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Order over Justice

International Human Rights Norm Promotion by Western European States

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**Order over Justice: International Human Rights Norm Promotion by
Western European States**

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Abstract

This thesis offers a critical reinterpretation of the reasons why Western European states promote International Human Rights Law (IHRL). The argument is built on contributions from critical legal scholars and the English School of International Relations, and it is presented as an alternative to both normative cosmopolitanism and realist disbelief. The research looks at the systemic or structural constraints inherent to the international legal system, and argues that order trumps justice in Western European states' promotion of international human rights norms.

In essence, IHRL has evolved as a result of a tension between two forces: On the one hand, a European understanding of international society, based on order, the centrality of the state and a minimalist conception of human rights; on the other hand, a civil society and UN-promoted, mostly Western, particularly European and broader conception of human rights, based on justice. Human rights norms emerge and develop when some states' idea of order meets with advocates' idea of justice.

The thesis is theoretically situated in the milieu between solidarism and pluralism, and claims that when it comes to explaining Western European states' promotion of IHRL, second-wave English Scholars are right to point out that the world society is not only made out of nation-states. However, these authors are too hasty in raising the profile of global justice as a policy driver in the international system.

Methodologically speaking, the thesis applies a critical interpretation of state practice (discourse and action), with a particular focus on Spain and the UK, in relation to four norms at different degrees of settlement: a) the prohibition of torture, b) ecocide, c) justiciability of economic, social and cultural rights, and d) Responsibility to Protect.

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Abbreviations

CAT	1984 Convention Against Torture and other Cruel, Inhuman or Degrading Treatment
CEDAW	1979 Convention on the Elimination of All Forms of Discrimination Against Women
CERD	1965 Convention on the Elimination of All Forms of Racial Discrimination
CESCR	United Nations Committee on Economic, Social and Cultural Rights
CoE	Council of Europe
CRC	1989 Convention on the Rights of the Child
CRPD	2006 Convention on the Rights of Persons with Disabilities
ECHR	1950 European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms)
ECOSOC	United Nations Economic and Social Council
ECPT	(European) Committee for the Prevention of Torture
ESCR	Economic, Social and Cultural Rights
EU	European Union
ICC	International Criminal Court
ICCPR	1966 International Covenant on Civil and Political Rights
ICESCR	1966 International Covenant on Economic, Social and Cultural Rights
ICISS	International Commission on Intervention and State Sovereignty

ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICRMW	1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
IHRL	International Human Rights Law
ILC	International Law Commission
ILO	International Labour Organization
LGBT	Lesbian, Gay, Bisexual and Transgender (also Queer and Intersexual)
NGO	Non-Governmental Organisation
OHCHR	Office of the United Nations High Commissioner for Human Rights
PM	Prime Minister
P1-P6	Propositions 1-6 (see subsection 2.2.4).
R2P	Responsibility to Protect
TEU	Treaty of the European Union
UDHR	1948 Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UPR	Universal Periodic Review
US/USA	United States of America

1. INTRODUCTION: WHY DO WESTERN EUROPEAN STATES PROMOTE INTERNATIONAL HUMAN RIGHTS NORMS?

“Query: How did you know that substantial justice was done?”

Theodore Roosevelt: Because I did, because... I was doing my best.

Query: You mean to say that, when you do a thing, thereby substantial justice is done.

Roosevelt: I do. When I do a thing, I do it so as to do substantial justice. I mean just that.”¹

Leaders are prone to speak of justice in international forums, and the recognition of human rights is the most conspicuous example.

The 1948 Universal Declaration of Human Rights (UDHR) and the treaties and mechanisms originated from it did in fact introduce a fundamental change in international law. The UDHR compiled a fairly comprehensive list of the rights drafters could possibly think of at the time, and marked the beginning of international human rights law (IHRL), with international treaties that have been ratified by the vast majority of countries.² Their actions are now limited within their national boundaries vis-à-vis not only their citizens but all people under their jurisdiction. With the UDHR, IHRL and the mechanisms that followed, the individual became a subject in international law.

¹ From E. H. Carr, *The Twenty Years' Crisis* (London: Palgrave MacMillan, 2001[1939]), 73.

² Status of ratification of human rights treaties: <http://indicators.ohchr.org/> All websites were last checked on 1 September 2017. The core treaties are the 1965 Convention on the Elimination of All Forms of Racial Discrimination (CERD) (178 State parties), the 1966 International Covenant on Civil and Political Rights (ICCPR) (169 parties), the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR) (165 parties), the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (189 parties), the 1984 Convention Against Torture and other Cruel, Inhuman or Degrading Treatment (CAT) (162 parties), the 1989 Convention on the Rights of the Child (CRC) (196 parties), the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CRMW) (51 parties), the 2006 Convention on the Rights of Persons with Disabilities (CRPD) (174 parties), and the 2006 International Convention for the Protection of All Persons from Enforced Disappearance (57 parties).

Western European countries played a significant role in making this happen.³ The European Convention on Human Rights was adopted in 1950, less than two years after the UDHR. It entered into force in 1953 and currently all members of the Council of Europe are party to it. Its judicial body, the European Court of Human Rights, began to work in 1959, becoming the first international human rights judicial mechanism. After “a long and difficult infancy”, the European human rights system experienced a “turning point” in the 1970s, when France ratified the Convention, Italy accepted the Court’s jurisdiction on individual petitions, and the first British cases started to reach the Court.⁴ To this day, the European Court of Human Rights enjoys a high reputation,⁵ which is possibly related to its large workload, the exclusive dedication of the judges and the high level of state compliance.⁶ In spite of the noisy political debate, especially in the UK, about the alleged legitimacy deficit of the Court, empirical studies confirm the support among key stakeholders, including politicians, lawyers and judges.⁷ No less important is the fact that European countries have ratified most of the core human rights treaties.⁸ Latin American and African countries have done so too, but the gap between “rights in principle” (commitment in the form of ratification of human rights treaties) and “rights in practice” (implementation, actual protection of rights) tends to be smaller in Europe.⁹

Small non-Western states did also make important contributions in the

³ For Western Europe I understand the fifteen members of the European Union up to the Enlargement of 2004, plus Iceland, Norway and Switzerland, and the other small states in the subregion.

⁴ Ed Bates, *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights* (Oxford: Oxford University Press, 2010), 14.

⁵ Andrew Moravcsik, The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe, *International Organization*, 54:2 (2000), 218.

⁶ Committee of Ministers of the Council of Europe, *9th Annual Report (2015): Supervision of the execution of judgements and decisions of the European Court of Human Rights* Strasbourg: Council of Europe, 2016).

⁷ Başak Çali, Anne Koch and Nicola Bruch, The Legitimacy of Human Rights Courts: A Grounded Interpretivist Analysis of the European Court of Human Rights, *Human Rights Quarterly*, 35:4 (2013).

⁸ Exceptions must be noted. Albania and Bosnia and Herzegovina are the only European country that have ratified the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

⁹ Todd Landman, *Protecting Human Rights: A Comparative Study* (Washington DC: Georgetown University Press, 2005).

drafting process of the UDHR and in the first steps of the UN human rights regime.¹⁰ Decolonised countries were in the forefront of the fight against apartheid and pushed for the adoption of the 1965 Convention on the Elimination of Racial Discrimination,¹¹ and a number of non-European countries have resorted to human rights to define their foreign policies.¹² Some authors suggest that other Western countries must also be credited for this. The 1975 Helsinki Accords between the East and the West made explicit references to human rights,¹³ and President Carter's use of the human rights frame of US foreign policy in the late 1970s constituted a key milestone for human rights in the international arena.¹⁴ However, historically the US has not supported the cause of the legalisation of human rights,¹⁵ and it is actually at least questionable whether the US has overall been a promoter of human rights internationally.

Be that as it may, at least to this day, no norm has reached an advanced level of development or settlement in IHRL without the support of Western European states. Notwithstanding the differences between Western European countries, the subcontinent as a whole has played a significant role in the legal internationalisation of human rights. Most authors agree that the cultural and institutional origins of IHRL are located in Western Europe, or at least in the West.¹⁶ This is hardly surprising considering the nearly total

¹⁰ Susan Waltz, Universalizing Human Rights: The Role of Small States in the Construction of the Universal Declaration of Human Rights, *Human Rights Quarterly*, 23:1 (2001); Universal Human Rights: The Contribution of Muslim States, *Human Rights Quarterly*, 26: 4 (2004); Micheline Ishay, The Socialist Contributions to Human Rights: An Overlooked Legacy, *International Journal of Human Rights*, 9:2 (2005).

¹¹ Ronald Burke, *Decolonization and the Evolution of International Human Rights* (Pennsylvania: The Pennsylvania State University Press, 2010); Steven L. B. Jensen, *The Making of International Human Rights: The 1960s, Decolonization, and the Reconstruction of Global Values* (Cambridge University Press, 2016).

¹² David Forsythe, *Human Rights and Comparative Foreign Policy* (Tokyo: United Nations University Press, 2000); Alison Brysk, *Global Good Samaritans: Human Rights as Foreign Policy* (Oxford: Oxford University Press, 2009).

¹³ Sarah B. Snyder, *Human Rights Activism and the End of the cold War: A Translational History of the Helsinki Network* (Cambridge: Cambridge University Press, 2011).

¹⁴ Samuel Moyn, *The Last Utopia: Human Rights in History* (London: Belknap, 2010).

¹⁵ Beth A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge: Cambridge University Press, 2009), 42.

¹⁶ Jack Donnelly, International Human Rights: A Regime Analysis, *International Organization*, 40:3 (1986); Antonio Cassese, "The General Assembly: historical perspective 1945-1989", in Alston, P. (ed.), *The United Nations and Human Rights: a critical appraisal* (Oxford: Clarendon

domination by Western countries in the first two decades of existence of the UN.

Geographically and temporarily speaking, the international institutionalisation of human rights is rooted in Europe, but this does not mean that human rights are necessarily a Western idea. One can accept as a fact the European influence in the making of IHRL, but “genealogy is no substitute for moral argument”.¹⁷ More importantly, the genealogical argument does not imply that Western countries have an impeccable record on human rights either. NGOs' reports and the case-law from Strasbourg give a persuasive account of the opposite. Regardless of the intellectual origins of human rights and of the extent to which Western European countries act according to their promises, we must acknowledge that the decisions taken by their political leaders since the late 1940s made a difference so human rights could find a place in international law.

If so, why do Western European countries promote international human rights norms?

One might feel tempted to predicate that the preceding observations would confirm a genuine European commitment to global justice. This thesis will question this assumption.

The question that drives this thesis deals with the politics of international human rights law promotion. As eloquently put by Michael Freeman, “it is *politically* important that human rights have been codified in international and national law, but it is a mistake to believe that the legalization of human rights takes the concept out of politics” (italics in the original).¹⁸ The question is particularly important at this historical juncture of shifting tectonic plates

Press, 1992); Makau Mutua, “Politics and Human Rights: An Essential Symbiosis”, in Byers, Michael (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford: Oxford University Press, 2000); *Human Rights: A Political and Cultural Critique* (Philadelphia: University of Pennsylvania Press, 2002); Michael Freeman, *Human Rights: An interdisciplinary approach* (Cambridge: Polity, 2002); Moyn, *The Last Utopia: Human Rights in History*.

¹⁷ Jack Donnelly, Human Rights: A New Standard of Civilization?, *International Affairs*, 74:1 (1998), 20.

¹⁸ Freeman, *Human Rights*, 10.

with rising nationalism and a declining European presence in global affairs. The conditions under which IHRL grew up have fundamentally changed. Unpacking the politics behind IHRL is therefore essential if we want to maintain and raise the profile of the individual in future global politics.

A number of scholars in law and political science have worked on international norm *acceptance* and *compliance*, both from qualitative¹⁹ and quantitative perspectives.²⁰ These studies have helped make sense of the “decoupling”²¹ or “compliance gap”,²² or in other words, the conditions under which states promise to abide by international human rights norms, but then only respect them sometimes and to some extent.²³

¹⁹ Louis Henkin, *How Nations Behave: Law and Foreign Policy* (New York: Columbia University Press, 1979[1968]); Jeffrey Checkel, International Norms and Domestic Politics: Bridging the Rationalist-Constructivist Divide, *European Journal of International Relations*, 3:4 (1997); Thomas Risse, Stephen Ropp and Kathryn Sikkink (eds.), *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999); Vaughn Shannon, Norms Are What States Make of Them: The Political Psychology of Norm Violation, *International Studies Quarterly*, 44:2 (2000); Jeffrey Checkel, International Institutions and Socialization in Europe: Introduction and Framework, *International Organization*, 59:4 (2005); Simmons, *Mobilizing for Human Rights*; Emlie M. Hafner-Burton, *Making Human Rights a Reality* (Princeton: Princeton University Press, 2013); Thomas Risse, Stephen Ropp and Kathryn Sikkink (eds.), *The Persistent Power of Human Rights: From Commitment to Compliance* (Cambridge: Cambridge University Press, 2013).

²⁰ Linda Keith, The United Nations Covenant on Civil and Political Rights: Does it Make a Difference in Human Rights Behavior?, *Journal of Peace Research*, 36:1 (1999); Oona Hathaway, Do Treaties Make a Difference? Human Rights Treaties and the Problem of Compliance, *Yale Law Journal*, 111 (2002); Between Power and Principle: An Integrated Theory of International Law, *University of Chicago Law Review*, 72:2 (2005); Landman, *Protecting Human Rights*; Emilie Hafner-Burton and Kiyoteru Tsutsi, Human Rights in a Globalizing World: The Paradox of Empty Promises, *American Journal of Sociology*, 110:5 (2005); Emilie Hafner-Burton and James Ron, Seeing Double: Human Rights Impact through Qualitative and Quantitative Eyes, *World Politics*, 61:2 (2009); Emilie M. Hafner-Burton, International Regimes for Human Rights, *Annual Review of Political Science*, 15 (2012); Christopher J. Fariss, Respect for Human Rights has Improved Over Time: Modeling the Changing Standard of Accountability, *American Political Science Review*, 108:2 (2014). Sikkink and Simmons would probably see themselves as on both the quantitative and qualitative sides of the spectrum.

²¹ Hafner-Burton and Tsutsi, Human Rights in a Globalizing World; Nitza Berkovitch and Neve Gordon, Differentiated Decoupling and Human Rights, *Social Problems*, 63:4 (2016).

²² James Harrison and Sharifah Sekalala, Addressing the compliance gap? UN initiatives to benchmark the human rights performance of states and corporations, *Review of International Studies*, 41:S-5 (2015).

²³ Henkin famously said that “it is probably the case that almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time” (*How Nations Behave*, 47), but he also acknowledged that “international human rights law has been less successful” (*The Age of Rights*, New York: Columbia University Press, 1990, 200). This is so because, unlike other realms of international law, IHRL “serves idealistic ends, not particular national interests” (*How Nations Behave*, 228). The gap between ratification and compliance is noticeable, and so must be the underlying motivation to do one thing and the other.

However, scholars have not explored sufficiently why states *promote* international human rights norms, that is, why they become advocates of the recognition of certain rights in international law.²⁴ This thesis intends to make a contribution in this regard by exploring qualitatively why Western European states promote some human rights norms more than others.

I contend that the lack of critical scrutiny of the reasons why countries promote IHRL is due to the widespread assumption that this area of law represents a genuine normative accomplishment, a globalised zenith of the Enlightenment project. The recognition of human rights would have made international law more humane, less state-centric and more inclined to justice. Insofar as this was made possible only because states agreed to it in the first place, the reason why some states promote IHRL must be that, after the horrors of World War II, governments in Europe and beyond came to *believe* that humanity needed international law to protect human dignity and freedom.

This assumption is sometimes unambiguous and sometimes hidden between the lines. Steiner, for example, implies that human rights law promotion is the result of constructed identities, and this must be so because the human rights regime does not fit the rational choice model since “these treaties declare ideals of State conduct that no State can fully match, and that tower above most States' conduct”.²⁵ For Morris, norm innovation by great powers must be “motivated by a belief that benefit will accrue to the state *and* because the values embodied in the norm in question are of intrinsic value” (italics in the original).²⁶ In a recent article, Hannum writes that, while human rights can potentially be understood in different ways in different contexts, “the contemporary content of human rights is defined most clearly and most powerfully as law”; the meaning of IHRL therefore must be

²⁴ Exceptionally, Mark Pollack, Who supports international law, and why?: The United States, the European Union, and the international legal order, *International Journal of Constitutional Law*, 13:4 (2015), 877.

