frost and Lechner note, practice theory is still nominally constructivist in urging an account of meaning as socially constituted (2016, p. 335). Christian Bueger and Frank Gadinger, two theorists who, alongside Pouliot and Adler, have done the most to drive the discourse of practice theory to the mainstream of IR theory agree. They argue "…practice has gradually

emerged as a core category within constructivism" (2015, p. 450). Both practice theory and constructivism agree in regard to the metatheoretical commitment to understanding social reality and the knowledge within and of it as socially constructed (Pouliot 2010, p. 54).

The difference emerges in what is taken as the source of this. Whereas constructivism takes the social construction of reality as stemming from intersubjective understandings, practice theory locates the wellspring of understanding as rooted in practices (Bueger and Gadinger 2018, p. 100). Whilst practices are noted in constructivist work, they are supporting roles. In practice theory, they are the lead characters. They are not the outcome of the intersubjective understandings as to how to act in relation to norms but are the lifeblood from which these norms arise in which intersubjective understandings are bound to (Bueger and Gadinger 2014, p. 3). Practice operates at an ontologically foundational level then; they inform practitioners of the differing rules of contingent social games. This 'sense of the game' gives agents a feel as to whether a social context requires instrumental rationality, norm compliance or communicative action (Pouliot 2010, p. 36).

To focus first on the notion of practice themselves, the very understanding as to what a practice is indicates a schism to be covered in the following pages. In brief, one strand of practice theorists inspired by Pierre Bourdieu such as Pouliot, in his own work and in early work with Adler, contend practices to be:

> …socially meaningful patterns of action which, in being performed more or less competently, simultaneously embody, and act out and possibly reify, background knowledge and discourse in and on the real world (2011, p. 4-5).

The focus here is on social order, with habitual actions cementing this order in place whilst simultaneously emphasising its contingency. The other strand is related more to Aristotle and his conception of phronesis which Adler latterly develops towards (2019). These practices are not 'more or less' competent actions but are the outcomes of careful consideration of consequences of actions (Frost and Lechner 2016, p. 338). The difference is

slight but important and moves practice theory in a more normative direction in explaining both order and change as the result of incremental alterations to habitual action on a prudential basis (Brown 2012, p. 439).

The 'practice turn' in International Relations Theory more broadly relates to an increased focused on everyday actions which produces social order in international politics (Neumann 2002). Practice theory focuses attention on how this social order is a continually reproducing process of habitual actions (Reckwitz 2002, p. 249). Practice theory then is a more of a social theory than IR theory specifically that focuses attention not just on what agents think about, but the foundations from which they think from (Pouliot 2010). This base is considered to be the practices which make understanding intelligible. We can only understand an action, such as the instruction to 'brush your hair', if we are already socialised into the understanding that such an action refers to the use of a comb on the head and not the use of a paintbrush on the legs. In the performance of actions, be it the brushing of hair, or in international politics, the signing of treaties, actions bring to life the repository of understandings that the collectively of prior habitual actions have embedded within them. In their repeated action, they both embed understandings in the agent and dissipate knowledge to the 'audience'. Pouliot pulls upon this thread of argument in the contention that:

> In world politics, for instance, state elites come to master the international rules of sovereignty and non-intervention in part through implicit learning. Most of them were never trained in the formal schemes of international law. Statespersons simply replicate, in and through practice, the way things are done in international society (2010, p. 30).

Practices are then argued to be ontologically prior to intersubjective understandings around norms or acts of reason. They are the basis from which reasoning and understandings draws.

Practice theory thus focuses on what we do, why we do it and how we do it (Reckwitz 2002). Puoliot refers to this as 'the logic of practicality': the appearance of actions as commonsensical rather than as a result from deliberation or reasoning form instrumental, rule based or shared through mutual dialogues (2010, p. 13). One of the theoretical outcomes of this is the focusing attention on the communal contexts in which practices arise, are repeated and become simply the 'way things are'.

As Neumann, whose 2002 article was one of the first theoretical stakes in the ground in this regard argues, "Practices are nested phenomena" (2002, p. 629). To unpack this, actions and understandings are informed by implicit understandings in communal contexts. In this regard, Schatzki, Cetina and Savigny in their argument of the centrality of practices to social theory more broadly, posit:

> It is always necessary to ask what disposes people to act and enact the practices they do, how and when they do; and their aims, their lived experience and their inherited knowledge will surely figure amongst the factors of interest here (2001, p. 3).

The relative novelty of practice theory in historical terms means there is contestation of its fundamental identity. For some, it is a broad meta theory that is capable of subsuming almost all social theories within its grasp. For Adler and Pouliot for instance, practice theory is rather capacious in covering almost every theory:

> For example, realists can analyse the lifecycle of the balancing practice from a material power perspective, while liberals can emphasise the choices of institutions and individual choice. Alternatively, English school scholars can emphasise the historical processes via which emerging practices aggregate into social societies, while constructivist and poststructuralist scholars may emphasise transformation in collective meanings and discourse as a result of practice (Adler and Pouliot 2011, p.38)

The phraseology used to outline this approach then is rather broad and centre around comments which emphasise "…family resemblances…" (Brown 2012, p. 439) or of a set of "…shared commitments..." (Bueger and Gadinger 2014, p. 454). However, for Bueger and Gadinger, it is important to keep its theoretical approach distinct in order not to become an "…overcrowded circus" (2015, p. 450) and to rebut assertions that practice theory is nothing new (Ringmar 2014). In order to keep practice theory as distinct domain, not everyone should be considered a practitioner (Bueger and Gadinger 2014, p. 13). Bueger and Gadinger note six of these common to practice theorists (2014, p. 454 – 455):

1) An emphasis on process over static being: The emphasis is on how things become rather than simply be. Such an approach emphasises consistent dynamism. For instance, in approaching 'ordering' rather than simply 'order'. Conceptions of such ordering is then more consistently evolutionary rather than being periods of 'cool' punctuated by moments of rupture.

2) They offer a distinct perspective on knowledge: They situate knowledge in practice and thereby develop an account of knowing and doing.

3) They grasp knowledge and the acquisition of knowledge as inherently collective processes: Members of distinct groups as diverse as sports teams to professional occupations learn and internalise practices and internalise the "rules of the game". This is done mostly through interaction.

4) Practices have materiality: "Bodies are the main carrier of practices. But they are not the sole ones" (Bueger and Gadinger 2015, p. 453). For instance, in terms of technology and weapons systems, drones indicate knowledge around the desire for precision in targeting. Though they may not be used this way, they still can be conceptualised a physical instantiation of the idea of distinction in combat.

5) Social order is appreciated as multiplicity: There is no one definitive and holistic conception of social order, rather there are multiple overlapping orders. This

refers back to (1) in articulating order as the consistent management of such overlapping and intersecting orders. Bueger and Gadinger note in regard to this:

> There is never a single reality but always multiple ones. This does not imply chaos, limitless plurality, or an atomized understanding of order. Orderliness is, however, an achievement. It requires work and emerges from routines and repetitiveness in situated accomplishments of actors. As such, order is always shifting and emergent. The assumption is that actors are reflexive and establish social orders through mutual accounts (2015, p. 453).

6) Practice theories embrace a performative understanding of the world: What we know about the world can be seen through the performance of practices and their embodiment of background dispositions in such actions." This 'world of becoming' is the product of ongoing establishment, re-enactment, and maintenance of relations between actors, objects and material artifacts" (Bueger and Gadinger 2015, p. 453).

As aforementioned, much of practice theory in its early articulations relate to Bourdieu (Brown 2012). Early practice theorists work (Neumann 2002) (Pouliot 2010) (Adler and Pouliot 2011) explicitly pull upon Bourdieu in various ways to underwrite the importance of practice to IR theory. For Merand and Pouliot, Bourdieu was a theorist of domination, thus allowing a crossover to a field concerned with power relations relatively easy (2008).