²⁵ Henry Steiner, “International Protection of Human Rights”, in Evans, Malcolm (ed.), *International Law* (Oxford: Oxford University Press, 2003), 778.

²⁶ Justin Morris, “Normative Innovation and the Great Powers”, in Bellamy, Alex J. (ed.), *International Society and its Critics* (Oxford: Oxford University Press, 2005), 269.

univocal.²⁷

The assumption that states promote IHRL because they *believe* in human rights is particularly present in parts of the constructivist literature. Constructivist scholars start from the principle that national identities and interests are constructed over time through interaction, social meaning and shared ideas.²⁸ States promote certain norms because they identify with them. Endorsing IHRL would be a way of articulating their “cosmopolitan creed”.²⁹ From this perspective, human rights researchers have attempted to explain the prohibition of use of chemical weapons,³⁰ the West's policy change in relation to the South African apartheid,³¹ or the establishment of the International Criminal Court totally or partially as a matter of shared and constructed legitimacy.³² In constructivist terms, legitimacy can be understood as “a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions”.³³

According to Finnemore and Sikkink's famous model of international norm diffusion, states play a key role when they choose to embrace and promote certain standards of adequate behaviour before other states internalise them.³⁴ However, their model does not explain why a given state makes the decision to take a step forward and join norm entrepreneurs campaigning for the acceptance of the norm by more reluctant states. Finnemore and Sikkink are of the opinion that states promote human rights norms “for reasons that

²⁷ Hurst Hannum, Reinventing Human Rights for the Twenty-First Century, *Human Rights Law Review*, 16:3 (2016), 411.

²⁸ Alexander Wendt, Constructing International Politics, *International Security*, 20:1 (1995), 71-72; *Social Theory of International Politics* (Cambridge: Cambridge University Press, 1999), 1.

²⁹ Brysk, *Global Good Samaritans*, 36.

³⁰ Richard Price, A Genealogy of the Chemical Weapons Taboo, *International Organization*, 49:1 (1995).

³¹ Audie Klotz, Norms Reconstituting Interests: Global Racial Equality and U.S. Sanctions Against South Africa, *International Organization*, 49:3 (1995).

³² Caroline Fehl, Explaining the International Criminal Court: A 'Practice Test' for Rationalist and Constructivist Approaches, *European Journal of International Relations*, 10:3 (2004).

³³ Mark Suchman, Managing Legitimacy: Strategic and Institutional Approaches, *The Academy of Management Review*, 20:3 (1995), 574.

³⁴ Martha Finnemore and Kathryn Sikkink, International Norm Dynamics and Political Change, *International Organization*, 52:4 (1998).

relate to their identities as members of the international society”.³⁵ In other words, states promote norms internationally because they consider them legitimate. This point is taken for granted in later works by the same authors and their colleagues.³⁶ This thesis offers a different view.³⁷

A question from the historian Mark Mazower gives me the opportunity to announce the argument I will develop in the next chapter. He asks: “Given that the protection of human rights implies a curtailing of the state’s power over its citizens or subjects, how do we explain why the states grouped together in the United Nations Organization came to commit themselves to the defence of human rights?”.³⁸ Against conventional views that focus on the repulse towards the Nazi crimes and on the influential role played by people like Eleanor Roosevelt, René Cassin or Raphaël Lemkin, Mazower argues that, far more important, there was a general sense that the Central and Eastern European minority rights regime of the League of Nations had been totally ineffective in preventing World War II. As a result, states established a new system, this one based on universal and individual rights.³⁹ European

³⁵ Id, 902.

³⁶ In 1999, Risse, Ropp and Sikkink (eds.), *The Power of Human Rights*. For a reflection on the process, conditions and mechanisms by which actors contribute to move from commitment to compliance, see Risse, Ropp and Sikkink (eds.), *The Persistent Power of Human Rights*, of 2013.

³⁷ I must render account of other critiques of Finnemore and Sikkink’s model. Bob (*The Marketing of Rebellion: Insurgents, Media, and International Activism*, Cambridge: Cambridge University Press, 2005) and Berkovitch and Gordon (The Political Economy of Transnational Regimes: The Case of Human Rights, *International Studies Quarterly*, 52:4, 2008) denounce the undue political and economic pressure of Northern NGOs over advocates in the Global South. Acharya (How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism, *International Organization*, 58:2, 2004) has also talked about the need to examine carefully how global norms get “localised”. Gordon and Berkovitch (Human Rights Discourse in Domestic Settings: How Does it Emerge?, *Political Studies*, 55:1, 2007) also addressed the problem of “domestic resistance” to global norms in certain contexts (in particular, they write about Israel). Warning about norm regression, McKeown (Norm Regress: US Revisionism and the Slow Death of the Torture Norm, *International Relations*, 23:1, 2009) questioned the positive linear progression underpinning the model of Finnemore and Sikkink. Bloomfield (Norm entrepreneurs and theorising resistance to normative change, *Review of International Studies*, 42:2, 2016) argued that, just as we may have norm entrepreneurs, there may also be “norm antipreneurs” that favour the status quo, or “rival entrepreneurs” from what Bob (*The Global Rights Wing and the Clash of World Politics*, Cambridge: Cambridge University Press, 2012) calls the “global right wing”.

³⁸ Mark Mazower, The Strange Triumph of Human Rights, 1933-1950, *The Historical Journal*, 47:2 (2004), 380.

³⁹ This could partly explain why the 1966 International Covenant on Civil and Political Rights protects “persons belonging to (...) minorities” (Article 27), and not minorities themselves as groups. With an entirely different history, African countries adopted a more collectivist approach

governments felt protected by the prohibition of intervention in domestic affairs, solemnly proclaimed in Article 2(7) of the UN Charter.⁴⁰ In spite of initial expectations,⁴¹ this principle was soon to be interpreted in a rather flexible way by UN bodies and regional human rights institutions.⁴² Yet, states did not know this in the 1940s. For Mazower, “it seems they were happy enough to accept the appearance of a lofty-sounding Universal Declaration which committed them, in truth, to very little”.⁴³

The argument defended in this thesis trails Mazower's line of thought. As opposed to those constructivists who assume that countries promote human rights norms because they identify with them and want to encourage others to follow their example, and those realists who dismiss human rights as a manifestation of the power of the West over the rest, in this thesis I will argue that IHRL has evolved as a result of a tension between two forces: On the one hand, a European understanding of international society, based on order, the centrality of the state and a minimalist conception of human rights; on the other hand, a civil society and UN-promoted, mostly Western, particularly European and slightly broader conception of human rights. Analytically speaking, I believe this tension is best understood in the continuum between the dichotomies of the English School of International Relations: order/justice, pluralism/solidarism and international society/world society. The English School also offers the opportunity to study the IHRL regime as a component of the international system in its own right, and to develop certain theoretical propositions in an analytical model based on a system-

when they agreed upon the African Charter on Human and Peoples' Rights in 1981.

⁴⁰ “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.”

⁴¹ Goodrich wrote this in the first article ever published in *International Organization*: “The point upon which attention needs to be focused for the serious student of international affairs is that the United Nations does not represent a break with the past, but rather the continued application of old ideas and methods with some changes deemed necessary in the light of past experience. If people would only recognize this simple truth, they might be more intelligent in their evaluation of past efforts and more tolerant in their appraisal of present efforts.” (Leland Goodrich, *From League of Nations to United Nations*, *International Organization*, 1:1, 1947, 5).

⁴² Antonio Cançado Trindade, *The Domestic Jurisdiction of States in the Practice of the United Nations and Regional Organisations*, *International and Comparative Law Quarterly*, 25:4 (1976).

⁴³ Mazower, *Strange Triumph*, 396.

focused “level of analysis”.⁴⁴

Based on a systemic reflection, I will claim that IHRL is not purely the product of Europe's self-interested wishes or liberal dreams. It is not an identity-based humanitarian project either. The promotion of IHRL by Western European countries is based on an order-based idea of international society. However, even though the international institutionalisation of human rights owes much to the European input, other actors have also had an influence: Apart from non-European countries with different agendas, there are NGOs, UN bodies, academics and like-minded government officials.

The theoretical argument, which I call Order-over-Justice, is set out in chapter 2. The thesis is theoretically situated in the milieu between solidarism and pluralism. It claims that, when explaining Western European states' promotion of IHRL, second-wave English Scholars are right to point out that the world society is not only made out of nation-states, but these authors were too hasty in raising the profile of global justice as a policy driver in the international system. The last section of this chapter advances six propositions derived from Order-over-Justice. The first two propositions are time-dependent, and concern the intensity with which Western European states are likely to promote or to resist a human rights norm at earlier and later stages of the norm's life. The remaining four propositions look at the nature of the norm itself, and in particular, its clarity, its burden in terms of requirements from the state, its fitness within liberalism, and the support received from norm entrepreneurs.

Chapter 3 is devoted to the research method: A critical interpretivist perspective based on a hierarchical structure of legal tools and a five-level categorisation of human rights norms in light of their degree of settlement in international law. To keep the project manageable regarding only the two time-dependent propositions, I will focus on two relatively large countries within the Western European context: Spain and the United Kingdom. The

⁴⁴ David Singer, The Level-of-Analysis Problem in International Relations, *World Politics*, 14:1 (1961).

grounds for the choice will be elaborated in chapter 3. At this point it is sufficient to say that these two countries were chosen from the pre-selection of the five relatively large Western European countries, namely Germany, France, Italy and the mentioned two. Despite the differences, Order-over-Justice anticipates that Western European countries would follow similar paths in the international promotion of human rights law.

The empirical chapters 4, 5, 6 and 7 explore why Western European states promoted or did not promote four human rights norms, and how their attitudes towards these norms have evolved over time. The answers to these questions are sought in the hermeneutics of the relevant treaties and in their *travaux préparatoires*, as well as the opinions expressed by international courts, independent international bodies and legal and political commentators. All six propositions will be examined in relation to four norms at different stages of development: a) The *prohibition of torture*, as an example of a globally settled norm that emerged in the 1970s; b) *Ecocide*, a failed norm that lived from the early 1970s up to the mid 1990s; c) *Justiciability of economic, social and cultural rights*, a norm at an advanced stage of development that emerged in the 1990s; and d) *Responsibility to Protect*, a proto-norm that was born in the early 2000s.

Chapter 8 carries out a comparative exercise of the findings from the four cases. It also presents the theoretical contribution of this thesis: Order and pluralism can still be drivers in our world society, and both the English School and the study of IHRL would benefit from more critical and self-critical approaches. Besides, this chapter offers insight into what this may mean in practical terms for IHRL and human rights advocacy in the foreseeable future. At a time of rising nationalism in the Global North and ever growing power from the Global South, identifying the factors that lie beneath the legal recognition of human rights is key to ensure that these ideal goals of humanity inspire policy decisions in the coming years.

2. ORDER-OVER-JUSTICE: A THEORY OF INTERNATIONAL HUMAN RIGHTS NORM PROMOTION

“It is better to recognise that we are in darkness than to pretend that we can see light” (Hedley Bull, 1977)⁴⁵

“It is better to light a candle than to curse the darkness” (claimed to be a Chinese proverb, Amnesty International’s traditional motto)

This chapter sets out the theoretical framework of the thesis. The chapter begins with a critical review of the literature on international human rights promotion between normative cosmopolitanism and realist disbelief (2.1). As an alternative explanation, the second part presents Order-over-Justice, a systemic approach built on the dichotomous vantage point from which the English School interprets international law (2.2). This section includes six propositions that one expects to see if, as the theory suggests, Western European states promote international human rights legal norms as a matter of international order more than as part of a global justice project.

2.1. International Human Rights Law between normative cosmopolitanism and realist disbelief

Cosmopolitanism is based on the moral unity of humankind and equal deservedness of all human beings. In normative terms, cosmopolitanism advocates that morality cannot be contained to communities separated by national boundaries. The cosmopolitan way of thinking stresses that universal morality is of such importance that most if not all other considerations must give way, including national interests and territorial integrity, if required.

⁴⁵ Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (London: Palgrave, 2002[1977]), 308.

As we will see later, cosmopolitanism is popular in the English School (subsection 2.2.2) and it is particularly present in segments of the constructivist tradition in International Relations. As advanced in chapter 1, generally for constructivists states promote certain norms because they identify with them. According to Finnemore and Sikkink's model, states promote human rights norms "for reasons that relate to their identities as members of the international society".⁴⁶ Another telling example of normative cosmopolitanism in constructivism is Adler's famous quote: "human rights have become a central factor in the interests of democratic nations because they increasingly define social identities", and "it would be very difficult for a European state to consistently abuse human rights and still be deemed to belong to contemporary 'Europe'".⁴⁷

Ian Manners is worth mentioning here as well. Manners' referred to the European Union as a "normative power": The central component of the EU's power is that it "exists as being different to pre-existing political forms, and that this particular difference predisposes it to act in a normative way".⁴⁸ For him, "the most important factor shaping the international role of the EU is not what it does or what it says, but what it is".⁴⁹ Manners' analysis has been critiqued by a number of authors,⁵⁰ who are at the very least hesitant about the normative place of EU's place in the world. Part of the problem lies in the case chosen by Manners to exemplify his argument: The abolition of the death penalty. Oddly enough, it is the same example chosen by Moravcsik to illustrate some of the differences between the United States and European

⁴⁶ Finnemore and Sikkink, *International Norm Dynamics and Political Change*, 902.

⁴⁷ Emanuel Adler, *Seizing the Middle Ground: Constructivism in World Politics*, *European Journal of International Relations*, 3:3 (1997), 340 and 345.

⁴⁸ Ian Manners, *Normative Power Europe: A Contradiction in Terms?*, *Journal of Common Market Studies*, 40:2 (2002), 242.

⁴⁹ *Id.*, 252.

⁵⁰ Richard Youngs, *Normative Dynamics and Strategic Interests in the EU's External Identity*, *Journal of Common Market Studies*, 42:2 (2004); Marika Lerch and Guido Schweltnus, *Normative by nature? The role of coherence in justifying the EU's external human rights policy*, *Journal of European Public Policy*, 13:2 (2006); Helene Sjursen, *What kind of power?*, *Journal of European Public Policy*, 13:2 (2006); The EU as a 'normative' power: how can this be?, *Journal of European Public Policy*, 13:2 (2006); Adrian Hyde-Price, *'Normative' power Europe: a realist critique*, *Journal of European Public Policy*, 13:2 (2006); Tuomas Forsberg, *Normative Power Europe, Once Again: A Conceptual Analysis of an Ideal Type*, *Journal of Common Market Studies*, 49:6 (2011).

political leaders in their views about human rights.⁵¹ Manners' selection is slightly biased, because the death penalty is quite a unique case. With the exception of Belarus, the death penalty has disappeared from Europe entirely, and Western Europe has not seen an execution in decades. It is probably safe to say that political leaders' opposition to the death penalty in Europe is a matter of principles, but it is also true that no other human rights norm resembles the prohibition of the death penalty either in its radical clarity (the opposition must be absolute regardless of the crime) or in its consequences (other rights are more costly or have unexpected consequences, while the death penalty affects a relatively small number of inmates). If Manners had chosen another human right, such as the prohibition of torture or the right to health, he would have struggled to argue persuasively that the power of Europe is of "normative" nature.⁵² In fact, Manners himself later acknowledged the limitations of his approach at the practical level: "It is one thing to say that the EU *is* a normative power by virtue of its hybrid polity consisting of supranational and international forms of governance; it is another to argue that the EU *acts* in a normative (i.e. ethically good) way" (italics in the original).⁵³

Cosmopolitan readings of states' declared intentions and motivations risk assuming "a relatively high degree of sincerity on the part of the creators, the internalization of a moral obligation by the leadership and relative consistency in practice".⁵⁴ My disagreement with the assumption of normative cosmopolitanism lies essentially in the expectations towards state behaviour. Human rights legalism and diplomatic talking are full of references to justice, equality, freedom and solidarity, but if the promotion of human rights law by states were a cosmopolitan project, we would expect

⁵¹ Andrew Moravcsik, Explaining International Human Right Regimes: Liberal Theory and Western Europe, *European Journal of International Relations*, 1:2 (1995); "The Paradox of US Human Rights Policy", in Ignatieff, Michael (ed.), *American Exceptionalism and Human Rights*, Princeton: Princeton University Press (2005).