Bourdieu's work brings a conceptual vocabulary of field, habitus and capital. For Bourdieu, differing social spheres are 'fields' – the key insight is that actors are not situated in isolation from one another but in broader configurations. In turn, habitus refers to the experiences and strategies of agents seeking to establish a position in these fields. These positions are defined by one's accumulation of the relevant capital necessary to establish one's place in a field's hierarchy (Pouliot 2010, p. 33). The concepts are collectively taken to overcome the distinction between structure and agency by laying a theoretical blanket over

both sides of the debate to bring them under one common domain. The argument is that multiple fields constitute social life and are impacted by the degrees of capital agents possess in these differing fields to occupy differing positions within the differing hierarchies of multiple fields. Habitus here works as the interlinking nodule between structure and agency as the accumulation of dispositions which inform action of individual agents but become reified simply as the 'thing to do'. They are the body of information that motivate action and make it understandable (Brown 2012). Pouliot refers to this as "…a sense of the game" (2010, p 35). This 'sense of the game' is neither agential nor structurally determined. Rather it mediates between the two and gives the accomplished agent an indication as to whether that particular social context requires instrumental rationality, norm compliance of communicative action in response (Pouliot 2010, p 36).

The broad critique of such an approach however is an overdue focus on order over change and of a relative lack of novelty to its theoretical commitments (Ringmar 2014). The focus on Bourdieu and in particular the use of the concept of habitus, though distinct from habit, remains a language that speaks to the reification of actions without too much conscious reflection. Whereas Pouliot spoke of habit as unreflective action, with action Y following situation X simply as the 'thing to do' (2010, p. 21), an alternative Aristotelian dimension can be seen in an increased emphasis in the importance of practical reasoning as reasoning oriented towards action (Brown 2012). The focus here is upon practices as considered actions that spring from the same 'nested' based (Neumann 2002) but involve more prudential and pragmatic reasoning.

The Aristotelian concept of phronesis replaces habitus as the reasoning power of the agent is promoted (Brown 2012, p. 442):

> Phronesis describes action-oriented practical knowledge including a dimension of ethics and prudence. It contains not only a functional but also an inherently normative dimension. In its functional dimension, phronesis relies on acquired, latent background knowledge. However, as it is immediately conducive to world-making, it holds a normative dimension as well (Hansen-Magnusson 2016, p. 337).

The ‘thing to do’ moves to ‘what we could do’ – it is still based on practical experience and the wisdom from which this draws but has a dimension above that considers alternative action that is still close enough to be related to the initial habits of action. The Aristotelian position moves to the argument of practical judgment of circumstance rather than strict application of a particular rule and to carefully consider the consequence of actions (Frost and Lechner 2016, p. 338). There are important consequences for the Humanisation argument as currently considered in the articulation of a vision of global law enforcement when humanity is deemed to be injured that is more akin to global duty. Taking an approach inspired by phronesis however reorientates this. Writing in terms of humanitarian intervention for instance, Brown argues persuasively of the need for ethical reasoning to be based on reflection of circumstance rather than algorithmic rule following (2010, p. 30):

> In dealing with complex situation, such as deciding whether it is right that one state should interfere forcibly in the affairs of another there is no substitute for a form of moral reasoning that involves a judgment that takes into account the totality of circumstances, rather than seeks for a rule to apply (Brown 2010, p. 231).

It is towards this latter dimension that practice theory has been turning (Adler 2019). There are important consequences to this. Under this reading, theoretical reflection matters, but less as formalistic rule following and more on the results of action to the broader realm in which a practice takes place. Practice within differing communities then is prior to both shared understandings and to theory (Frost and Lechner 2016, p. 339). From this, an increased emphasis is placed on the communal context in which practices arise and edge forward the normative development of international society as minimal alterations in order to develop the system in a piecemeal fashion.

Furthermore, Adler replaces Bourdieu’s concept of the ‘field’ as an area of strategic, hierarchical, interaction in which agents fight for positions with a broader concept of social order in which communities of practice are arranged horizontally (2019, p. 112 – 113). All forms of social order, including international social order, under such a reading are the result of the dynamic interaction of communities of practice across a horizontal plane. In

and through differing communities of practice then, background knowledge is dispersed and contestation between such communities' results in shared meanings and expectations. Rather than generate uniformity, communities of practice manage differences (Adler 2019, p 114).

This move is an important one for in conceptualising social order as a dynamic process in which different communities of practice interlock to constitute such order, various practices vie for practical authority. This returns back to the idea of epistemic practical authority as the master mechanism in determining what practitioners can expect to receive in terms of such things as rights, obligations and entitlements (Adler 2019, p. 3). In effect, the fixing of epistemic practical authority as a result of the dynamic interplay of multiple and overlapping communities of practice results in the fixing of meaning to social reality which allows differing communities of practice to interact on a stable basis. Whereas in Bourdieu inspired practice theory this is conceptualised as being a battle for hierarchical supremacy, in this latter argument this is articulated as occurring horizontally. In the former, habitus, field and capital combine to influence action in a downward fashion as those with accumulated capital influence can influence the reification of actions on those lower down the hierarchy. In the latter, interactions are more dynamic as communities interact collectively not to fix a position in hierarchy but to spread practices horizontally and in doing so dispersing the background knowledge bound to such practices. It is here that space emerges for the consideration of ethically better practices to emerge as practices arise within a stable system of expectations and to gradually affect the social architecture that the collection of practices together constitutes (Frost 2009, p. 28).

Consideration of alternative practices though requires concern for what Brown calls the ‘totality of circumstances’ (2012, p. 231). In relation to international society, this totality of circumstances forces attention back to the broader institutional context in which such practices arise. This entails more prudential consideration not just of what may be considered the practices of humanity that Humanisation focuses on but on how these interact with other practices in the formation of international social order. It may be seen as returning then to the argument of Frost in stressing institutional logic that must be considered when considering the ’hard questions’ of international politics (1996).

In this regard, it is not enough to merely invoke claims of humanity as being the underwriting elements which gives moral licence to subsequent actions. Rather the broader totality of practices must be considered. When considering alternative practices, such as a loosening of *ad bellum* restrictions in the name of humanity, more practical consideration must be given to how these affects this 'totality of circumstances'.

The conclusions that Humanisation theorists reach in this regard arguably fail to take account of this broader totality. On this, there is already evidence as to how the increased attention towards claims of humanity and considerations of human oriented ethicality in international affairs have rather worked to expand the use of force against any professed human oriented constraints (Moyne 2022). Sinja Graf for one writes forcefully in regard to how appeals to humanity in isolation do not necessarily lead to a morally improved world. Appeals to the legal concept of crimes against humanity in isolation for instance fuels a vocabulary of politics that underwrites a hierarchical world order. The norm of sovereign equality is demoted with the legitimacy of forceful interventions resting on a hierarchy that arguments which consider some as offenders against this normative universe construct (2021, p. 156 – 158). Importantly, this is the effect not of exclusion whereby actors are considered sitting outside a particular normative realm in which the European mould was taken as the civilised ideal. Rather it is one of inclusion within international society constituted by practices of international law with particular emphasis on ICL. Actors are constituted as within the same unified community gifted through international law, but in being so, actors become stratified. The civilised and the uncivilised as markers of inclusion and exclusion turn instead into the law abiding and the law breaking as normatively ranked hierarchical positions (2021, p. 5).

The headline claim that comes from Graf's analysis concerns how in the formulation of 'crimes against humanity', to rely on an excessively individualist strand of underwriting thought is to cloud the manner in which such a concept is bound to the normative order itself. It represents a more communally oriented position concerning how norms such as crimes against humanity emerge:

> The offender against humanity holds a recognizable position within mankind's normative order precisely by virtue of being legible as the breaker of its laws (Graf 2021, p. 13).

When claims to offence against this normative order are made, it is precisely because such an action is considered a crime against this normative order as a collective subject that the notion of it being an offence has teeth. It is that crimes against humanity are an offence against the normative fabric of the community rather than as primarily as a physical injury to mankind (Graf 2021, p. 14 – 17). This draws the focus back to the 'normative fabric' of the community which admits crimes such as those deemed against humanity as a normative injury. In so doing allowing the space for human oriented offenses to arise but does so whilst situating such crimes as situated within a community admitting systemic norms and the role of States also. Offenses still figure under such a reading, but offenders are continued to be granted minimal normative recognition as members within this community and so contribute to an ongoing dialectic as the proper normative contours of international society. To be considered a crime against humanity is to recognise a sufficiently unified community to whom such a crime is pressed against. It entails the recognition of international society as one in which certain practices work to constitute a world order.

Graf's analysis, whilst not being a part of the practice *oeuvre*, is instructive here for it illustrates how international criminal law has been used in such a fashion to erect distinctions between 'enforcers' of humanity and 'offenders' as internal participants of international society in a hierarchical fashion akin to the arguments of Bourdieu. It is illustrative of how ethical claims in the name of humanity may work to fix positions in an international legal hierarchy with some members having more 'capital' than others in the guise of the right kind of respect for human rights and liberal values. Practice theory has registered the problem of this in skating closer to forms of political domination than interconnectedness. Indeed, a normative turn can be seen in Adler's *World Ordering* (2019) which stresses the need for legitimacy amongst participants order for ethical practices to stick and to spread. The move from Bourdieu to Aristotle that Adler engages in here impacts the understanding of practices and the environment in which they reside with important

considerations for Humanisation. Practices are conceived less as habitual actions and more so as considered and reflective actions. In this they move towards practical forms of reasoning in which practitioners use their wellspring of background knowledge to engage considerately to contingent circumstances. This allows the propensity for change in a bounded fashion as small changes to established practices are reiterated.

Crucially for its application to the Humanisation argument is the claim that in order for these changes to have any purchase, there must be reciprocity between participants. “This promotes horizontal systems of rule…” (Adler 2019, p. 133), which in turn foster a sense of commitment amongst practitioners to their practices (Adler 2019, p. 148). There is crossover here within international legal theory, in particular the work of Thomas Franck and his academic focus on legitimacy in international law. For Franck, international law’s fairness is key to a perception of its legitimacy. “In procedural terms: humanity wants reassurance that the emerging legal system is capable of ensuring both stability and progressive change”. These twin desires are cashed out through notions of procedural and substantive fairness which “...may not always pull in the same direction” (1995, p. 7). Procedural fairness refers to how rules are formed and applied in line with participants' perception of the right process. Substantive fairness refers to the manner in which the effects of such rules are distributed (1995, p. 7). Notions of order and justice hang above each respectively, but it is procedural legitimacy and its preference for order that for Franck has the greatest claim in underwriting the perception of international law’s legitimacy overall.

Such an argument allows the scope for order change in a manner akin to the Humanisation argument, but it rejects the argument that the emergence of human oriented practices within international law have led to that system become hierarchical or becoming moulded in the image of domestic law. Rather, it establishes humanity law as a practice alongside sovereignty practices traditionally considered. It allows the argument for normative evolution but falls short of normative revolution.

What we have seen then is a gradual move towards more institutionally oriented forms of reasoning that is guided by the practices inherent to international society. Tensions still

remain, however. Indeed, whilst practice theory moves towards forms of theory which sheds a degree of individualism by focusing on repeated practices and actions in the international political space, the practical cosmopolitans considered above continue to be guided by their commitments to normative individualism. In articulating the legalised practices of humanity as *sui generis* rather than as an element within a broader societal structure, they continue to move to assertions of the legitimacy of external action in the internal affairs of states and towards more hierarchical understandings of the international legal structure.

A different picture emerges however when we are disciplined by not just the practices of humanity law as a *sui generis* practice, but how these sit alongside broader practices of sovereignty. Doing so seeks to respond to the charge that the challenge for such approaches is in being 'unduly conservative' (Boucher 2009, p. 291) in outlining normative evolutions by starting from a standpoint of existent norms and their ontological base in practices. In addition, it reflects Linklater's foundational claim that humanisation is concerned with the proper operation of sovereignty (Linklater 1982, p. 194). Attention now turns to how we may consider the practices of international law as it relates both to sovereignty and humanity in the formation of international society.

2.7: The Practices of International Law Constituting International Society

Practice theory having its roots in social theory means its tenets have been applied to micro levels such as that of the family to meta levels as of international society. International society may then be conceptualised as constituted by and constitutive of certain practices. Practices are prior to rules and norms and constitute social order (Adler 2019, p. 148). To return to the language of Pouliot, it is the socialisation of actors towards them having a 'sense of the game' which establishes actors as particular participants in particular social fields. Frost argues in direct relations to international relations, that:

> In order to participate in international affairs, either as an individual or as part of a collective actor (such as a state, international organisation or a corporation), one has to have some understanding about what is happening around one and why (2009, p. 7).

Understanding 'what is happening around one and why' in contemporary international politics necessitates recognition of the centrality of international law to the practice at large. In short terms, we have seen the 'legalization' of world politics as a distinct process entailing the legal institutionalisation of norms in world politics (Abbott et al 2000, p. 401). International law regulates almost all areas of life almost all of the time, from the deep seabed to the surface of the moon.

Across classic accounts of international relations, the centrality of international law as a fundamental practice is outlined. In Hedley Bull's *The Anarchical Society*, international law, alongside great power rivalry, diplomacy, balance of power and war is a fundamental institution that exists to facilitate the ordered relations between states as they face cooperation and collaboration problems (1977, p. 8). Similarly, Robert Jackson's *Quasi-States* argues in terms which echo articulations of practice theory in the claim that, the institution of public international law, "…belongs to the constitutive part of the game in that it is significantly concerned with moderating and civilizing the relations of independent governments (1990, p. 36). For James Mayall, international law is "…the bedrock institution on which the idea of international society stands and falls" (2000, p. 94). Louis Henkin's dictum, that, "Almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time" is perhaps the clearest articulation of this (1979, p. 47). It paints a picture of the practice of international law in all its forms as fundamental to the working of the international system.

As a practice constitutive of international social order, international law is central to our contemporary understanding of world politics. On the route into understanding 'the sense of the game', it helps construct our conceptualisation of that very order. On the way out, when we tackle questions which arise as a consequence of this construction and of the

possibility and desirability of alterations, we are conditioned by the broader landscape of core practices which give the order its fundamental identity.

Following this line of argument, both states and individuals as legal subjects, are constituted as specific types of actors within a specific set of practices which bring with it their own ethical considerations (Frost 2009). Whereas under the legalistic reading of Humanisation the arc of ethical reasoning bends towards the separation of the individual from international society as an actor *sui generis* (Beitz 2009), a different picture emerges when we take practices of both sovereignty and humanity as centrally important. Individual subjects to international law under such a reading are not atomistic nor detached from international society but are constituted as a specific type of actors within this specific institutional realm (Frost 2009). The human subjectivity of humanity law does not divorce human subjects from international society but rather the opposite is true. Individuals become deeply embedded with the community in their construction as individual international rights holders of a specific kind. In turn, this practice becomes a constitutive feature of the broader landscape of practices which constitutes international society. It both reinforces the community in which such practices develop from and admits the necessary space for ethical consideration concerning the place of the human. □

To flesh this out, we may, perhaps counterintuitively at first blush, examine the reasons offered by President Putin in relation to the use of force in Ukraine and the response of the international community that followed. In a speech to the people of Russia in the immediate aftermath of the use of force, Putin outlined the reasons for such action in the following manner:

> The collapse of the Soviet Union led to a redivision of the world, and the norms of international law that developed by that time – and the most important of them, the fundamental norms that were adopted following WWII and largely formalised its outcome – came in the way of those who declared themselves the winners of the Cold War…

For the United States and its allies, it is a policy of containing Russia, with obvious geopolitical dividends. For our country, it is a matter of life and death, a matter of our historical future as a nation. This is not an exaggeration; this is a fact. It is not only a very real threat to our interests but to the very existence of our state and to its sovereignty…

This brings me to the situation in Donbass. We can see that the forces that staged the coup in Ukraine in 2014 have seized power, are keeping it with the help of ornamental election procedures and have abandoned the path of a peaceful conflict settlement. For eight years, for eight endless years we have been doing everything possible to settle the situation by peaceful political means. Everything was in vain.