⁵² Similarly, Lerch and Schweltnus, Normative by nature?

⁵³ Ian Manners, The normative ethics of the European Union, *International Affairs*, 84:1 (2008), 65.

⁵⁴ Bruce Cronin, *Institutions for the Common Good: International Protection Regimes in International Society* (Cambridge: Cambridge University Press, 2003), 192.

states to behave in line with human rights as a matter of principle. However, a reality-check proves otherwise.

First, in general, countries have been much quicker at proclaiming rights than at providing the necessary tools to ensure their implementation and enforcement. Initially, the UN Commission on Human Rights, a political body conformed by Member States, interpreted its mandate in a highly restrictive way. In its first session in early 1947, the Commission resolved that it had “no power to take any action in regard to any complaints concerning human rights”.⁵⁵ At least for the first two decades, states were reluctant to establish independent monitoring bodies, and when they eventually did agree to set up the mechanisms, they created artificial distinctions between rights. As shown in chapter 6, this is the case of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which was not accompanied by any independent monitoring body, unlike the International Covenant on Civil and Political Rights (ICCPR), adopted the very same day (16 December 1966), which was born with its own Human Rights Committee.⁵⁶

Secondly, the assessment is not very different when we look at the European human rights regime. In Sikkink’s opinion, after World War II, unlike their US counterparts, European leaders agreed to a regional institutional framework on human rights to prevent the repetition of the experience of repression and war in the continent.⁵⁷ For Moravcsik, post-War European leaders were trying to protect future generations from possible authoritarian temptations from their successors.⁵⁸ However, at that time, Europe was still far from having strong monitoring bodies. Individuals had to request the European Commission of Human Rights to submit their complaints to the European Court on their behalf, and for years the Commission “acted primarily as a

⁵⁵ Commission on Human Rights, Report of the 1st Session, 27 January-10 February 1947, UN doc: E/259, para. 22.

⁵⁶ The UN Committee on Economic, Social and Cultural Rights was only set up in 1985 by ECOSOC, and since the entry into force of the Optional Protocol in 2013 it also has the mandate to deal with individual complaints.

⁵⁷ Kathryn Sikkink, “The Power of Principled Ideas: Human Rights Policies in the United States and Western Europe”, in Goldstein, Judith and Keohane, Robert O. (eds.), *Ideas and Foreign Policy: Beliefs, Institutions, and Political Change* (Ithaca: Cornell University Press, 1993).

⁵⁸ Moravcsik, *The Origins of Human Rights Regimes*.

political body limiting the types of cases heard” by the Court.⁵⁹ It was only in 1998, with the entry into force of the 11th Protocol to the European Convention on Human Rights, that individuals gained direct access to Strasbourg. To this day, the European Court of Human Rights remains the only international court of its kind where individuals can lodge a complaint for the breach of their rights.⁶⁰

And thirdly, if states promoted human rights as a matter of justice, one would expect to see them using available resources to enhance the protection of human rights beyond borders. Nonetheless, states have hardly ever used the interstate complaint mechanisms at their disposal. Although the ICCPR regulates this possibility in great detail (Articles 41-43), so far not even a single case has ever been brought to the attention of the Human Rights Committee. Since the 1950s, only 20 cases have been lodged at the European Court of Human Rights by one or more countries, more than half of which affect territorial disputes between them.⁶¹ For Krasner, “states have been reluctant to accuse other states of human rights violations because of the danger that their own sovereign control would be undermined”.⁶² In fact, a cynic could even argue that states have agreed to a set of independent human rights mechanisms at the UN and the Council of Europe so they can have a valid excuse not to use the interstate mechanisms, which are much more uncomfortable in diplomatic terms. It is true that the Western European and Others Group is the most active at the Universal Periodic Review,⁶³ which is

⁵⁹ Karen Alter, *The Evolving International Judiciary*, *Annual Review of Law and Social Sciences*, 7 (2011), 398; Bates, *The Evolution of the European Convention on Human Rights*, 140-142.

⁶⁰ With the entry into force of the 14th Protocol in 2010, cases can be declared inadmissible if the applicant did not suffer a “significant disadvantage”. The 15th Protocol, not yet in force, will formalise the praetorian principles of subsidiarity and states' margin of appreciation.

⁶¹ http://www.echr.coe.int/Documents/InterStates_applications_ENG.pdf Four of the cases were brought by Cyprus against Turkey in relation to Northern Cyprus (in the 1970s and in 1994), three more were submitted by Georgia against Russia after the intervention in Abkhazia and South Ossetia (2008), and four from Ukraine against Russia in 2014 and 2015. The African Commission on Human and People's Rights has only dealt with one of this type of cases so far (*DRC v. Burundi, Rwanda and Uganda*, 2004). The Inter-American interstate complaint procedure was used for the first time in 2006, nearly three decades after the entry into force of the Convention, and so far there have only been two cases (*Nicaragua v. Costa Rica*, 2007, and *Ecuador v. Colombia*, 2010).

⁶² Stephen Krasner, “Sovereignty, Regimes, and Human Rights”, in Rittberger, Volker (ed.), *Regime Theory and International Relations* (Oxford: Oxford University Press, 1993), 164.

⁶³ Edward McMahon, *The Universal Periodic Review: A Work in Progress. An Evaluation of the*

based on state-to-state recommendations, but it is also true that bringing a case to the European Court of Human Rights and making a recommendation at the Human Rights Council are just not comparable in their legal effects and political consequences.

Having talked about normative cosmopolitanism, we can find realist disbelief, or “the scepticism of the realists” as Beitz put it, on the opposite corner of the mat.⁶⁴ Realists are sceptical about international law in general,⁶⁵ and about the international recognition of human rights in particular.⁶⁶ For realists, it is unwise to judge other states' actions from a moral perspective.⁶⁷ Norms do not matter much,⁶⁸ or they are simply “reflections of the distribution of power in the world”,⁶⁹ and get subsumed “in the material structure of the international system”.⁷⁰ With the prisoner’s dilemma in mind, Krasner skilfully captures the distress that international law provokes in many

First Cycle of the New UPR Mechanism of the United Nations Human Rights Council (Berlin: Friedrich-Ebert-Stiftung, 2012).

⁶⁴ Charles Beitz, *Political Theory and International Relations* (Princeton: Princeton University Press, 1999[1979]), 15.

⁶⁵ Hans Morgenthau, Positivism, Functionalism, and International Law, *American Journal of International Law*, 34:2 (1940). Martin Wight (*International Theory: The Three Traditions*, Leicester: Leicester University Press, 1991, 238) says that it is not true that realists consider international law to be irrelevant. For them, however, the meta-rule of international law would be the principle of *rebus sic stantibus* (things thus standing) and not *pacta sunt servanda* (promises must be kept). International publicists generally see the former principle as an escape clause that allows for a treaty obligation to be deemed inapplicable if the circumstances have notably changed. The problem is that, in an essentially self-help system like the existing international society, there is not much difference between disregarding the rule entirely and deeming it inapplicable whenever one claims to experience a circumstantial change.

⁶⁶ Hans Morgenthau, The Twilight of International Morality, *Ethics*, 58:2 (1948), 99. Morgenthau was less radical than many of his followers in his approach to international law. He conceded that “to deny that international law exists as a system of binding legal rules flies in the face of all the evidence” (*Politics Among Nations: The Struggle for Power and Peace*, New York: Alfred A. Knopf, 1948, 211). On the British side, Carr even ambivalently allocated some value to morality in international politics: “The utopian who dreams that it is possible to eliminate self-assertion from politics and to base a political system on morality alone is just as wide of the mark as the realist who believes that altruism is an illusion and that all political action is based on self-seeking. [...] Politics cannot be divorced from power. But the *homo politicus* who pursues nothing but power is as unreal a myth as the *homo economicus* who pursues nothing but gain. Political action must be based on a co-ordination of morality and power” (*The Twenty Years' Crisis*, 92).

⁶⁷ Hans Morgenthau, *Human Rights and Foreign Policy* (New York: Council on Religion and International Affairs, 1979); George Kennan, Morality and Foreign Policy, *Foreign Affairs*, 64:2 (1985).

⁶⁸ Glenn Snyder, Process variables in neorealist theory, *Security Studies*, 5:3 (1996), 169.

⁶⁹ John Mearsheimer, The False Promise of International Institutions, *International Security*, 19:3 (1994/95), 7.

⁷⁰ John Mearsheimer, A Realist Reply, *International Security*, 20:1 (1995), 91.

realists: “If no one obeys the law, it hardly matters. If everyone obeyed the law, the world might be a better place. But if some states assume that everyone will honor the law, while others cheat, the world could be a worse place than it would have been with no law at all”.⁷¹ From a realist perspective, it is also possible that Western European states promote IHRL as one of their “milieu goals”, which “aim at shaping conditions beyond [states'] national boundaries”.⁷² The fact that milieu goals can be shared with other countries does not make them any less self-centred. It only confirms that states can have common interests. Applied to our case, the promotion of IHRL would not be a matter of values and principles, but an entirely rational and self-interested decision. From this perspective, promoting human rights would be one way for Europeans to have a say in the world.

Realism is also present among legal scholars. Some have argued that, in spite of their discursive salience, the proclamation of human rights in international law has very little connection with the actual improvement of human rights around the world, which in their opinion has to do with more interdependent trade relations and with the end of the Cold War. However, liberal democracies keep drafting, signing and ratifying human rights treaties because they can do it at a very little cost, and not doing so would make them look like ugly outliers.⁷³

Prudence often associated with realist foreign policy can actually have a positive impact on human rights beyond national borders.⁷⁴ However, IHRL is not just the reflection of the combination of Western national powers and interests, as realists would expect. The argument put forward in this thesis

⁷¹ Stephen Krasner, Realist Views of International Law, *Proceedings of the Annual Meeting (American Society of International Law)*, 96 (2002), 268.

⁷² Arnold Wolfers, *Discord and Collaboration: Essays on International Politics* (Baltimore: The John Hopkins Press, 1962), 73.

⁷³ Jack Goldsmith and Eric Posner, *The Limits of International Law* (Oxford: Oxford University Press, 2005); Eric Posner, *The Twilight of Human Rights Law* (Oxford: Oxford University Press, 2014).

⁷⁴ Jack Donnelly, *Realism and International Relations* (Cambridge: Cambridge University Press, 2000), 185-188; “The Ethics of Realism”, in Reus-Smit, Christian and Snidal, Duncan (eds.), *The Oxford Handbook of International Relations* (Oxford: Oxford University Press, 2008), 157-159; David Jones and M. L. R. Smith, Return to Reason: Reviving Political Realism in Western Foreign Policy, *International Affairs*, 91:5 (2015).

differs directly from realism in three ways.

Firstly, I argued earlier that the delay in the establishment of independent monitoring bodies and their relative weakness constitute arguments against a cosmopolitan value-based explanation of the existence of IHRL. On the other hand, the existence of these bodies, as late and weak as they can be, contradicts the realist expectation. Realism would find it very hard to explain the high degree of state compliance with the judgements of the European Court of Human Rights. More generally, realists cannot account for the existence of an international system that is not based on reciprocity. In fact, realists would probably say that reciprocity is a necessary but not sufficient condition; for an international regime to emerge and endure, it would also have to represent accurately the pre-existing power distribution between states. Be that as it may, with IHRL, states impose obligations on themselves irrespective of state-to-state conditional obligations. The logic of reciprocity in interstate relationships is therefore by definition inconsistent with IHRL.⁷⁵ It is certainly different in the case of International Humanitarian Law, which emerged in the 19th century as a field of cooperation between sovereign countries. Morrow illustrates this point very well in relation to prisoners of war, an area in which even countries in conflict with each other may find good rational reasons to cooperate reciprocally.⁷⁶ Mazower shows that the 1899 Martens clause⁷⁷ was the result of very rational and reciprocity-based interstate arguments.⁷⁸ In fact, Alexander has made the persuasive argument that the humanitarian dimension of the international law of armed conflict is a rather new phenomenon that began approximately in the 1970s, with the

⁷⁵ Stanley Hoffmann, *The Study of International Law and the Theory of International Relations*, *American Society of International Law Proceedings*, 26 (1963), 31. For a contrary view, Stephen Hopgood, *The Endtimes of Human Rights* (Ithaca: Cornell University Press, 2013), ch. 8.

⁷⁶ James Morrow, *The Institutional Features of the Prisoners of War Treaties*, *International Organization*, 55:4 (2001).

⁷⁷ "Until a more complete code of the 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 and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience." (Preamble of the 1899 Convention with respect to the laws of war on land, Hague II).

⁷⁸ Mark Mazower, *Governing the World: The History of an Idea* (London: Allen Lane, 2012), 75.

effective lobbying of NGOs and key individuals.⁷⁹

A second point of disagreement with realism is that IHRL cannot represent the will of the European West because IHRL has its own life. The human rights regime does not simply reflect the will of Western European governments within the hegemonic structures of power. Although the international institutionalisation of human rights owes much to the European input, other actors have also had an influence. Apart from non-European countries with different purposes, there are NGOs, think-tanks, journalists, UN bodies and even like-minded government officials and diplomats. Forces connected to non-univocal ideals of global justice may motivate these actors. Because of the number of independent advocacy actors within the international human rights regime, Western European states cannot be certain about the future meaning of the norm they are helping to bring to life. At times, the paths of states and advocates may meld for strategic or tactical reasons and a new human rights norm may emerge out of that momentum, but the motivations beneath each actors' decision are different. The fate of the new-born norm will depend upon the power distribution between the states and the advocates. Once the norm enters the realm of the global, states will not keep all the power over its meaning any more.

This connects with the third fundamental difference between realism and the argument put forward in the following pages. For realism, the innards of the state are of minor importance. States are intrinsically (for classical realists) or structurally (for neorealists) cursed to mistrust each other and maximise their influence in a context of anarchy. The approach defended in this thesis, on the contrary, recognises the importance of civil liberties and democratic institutions at the domestic level, insofar as only these freedoms can allow non-state actors to lobby government officials and to champion human rights. In their condition of norm entrepreneurs, civil society organisations in European democracies use international law as a tool for justice, and the

⁷⁹ Amanda Alexander, A Short History of International Humanitarian Law, *European Journal of International Law*, 26:1 (2015).

state must negotiate the meaning of norms at the domestic and the international levels.

2.2. Order-over-Justice: An alternative explanation from the English School

In contrast with what I see as the excesses of normative cosmopolitanism and the shortcomings of realist disbelief, this section provides an alternative explanation of the role and motivation of Western European states in promoting international human rights norms. Firstly, I introduce the notions of *consent* and *consensus* in IHRL (subsection 2.2.1), whose differences will give way to my theoretical approach within the contours of the English School and its dichotomies (2.2.2). Then, I present why Order-over-Justice is best suited to explain critically why Western European states promote human rights norms in international society (2.2.3). I conclude this chapter with the six propositions stemming from Order-over-Justice (2.2.4).

2.2.1. International Human Rights Law is not (just) what states make of it

The international human rights legal system is built on the 1948 Universal Declaration of Human Rights (UDHR). This was indeed the tool by which states gave content to a number of human rights-related provisions contained in the 1945 UN Charter: Articles 1, 55, 56 and 68.⁸⁰ Based on a thorough survey of national legislation and case-law and on the analysis of statements by governments and international bodies, Hannum concludes that “the Declaration represents the only common ground when many states discuss human rights [and] it is the first instrument that should be consulted

⁸⁰ Cassese, “The General Assembly”, 25-27; Freeman, *Human Rights*, 33; Ishay, *The History of Human Rights*, 216; Henry Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals* (Oxford: Oxford University Press, 2007), 134-135.

when attempting to identify the contemporary content of international human rights law”.⁸¹

Human rights, of course, were not invented in 1948. They had been discussed, explored and advocated long before, even in Ancient Rome and Greece, but especially in Europe since the Enlightenment.⁸² History had also witnessed solidarity movements, like labour in the late 19th and early 20th centuries, and humanitarian projects, like the movement against slavery or the Red Cross, both of them in the 19th century.