As I said in my previous address, you cannot look without compassion at what is happening there. It became impossible to tolerate it. We had to stop that atrocity, that genocide of the millions of people who live there and who pinned their hopes on Russia, on all of us…

I have already said that Russia accepted the new geopolitical reality after the dissolution of the USSR. We have been treating all new post-Soviet states with respect and will continue to act this way. We respect and will respect their sovereignty, as proven by the assistance we provided to Kazakhstan when it faced tragic events and a challenge in terms of its statehood and integrity. However, Russia cannot feel safe, develop, and exist while facing a permanent threat from the territory of today's Ukraine…

The same is happening today. They did not leave us any other option for defending Russia and our people, other than the one we are forced to use today. In these

> circumstances, we have to take bold and immediate action. The people's republics of Donbass have asked Russia for help.
>
> In this context, in accordance with Article 51 (Chapter VII) of the UN Charter, with permission of Russia's Federation Council, and in execution of the treaties of friendship and mutual assistance with the Donetsk People's Republic and the Lugansk People's Republic, ratified by the Federal Assembly on February 22, I made a decision to carry out a special military operation.
>
> The purpose of this operation is to protect people who, for eight years now, have been facing humiliation and genocide perpetrated by the Kiev regime. To this end, we will seek to demilitarise and denazify Ukraine, as well as bring to trial those who perpetrated numerous bloody crimes against civilians, including against citizens of the Russian Federation (Putin 2022).

That Putin in this official address pulls upon both arguments of state sovereignty and of humanity in justifying action in response to genocide tell us something about the way in which these two practices constitute international society. Their direct references, alongside broader rhetorical gestures to the UN charter as fundamental norms of international law speak to how despite being in breach, the pull of these practices is such that in attempting to justify actions contrary to the very fundamental norms referenced, he is forced to couch his language in the very practices in which are being contravened. There are then ethical considerations embedded into the meta-practice of the society of states, but these are not unidimensional. Rather, they have a dualistic character to them which mirror the constitutive practices of sovereignty and humanity.

In referring both to sovereignty and human oriented considerations, the speech is indicative of how such practices are illustrative of deeper canon of background knowledge which as a participant in the global practice of international society an actor must couch their language in when seeking to justify action (Adler 2019). Furthermore, the use of the

term ‘special military operation’ is a backhanded reconstitution of the centrality of non-intervention rule in the deliberation attempt use of language other than that of aggression. In addition, it neatly illustrates one of the concerns which animates the argument at work here more broadly regarding the potential for manipulation that claims to human rights abuses can facilitate.

The response of the international community is also enveloped by the twin practices of sovereignty and humanity. Following the use of force, the UN General Assembly adopted resolution ES-11/1, supported by 141 member states, with 35 abstentions, and 5 negative votes (Russia, Belarus, North Korea, Syria, and Eritrea). In doing so, the General Assembly outlined its position by:

> Reaffirming the paramount importance of the Charter of the United Nations in the promotion of the rule of law among nations,
>
> Recalling the obligation of all States under Article 2 of the Charter to refrain in their international relations from 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 United Nations, and to settle their international disputes by peaceful means (United Nations General Assembly 2022, p.1-2).

The resolution progressed to state a number of conclusions. It:

> Reaffirms its commitment to the sovereignty, independence, unity and territorial integrity of Ukraine within its internationally recognized borders, extending to its territorial waters;
>
> Deplores in the strongest terms the aggression by the Russian Federation against Ukraine in violation of Article 2 (4) of the Charter;

> Demands that the Russian Federation immediately cease its use of force against Ukraine and to refrain from any further unlawful threat or use of force against any Member State;
>
> Also demands that the Russian Federation immediately, completely and unconditionally withdraw all of its military forces from the territory of Ukraine within its internationally recognized borders…
>
> Condemns all violations of international humanitarian law and violations and abuses of human rights, and calls upon all parties to respect strictly the relevant provisions of international humanitarian law, including the Geneva Conventions of 1949 2 and Additional Protocol I thereto of 1977, 3 as applicable, and to respect international human rights law, and in this regard further demands that all parties ensure respect for and the protection of all medical personnel and humanitarian personnel exclusively engaged in medical duties, their means of transport and equipment, as well as hospitals and other medical facilities;
>
> Demands that all parties fully comply with their obligations under international humanitarian law to spare the civilian population, and civilian objects, refraining from attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population, and respecting and protecting humanitarian personnel and consignments used for humanitarian relief operations (United Nations General Assembly 2022, p. 3-4).

That such a resolution was authored by the UN General Assembly comprising all member states and reflects both sovereignty and humanity considerations wrapped up in the language of the UN Charter and international humanitarian law speaks to the dualistic

structure of international society in which international law is the common practice. Furthermore, in referencing the need to abide by IHL and in calling for all parties to do so, it reflects a deeper 'sense of the game' in which participants are engaged as reflecting both primary rules and the constitutive secondary rules that Hart spoke of (2012). Such secondary rules despite their title are considered to be the constitutional ligaments of a society structured by international law (Onuf 1994, p 13 – 14).

The resulting image of international society constituted by practices of international law then admits space for ethical reasoning. Practices of international law which capture both sovereignty and humanity-oriented considerations are then constitutive of the "…social architecture…" within which agents are constituted (Frost 2009, p. 28). We may then speak of the twin practices of sovereignty and humanity as international legal practices constitutive of a legalized international society. As the backlash to the use of force in Ukraine shows however, there is a common core of constitutive fundamental practices reflected in considerations of sovereignty that continue to be dispositive. They structure the community in which subsequent practices arise. This does not deny that human oriented practices cannot emerge within this broader institution. Indeed, by conceptualising international society as emanating from practices there is a greater propensity to grasp how such practices emerge and are reiterated so as to nudge this institutional architecture forward.

This section has made a number of steps. Firstly, it justified the relevance of Humanisation to IPT. Secondly, it illustrated the affinities that Humanisation has with traditional IPT. Thirdly, a general exploration of constructivism was engaged with before a fourth step in exploring constructivism's impact on IPT more generally. Fifth, an account of constructivism's development towards a focus on practices was engaged in. Sixth, practice theory was. What emerged through these steps is a recognition of how international law is considered fundamental to an understanding of the international community. Where it develops beyond these accounts is in the contention that sovereign oriented and human oriented practices of international law operate as fundamental practices which together constitute international society. In doing so, it rejects the argument of international legal hierarchy and instead conceptualises this structure horizontally.

Part Three: Jus Cogens, Reprisals and Common Article Three of the Geneva Conventions

The purpose of this section is to put flesh on the bone of the contention that there is scope for the normative evolution of international society of the sort that Humanisation is concerned with, though without the broader structural changes that the arguments which have come before posit. It seeks to build on the claims which emerged through the exploration of the 'practice turn' and its pivot to phronetic forms of IPT to consider how bounded progress can occur under conditions, but to do so requires broader appreciation of constitutive practices which form the basis of international society itself. This entails the grounding of systemic norms as of sovereign equality and consent which necessitates a horizontal conception of the international order. In doing so, it takes seriously the contention that judgment in international politics requires the appreciation of the 'totality of circumstances' (Brown 2012, p. 232). To do so, it takes three core elements of Humanisation theory in the form of *jus cogens*, reprisals and Common Article Three (CA3) and rearticulates them in a manner which reconciles them with a horizontal structure of international order. Doing so completes the normative task this thesis set itself in articulating the claim that there are good reasons not to shift to a system of human oriented normativity whilst demonstrating how normative evolutions may still occur in conditions of heterarchy.

3.1 Practice and *Jus Cogens*: Rethinking Obligation and Compliance

Jus cogens in the international law literature are legal norms which permit no derogation and bind without consent. The formal source is Article 53 of the Vienna Convention on the Law of Treaties which states:

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of present Convention, a peremptory norm of general international law is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character (United Nations 1969, p. 18).

The specific content of *jus cogens* however is not a settled matter. Though in the literature, certain norms pop up ubiquitously and represent both systemic and substantive norms. Systemic *jus cogens* norms concern those inherent to the system and include consent, *pacta sunt servanda* and consent (Orakhelashvili 2006, p. 44- 45). Substantive *jus cogens* norms on the other hand protect a value integral to the international community as a whole (Orakhelashvili 2006, p. 46). Prohibitions against the use of force, torture, and genocide are often included in this category (Schmidt 2016, p. 267 – 268). Taken together, they are argued to protect the communal interest of the international community as a whole rather than individual states. *Jus cogens* take precedence over *lex specialis* in a reversal of the typical relationship in instances of legal conflict.