For Vincent, individual rights were “important for the birth of the idea of a society of states”,⁸³ and Reus-Smit goes as far as to find in the struggle for individual rights a common theme in the “expansion of the international system” between the mid 17th century and the collapse of the Soviet Union.⁸⁴ Alternatively, Moyn argues that human rights only began to take a relatively important role in international affairs in the 1970s,⁸⁵ and Stefan-Ludwig Hoffmann even claims that to reach that point human rights had to wait until the 1990s.⁸⁶

The disagreement between these authors lies on their expectations. Albeit not verbalising it, these commentators have different understandings of the prominence that human rights could potentially have on the international stage. In a nutshell, the more we expect from human rights, the less likely we are to be persuaded that human rights actually shape actors’ behaviour in real life international politics. As I let slip in section 2.1, the point that expectations matter greatly will run through this thesis. I will come back to this in more detail later on.

Be that as it may, the concept that emerged after the Second World War was

⁸¹ Hurst Hannum, The Status of the Universal Declaration of Human Rights in National and International Law, *Georgia Journal of International and Comparative Law*, 25 (1995/96), 353.

⁸² Ishay, *The History of Human Rights*.

⁸³ R. J. Vincent, Western Conceptions of a Universal Moral Order, *British Journal of International Studies*, 4:1 (1978), 26.

⁸⁴ Christian Reus-Smit, Struggles for Individual Rights and the Expansion of the International System, *International Organization*, 65:2 (2011); *Individual Rights and the Making of the International System* (Cambridge: Cambridge University Press, 2013).

⁸⁵ Moyn, *The Last Utopia*

⁸⁶ Stefan-Ludwig Hoffmann, Human Rights and History, *Past and Present*, 232:1 (2016).

as revolutionary as it was surprisingly simple: That a shared humanity is enough to provide all individuals with the same rights and liberties. In the wording of the first two provisions of the UDHR: “All human beings are born free and equal in dignity and rights” and “everyone is entitled to all the rights and freedoms set forth in this Declaration”.

The idea, however, is not that states *create* rights by international law. States, rather, *recognise* them, and that is the language used in international human rights documents, treaties and declarations, where states express their opinions via ratification and voting at the General Assembly or at ad hoc international conferences.

In international law, a treaty is “an international agreement concluded between States”.⁸⁷ As such, international treaties “are evidence of the express consent of States to regulate their interests according to international law”.⁸⁸ Any treaty is delimited by what states decide in the drafting process and it is only applicable to those countries that, in the exercise of their sovereignty, choose to ratify it. International organisations play a growing role as autonomous law-makers,⁸⁹ significantly in the case of human rights by shaping and reframing the meaning of clauses over time, but to this day states remain the main political and legal actors in international affairs.

A theory on international human rights norm promotion must therefore take the state as the central unit of analysis, because the state is the main author of international law and the main holder of human rights obligations. Traditionally, states were considered as the only subjects in international law and, therefore, the only duty-bearers. Yet, even if states are central, they are not alone any more. We also have local, national and international NGOs, think-tanks, journalists, academics and even country diplomats based in New

⁸⁷ Article 2(1)(a) of the 1969 Vienna Convention on the Law of Treaties: “For the purposes of the present Convention: [...] 'treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.”

⁸⁸ Martin Dixon and Robert McCorquodale, *Cases and Materials on International Law* (Oxford: Oxford University Press, 2003), 56.

⁸⁹ Michael Barnett and Martha Finnemore, *Rules of the World: International Organizations in Global Politics* (Ithaca: Cornell University Press, 2004).

York and Geneva who may be more receptive to human rights debates. There is a plurality of actors, and a theory of state promotion of IHRL must beware of the range of writers of the ideas and interests that shape the international society.

States play a central role in treaty-making, but also in keeping human rights in the diplomatic agenda by using a certain language and by voting in a certain way at the General Assembly, the Human Rights Council and other meetings in regional organisations. State action and opinion is key in order to establish the degree of settlement of a norm. This is the bottom line of the *Nicaragua case* (1986), where the International Court of Justice introduced the “modern approach” to customary international law.⁹⁰

“In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indicators of the recognition of a new rule”.⁹¹

As observed by Schachter, “in place of a practice that began with the gradual accretion of acts and subsequently received the imprimatur of *opinio juris*, the Court reversed the process: an *opinio juris* expressed first as a declaration would become law if confirmed by general practice”.⁹² In other words, the existence of a customary norm would be determined, prior to state action, by the way the state justifies it. “Even massive abuses do not militate against assuming a customary rule as long as the responsible author state seeks to hide and conceal its objectionable conduct instead of justifying it by invoking legal reasons”.⁹³ The researcher must therefore explore statements and voting patterns at the UN in order to identify the state's *opinio juris* in

⁹⁰ Anthea Roberts, Traditional and Modern Approaches to Customary International Law: A Reconciliation, *American Journal of International Law*, 95:4 (2001), 757-758. For a critique, Stefan Talmon, Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion, *European Journal of International Law*, 26:2 (2015), 429-434.

⁹¹ ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Judgement of 27 June 1986, para. 186.

⁹² Oscar Schachter, “New Custom: Power, *Opinio Juris* and Contrary Practice”, in Makarczyk, Jerzy (ed.), *Theory of International Law at the Threshold of the 21st Century* (The Hague: Kluwer Law International, 1996), 532.

⁹³ Christian Tomuschat, *Human Rights: Between Idealism and Realism* (Oxford: Oxford University Press, 2003), 34-35.

relation to a given norm. They must also bear in mind the state's "position of power within the international order",⁹⁴ because *opinio juris* is not dislocated from power distribution in the international system.⁹⁵

The politics of international law suggests that votes and statements provide useful information as regards the reasons why states behave in a certain way in the international sphere. However, before asking whether a state believes that its actions are the manifestation of a binding international norm (*opinio juris*), one must respond a fundamental question: Why is international law binding?

The foundation of the binding nature of international law is a contentious matter, and the essence of the conflict is whether the obligatory force of international law comes from consent or from consensus. Since Oppenheim, who was convinced that "we are nowadays no longer justified in teaching a law of nature and a 'natural' law of nations",⁹⁶ the traditional view has been that states commit to abide by international law when, in exercise of their sovereignty, they choose freely to ratify an international treaty. The traditional or standard view of consent is formal and allegedly normatively neutral, and connects the authority of international law to its binding nature.⁹⁷

This was the view expressed by the Permanent Court of International Justice in the famous *Lotus case* (1927): "International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will".⁹⁸ Translated into domestic legal terms, based on this consent-based approach, international law would resemble private contract law more than public law. This is the intellectual framework

⁹⁴ Brigitte Stern, Custom at the Heart of International Law, *Duke Journal of Comparative & International Law*, 11 (1981), 108.

⁹⁵ Niels Petersen, The International Court of Justice and the Judicial Politics of Identifying Customary International Law, *European Journal of International Law*, 28:2 (2017).

⁹⁶ Lassa Oppenheim, The Science of International Law: Its Task and Method, *American Journal of International Law*, 2:2 (1908), 328.

⁹⁷ Başak Çali, *The Authority of International Law: Obedience, Respect, and Rebuttal* (Oxford: Oxford University Press, 2015), 24-33.

⁹⁸ PCIJ, *Case of the S.S. Lotus (France v. Turkey)*, Judgement of 7 September 1927, 18.

from which we must interpret E. H. Carr's words when he wrote that “international law differs from the municipal law of modern states in being the law of an undeveloped and not fully integrated community. It lacks three institutions which are essential parts of any developed system of municipal law: a judicature, an executive and a legislature”.⁹⁹ This quote reflects the scepticism of those who harbour doubts about the very legality of international law.

In opposition to this view, H. L. A. Hart, one of main figures of legal positivism in the 20th century, argued that the contractual view of international law is not deep enough, because consent still requires a rule of recognition, i.e., a meta-rule that gives validity to the normative system as a whole. Even private law requires a prior rule that affirms the binding nature of contractual agreements.¹⁰⁰

If the view based on consent has limitations, so does the alternative based on consensus. According to this approach, norms emerge and evolve as a matter of general practice and soft law, and in application of general principles over which states do not have absolute control.¹⁰¹ Defenders of consensus as binding force of international law often refer to the notion of *jus cogens* (peremptory law) as evidence of the existence of a set of rules whose observance is not constrained by states' will.¹⁰² The main argument against a consensus-based idea of international law is that the power of law depends on its authority, and authority requires hierarchy. States are functionally equal and coexist in an international structure that is anarchic, either by definition¹⁰³ or by cultural and social construction¹⁰⁴; hence, international

⁹⁹ Carr, *The Twenty Years' Crisis*, 159.

¹⁰⁰ H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1994[1961]), 225-226.

¹⁰¹ Andrew Guzman, Against consent, *Virginia Journal of International Law*, 52:4 (2012).

¹⁰² Article 53 of the 1969 Vienna Convention on the Law of Treaties defines *jus cogens* as “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”

¹⁰³ Kenneth Waltz, *Theory of International Politics* (Reading (US): Addison-Wesley Publishing Company, 1979).

¹⁰⁴ Alexander Wendt, Anarchy is what States Make of it: The Social Construction of Power Politics, *International Organization*, 46:2 (1992); *Social Theory of International Politics* (Cambridge: Cambridge University Press, 1999).

law must be toothless, and it cannot really be law.

Whether international law is about consent or about consensus is perhaps the ultimate debate within the liberal view of international law, a view that sees “states-as-individuals” who agree on a set of rules to regulate their interactions and to order the international system thereby preserving their individual freedom.¹⁰⁵ Since Vattel's *Droit des gens*,¹⁰⁶ international lawyers have assumed that liberal principles, and in particular the rule of law, matter in international affairs.¹⁰⁷ In his ground-breaking *From Apology to Utopia*, Koskenniemi argues that international law serves two opposite purposes at once. On the one hand, international law can be based on the state will and has the virtue of concreteness. Nevertheless, when it is too closely related to the actual state practice it becomes “apologetic” of existing power. On the other hand, international law can constitute an ideal or a plurality of ideals of state behaviour. As such, its virtue is that it asserts the autonomous normative power of the law. Its vice, however, is that it may be unreal insofar as it may be too disconnected from actual practice. In our terminology, Koskenniemi's idea of apology is the danger of the consent-based view of international law while his utopia lies at the edge of the consensus-based approach.¹⁰⁸

The debate between consent/positivism and consensus/naturalism is therefore a fundamental knot of modern international law. It is not the intention of this thesis to try undoing it. Yet, from a pragmatic perspective, we can bring forward the classic Roman law distinction between *potestas* and *auctoritas*. The former refers to the hierarchically *superior authority* that holds the power of coercion to decide over others; the latter, on the other hand, refers to the institution or individual who is socially deemed as a *public authority* in a given area. This second figure's power is recognised as

¹⁰⁵ Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge University Press (2005[1989])), 22.

¹⁰⁶ Emer de Vattel, *The law of nations, or, principles, of the law of nature, applied to the conduct and affairs of nations and sovereigns* (London: Eighteenth Century Collections Online, 1797[1758]).

¹⁰⁷ Koskenniemi, *From Apology to Utopia*, ch. 2.

¹⁰⁸ Id, ch. 5, on the sources of international law.

legitimate by the community due to its knowledge and moral standing and the persuasion and coherence of its arguments. *Potestas* can be imposed; *auctoritas* is conferred.

States are not the only actors of international law. They do not retain full control over the meaning of human rights norms. Once they get internationalised, norms have a life of their own. The European Court of Human Rights has recognised a wide margin of appreciation over the meaning of the European Convention in each country, but it has also made clear that the Convention is a “living instrument which [...] must be interpreted in the light of present-day conditions”,¹⁰⁹ and it has absorbed a good deal of power thereby. However, one must remain prudent about cosmopolitan arguments based on an international law beyond states' will. States are an essential ingredient of international regimes. We might be able to conceive a world without states, but states qua states pose certain limits to a cosmopolitan understanding of human freedom. Ultimately the legitimacy of authoritative bodies (bodies with *auctoritas*) very much depends upon the extent to which states (with *potestas*) allow those bodies to carry out their work independent and effectively.

Nevertheless, it is also true that, once states join international regimes, they cannot leave at no cost.¹¹⁰ Human rights treaties often set limitations to regressive measures and to reservations, but much more important is the fact that states feel “rhetorically entrapped” by the discourse of human rights.¹¹¹ The power of human rights is such that once a given issue is framed in the language of rights, it is too costly for states to argue otherwise. Even if they do not agree with the way in which human rights provisions have been

¹⁰⁹ ECtHR, *Tyrer v. UK* Judgement of 23 April 1978, para. 31.

¹¹⁰ Robert Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton: Princeton University Press, 1984); Simmons, *Mobilizing for Human Rights*, 13.

¹¹¹ Frank Schimmelfennig, The Community Trap: Liberal Norms, Rhetorical Action, and the Eastern Enlargement of the European Union, *International Organization*, 55:1 (2001). Schimmelfennig was writing about how Western European countries could not oppose any longer the EU enlargement to the East after proclaiming the EU as a club of democracies and freedom fighters.

interpreted, states have hardly any other choice but to accept them.¹¹² One may legitimately wonder whether countries would have voted in favour of human rights documents had they known how they were going to be interpreted decades later. In fact, Brian Simpson, one of most authoritative analysts of the evolution of the European Convention on Human Rights, believes they would have not: “Had the politicians then been able to foresee [the] intrusiveness [of the European Court of Human Rights] it is most improbable that the convention would have ever have been ratified”.¹¹³ It is certainly an interesting question, but the fact remains that states did join human rights regimes and that they have not left yet.

To summarise, notwithstanding the lack of agreement about the source of the binding force of international law, we can assert that: a) States are bound at least by the obligations they consent to; b) the precise meaning of those obligations evolves over time and it rests on the interpretative work of authoritative bodies; and c) these bodies are set up by states, but states do not have control over the hermeneutics of independent human rights mechanisms and they get trapped in the rhetoric of human rights.

None of this means that human rights have taken international law from consent to consensus. We now have international treaties on human rights-related matters and independent bodies that more or less successfully monitor states’ compliance with those treaties. We did not have them only a few decades ago, and they are to be welcomed. That said, the remaining of this chapter argues that it would be rash to assume that IHRL has altered the most fundamental pillars of international society.

¹¹² Venezuela was very criticised when it denounced the American Convention on Human Rights in 2012. A number of high members of the UK Conservative Party have also favoured the denunciation of the European Convention on Human Rights, but so far the Government has not followed through conclusively, although this might very well change in the future.

¹¹³ Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford: Oxford University Press, 2000), 4.

2.2.2. The English School and its dichotomies

Why do Western European states promote international human rights norms? The theoretical explanation to be defended in this thesis is based on a political tension between two forces, order and justice, a tension that takes place in the battleground for legitimacy in the international society. This tension is best explained from the perspective of the English School.

Even though some have certified the decline of the English School and predicted its marginalisation,¹¹⁴ others find in it a bridge between cosmopolitanism and realist geopolitics.¹¹⁵ There is no academic agreement about the place of the English School in the theoretical spectrum of International Relations. According to Kratochwil, Bull's *The Anarchical Society* is “the most articulate counter-proposal to realism”,¹¹⁶ but for Donnelly, the English School is “a heavily hedged realism”,¹¹⁷ and in fact Gilpin's major *War and Change in World Politics* makes several references to Bull's work when writing about “the nature of the international system”.¹¹⁸ Both Reus-Smit¹¹⁹ and Bellamy¹²⁰ treat Carr as the first prophet of the English School, while for Mearsheimer,¹²¹ and indeed for most historians of realist thought, Carr was one of the first proponents of realism.¹²² The lack of agreement

¹¹⁴ Roy Jones, The English School of International Relations: A Case for Closure, *Review of International Studies*, 7:1 (1981); Ian Hall, Still the English Patient? Closures and Inventions in the English School, *International Affairs*, 77:4 (2001).

¹¹⁵ Andrew Linklater, *The Problem of Harm in World Politics: Theoretical Investigations* (Cambridge: Cambridge University Press, 2011), 127.

¹¹⁶ Friedrich Kratochwil, “Sociological Approaches”, in Reus-Smit, Christian and Snidal, Duncan (eds.), *The Oxford Handbook of International Relations* (Oxford: Oxford University Press, 2008), 448.

¹¹⁷ Donnelly, *Realism and International Relations*, 30.

¹¹⁸ Robert Gilpin, *War and Change in World Politics* (Cambridge: Cambridge University Press, 1981), 25-39.

¹¹⁹ Christian Reus-Smit, Imagining society: constructivism and the English School, *British Journal of Politics and International Relations*, 4:3 (2002), 506.

¹²⁰ Alex Bellamy, “Introduction: International Society and the English School”, in Bellamy, Alex J. (ed.), *International Society and its Critics* (Oxford: Oxford University Press, 2005), 5.

¹²¹ John Mearsheimer, E.H. Carr vs. Idealism: The Battle Rages On, *International Relations*, 19:2 (2005).

¹²² Carr wrote that “the characteristic vice of the utopian is naïvety; of the realist, sterility” (*The Twenty Years' Crisis*, 12), and that “it is an unreal kind of realism which ignores the element of morality in any world order” (Id, 216). It was clear for him that the discipline of International Relations had to be a “science not only of what is, but what ought to be” (Id, 6). In the 1946

about whether Carr fits better as an early proponent of the English School or as a moderate realist is accentuated by Bull, who critiqued him for his alleged lack of attention to the role played by moral values in international society.¹²³

The confusion about the appropriate location of English School continues. Hobson found the English School in the drawer of “State-centric liberalism”,¹²⁴ and later referred to it as “English Realism”,¹²⁵ as had done Halliday, although his choice had been “British Realism”.¹²⁶ For others, Bull was a sort of early visionary of constructivism.¹²⁷ From the realist perspective, Krasner also simplifies the similarities between constructivism and the English School.¹²⁸ The difficulties encountered by R. J. Vincent, an English Scholar,¹²⁹ when attempting to categorise Bull reveal a lot about the eclecticism of this theoretical paradigm: “Bull stood four-square in the Grotian or rationalist tradition, toward the pluralist end of its spectrum in the early writing on Hobbes and on Grotius; more toward the solidarist end in his later writing on the expansion of international society”.¹³⁰ (See below about the distinction between pluralism and solidarism).

Unlike constructivists, for whom “anarchy is what States make of it”,¹³¹ English Scholars accept anarchy as a theoretical premise, thus the title chosen by Bull for his book. Unlike realists and neoliberal institutionalists,

second edition of the book, Carr wrote that “some passages of *The Twenty Years' Crisis* state their argument with a rather one-sided emphasis which no longer seems as necessary or appropriate today as it did in 1939” (Id, cv). This is so because, in his view, the period between the two World Wars had been a time of “almost total neglect of the factor of power” (Id, cv).

¹²³ Hedley Bull, *The Twenty Years' Crisis Thirty Years On*, *International Journal*, 24:4 (1969).

¹²⁴ John Hobson, *The State and International Relations* (Cambridge: Cambridge University Press, 2000), 89.

¹²⁵ John Hobson, *The Eurocentric Conception of World Politics: Western International Theory, 1760-2010* (Cambridge: Cambridge University Press (2012), 222.

¹²⁶ Fred Halliday, *Rethinking International Relations* (London: Palgrave, 1994), 97-99.

¹²⁷ Timothy Dunne, The Social Construction of International Society, *European Journal of International Relations*, 1:3 (1995), 368 and 374-379; Wendt, *Social Theory of International Politics*, 3; Reus-Smit, *Imagining society*.

¹²⁸ Stephen Krasner, *Sovereignty: Organized Hypocrisy* (Princeton: Princeton University Press, 1999), 71.

¹²⁹ By “English Scholar” I refer to an academic self-ascribed to or commonly associated with the English School of International Relations.

¹³⁰ R. J. Vincent, Hedley Bull and Order in International Politics, *Millennium: Journal of International Studies*, 17:2 (1988), 197. Echoing Gramsci, Nicholas Wheeler and Timothy Dunne speak of “Hedley Bull's pluralism of the intellect and solidarism of the will” (Hedley Bull's Pluralism of the Intellect and Solidarism of the Will, *International Affairs*, 72:1, 1996, 91).

¹³¹ Wendt, *Anarchy is what States Make of it*, 391.

the English School considers that the “international society can emerge as a natural product of the logic of anarchy”,¹³² because even within anarchy rules and norms can guide states' behaviour. Adding to the mélange of academic relatives, Suganami,¹³³ Patomäki¹³⁴ and Schouenborg¹³⁵ have another name for English School: “British institutionalism”.

Therefore, there is no agreement about the academic box that suits the English School best. Be that as it may, in its original sense,¹³⁶ the English School is built on the distinction between the *international society* and the *international system*. The society needs the system but a system, at least in theory, can exist without a society. The breadth and depth of the interaction between the units, which for Bull were basically the sovereign states, generate certain propositions about each other's behaviour, and unleashes a conjunction of shared interests and values, from which an international society can emerge. In its minimalist form, the international society is “a practical normative answer to the anarchical condition of world politics”.¹³⁷

For English Scholars, the consequences of anarchy very much depend on the interactions between the units. Against realists, the balance of power is a consequence of order rather than of lack thereof.¹³⁸ This is something neoinstitutionalists of the 1970s and 1980s could have accepted. However, the added value of the English School is the attention given to shared

¹³² Barry Buzan, From international system to international society: structural realism and regime theory meet the English school, *International Organization*, 47:3 (1993), 327.

¹³³ Hidemi Suganami, The Structure of Institutionalism: An Anatomy of British Mainstream International Relations, *International Relations*, 7:5 (1983); British Institutionalism, or the English School, 20 Years On, *International Relations*, 17:3 (2003).

¹³⁴ Heikki Patomäki, *After International Relations: Critical Realism and the (re)construction of World Politics* (London: Routledge, 2002), 78.

¹³⁵ Laust Schouenborg, “The English School and Institutions: British Institutionalism?”, in Navari, Cornelia and Green, Daniel M. (eds.), *Guide to the English School in International Studies* (Chichester: Wiley & Sons, 2014).

¹³⁶ C. A. W. Manning, *The Nature of International Society* (London: G. Bell and Sons, 1962); Herbert Butterfield and Martin Wight (eds.), *Diplomatic Investigations: Essays in the Theory of International Politics* (Cambridge (USA): Harvard University Press, 1966); Bull, *The Anarchical Society*.

¹³⁷ Robert Jackson, *The Global Covenant: Human Conduct in a World of States* (Oxford: Oxford University Press, 2000), 36.

¹³⁸ Martin Wight, “The Balance of Power”, in Butterfield, Herbert and Wight, Martin (eds.), *Diplomatic Investigations: Essays in the Theory of International Politics* (Cambridge: Harvard University Press, 1966); Richard Little, The English School's Contribution to the Study of International Relations, *European Journal of International Relations*, 6:3 (2000), 404-408.

interests and values, and the strength of the bonds generated between the units that form the international society.

Rooted in the Grotian tradition of international law,¹³⁹ Bull identifies an international society “when a group of states, conscious of certain common interests and common values, form a society in the sense that they conceive themselves to be bound by a common set of rules in their relations with one another, and share in the working of common institutions”.¹⁴⁰ Paraphrasing Buzan, the international society is “a regime of regimes”, in other words, it is “the political foundation that is necessary before regimes can come into play”.¹⁴¹

Bull's international society is one constituted by states that share agreements and understandings. Writing in the 1960s, for him there was no reason to believe “that individual human beings are subjects of international law and members of international society in their own right”.¹⁴² Unlike Jackson, for whom a “global covenant”, the “institutional answer to the diversity of humankind”, is justified by the plurality of nations and value-systems,¹⁴³ Bull's international society is in no way prescriptive, but functional: It is based on an “actual area of agreement between states and informed by a sense of the limitations within which in this situation rules may usefully be made rules of law”.¹⁴⁴ The notion of international society is Bull's best interpretation of the world as he saw it in his time. For him, the level of cultural unity among states is not the relevant factor.¹⁴⁵ Relying on the power

¹³⁹ Hersch Lauterpacht, *The Grotian Tradition in International Law*, *British Yearbook of International Law*, 23 (1946); Hedley Bull, “The Grotian Conception of International Society”, in Butterfield, Herbert and Wight, Martin (eds.), *Diplomatic Investigations: Essays in the Theory of International Politics* (Cambridge (USA): Harvard University Press), 1966; Hedley Bull, Benedict Kingsbury and Adam Roberts (eds.), *Hugo Grotius and International Relations* (Oxford: Clarendon Press, 1992).

¹⁴⁰ Bull, *The Anarchical Society*, 13.

¹⁴¹ Buzan, *From International System to International Society*, 350.

¹⁴² Bull, “The Grotian Conception of International Society”, 64.

¹⁴³ Robert Jackson, *The Global Covenant*, 403 and ch. 15.

¹⁴⁴ Bull, “The Grotian Conception of International Society”, 70-71.

¹⁴⁵ Contra Martin Wight, *Systems of States* (Leicester: Leicester University Press, 1977) 33; Adam Watson, *Systems of States*, *Review of International Studies*, 16:2 (1990), 102; Nicholas Rengger, *A City Which Sustains All Things? Communitarianism and International Society*, *Millennium: Journal of International Studies*, 21:3 (1992), 354 and 362.

of the will, states constitute the international society ultimately to preserve order between them.

Bull defined order as “a pattern that leads to a particular result, an arrangement of social life such that it promotes certain goals or values”.¹⁴⁶ For him, all societies recognise three elementary goals or elements of order: a) The limitation of the use of force; b) the sanctity of promises; and c) the assignment of property rights.¹⁴⁷ In international law, the first goal inspires the rules of *jus ad bellum* (UN Charter) and *jus in bello* (International Humanitarian Law). The second goal is ensured by the *pacta sunt servanda* (Article 26 of the 1969 Vienna Convention on the Law of Treaties), and the third one by the principle of state sovereignty (Article 2(7) of the UN Charter). These goals do not derive “from the interests simply of the ruling group, but from the perceived interests of all states in securing the elementary conditions of social coexistence”.¹⁴⁸

Bull distinguished between three ideal types of international society, the Hobbesian, the Grotian and the Kantian, which resemble notably Wendt's “three cultures of anarchy”, epitomised by Hobbes, Locke and Kant.¹⁴⁹ Even though Wendt's argument on the culture of anarchy “builds directly on Bull”,¹⁵⁰ a fundamental distinction between the two is that, while the latter assumed a correlation between the level of unit cooperation and the strength of the society, for Wendt the “shared knowledge and its various manifestations -norms, rules, etc.- are analytically neutral with respect to cooperation and conflict”.¹⁵¹ For Wendt, a Kantian culture of anarchy, based on a high degree of cooperation, is compatible with a low degree of cultural internalisation of its norms and institutions. In that case, the units would abide by the norms for purely strategic reasons such as force or price, and

¹⁴⁶ Bull, *The Anarchical Society*, 3-4.

¹⁴⁷ Id., 4.

¹⁴⁸ Bull, *The Twenty Years' Crisis Thirty Years On*, 630.

¹⁴⁹ Wendt, *Social Theory of International Politics*, ch. 6; Bull, *The Anarchical Society*, 23-26.

¹⁵⁰ Wendt, *Social Theory of International Politics*, 253.

¹⁵¹ Id.

not because they grant them any particular legitimacy. This is a subtlety that Bull did not observe.

The English School is defined by its dichotomies. The first dichotomy is the one between order and justice. Possibly influenced by Carr's classical realism,¹⁵² for Bull order is desirable because it is “the condition of the realisation of other values”, including justice.¹⁵³ Order trumps justice, which for Bull could adopt any of these three forms: justice between states, justice in the form of universal human rights, and justice as a cosmopolitan and global idea.¹⁵⁴ Order would not be states' only goal. Order is *merely* the primary goal. Other goals can be pursued as long as order is not put at risk. States may “consent” to normative or international policy changes in the name of justice,¹⁵⁵ but only when they perceive sufficient consensus exists as per the meaning of those normative values. As we will see later in this subsection, a second wave of English Scholars two decades after Bull would give more prominence to justice as a driver in international society.

In spite of its contributions, the English School has been duly criticised for its pronounced Eurocentric bias.¹⁵⁶ Even though the Grotian conception of international society is meant to be theoretically and normatively universal,¹⁵⁷ the actual version of international society that early representatives of the English School had in mind is one that expanded from Europe to the rest of the world.¹⁵⁸ This is something traditional English Scholars were aware of. Bull interpreted the anti-colonisation process, the

¹⁵² Andrew Hurrell, “Order and Justice”, in Navari, Cornelia and Green, Daniel M. (eds.), *Guide to the English School in International Studies* (Chichester: Wiley & Sons, 2014), 144.

¹⁵³ Bull, *The Anarchical Society*, 93.

¹⁵⁴ Hedley Bull, Order vs. Justice in International Society, *Political Studies*, 19:3 (1971), 273-276.

¹⁵⁵ Id., 281-282.

¹⁵⁶ Little, The English School's Contribution to the Study of International Relations; Turan Kayaoglu, Westphalian Eurocentrism in International Relations Theory, *International Studies Review*, 12:2 (2010); Andrew Linklater, The English School Conception of International Society: Reflections on Western and non-Western Perspectives, *Ritsumeikan Annual Review of International Studies*, 9 (2010); International Society and Civilizing Process, *Ritsumeikan International Affairs*, 9 (2011); Hobson, *The Eurocentric Conception of World Politics*, ch. 9.

¹⁵⁷ Hedley Bull, “The Importance of Grotius in the Study of International Relations”, in Kingsbury, Benedict and Roberts, Adam (eds.), *Hugo Grotius and International Relations* (Oxford: Clarendon Press, 1992), 80-83.

¹⁵⁸ As clearly seen in Hedley Bull and Adam Watson (eds.), *The Expansion of International Society* (Oxford: Clarendon Press, 1984).

movement for racial equality and the struggle for international economic justice stemming from the then so-called Third World as manifestations of a “revolt against the West” and attempts to transform the international society.¹⁵⁹ When accounting for the “expansion” of the Western-type international society, Bull and Watson attempted to justify themselves: “it is not our perspective, but the historical record itself that can be called Eurocentric”.¹⁶⁰

For Hobson, on the one hand, the English School advocated a view of a pluralist and tolerant international society with only a small number of principles in common, while on the other hand it adopted a Eurocentric view of the expansion of the international society in line with a certain “standard of civilisation” established in the West.¹⁶¹ The idea of the “standard of civilisation” is definitely not unique to the English School, but it is very much engrained in this tradition.¹⁶² The standard was popularised in the 19th century, and applied retroactively.¹⁶³ It was never defined in detail; it was instead constructed as self-image of the West in opposition to the *other*.¹⁶⁴ The standard of civilisation was not predesigned in the West and imposed later on the rest. On the contrary, it developed out of the interaction of Western countries with other cultures and peoples. While the centre of the international society remained in Europe, the features of this society were the product of Europeans’ engagement with the rest of the world. Thus, the construction of the standard of civilisation and the expansion of the European society took place at the same time.¹⁶⁵

Positivist consent-based modern international law was part of the civilising

¹⁵⁹ Hedley Bull, “The Revolt Against the West”, in Bull, Hedley and Watson, Adam (eds.), *The Expansion of International Society* (Oxford: Clarendon Press, 1984).

¹⁶⁰ Bull and Watson (eds.), *The Expansion of International Society*, 2.

¹⁶¹ Hobson, *The Eurocentric Conception of World Politics*, 231.

¹⁶² Barry Buzan, The ‘Standard of Civilisation’ as an English School Concept, *Millennium: Journal of International Studies*, 42:3 (2014).

¹⁶³ Gerrit Gong, *The Standard of ‘Civilization’ in International Society* (Oxford: Clarendon Press, 1984), ch. 1.

¹⁶⁴ Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870-1960* (Cambridge: Cambridge University Press, 2001), 103 and 134.