Despite a lack of specific clarity to their content, the understanding of *jus cogens* in international law is that they herald a new age. They are argued to establish hierarchy into the international legal system (Bianchi 2008, p. 494) by injecting into a corpus of moral norms into positive international law (Teson 1998, p, 93).

They are argued to be fundamental to a new global order through three primary theoretical mechanisms which in turn explain their peremptory character. The first, as

expressions of modern natural law through the language of 'higher ethical norms' (O'Connell 2012). Notions of consent to obligation are brushed aside here in favour of the argument of moral absolutes. The second, as hierarchically superior norms indicative of an international public order. They operate by delineating a minimal core of norms that safeguard the higher interests of the international legal system (Orakhelashvili 2006, p. 10 - 28). The third takes this argument further in arguing that they are indicative of international constitutional law (Weatherall 2015). Whereas arguments of the second type outlined structural norms such as *pacta sunt servanda* and consent as *jus cogens* (Orakhelashvili 2006, p. 45), the latter articulates more substantive norms and articulate a degree of value cohesiveness to the international legal order writ large.

Where these three combines is in the argument concerning the obligatory force of *jus cogens*. Uneasiness with resting jus *cogens* entirely on natural law has led to a bridging of natural law with positive law as seen in Weatherall but also in O'Connell (2012) and Tomuschat (1999). Each articulates the argument that jus *cogens* are at their core moral norms that emerge through customary law, essentially bringing to life through positive law a nascent moral core to international legal order. However, questions arise concerning norms such as torture which on the one hand are considered so fundamental to the values and interests of the international community to be considered *jus cogens*, yet on the other hand are widely breached (Brunnee and Toope 2010, p. 270). This section shall progress to offer an alternate account of how (non) compliance and obligation can work to foster *jus cogens* through the help of practice theory. Before that, it is necessary to lay some more groundwork.

Robert Kolb critiques the sort of approaches outlined above as being only partially correct, and in their more substantive iterations as being bluntly ideological (2017). For Kolb "It is not sufficient to sing the virtues of the 'fundamental rules' of the international community" (Kolb 2017, p. 47). Such approaches explain some parts of *jus cogens* but not all, with political ideologies filling uncomfortable gaps where their pronouncements of value cohesiveness lack fidelity to the empirical environment. The better approach for him is to define *jus cogens* by their effect in terms of non-derogability. The emphasis is on their effect as a legal technique. In this sense, they operate to protect the unity of the international legal order from fragmentation (2017, p. 126).

In turn, this underwrites a more nuanced conclusion than those briefly surveyed above. There is recognition of the concept of *jus cogens*:

> But the victory should not be pushed too far, lest it transform itself into a Pyrrhic one. The subjects of law, especially States, with their sovereignty and beliefs, must be able to live in peace with the concept and its ramifications. That this concept opposes some resistance to some misplaced intentions of some State(s) is entirely in order. But if the notion is pushed too far, it will backfire. The danger of a 'do-gooder' *jus cogens* is that it may discredit the concept entirely and allow power politics to exact an all too easy revenge (Kolb 2017, p. 128)

To relate this to the argument at hand, the argument maintains that the practices under the definitional umbrella as being *jus cogens* must work together in order to be meaningful. It speaks to the broadening of the international legal order to include *jus cogens* speaks to the development of that very order, but it falls short of the more value laden articulations which are the norm in the legal literature. Arguments which speak of the structural transformation of the international legal order for Tams misunderstand how rather than being indicative of hierarchy, such evolutions indicate a more complex multilateralism (2007).

The arguments of Kolb and Tams bring us closer to the perspective offered here that that both considerations of sovereignty and humanity are fundamental practices of an international society which together work to constitute a core of *jus cogens* norms. The broader theoretical perspective of practice theory with its theoretical affinity with constructivism reimagines the arguments of *jus cogens* peremptory character. Taking this broader perspective, human oriented ethical considerations arise and indeed can be seen through *jus cogens*, but these are embedded in a deeper constitutive structure in which sovereignty-oriented practices continue to be the master mechanism in understanding where we are in terms of the normative evolution of international society.

To unpack this, constructivism claims that international law is more than just a collection of formal rules and norms. As norms which arise in a decentralised system, they

give a glimpse into the broader sociological expectations and ethical desires of the system in which they emerge. Reus-Smit's account of constitutional structures for instance is one such example of an account that shows how constitutional structures arise under conditions of anarchy (1997). Peremptory norms under such a reading reflects a broader account of normativity which indicate social and ethical norms as well as formal legal norms.

Taking practices as the ontological foundation from which shared understandings eventually emerge moves the dial further in terms of understanding the role of *jus cogens*. The perspective moves away from being formal norms in and of themselves but as indicative of a normatively aspirational society of states in which certain core practices are constitutive. Practices such as sovereign states consent to treaties across the international legal board and repeated articulations of certain norms having a peremptory character bring to life a set of background dispositions which marries the centrality of states with aspirations for the protection of humanity. They do more than reflect intersubjective understandings. Their repeated practice constitutes a social world that is dualistic in its character.

Furthermore, practice theory brings with it a conceptual vocabulary which can reinvigorate discussions around *jus cogens*. For instance, Pouliot speaks of the role of 'constitutive practices' as actions endowed with specific meaning and give a community of practice and its practitioners a fundamental identity (2010, p. 40). In addition, Frost and Lechner speak of such constitutive rules as evolving artefacts which contain within them an appreciation of certain values and simultaneously require reflective appreciation of their role. For Swidler, these practices are 'anchoring practices' (2001, p. 90). Such practices are then the lifeblood of social orders in being constitutive of that very order. They "…cannot be changed without disrupting collectively established realities" (2001, p. 90). In this they echo the formal source of *jus cogens* in Article 53 the Vienna Convention on the Law of Treaties. Anchoring practices then define roles and identities as well as informing the set of subsequent practices in determining what the scope of action available to practitioners and in stabilising social order. In effect, they define the social order and the scope of practices within (Frost and Lechner 2016).

Widespread obligation to international law writ large then brings with it the recognition that within this practice there are certain constitutive norms that emerge through practice more broadly that are fundamental. States are conditioned by their own and others practice recognising the centrality of certain norms as fundamental to the 'collective reality' which is established through widespread practice in compliance with legal norms. In part this explains why in his address to the Russian people, Putin pulled upon the language of genocide for its formal prohibition is considered to be a fundamental 'rule of the game'. In doing so, contributing to the status of genocide as such a fundamental norm. The obligatory force of *jus cogens* through a practice theory perspective then is explained by the wider universe of compliance to international law as a practice which constitutes states individually and the collective of which they are a part as specific types of actors within this specific institutional context. Obligations to abide by *jus cogens* are the price to be paid to be a participant within the game of international politics.

In this*, jus cogens* have an existence beyond being formal legal norms and instead operate as practically actioned normative guardrails which keep the international legal order coherent and admits the existence of certain core norms. Obligation to and compliance in respect *of jus cogens* are a result of a legalized practice of international affairs constructing participants in a specific sense which commits states to recognise such rules as peremptory. They bring to life a canon of background knowledge which admits the centrality of states alongside a rejection of the extreme positivist view that whatever states do is just or legitimate. Whilst there is wiggle room for new human oriented practices to emerge, a systemic core of sovereignty norms continues to be the guiding light in forming the structures in which such human oriented practices emerge. This is not to downplay the role of human oriented practices but to discipline them as being part of a broader meta practice constitutive of the society of sovereign states. Through this, we can conceptualise *jus cogens* not as hierarchical norms but as constituting the boundaries of a horizontal order which admits both systemic and substantive practices. Whereas the traditional approach has to been to conceptualise this via a cosmopolitan perspective, the practical based approach with its communitarian underpinnings rewrites this. Practices emanate from communities of practice (Adler 2005) and the development of *jus cogens* in the broader practice of the society of states is no different in this regard. Whereas the Humanisation argument previously considered moves to assertions of hierarchy and a domestication of

the international legal model to explain the significance of *jus cogens*, through a practice-based approach this need not be the case.