¹⁶⁵ Gong, *The Standard of ‘Civilization’*, 6; Barry Buzan, Culture and International Society, *International Affairs*, 86:1 (2010).

project of the 19th century.¹⁶⁶ Through international law, European nations developed a shared identity and a common understanding of the idea of international order based on the principle of sovereign equality and the predictability of behaviour. This idea of international order had a universal vocation, but also drew a line between civilised and non-civilised nations. Territorial sovereignty and the generality and predictability of the international rule of law were only to be expected within the confines of Western civilised countries. Interaction with non-civilised peoples was not guided by the same parameters. The international legal effects of the standard of civilisations reached as far as the 1945 Statute of the International Court of Justice, whose Article 38 says, in a language that makes us feel uncomfortable now, that one of the sources of international law are “the general principles of law *recognized by civilized nations*” (italics added).

Hence, international order was not a neutral concept; it was a legal and political construct that intended to institutionalise and progressively enlarge a type of international society in light of the European image of the self. Insofar as the international law of the 20th century is the heir of the international order built in the 19th century, one must acknowledge the conservative, exclusionary, colonialist and definitely Eurocentric origins of our international society.¹⁶⁷

When doing the exposé of his international society, Bull talked tangentially about the idea of *world society*, which would include non-state actors, such as corporations and NGOs, and ultimately the world population at large. Based on his writing, the world society would cover both the international society and the values and interests of humanity as a whole; human rights could potentially be one of those values and interests, but only as long as they were

¹⁶⁶ Gong, *The Standard of 'Civilization'*; Koskenniemi, *The Gentle Civilizer of Nations*, 99-116; Mazower, *Governing the World*; Buzan, The 'Standard of Civilisation' as an English School Concept, 579.

¹⁶⁷ Antony Anghie, Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law, *Harvard International Law Journal*, 40:1 (1999), 60; Edward Keene, *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics* (Cambridge: Cambridge University Press, 2002).

compatible with the requirements of international order.¹⁶⁸

The political structure and institutional settings of the idea of world society remained essentially undefined for years, but contemporary English Scholars, like Buzan and Dunne, have made the move from international society to world society.¹⁶⁹ It is a move that has paralleled a shift from pluralism to solidarism,¹⁷⁰ which Bull saw as the reproduction “in international society [of] one of the central features of domestic society”,¹⁷¹ i.e., the existence of some sense of common purpose that binds (international) society together.

The change of perspective brought about by solidarism goes hand in hand with a displacement of the core of international society from the idea of order to that of justice.¹⁷² Unlike realists, pluralist English Scholars tend to see a rule-based international society guided by the preservation of order. Unlike pluralists, solidarist English Scholars¹⁷³ are inclined to believe that interstate relationships are regulated by a broader scope of values, and the idea of human rights is one of those *additional* values. Cochran explains the difference with brilliance: “For pluralists, moral community does not run deep and cannot be relied upon to sustain cosmopolitan duties in international society. [...] For solidarists, there are indications that from a minimum level of moral community, more maximal ethical concerns can be brought to bear within international society without compromising the

¹⁶⁸ Bull, *The Anarchical Society*, 278-279.

¹⁶⁹ Barry Buzan, *From International to World Society? English School Theory and the Social Structure of Globalisation* (Cambridge: Cambridge University Press, 2004); Dunne, *The Social Construction of International Society: “The English School”*, in Reus-Smit, Christian and Snidal, Duncan (eds.), *The Oxford Handbook of International Relations* (Oxford: Oxford University Press, 2008).

¹⁷⁰ Christian Reus-Smit, “Society, power, and ethics”, in Reus-Smit, Christian (ed.), *The Politics of International Law* (Cambridge: Cambridge University Press, 2004), 274-279; Dunne, “The English School”, 274-275.

¹⁷¹ Bull, *The Anarchical Society*, 230.

¹⁷² R. J. Vincent, Hedley Bull and Order in International Politics; Reus-Smit, *Imagining society*, 490.

¹⁷³ R. J. Vincent, *Human Rights and International Relations* (Cambridge: Cambridge University Press, 1986); Nicholas Wheeler, *Pluralist or Solidarist Conceptions of International Society*; Bull and Vincent on Humanitarian Intervention, *Millennium: Journal of International Studies*, 21:3 (1992); *Saving Strangers: Humanitarian Intervention in International Society* (Oxford: Oxford University Press, 2000); Cronin, *Institutions for the Common Good*; Ian Clark, *International Legitimacy and World Society* (Oxford: Oxford University Press, 2007); *The Vulnerable in International Society* (Oxford: Oxford University Press, 2013).

edifice of this intersocietal form”.¹⁷⁴

The tension between solidarism and pluralism underpins the consent-versus-consensus debate about what makes international law binding. While pluralists lean towards a version of international law based on the consent of states, solidarism remains more open to natural law and to norms that do not require the acceptance of the state *ex professo*.¹⁷⁵ As we will see in chapter 7, this tension is of critical importance to understand the different positions vis-à-vis the idea of humanitarian intervention and the challenges facing the notion of Responsibility to Protect. At this point, it is sufficient to note the irony that humanitarian interventions in the post-Cold War era were justified by reference to the Chapter VII of the UN Charter, devoted to “maintain or restore international peace and security” (Articles 39 and 1). It is as if a justice-based argument had been disguised as an order-based excuse.

Generally speaking, the English School of the 1960s and 70s was pluralist but moved in the direction of solidarism in a second wave that began in the mid 1980s.¹⁷⁶ With the move from pluralism to solidarism, the extension of the English School into the realm of morality and normativity made an important contribution to the analysis of human rights. As Rengger puts it, human rights have become the “lingua franca” of ethical discussions in International

¹⁷⁴ Molly Cochran, “The Ethics of the English School”, in Reus-Smit, Christian and Snidal, Duncan (eds.), *The Oxford Handbook of International Relations* (Oxford: Oxford University Press, 2008), 293-294.

¹⁷⁵ Buzan, *From International to World Society?*, 55; William Bain, “The Pluralist–Solidarist Debate in the English School”, in Navari, Cornelia and Green, Daniel M. (eds.), *Guide to the English School in International Studies* (Chichester: Wiley & Sons, 2014), 159-160.

¹⁷⁶ Andrew Linklater and Hidemi Suganami, *The English School of International Relations: A Contemporary Reassessment* (Cambridge: Cambridge University Press, 2006), ch. 1; Hidemi Suganami, “The Historical Development of the English School”, in Navari, Cornelia and Green, Daniel M. (eds.), *Guide to the English School in International Studies* (Chichester: Wiley & Sons, 2014); Barry Buzan, *An Introduction to the English School of International Relations* (Cambridge: Polity, 2014), ch. 1. Vincent claims that the international society envisioned by Grotius in the 17th century was more a society of humankind than one made out only of states (“Grotius, Human Rights, and Intervention”, in Kingsbury, Benedict and Roberts, Adam (eds.), *Hugo Grotius and International Relations*, Oxford: Clarendon Press, 1992). A similar argument is made by Jackson, for whom Westphalia was the conversion of a solidarist Latin Christendom into a pluralist society of states (*The Global Covenant*, 165). In that sense, solidarism could have preceded pluralism, but perhaps due to the weight of realism in the early times of the Cold War, first-wave English Scholars would have adopted a more moderate and order-based approach.

Relations.¹⁷⁷

The “normative turn” of the English School owes much to Vincent's *Human Rights in International Relations*.¹⁷⁸ Vincent acknowledged that he wrote his book with the hope of making “some inroads on [Bull's] cheerful scepticism about human rights”.¹⁷⁹ Indeed, as a pluralist, Bull was so convinced about the central role of states in the international society that he was highly suspicious about the implications of recognising individual human rights in international law: “Carried to its logical extreme, the doctrine of human rights and duties under international law is subversive of the whole principle that mankind should be organised as a society of sovereign states”.¹⁸⁰ According to Wheeler, for other pluralists “human rights issues could only achieve prominence on the agenda of international society if they were raised by individual states”.¹⁸¹ IHRL has indeed given human rights a place in international affairs while remaining loyal to the principle of state sovereignty at the same time.¹⁸²

The normative turn in English School opened the door to the study of the changing nature of *legitimacy* in international society, that is, the study of the admissibility of behaviour based on the shared values, rules and interests of a society constituted by states and other actors.¹⁸³ The idea of legitimate power lies at the core of the research agenda of the English School.¹⁸⁴ “Power is not self-justifying; it must be justified by reference to some source outside or beyond itself, and thus be transformed into 'authority'”.¹⁸⁵ A number of authors have ventured to suggest that some degree of compliance with

¹⁷⁷ Nicholas Rengger, The world turned upside down? *Human rights and International Relations* after 25 years, *International Affairs*, 87:5 (2011), 1160.

¹⁷⁸ Vincent, *Human Rights and International Relations*. See also Andrew Linklater, Prudence and principle in international society: reflections on Vincent's approach to human rights, *International Affairs*, 87:5 (2011).

¹⁷⁹ Vincent, *Human Rights and International Relations*, viii.

¹⁸⁰ Bull, *The Anarchical Society*, 146.

¹⁸¹ Wheeler, *Pluralist or Solidarist Conceptions of International Society*, 470.

¹⁸² Krasner, *Sovereignty*, 32; Jack Donnelly, State Sovereignty and International Human Rights, *Ethics and International Affairs*, 28:2 (2014).

¹⁸³ Donnelly, Human Rights: A New Standard of Civilization?; Linklater, *The Problem of Harm in World Politics*; Clark, *International Legitimacy and World Society*.

¹⁸⁴ Hurrell, “Order and Justice”, 146.

¹⁸⁵ Wight, *International Theory*, 99.

human rights has become the standard of civilisation of our times.¹⁸⁶ Legitimacy can be interpreted as a political space that reveals the tension between order and justice.¹⁸⁷

Table 1 The dichotomies of the English School

<i>What actors?</i>	International society (of states)	World society (of states and others)
<i>What unites them?</i>	Pluralism: Shared interests	Solidarism: Shared interests and values
<i>What drives their actions?</i>	Order	Order and Justice
<i>How do they approach international law?</i>	Positive law, realism and consent	Natural law, idealism and consensus

Contemporary solidarist English Scholars tend to argue that the world today has little to do with the one of their academic predecessors back in the 1960s and 70s. The state-led international society would have been replaced by a *mélange* of actors in the post-Cold War world society.¹⁸⁸ English School would have to wash out its realist scent because justice would be at least as important as order with the surge of a “solidarist consciousness”.¹⁸⁹ Wheeler,

¹⁸⁶ Foretold by Gong, *The Standard of ‘Civilization*, 91; Vincent, *Human Rights and International Relations*, 130; Donnelly, *Human Rights: A New Standard of Civilization?*; Clark, *International Legitimacy and World Society*; Buzan, *The ‘Standard of Civilisation’ as an English School Concept*, 582.

¹⁸⁷ For Clark, “the practice of legitimacy describes the political negotiation amongst the members of international society as they seek out an accommodation between those seemingly absolute values, and attempt to reconcile them with a working consensus to which all can feel bound” (*Legitimacy in International Society*, Oxford: Oxford University Press, 2005, 29-30).

¹⁸⁸ Buzan, *From International to World Society?*

¹⁸⁹ Andrew Hurrell, “Order and Justice in International Relations: What Is at Stake?”, in Foot, Rosemary, Gaddis, John and Hurrell, Andrew (eds.), *Order and Justice in International Relations* (Oxford: Oxford University Press, 2003; Hurrell, *On Global Order: Power, Values, and the Constitution of International Society* (Oxford: Oxford University Press, 2008).

for example, defends that a major transformation of the international society has given birth to a solidarist norm of humanitarian intervention that now outdoes the pluralist norm of national sovereignty.¹⁹⁰

The solidarist fashion within the English School was matched by the optimism of a number of publicists and legal philosophers after the Cold War. It is beautifully captured by the title chosen by Louis Henkin and Norberto Bobbio, who chose the same name for their books, published in 1990 in the US and in Italy respectively: *The Age of Rights*.¹⁹¹ As far as it is known, none of these two authors was aware of the title selected by the other one. Henkin could not hide his celebratory and triumphal tone:

“Ours is the age of rights. Human rights is the idea of our time, the only political-moral idea that has received universal acceptance. The Universal Declaration of Human Rights, adopted by the United Nations General Assembly in 1948, has been approved by virtually all governments representing all societies. Human rights are enshrined in the constitutions of virtually every one of today’s 170 states—old states and new; religious, secular, and atheist; Western and Eastern; democratic, authoritarian, and totalitarian; market economy, socialist, and mixed; rich and poor, developed, developing, and less developed. Human rights is the subject of numerous international agreements, the daily grist of the mills of international politics, and a bone of continuing contention among superpowers”.¹⁹²

The enthusiasm was not of these authors alone. Richard Falk wrote more than thirty years ago:

“Given [the] combination of domestic and international factors, it becomes clear that governments cannot be entrusted with the role of serving as the guardian of fundamental human rights. In this regard, the whole tradition of international law is to some extent regressive in the current era. Even the United Nations is an organization of states in which the interests of peoples are misleadingly assumed to be legitimately represented by governments. [...] A first step is for people to insist upon their own legitimacy as a source of rights, even against the state”.¹⁹³

¹⁹⁰ Wheeler, *Saving Strangers*.

¹⁹¹ Henkin, *The Age of Rights*; Norberto Bobbio, *The Age of Rights* (Cambridge: Polity Press, 1996[1990]).

¹⁹² Henkin, *The Age of Rights*, ix.

¹⁹³ Richard Falk, *Human Rights and State Sovereignty* (New York: Holmes and Meier Publishers, 1981), 189-190.

More recently, Falk has advocated a new citizenship (“citizen pilgrim”), a “necessary utopianism”, a “global parliament” and a “global democracy” in order to “achieve human rights”.¹⁹⁴

I find these conclusions well intentioned but too hasty. Irrespective of the opinion we may hold about Falk's call for action, human rights have reached international recognition through a certain institutional framework defined not the least by national sovereignty. The recognition of human rights in secondary institutions, i.e., international treaties and mechanisms, has not radically changed the deep structure of the international system and its primary institutions, particularly the principles of national sovereignty and positivist international law.¹⁹⁵ Inasmuch as human rights are proclaimed in international law, considering the limitations of this regime, justice cannot replace or even join order as the new gravitational force of the international society. International NGOs and other actors have certainly pushed in that direction, but states remain the key players in international law-making. Paraphrasing Cox, “to change the world, we have to begin with an understanding of the world as it is, which means the structures of reality that surround us”.¹⁹⁶

In the following subsection I will develop why I believe that the role and motivation of Western European states' promotion of IHRL is understood best as the product of political contention between international order and global justice.

¹⁹⁴ Richard Falk, *Achieving Human Rights* (New York: Routledge, 2009).

¹⁹⁵ On the distinction between primary and secondary institutions, see Buzan (*From International to World Society?*, ch. 6). Find a very acute analysis of the intersubjective ontologies of both kinds of institutions in Spandler (The political international society: Change in primary and secondary institutions, *Review of International Studies*, 41:3, 2015). Holsti defines international institutions as the “context within which the games of international politics are played. They represent patterned (typical) actions and interactions of states, the norms, rules, and principles that guide (or fail to guide) them, and the major ideas and beliefs of a historical era” (*Taming the Sovereigns: Institutional Change in International Politics*, Cambridge: Cambridge University Press, 2004, 18).

¹⁹⁶ Robert Cox, “Social Forces, States and World Orders: Beyond International Relations Theory”, in Keohane, Robert O. (ed.), *Neorealism and Its Critics* (New York: Columbia University Press, 1986), 242.

2.2.3. A systemic approach to international human rights norm promotion by Western European states

As Buzan observed more than two decades ago, the unit of analysis is not necessarily the source of explanation.¹⁹⁷ The central unit of analysis of this thesis is the state, but the source of explanation will be systemic, since we look for it in the structure of IHRL. It is important to note that structuralism, understood as the approach that is based on the principle by which units are arranged within a system, is not equal to determinism.¹⁹⁸ A single level of analysis, or indeed one source of explanation, is not sufficient to account for all events in international relations. The systemic theory defended in the following pages will not explain *all* the facts, but will hopefully explain the facts better than alternative theories.

Based on a systemic understanding of IHRL, I claim that the international human rights regime has evolved as a result of a tension between two poles. On one end, we have an idea of international society with a minimalist conception of human rights, based on order and on the centrality of the state. On the other end, we find a broader conception of human rights, understood as a matter of universal justice. The argument defended in these pages is that for decades Western European countries have promoted a global human rights regime based on their own understanding of what order means in international society.

The argument is systemic because it is based on the nature and functioning rules of international law. I argue that international law and the institutions of IHRL, as part of the international system, compel actors to act in a certain way, regardless of the possible preferences of states or their

¹⁹⁷ Barry Buzan, “The Level of Analysis Problem in International Relations Reconsidered”, in Booth, Ken and Smith, Steve (eds.), *International Relations Theory Today* (Pennsylvania: The Pennsylvania State University Press, 1995), 202-213.

¹⁹⁸ Id, 212-213.

representatives.¹⁹⁹ When promoting IHRL, Western European states must be motivated or compelled by order, because states qua states cannot overcome the systemic pressures for order in the international system. However, the international human rights regime includes independent judicial or quasi-judicial bodies that specify the meaning of human rights norms over time, and it also opens the door to the input of advocacy groups and individuals (even within governmental institutions), who have an influence in the interpretation of those norms. These actors, unlike states, are broadly speaking motivated by justice rather than order. IHRL is the product of a dialectical tension between state-led order and the idea of justice articulated by monitoring bodies, advocacy groups and like-minded individuals.

This thesis follows Samuel Moyn's narrative of IHRL.²⁰⁰ Up to the 1970s the idea of human rights was basically absent from collective imagination and political discourse. Human rights were spoken among an elite of diplomats, jurists and intellectuals. The UDHR had been adopted in 1948, but the first universal human rights treaty, the International Convention on the Elimination of Racial Discrimination, only entered into force in 1969. As said in chapter 1, this was one of the first diplomatic victories of the newly decolonised countries. The European Court of Human Rights opened its doors in the 1950s, but it only dealt with a handful of cases in its first decades. With the exception of this Court, accountability mechanisms were inexistent until the late 1960s, and the creation of independent monitoring bodies at the UN was only reluctantly accepted by Western European states.²⁰¹ The number of books on human rights in English multiplied by four in the 1970s, and by ten by the early 21st century.²⁰² The number of references to "human

¹⁹⁹ Order does not always have to be the result of individual's deliberate intentions. In an international system "order may prevail without an orderer" (Waltz, *Theory of International Politics*, 77). "This basic tissue resulting from many single plans and actions of people can give rise to changes and patterns that no individual person has planned or created. From this interdependence of people arises an order sui generis, an order more compelling and stronger than the will and reason of the individual people composing it" (Norbert Elias, *The Civilizing Process: Sociogenetic and Psychogenetic Investigations*, Oxford: Blackwell, 2000[1939], 366).

²⁰⁰ Moyn, *The Last Utopia*.

²⁰¹ Burke, *Decolonization and the Evolution of International Human Rights*, ch. 3.

²⁰² Beth Simmons, The Future of the Human Rights Movement, *Ethics & International Affairs*, 28:2 (2014), 186.

rights” in *New York Times* and the *British Times* multiplied fivefold in the mid 1970s, coinciding with the time when President Carter promised that his foreign policy was going to be inspired by human rights.²⁰³ This happened in 1977, precisely the year when Amnesty International was awarded the Nobel Peace Prize. In that decade, human rights also obtained an academic mark. Between 1968 and 2000, more than 140 universities in 59 countries established research centres and degrees in this field.²⁰⁴

In the aftermath of World War II, the recognition of IHRL in Europe was a conservative exercise to redefine the European identity.²⁰⁵ The European Convention on Human Rights includes the right to marry (Article 12) and the protection of private property (Article 1 of Protocol 1), and not the right to housing, the right to health or indeed the right to work. It is also not surprising that for more than two decades the international human rights regime was limited to the proclamation of rights, rather than the articulation of effective mechanisms to oversee their protection and fulfilment. At least for two decades, IHRL was conceived as a tool to institutionalise and thereby constrain the meaning of human rights.

The idea of international human rights started to change in the 1970s, when groups and individuals started to frame their fights and grievances as human rights issues. It was also the period when the independent human rights accountability mechanisms at the United Nations and in the European and Inter-American systems began to expand the meaning of global human rights norms and to assess state performance based on them. In their view, the real meaning of human rights had to go far beyond the intention of states when they ratified the treaties. Human rights were grounded much deeper than that. They were prior and superior to state consent. They belonged to humanity as a whole. The idea is clearly visible in these words by Cançado-

²⁰³ Moyn, *The Last Utopia*, 231.

²⁰⁴ David Suárez and Patricia Bromley, Professionalizing a Global Social Movement: Universities and Human Rights, *American Journal of Education*, 118:3 (2012).

²⁰⁵ Moyn, *The Last Utopia*, 78-79. On the right-wing and British origins of the European human rights system, see Marco Duranti, *The Conservative Human Rights Revolution*, (Oxford: Oxford University Press, 2017).

Trindade, member of the International Court of Justice and former judge of the Inter-American Court of Human Rights:

“It is not function of the jurist simply to take note of what the States do, particularly the most powerful ones, which do not hesitate to seek formulas to impose their ‘will’, including in relation to the treatment to be dispensed to the persons under its jurisdiction. [...] [The Law] does not emanate from the inscrutable ‘will’ of the States, but rather from human conscience. General or customary international law emanates not so much from the practice of States (not devoid of ambiguities and contradictions), but rather from the *opinio juris communis* of all the subjects of International Law (the States, the international organizations, and the human beings). Above the will is the conscience.”²⁰⁶

In spite of calls to push for a justice-based agenda, justice was not the force behind Western European states’ promotion of IHRL in the years after the War. The motivation was different, and it had more to do with the legalisation of order, as they understood it. Following Vattel’s description of the European political system of his time, European states had a “common interest in maintaining order and liberty”.²⁰⁷ This common interest pushed them to recognise human rights in international law and to encourage others to join them. However, in line with the traditional liberal principles of European societies, they allowed the creation of a system where other actors could make their voices heard, many of whom were unlikely to see international human rights the way they did (as a matter of order), but rather as a tool to recognise the inherent dignity, freedom and equality of humanity at large and of all members of the global family.

IHRL then becomes a double-edged sword that serves two opposite purposes at once: concreteness of the regulatory framework and ideals of adequate behaviour. But, in Koskeniemi’s framework, advanced in subsection 2.2.1, both of these goals or purposes risk falling into two vices: respectively, apology of existing power, and absolute disconnect from reality and actual state practice.

²⁰⁶ Antonio Cançado Trindade, Concurring opinion in the Advisory Opinion OC-18/03, of 17 September 2003, Requested by Mexico, on the Juridical Conditions and Rights of the Undocumented Migrants, para. 87.

²⁰⁷ Keene, *Beyond the Anarchical Society*, 16-17.

Extracting the meaning of human rights from international law is therefore an exercise of “hegemonic contestation”, the expression chosen by Koskenniemi to refer to “the process by which international actors routinely challenge each other by invoking legal rules and principles on which they have projected meanings that support their preferences and counteract those of their opponents”.²⁰⁸ Nevertheless, one must beware that from the very moment when human rights get institutionalised, they are subject to the constraining effects of international law, a system where states are still the main gatekeepers. As long as international law remains the law states agree upon (apart from the interpretation, over which they do not have full control), international law is by definition limited in terms of emancipatory potential for justice. This is what Stammers refers to as the “paradox of institutionalisation”, or what Koskenniemi calls the “colonization of political culture by a technocratic language”.²⁰⁹

Order-over-Justice looks with critical eyes to the English School, and in particular to its dichotomies and its evolution from a kind of soft realism in the 1960s and 70s to moderate cosmopolitanism since the 1990s. Several scholars have made the link between Critical Theory and the English School,²¹⁰ and I see a number of points of reciprocal enrichment between the English School of International Relations and Koskenniemi’s critical approach to international law, regarding for example the politics of contention, the relationship between consent and hegemony, or the notion of legitimacy in international society.

The dichotomies of the English School illustrate the political tension between Western European states and other actors in the human rights community. Notwithstanding the nuances that may distinguish them, the Order-over-

²⁰⁸ Martti Koskenniemi, International law and hegemony: a reconfiguration, *Cambridge Review of International Affairs*, 17:2 (2004), 199.

²⁰⁹ Neil Stammers, *Human Rights and Social Movements* (London: Pluto Press, 2009); Martti Koskenniemi, “The Effects of Rights on Political Culture”, in Alston, Philip (ed.), *The EU and Human Rights* (Oxford: Oxford University Press, 1999), 99.

²¹⁰ Linklater, *The Problem of Harm in World Politics*; Linklater and Suganami, *The English School of International Relations*; Ian Clark, *Hegemony in International Society* (Oxford: Oxford University Press, 2011).

Justice approach sees the group of Western European states as rational but not purely self-interested actors. Their intentions in promoting the international human rights regime are not simply cosmopolitan or humanitarian. They are not isolationists, but multilateralists, and they see international law as an essential component of their idea of order. Ultimately, Western European states believe international law cannot be imposed on them; they must expressly consent to it. However, the balancing entry of international law is that “if they once consent to submit themselves to a rule of international law, states are bound by such rule to the same extent and degree as subjects are bound by rules of the municipal law of their state”.²¹¹ In other words, the notion that promises must be kept is one of the defining elements of the Western European concept of order in international society. The idea of IHRL Western European countries put forward is order-focused in its original formulation, and it is subsequently negotiated through the interaction with NGOs, UN officials and other actors, who demand states to respect the human rights norms they promised to abide by.

Order-over-Justice foresees that Western European states will promote those rules that are in line with their understanding of international order. For the very same reason, they will refuse to endorse a norm that they consider to be at odds with an ordered international society. Once the norm is recognised in the human rights regime, political leaders with governmental responsibility are confronted by the need to balance a systemic impulse for order with a both internal and external pressure for justice.

I argue that Western European states promoted IHRL as a manifestation of the liberal principles of the European society of the 19th century. Western European states promoted the international legalisation of their own Eurocentric view of human rights. In this sense, Western European promotion of IHRL worldwide is part of the expansion of the limits of the *standard of civilisation*. In the 19th century European mind-set, this standard drew a line between the gentlemen’s club among whom promises must be

²¹¹ Oppenheim, *The Science of International Law*, 333.

kept (*pacta sunt servanda*), and everybody else, whose barbarism did not let them understand the value of order and norm-compliance. As the European society expanded worldwide,²¹² the civil rights and fundamental freedoms that supposedly define Western European societies had to be brought to the world as well. Human rights somehow became a new standard applicable to all countries, at least theoretically.

Vincent argued that, by proclaiming human rights in international treaties, “states have dissolved international society into a world society in which groups and individuals have equal standing with states.”²¹³ Unlike Vincent and a number of contemporary representatives of the English School, I do not believe that the recognition of human rights in international law is per se a sign of a solidarist turn in the international society.

IHRL walks along a high wire with one gravitational force on each side: order and justice. A pluralist order-based idea of international society explains why Western European countries promote international human rights norms in the first place. However, as solidarists point out, states are not alone in the world society. Public and private actors advocate the adoption of international human rights norms for reasons that have more to do with a cosmopolitan idea of justice. International society is the field in which the human rights regime emerged and evolved and keeps evolving while we speak, in a process of complex interaction between world society and the society of states. The Order-over-Justice approach to IHRL helps us understand the continuum between an international society defined by order and a world society inspired by justice.

2.2.4. Six propositions from Order-over-Justice

This thesis is systemic because it takes the international system of IHRL as its

²¹² Bull and Watson (eds.), *The Expansion of International Society*; Adam Watson, *The Evolution of International Society* (London: Routledge, 1992), ch. 22.

²¹³ Vincent, *Human Rights and International Relations*, 93.

source of explanation. The theory defended here is not based on state identity or constitution but on the structure of the international system as a whole, a system of which states are the main units. This is not to say that there are not meaningful differences within Western Europe, but only that these differences are not relevant *enough* when it comes to explaining what drives Western European states to advocate the inclusion of human rights in international law.

Finnemore and Sikkink claim in their well-known model of international norm diffusion that states play a key role in the “norm cascade” when they choose to embrace norms defended by norm entrepreneurs.²¹⁴ As said earlier, for these authors states promote human rights norms “for reasons that relate to their identities as members of the international society”.²¹⁵ Alternatively, Order-over-Justice suggests that Western European states will promote the rules that fit in their understanding of global order, and reject those that would squeal in an ordered international society.

Order-over-Justice makes six propositions, the first two of which expect a change of state behaviour over time, while the remaining four look at the degree of clarity, burden, fitness with liberal principles, and salience in the advocacy of strong and resourceful norm entrepreneurs.

The passing of time, sequence and path-dependence matter greatly in politics.²¹⁶ If Order-over-Justice is correct, the motivation to support a human rights norm must evolve over time. The driver of Western European state action will remain order rather than justice. In the beginning, states keep control over the meaning of the norm, since they hold the greatest power in international treaty making. They take part in the drafting process and they are formally free to sign and ratify the treaty, or not. However, human rights norms evolve over a long period of time, and once they get recognised in international law, and other actors (NGOs and UN independent bodies) join

²¹⁴ Finnemore and Sikkink, *International Norm Dynamics and Political Change*.

²¹⁵ *Id.*, 902.

²¹⁶ Paul Pierson, *Politics in Time: History, Institutions, and Social Analysis* (Princeton: Princeton University Press, 2004).

in the interpretative exercise, states lose control over the meaning of human rights norms. Yet, the cost of denouncing a human rights treaty is too high, which means that states may formally endorse the human rights regime, even if the norm has progressively acquired a significance they do not necessarily feel comfortable with. If normative cosmopolitans were right and justice were at least as important as order, the mere recognition of the norm would not be sufficient. States would cooperate with other actors raising the global status of the norm, detailing and developing its implications, encouraging new states to accept this standard of adequate behaviour and creating new international obligations. On the contrary, provided the norm fits into their idea of international order, if Order-over-Justice is accurate, we would expect states to be more proactive in the beginning reducing the intensity over time. Therefore, the first proposition is that *Western European states are more likely to promote a human rights norm at the early stages of its life (P1)*.

The degree of settlement of a norm will also condition state practice. In fact, the status of an international legal norm depends greatly on state action, not the least because states draft, sign and ratify treaties and therefore create international rules, but also because with their actions and behaviour they express a certain *opinio juris*, the opinion about the normative adequacy of certain behaviour.

The status of a norm depends on whether states deem it authoritative. I follow Hurd's three ideal tests of norm authority: compliance, justification and automaticity.²¹⁷

The test of compliance was used by Hedley Bull,²¹⁸ for whom the authority of a norm would depend on whether states comply with it or not. Bull followed this approach because in his opinion compliance with international law and fulfilment of the national interest go hand in hand.²¹⁹ The essential problem with this approach is that promoting IHRL is not self-evidently a matter of

²¹⁷ Ian Hurd, "Theories and tests of international authority", in Cronin, Bruce and Hurd, Ian (eds.), *The UN Security Council and the Politics of International Authority* (London: Routledge, 2008).

²¹⁸ Bull, *The Anarchical Society*, 131.

²¹⁹ Id, 134.

national interest, in spite of what international bodies have said for decades. The International Court of Justice proclaimed in the *Reservations to the Genocide Convention case* (1951) that this Convention had a “purely humanitarian and civilizing purpose” that represented “a common interest” among states; the court added that “a denial of the rights of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity which is contrary to moral law”.²²⁰ In the *Barcelona Traction case* (1970), the ICJ concluded that “the principles and rules concerning the basic rights of the human person” generate certain obligations for all states “towards the international community as a whole [and] in view 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*”.²²¹ For the UN Human Rights Committee, this is also the fundamental principle that underpins the general legal obligation imposed by the International Covenant on Civil and Political Rights.²²²

However, by their nature these are essentially normative statements. It would not be wise to take for granted that states act in a certain way because an IHRL norm tells them so. States may be acting regardless of the norm (because it happens to go in their economic or security favour, for example), and not because of the norm.