Indeed, practice theory may help understand the role of *jus cogens* by closing the theoretical gap in terms of the identification of certain peremptory norms which oblige without consent even in the face of contrary practice. Conceptualising *jus cogens* as an outcome of practices which constitute a legalized international order that admits both sovereignty oriented and humanity oriented consider is useful for as the Humanisation argument makes the case for, there is a common core to a collective of human oriented norms such as torture which have a degree of symmetry to their normative core (Meron 2006).

As Weatherall argues in relation to torture, in terms which neatly encapsulate the Humanisation argument overall:

> Torture is quite obviously contrary to respect for the intrinsic dignity of the human person. The convergence of the prohibition of torture in international human rights law, international humanitarian law, and international criminal law is indicative of the higher interests of the international community in safeguarding the dignity of the human person through its prohibition (2015, p. 232).

Similarly, in *Furunddzija* at the ICTY, reference was made to the *jus cogens* status of the prohibition of torture as "…one of the most fundamental standards of the international community" (1998, p. 153).

However, despite progress, the use of torture is widespread (United Nations 2022, p. 6), with all forms of states from liberal to authoritarian being found to have engaged in it (Brunnee and Toope 2010, p. 231). For Ryder McKeown, the anti-torture norm is indicative of a norm in regress as some states, in particular the U.S., sought to legitimise its use following the events of September 11 (2009). Brunnee and Toope following an examination of compliance to the norm with particular emphasis on the congruence between official

action and legal norms, argue that rather than a norm of *jus cogens*, it is rather more a moribund rule (2010, p. 232 - 250).

The release of the 'torture memos', a set of President Bush era papers which sought to provide legal support for interrogating suspects of terrorism indicate this attempted process of regress and revisionism. The documents sought to roll back protections embedded within the Geneva conventions, which Alberto Gonzalez, President Bush's Attorney General, called 'quaint and obsolete' (Greenberg 2009, p.5). The conclusion of this was the signing off of 'enforced interrogation techniques' up to the point of physical impairment and organ failure (Moyn 2022, p. 244). For John Yoo, the principal architect of the memo's contents, what underwrote this was that the protections embedded within the Geneva Conventions did not apply as the U.S. was engaged in a war against 'unlawful combatants' (van-Aggelen 2005, p. 167). This reasoning was applied to both Al-Qaeda and the Taliban. In the former, the reason was that as Al-Qaeda was not a state, international law did not apply. In the latter, they were considered the rulers of a failed state and so lacked entitlement to prisoner of war status (Yoo 2004, p. 139). For Moyn, reflecting concerns of the instituting of international legal hierarchy, this is, "…strongly reminiscent of colonial-era assumptions that some peoples simply were not civilized enough to be a part to international legal arrangements" (2022, p. 243).

The original intention of the memo's to be kept classified and the response of the international community however tells us that, despite being used in all regions of the globe, there is something to torture as an offence which speaks to international society's normative aspirations and the practices which constitute it. Furthermore, the U.S. is not unique in its attempts to shield the use of torture by a thin veneer of alternative phraseology. Amnesty International for instance note how the phrase 'torture' indicates an idea repugnant to the notion of humanity and as such, there is a tendency to call it by another name. 'Interrogation in depth' and 'civic therapy' are two such examples (1973, p. 29-30). Additionally, in the wake of the torture memo's release and despite being during the 'War on Terror' in which they were also engaged, European allies to the U.S. refused to share intelligence with U.S. authorities in fear of being embroiled in claims of aiding torture (Brunnee and Toope 2010, p. 255). In addition, all states in which the U.S. had detention facilities forced the relocation of detainees (Senate Select Committee 2014, p. 15). The

effect of the use of torture as occurring within such detention facilities has since spurred further developments to international law surrounding torture in the development of the United Nations Standard Minimum Rules for the Treatment of Prisoners. Also termed the 'Mandela' rules, the declaration states such rules to be part of the progressive codification of international law post-UNCAT (2015, p.1).

In her recent interim report, the new Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the *jus cogens* status of the anti-torture norm is restated (United Nations 2022, p. 9). Pertinently, this status is supported through the language of voluntary consent of all nations to either the UDHR (1948), UNCAT (1984), the ICCPR (1966), the Convention on the Elimination of All Forms of Racial Discrimination (1965), the Convention in the Suppression and Punishment of the Crime of Apartheid (1973), the Rome Statute (1998), the Genocide Convention (1948), the Geneva Conventions (1949) and the Additional Protocols (1977), the Convention on the Elimination of All Forms of Discrimination against Women (1979) and other regional declarations (2022, p. 12 13). Important here is the way in which the claim that "Arguably, the prohibition against torture is the most regulated right under international law…" is made (United Nations 2022, p. 14). It is not due to notions of metaphysical agency nor of widespread compliance, but rather as operating as a fundamental standard to the practice of human oriented law as established through the voluntary consent of states. As is argued, "There is no state in the world that has not voluntarily accepted the obligation to prohibit, prevent and respond to torture and other ill-treatment…" (2022, p. 12)

It is the notion of voluntary consent that is doing the work here. It speaks to the argument that the practices of states as participants in a legalised practice of international politics can work towards normative goals that seek to protect human interests. In consenting to treaties, states reaffirm the practices of sovereignty orientated international law. Yet in so doing, they reaffirm and reiterate the practice of human oriented law as an offshoot of this. In this, it refocuses the conceptualisation of how international law away from its hierarchical/ domesticated articulations and instead focuses attention on how *jus cogens* norms can arise as an outcome of the practices of states in consenting to treaties which seek to protect fundamental human interests. It is the repeated practice of consent

that is more indicative of the normative character of international society than any values embedded in norms which are consented to.

To return to the language of 'anchoring practices', to discount torture as a *jus cogens* norm on the basis of non-compliance as Brunnee and Toope would do, would disrupt the collective imagination of international society as one that has normative aspirations to the protection of the individual which the practices that Humanisation. Rather, by rebutting assertions of hierarchy in international law through an articulation of international society as constituted by practices which admit both sovereignty oriented and humanity-oriented considerations in a condition of heterarchy we may still continue to assert that international society is a normatively evolving entity. However, it focuses attention back on these very practices and restates the fundamental role of practices necessary for the very construction of that community in actions such as the repeated consent to treaties. In short, it emphasises the communitarian nature in which practices emerge in which *jus cogens* may be considered a fundamental version of. Obligation to *jus cogens* norms through this view is a feature of being a member of such this community constituted by practices of sovereignty and humanity and articulated through the language of international law.

3.2 Reprisals and Reciprocity

The decline in the acceptable scope of reprisals is a cornerstone of Meron's thesis (2006, p. 9 - 16). For Meron, the very idea of reprisals is indicative of the sort of community-oriented basis of classical international law in submitting communities to collective responsibility (2006, p. 14). Reprisals then are taken as indicative of the foundational notion of reciprocity in international law that has been replaced under human oriented normativity. The general legal trend towards the diminishment of reprisals then is demonstrative of the decline in reciprocity and is exemplary of the sort of direction to which IHL is being pulled under the influence of human rights (2000, p. 249-250). This empirical decline in scope, for instance through Additional Protocol (I)'s prohibition against reprisals against the entire civilian population is then indicative of the changing face of international law's basic structure as it moves from 'reciprocity-based origins' (Meron 2006, p. 33) towards less consensual forms

of law making. For Meron, this is a necessary move for the process of international law in developing a more 'humane face' (2006, p. 1) has been established via the inroads made on the dominant role of reciprocity; the fostering of accountability; the formation, formulation and interpretation of rules" (2006, p. 1). Yet by moving towards a less reciprocity based international legal order, we may be stifling vital normative evolutions which work to nudge the normative evolution of international society forward.

We can understand this claim more by looking at the role of reciprocity in less individualistic forms of International Law Scholarship (ILS) and International Political Theory. Brunnee and Toope for instance argue that crucial to the legitimacy of international law is the notion of reciprocity between its participants. Their interactional account in this regard emphasises the procedural aspect of the formation of international law, arguing that legality is built through 'law-making processes' (2010, p. 91), which at its heart maintains the necessity for repeated participation in the construction and solidification of norms. "Law does not depend on hierarchy between law givers and subjects, but on reciprocity between all participants in the enterprise" (2010, p. 7). The distinctive 'compliance pull' of international law on this account rests on a horizontal structure which undergirds accounts of legal legitimacy (Brunnee and Toope 2010, p. 24 - 26).

From IPT, the notion of reciprocity is best articulated by John Rawls. For Rawls, reciprocity is a "limiting feature" (1999, p. 151). "It asks of other societies only what they can reasonably grant without submitting to a position of inferiority or domination" (Rawls 1999, p. 121). A system of hierarchy extends beyond the bounds of what may be considered legitimate by locking in positions within a hierarchy with unfavourable terms. A horizontal system rather underwrites a condition in which an ideal of public reason can be instituted. Writing in relation to constituents within a democratic polity, Rawls writes:

> This ideal is realised, or satisfied, wherever judges, legislators, chief executives and other government officials, act from and follow the idea of public reason to other citizens their reasons for supporting fundamental political positions in terms of the political conception of justice they regard as most reasonable (Rawls 1999, p. 135).

Extending this to international matters, the articulation of and enactment of principles must rely on a conception of international political reason that has the breadth to be truly shared. The point is that reciprocity works to nudge forward the normative evolution of international society in a manner more legitimate. To bring this back to Humanisation, it means basing arguments in what Brunnee and Toope refer to as the 'structural imperatives' of international law: the horizontal order established amongst equal states (2010, p. 90).

As outlined in the previous section, Emmanuel Adler develops this point in regard to the spread of practices which acknowledge a 'common humanity' (2019, p. 276). Horizontal systems of rule avoid the critique of value imperialism by tracing the development of ethical normativity through the spread of practices through communities of practice (2019, p. 40). What edges the normative evolution forward is the spread of practices which acknowledge our 'common humanity' under conditions of heterarchy as opposed to practices of imposition in hierarchical systems of rule. To bring this back to Humanisation, the argument of the decline in reprisals as illustrative of a broader decline in the role of reciprocity in international law speaks more to the notion of vertical imposition rather than horizontal spread. However, if we conceptualise the international order horizontally whilst admitting space for episodic human oriented acts, we can rearticulate the role of reprisals as edging forward the normative evolution of international society.

This may sound odd for the narrow and technical definition of reprisals is that of an act by one belligerent that is formally illegal but is mitigated for being in response to a prior unlawful act. The purpose of such an act is to attempt to compel the original lawbreaking belligerent back in lawful line. The argument of the International Independent Commission on Kosovo's declaration of NATO's operation Allied Force as 'illegal but legitimate' (2000, p. 4) covered previously is one such instance. More recently, we may look towards the strikes on Mount Sinjar (Syria) by the United States, France and the United Kingdom in April 2018. Such strikes mirror those of NATO's Operation Allied Force in lacking formal legal authority but as being deemed legitimate due to the seriousness of the case of which they were responding to.

The strikes under question here were launched in response to the use of a prior attack by Syrian forces that used chlorine gas killing more than eighty civilians (Scharf 2019,

p. 592). The strikes amounted to one hundred missiles directed towards chemical weapons making facilities that included dual use facilities in the form of a scientific research facility and in storage facilities. The reaction to this, minus that of Russia who sought a doomed UNSC resolution condemning the attacks, was of broad support (Scharf 2019, p. 593).

The strikes fell short of being a full intervention then, but they also edged the normative development of international society by placing a stake in the ground that the use of chemical weapons is a red line that shall draw an international response. It reveals that whilst a norm of humanitarian intervention as a legitimate *ad bellum* rule lacks support as a widespread practice, there is still support for more limited strikes in response to acts which shock the moral conscience such as the use of chemical weapons against civilians. They reveal that the unique nature of international society means that sometimes, action is necessary which stretches the boundaries of ordinary relations in the use of force without authorisation. But in doing so, they recognise a 'Grotian moment' in international law rendering the use of chemical weapons against a civilian population as outside the boundaries of legitimate state action. They are an act of systemic evolution rather than structural revolution in being episodic rather than repeated and in being in response to contingent circumstances.

Both Operation Allied Force and the attacks on Mount Sinjar then are examples of what Adler terms a 'cognitive punch' (2019, p. 72-73). Such acts are dramatic shocks that make apparent to political actors that the current workings of institutions have become dysfunctional. They do not however licence the wholescale abandonment of institutions nor norms (Frost 1996). In being reactions to the use of chemical weapons, such actions flesh out the notion of 'common humanity' practices as being repositories for ethical knowledge They are illustrative of institutional wiggle room that contributes to bounded progress. Such a form of progress is more muted than found in the accounts of Humanisation in rejecting the argument of wholescale order change. Rather it makes the claim that progress can and does occur, but in a shallower and indeterminate fashion (Adler 2019, p. 5). For this bounded progress to occur however, the horizontal structure of the international legal order is a prerequisite. Attention now turns to how this horizontal structure is better placed to guard fundamental rights articulated in Common Article Three of the Geneva Conventions. In doing so it completes both the analytic and normative contentions that this

thesis set itself. It argues the weight of human oriented international legal norms has not caused a paradigm shift and there are good reasons that structural transformations that Humanisation urges ought to be resisted.

Common Article Three of the Geneva Conventions, Customary International Law and the Necessity of Structural Equality.

The argument here extends in a more normative direction than the previous two in seeking to resurrect the foundational argument of the Humanisation tradition born from Meron's 1987 article 'The Geneva Convention as Customary Law'. There, Meron made the claim that the customary nature of humanitarian law is not merely of academic interest but of immense practical importance (Meron 1987). The headline claim is that it extends human rights protections through the customary status of the Geneva Conventions. This section seeks to finalise the normative claim that the moves to a system of human- oriented normativity and the structural transformations which follow risk too much. Its squanders the protections that Common Article Three (CA3) has under the conditions of structural equality.

The position outlined Meron is that by bolting human rights norms onto articles of customary IHL such as the Common Articles of the Geneva Conventions, it extends protections to all individuals regardless of state consent. Of these, CA3 is of particular importance. CA3 reads:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ' *hors de combat* ' by

sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilised peoples.

(2) The wounded and sick shall be collected and cared for… (International Committee of the Red Cross 2005, p. 35 - 36)

The affirmation of the customary nature of the Geneva Conventions *in toto* and of CA3 specifically extends a corpus of protections with a wider net than that which may be cast with recourse to conventional international law. Furthermore, customary legal obligations are not susceptible to the same denunciation and reservation considerations as conventional law. Simultaneously, arguing for the customary character of such humanitarian

norms bolsters the moral as well as the legal case for the observance of those humanitarian treaties deemed to pass over the necessary threshold (Meron 1987, p. 348-349).

The academic and jurisprudential elaboration of CA3 illustrates its importance in the Humanisation canon. Meron for instance notes how "This Article is a clear demonstration of the influence of human rights law on humanitarian law" (2006, p. 7). It sets a "...legal and moral floor…" (Teitel 2011, p. 136) and is fundamental to the conjoined contentions that these norms are the constitutive building blocks of a shared global community (Teitel 2011, p. 11) with the effect of relativising sovereignty (Teitel 2011, p. 58). Similar pronouncements are made in international courts. The ICJ in *Nicaragua* (1986) for instance opined:

> Article 3 which is common to all four Geneva Conventions of August 12, 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called "elementary considerations of humanity" (1986, p. 114).

Looking at the broader corpus of international legal norms, the elaboration of CA3 is of critical importance. In fleshing out the substantive element of the clause it links it to broader norms which can be seen to advance the normative evolution of international society. The jurisprudential elaboration of the importance of CA3 as heard in *Nicaragua* then supplements the phraseology of the Martens Clause. The phrase 'elementary considerations of humanity' are echoed in the Martens Clause's concentration on 'usages established between civilised nations'. In doing so, it affirms that in both international and civil conflicts, a corpus of human rights norms can be seen to attach to individuals.

Similarly, in *Tadic* before the ICTY, the argument was heard that the claim of CA3 as articulating the otherwise vague notion of 'elementary considerations of humanity' works to proscribe the use of certain weapons:

> Indeed, elementary considerations of humanity and common sense make it preposterous that the use by States of weapons prohibited in armed conflicts between themselves be allowed when States try to put down rebellion by their own nationals on their own territory. What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife (1995, p. 56).

The heart of the argument is that CA3 extends a baseline of protection to individuals in both international and civil conflict. The jurisprudential elaboration of which has then emphasised the commonality of the normative source in the protection of 'human dignity' and the broader effect this has in extending human rights norms, through the customary status of a treaty of IHL, towards all individuals. This is a vital claim as it extends a minimal corpus of human oriented protections in both war and peace and in terms of international and civil conflict.

Where Humanisation spoils this fertile ground is by overextending the claim of the underlying normative component of human dignity as doing the heavy lifting here. Rather, if we are to conceptualise the customary basis of CA3 as a result of the widespread practice of consent to the Geneva Conventions we stand of surer foundations than accounts which stress a nascent normative component as doing the work. Where Humanisation arguments overreach themselves is in the argument of a paradigm shift *in toto* which supplements the claims of the diminishment of norms of consent. By taking a different view which emphasises the role of state consent, we can arrive at similar conclusions but in a more muted fashion. The fundamental role of CA3 can be retained for instance and in doing so, it keeps the argument that a corpus of norms attaching to the individual realises a form of global justice. But it does not go further. It does not make the claim that the affixing of customary status to individual norms as of CA3 or on the broader treaties such as the Geneva Conventions underwrite an argument for a reformed international legal order. Rather, it stresses the basic elements which give international law force wrapped up as part of a broader account of socially oriented legal legitimacy. The customary nature of CA3 and

its vital role in extending a corpus of human rights protections through customary law then depends on the broader acceptance of the legitimacy of international law which comes under fire when gestures to hierarchy are made.

The equalitarian regime and its relation to international law may have its faults. Indeed, it is slow, cumbersome and bureaucratic. But the thin legitimacy of international law has greater capacity to withstand critiques of imposition if the structure of the international order continues to be conceptualised horizontally. The procedural legitimacy that comes from a horizontal international order means that the extension of human rights-oriented norms as those contained within CA3 to states who have not formally consented have greater purchase than the charge that such norms have legitimacy because they are considered to be vehicles of values in a hierarchical order.

The purpose of this part has been to outline how conceptualising international society as a horizontal order constituted by the practices of international law can still make sense of key elements of the Humanisation argument in relation to *jus cogens*, reprisals and CA3. In doing so, it sought to illustrate how normative evolution may still occur which continue the theme of protecting human dignity though in a manner which is reconciled with the structural actualities of the international system in terms of consent to international law and sovereign equality. In doing so, it emphasises how the repetition of practices as of state consent to international treaties offer a window in the normative character of international society which continues to be state based but admits spaces for practices that centre around human protection to emerge and for norms based on these to congeal. In addition, that there are episodic instances of the use of force for human protection builds on this point. Though that such instances are episodic and contingent upon circumstances reveals that such a practice does not hold enough weight to be considered a fundamental norm and so rolls back the Humanisation claim that such uses of force in humanity's name are indicative of a wholly new age. Building on these, the final example concerning the necessity of structural equality for the norms of CA3 to have purchase sought to outline why the structural equality that Humanisation has in its theoretical sights ought to be retained. Each example sought to outline core elements of the Humanisation *oeuvre* though in terms unfamiliar to them thus far. In shifting the theoretical dial away from those based in upon

normative individualism, a different picture emerges about the normative character of international society.

This different character requires broader forms of theorising. As this thesis has sought to illustrate, Humanisation is directly and indirectly garnering increasing attention across a diverse array of scholarly pursuits. However, the theoretical scaffold that wraps around these are limited in their scope. Humanisation has more to offer our understanding of the normative character of international society and is readily available for broader forms of theorising than the dominance of individualist accounts recognises. By broadening the scholarly conversation and in refining its scope as a result, Humanisation may reach towards the same goals though it may do so on a surer footing. Afterall, if 'Humanisation may have triumphed, but largely rhetorically' (Meron 2006, p 86) it points to the need to instigate broader forms of theory to both probe its analytical claims and strengthen its normative prescriptions.

Conclusion

This thesis set out to accomplish three primary tasks.

1) To make explicit the connections between arguments concerning the Humanisation of international law and contemporary International Relations and International Political Theory and International Relations Theory.

2) To adopt a position of immanent critique concerning Humanisation and inject an original line of argument in recognizing how the same motivating forces which lead to these conclusions can be recast in a manner that is both more philosophically legitimate and politically appropriate. By taking seriously the international political environment to which the ethical derivatives of the legal embellishments at the heart of Humanisation are to apply, the argument has sought to stand Humanisation up upon more secure foundations.

3) To Illustrate how normative evolution occurs in a heterarchical system of international order. By sketching how this has occurred, this thesis sought to bridge arguments of the Humanisation of International Law with non-individualistic forms of International Political Theory. The result being a more defensible thesis of the normative development of international society than the crucial articulations of Humanisation that have gone before.

Task (1) has been completed by weaving throughout the thesis the deep theoretical fidelity that arguments of the Humanisation of International Law with traditional International Political Theory (IPT). The first section of part one in particular engaged in an exposition of the Humanisation argument as it emerged as a practice in international law and how this has spurred a distinct tradition within International Legal Scholarship (ILS). This exposition

served to outline Humanisation as they emerged in International Law. Doing so drew attention to the theoretical fidelity between Humanisation and Constitutionalism and gestured towards the differences.

Part one, section two, sought to engage analytically with Humanisation. In doing so it sought it tease out and explore some of the key positions and theoretical presuppositions of Humanisation as it has been articulated thus far to work towards task (2). The section worked through these positions towards a discussion of Humanisation's impact on arguments concerning the use of force.

Part two built on the concerns articulated in the previous section by attempting to move Humanisation away from its theoretical home in the scholarship of international law and towards International Political Theory. It did so by outlining Humanisation's affinities with both traditional and contemporary International Political Theory before illustrating how the 'practice turn' can reimagine Humanisation's arguments of the need for structural transformation. In doing so it sought to bridge task (2) and (3).

Part three sought to complete task (3) by illustrating how the insights of the practice turn towards normative international theory can be applied to key elements of the Humanisation *oeuvre*. In seeking a rearticulation of *jus cogens* and reprisals in line with the insights of practice theory, it showed how normative evolutions can still occur without the need for structural transformation of the international legal order. Attention then moves to Common Article Three of the Geneva Conventions to flesh out the concern that the structural transformation which Humanisation work towards may work against its fundamental goal.

The argument of this thesis overall then is that there is much to be applauded for the empirical articulation and normative elaboration of the components of Humanisation thus far. Most importantly is the argument that what drives forward arguments about justice in international relations lie at the intersection of humanitarian and human rights norms in international law. However, the manner in which these are conceptualised, I argue, results in the relinquishing of the practical purchase these may have. The normative arguments drawn from the empirical base argue for a realignment of the normative core of

international law (away from state sovereignty and towards the needs of humanity) and result in a structural revolution on the international legal order (away from heterarchy and towards hierarchy).

By broadening the theoretical frame of reference, we are able to reimagine the theoretical argument which accounts for the rise in humanitarian sentiment in the post-1945 international order which accelerated post-Cold War. Furthermore, we can reconceive the effect that this has had on the normative structure of the international legal order. We are able to retain the argument that there is normative momentum to the claims of humanity. Yet it also makes the argument that for this to continue, the heterarchical structure of the international system needs to be maintained. It is only through this structure that the sort of normative evolutions that Humanisation is concerned with can occur and have genuine purchase. In affirming the priority of this structure of heterarchy other than of hierarchy we move to a conceptualization of the international order in which Humanisation can win not only in rhetoric, but in practice too.

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