Precisely because norm compliance may be instrumental, Hurd's second test is based on the justification given to comply (or not to comply) with the norm. This is the approach followed by the International Court of Justice in the *Nicaragua case* (1986), presented in subsection 2.2.1.²²³ However, in the case of human rights states may feel obliged to frame their intentions in line with IHRL because they are expected to do so, or so they believe. For example, a

²²⁰ ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion of 28 May 1951, 23.

²²¹ ICJ, *Case Concerning the Barcelona Traction, Light and Power Co. Ltd. (New Application: 1962) (Belgium v. Spain) (Second Phase)*, Judgement of 5 February 1970, para. 33-34.

²²² Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 2004, para. 2.

²²³ ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Judgement of 27 June 1986.

government would never admit that they intervene militarily in another country because they wish to plunder its natural resources. Protecting the civilian population would always be a much more acceptable reason. Therefore, alleged justification is not enough, even if it must certainly be looked at carefully.

The third and final test is the analysis of the automaticity of a norm, that is, the extent to which the norm “has entered into the decision-making calculus of states”.²²⁴ This means that the norm is automatically integrated in officials’ thinking process. This does not mean that states ever or seldom breach the norm. In fact, the reason of existence of any norm, domestic or international, is that its violation is foreseeable. “Any effective rule of conduct is normally violated from time to time, and if there were no possibility that actual behaviour would differ from prescribed behaviour, there would be no point in having the rule”.²²⁵ No treaty says that the Earth *must* be round and spin around the Sun. We establish norms because we believe that they are necessary because without them we would be worse off. The idea of the automaticity of the norm implies that the norm “can be fought against, contradicted, and reinterpreted, but it cannot be ignored”.²²⁶

Following this automaticity test, the degree of settlement of human rights norms depends on state behaviour and, in particular, on the extent to which the norm is embedded and conditions the decision-making calculus of the state. The level of settlement of a norm is expected to be higher the longer it has been around in diplomatic forums. Therefore, it is more difficult for a state to question the human rights nature of a claim that was incorporated to the human rights regime long ago. Second proposition: *Western European states are less likely to challenge a norm the longer it has been part of the human rights regime (P2)*.

It is important to note the difference between the first two propositions. In the first one, we expect states to be more proactive in the promotion of an

²²⁴ Hurd, “Theories and tests of international authority”, 35.

²²⁵ Bull, *The Anarchical Society*, 53.

²²⁶ Hurd, “Theories and tests of international authority”, 35.

international human rights norm at an early stage. In the second one, on the other hand, we expect states to be less inclined to oppose a norm when it reaches a greater level of settlement in the international system.

The degree of linguistic and conceptual clarity is also a relevant factor, but actually in the opposite direction of what has been suggested in some of the literature. Fuller saw clarity as one of the essential principles of the inner morality of law; lack thereof would be a failure of the legal system.²²⁷ Finnemore and Sikkink argue that clear norms are more likely to be accepted than ambiguous ones.²²⁸ For Legro, “the clearer, more durable, and more widely endorsed a prescription is, the greater will be its impact”.²²⁹ Franck also saw determinacy and coherence as criteria for norms’ entry into the international system.²³⁰

I hereby defend a very different view. Since norms generate the expectation of compliance, when governments want or feel the need to violate a norm, they have to interpret both the norm itself and the situation in a manner that presents the violation of the norm as socially acceptable.²³¹ Explaining what lies behind the promotion of IHRL is an exercise of normative exegesis about the meaning of legitimate state action. International forums are the political space where the meaning of legitimacy unravels. Dialogue and discourse are essential in world politics, and international law is part of that dialogue, insofar as diplomacy is a form of “international legal justification, [...] a set of resources with which states construct the explanations for their behaviour”.²³² If we see international law as the language of international politics,²³³ less clarity favours debate and leaves more room for the political

²²⁷ Lon Fuller, *The Morality of Law* (New Haven: Yale University, 1969[1964]).

²²⁸ Finnemore and Sikkink, *International Norm Dynamics and Political Change*, 906-907.

²²⁹ Jeffrey Legro, Which Norms Matter? Revisiting the “Failure” of Internationalism, *International Organization*, 51:1 (1997), 35.

²³⁰ Thomas Franck, Legitimacy in the International System, *American Journal of International Law*, 82:4 (1988), 712-713.

²³¹ Shannon, Norms Are What States Make of Them, 305.

²³² Ian Hurd, Law and the Practice of Diplomacy, *International Journal*, 66:3 (2011), 581-582.

²³³ David Kennedy, Theses about International Law Discourse, *German Yearbook of International Law*, 23 (1980); Koskenniemi, International law and hegemony; Nigel Purvis, Critical Legal Studies in Public International Law, *Harvard International Law Journal*, 32:1 (1991), 115; Christian Reus-Smit, “The politics of international law”, in Reus-Smit, Christian (ed.), *The*

fight. Normative open-endedness favours greater space for opposition of different political or normative views while formally respecting the language of the norm. If the human rights norm is drafted in a confusing or ambivalent way, the state can question the implications or requirements of the norm without having to question the norm itself. Clarity is desirable in principle, and it might benefit norm compliance and implementation, but lack of clarity would be preferred by countries that promote human rights norms as a matter of order. *Less clear norms get more support from Western European states than more detailed ones (P3).*

The fourth proposition is that states are more likely to support human rights norms if their requirements are small because they do not affect their jurisdiction, or because they basically recognise a right that is already enshrined in the state's internal legislation. For example, the 1966 UN International Covenant on Civil and Political Rights included a collection of rights that were essentially part of the 1950 European Convention on Human Rights. Ratifying the commitment to respect civil and political rights should be easier the second time, particularly when these rights have experienced a growing level of settlement (see P2).²³⁴ Softer legal tools may be more agreeable from states' perspective, because they leave room for interpretation, facilitate compromise solutions and interfere less with internal control.²³⁵ However, if justice were at least as important as order, one should expect a lower predominance of this cost-benefit analysis. Fourth proposition: *Less demanding or burdensome norms get more support from Western European states than more demanding norms (P4).*

The fifth variable is to what extent the norm resonates with states' self-perceived identity, which in the case of Western Europe, in contraposition to the other side of the standard of civilisation, is expressed by democracy,

Politics of International Law (Cambridge: Cambridge University Press, 2004).

²³⁴ This point is in line with Oona Hathaway's empirical findings (Why Do Countries Commit to Human Rights Treaties?, *Journal of Conflict Resolution*, 51:4, 2007).

²³⁵ Kenneth Abbott and Duncan Snidal, Hard and Soft Law in International Governance, *International Organization*, 54:3 (2000).

liberalism and principles of free market capitalism.²³⁶ This is certainly an area of deep philosophical reflection, but we can safely say that there are a number of values that are conventionally associated with Western liberalism: individual freedom, rule of law, formal equality, private property, market freedom, etc. One must note, in any case, that the reasons why Western European states promote liberal norms do not have to be of normative nature, of genuine conviction about the common good. Indebted as they are to the old standard of civilisation, the promotion of liberal norms by Western European states would be the result of their constructed notion of the self.

Norms that are deemed to oppose liberal principles are unlikely to get the necessary support from Western Europe because they would constitute a potential threat to their idea of order. So will the norms that are progressively interpreted in a way that may contradict liberalism. It will be easier for a state to accept, endorse and promote a new international norm when it resonates with pre-existing liberal domestic norms. *Norms or interpretations of norms that are not perceived to be in line with liberal values get less or no support from Western European states (P5).*

The sixth and final variable is the role of the norm entrepreneur. Specifically in IHRL I understand that norm entrepreneurs can of course be NGOs and networks, but also UN independent experts, judicial and quasi-judicial international bodies, and other influential commentators. Their pull can be noticeable at the stage of norm emergence, but also when shaping the meaning of the norm over time. In order to achieve their goals, norm entrepreneurs use the necessary vocabulary (framing processes) for the maximisation of the available resources (mobilising structures) given the contextual (political) opportunities.²³⁷ The political opportunities very much depend on the extent to which the norms fit into Western European states'

²³⁶ Wight, "The Balance of Power"; Moravcsik, Explaining International Human Rights Regimes; Taking Preferences Seriously: A Liberal Theory of International Politics, *International Organization*, 51:4 (1997).

²³⁷ Dough McAdam, John McCarthy and Mayer Zald (eds.), *Comparative Perspectives on Social Movements: Political Opportunities, Mobilizing Structures, and Cultural Framings* (Cambridge: Cambridge University Press, 1996).

idea of order in international society, but the identity, resources and language used by norm entrepreneurs are key factors as well. *Western European states are more willing to support norms that are promoted by well-known and resourceful entrepreneurs (P6).*

In summary, the proposition of Order-over-Justice is that the timing, the degree of norm settlement, the requirements imposed by the norm, its clarity, its compatibility with liberalism, and the role of norm entrepreneurs influence Western European states' decision to support a human rights norm and to promote its recognition in international law. In isolation, these propositions are far from exclusive to Order-over-Justice. The argument put forward here is that all of them matter when it comes to explaining why order drives Western European states decisions to promote some norms more than others. As developed in chapter 3, and further explored in chapters 4-7, once operationalised for different human rights norms, the non-temporary propositions (P3-P6) lead to different expectations in some cases. Out of the burden, the clarity, the compatibility with liberalism and the role of norm entrepreneurs, the analysis of state practice will shed light over the relative weight of each proposition to understand critically why Western European states promote human rights norms in international law.

3. METHOD: CRITICAL INTERPRETIVISM OF STATES' INTERNATIONAL PRACTICE

“There are so many causal variables operating in the empirical world that no theory can embrace more than a fraction of them; consequently every theoretical explanation, strictly speaking, is ‘false’.”

Glenn Snyder, 1996.²³⁸

In the second chapter, I presented a systemic theory that essentially claims that Western European states promote IHRL more as a matter of order than as justice. The theory is built on the identification of the international system as the source of explanation and of the state as the main unit of analysis. As opposed to common constructivist assumptions about normative cosmopolitanism, but also to realist scepticism towards international law, the argument is critical of the development of IHRL and of the role of Western European states within it. With the English School categories of order and justice as conceptual tools to observe empirically, this thesis intends to explain why Western European states promote IHRL, and in order to do so, it interprets the way these states conceptualise human rights norms and advocate institutions accordingly in international law.

Based on an epistemic commitment to the critical linkage between concepts and observations, I will first introduce a basic framework of critical interpretivism. I set this framework from the combination of a classical approach of English School and a critical epistemology of causality (section 3.1). In the second part, I will present the research design, which projects the idea of critical interpretivism on the theory of Order-over-Justice in the form of a hermeneutical exercise of international legal tools of human rights promotion of different hierarchical importance, in relation to four norms at different stages of development, and paying more attention to two relatively

²³⁸ Snyder, Process variables in neorealist theory, 167.

large countries in the Western European subregion: Spain and the UK (3.2). It is in this second section where I will also operationalise the six propositions presented in subsection 2.2.4 in relation to the four human rights norms.

3.1. Introduction: Critical interpretivism

The English School offers the opportunity to study the IHRL regime as a component of the international system. In its classical formulation, the English School adopts a traditionalist methodological approach based on philosophical, historical and legal reflection,²³⁹ explicitly reliant “upon the exercise of judgement”,²⁴⁰ as opposed to scientific hypothesis-testing.²⁴¹

The classical approach of English School provides a useful set of analytical references for the study of Western European state promotion of IHRL: State-centrism, qualitative interpretivism, inductivism, the study of states’ discourse and action (practice),²⁴² and a keen interest in international law as an object of research.

The practice of diplomacy takes place in an international stage of law, and as a result, international law provides “a critical checklist”²⁴³ of international practice, from which we can infer meanings, assumptions and motives. This idea fits with the approach adopted by contemporary representatives of the English School,²⁴⁴ as well as with interpretivism in international law,

²³⁹ Robert Jackson, *The Global Covenant*, ch. 3-4; Andrew Hurrell, Keeping History, Law and Political Philosophy Firmly within the English School, *Review of International Studies*, 27:3 (2001), 489.

²⁴⁰ Hedley Bull, International Theory: The Case for a Classical Approach, *World Politics*, 18:3 (1966), 361.

²⁴¹ Morton Kaplan, The New Great Debate: Traditionalism vs. Science in International Relations, *World Politics*, 19:1 (1966).

²⁴² I borrow Adler and Pouliot’s definition of “international practice”, which encompasses both action and discourse: “socially meaningful patterns of *action* which, in being performed more or less competently, simultaneously embody, act out and possibly reify background knowledge and *discourse* in and on the material world” (International practices, *International Theory*, 3:1, 2011, 4; italics are mine).

²⁴³ Cornelia Navari, The concept of practice in the English School, *European Journal of International Relations*, 17:4 (2010), 622.

²⁴⁴ Little, The English School’s Contribution to the Study of International Relations, 395 and 408;

understood as the product of shared practices in a group, where members may disagree about the meaning or the requirement of such practices, whose value and purpose is assigned by interpreters within certain historical and institutional constraints.²⁴⁵

English School has been criticised for its insufficient attention to methods, and in particular its lack of engagement with causality. In different forms and shapes, critiques have originated from the thin constructivist tradition²⁴⁶ and from realism,²⁴⁷ but also from structuralist English Scholars.²⁴⁸ Far from disregarding these challenges, this thesis advocates a deeper understanding of the idea of causality in state practice.²⁴⁹

Order-over-Justice acknowledges the importance of norms in international society, but in terms of causality it sees them more as effects than as causes. “They are downstream outcomes; they are not upstream inputs”.²⁵⁰ In other words, this thesis looks at institutionalised human rights as effects of Order and Justice-based forms of action and discourse, rather than the other way around.

I do not attempt to test a set of hypotheses based on the theoretical argument built in chapter 2, as positivists would want me to. Instead, I intend to reinterpret Western European states’ promotion of IHRL through the prism

Linklater and Suganami, *The English School of International Relations*, 101.

²⁴⁵ Başak Çali, On Interpretivism and International Law, *European Journal of International Law*, 20:3 (2009), 808.

²⁴⁶ Martha Finnemore, Exporting the English School?, *Review of International Studies*, 27:3 (2001), 509.

²⁴⁷ Dale Copeland, A Realist Critique of the English School, *Review of International Studies*, 29:3 (2003), 428.

²⁴⁸ Laust Schouenborg, *The Scandinavian International Society: Primary Institutions and Binding Forces, 1815-2010* (London: Routledge, 2012), ch. 3. See more on the methodological anti-orthodoxy of the English School in Cornelia Navari (ed.), *Theorising International Society: English School Methods* (London: Palgrave MacMillan, 2009).

²⁴⁹ Following: Milja Kurki, *Causation in International Relations: Reclaiming Causal Analysis* (Cambridge: Cambridge University Press, 2008); Patomäki, *After International Relations*; Colin Wight, A Manifesto for Scientific Realism in IR: Assuming the Can-Opener Won’t Work!, *Millennium: Journal of International Studies*, 35:2 (2007); Milja Kurki and Hidemi Suganami, Towards the politics of causal explanation: a reply to the critics of causal inquiries, *International Theory*, 4:3 (2012); Hidemi Suganami, Causation-in-the-world: A Contribution to Meta-theory of IR, *Millennium: Journal of International Studies*, 41:3 (2013).

²⁵⁰ Cornelia Navari, “Introduction: Methods and Methodology in the English School”, in Navari, Cornelia (ed.), *Theorising International Society: English School Methods* (London: Palgrave MacMillan, 2009), 6.

of Order-over-Justice to reflect on and ultimately understand the forces that push towards both ends of the Order-and-Justice continuum.

It must be possible to identify causal relations between ideal types and state practice, but only as long as we follow a nuanced philosophy of causation: a) causes do exist, and are efficacious in producing actions, b) many causes are unobservable and therefore no causal analysis can be totally satisfying, c) multiple causes interact in a complex and dynamic milieu, which in our case means that we cannot explain six to seven decades of IHRL promotion by fifteen countries based on one idea only, order; and d) interpretation is key, insofar as knowledge is not universally valid, but contextual and socially produced.²⁵¹

I therefore confess epistemological relativism, including the inevitable subjectivism of the researcher when it comes to setting the bar of adequacy of state practice vis-à-vis human rights standards. At the same time, however, I do not reject causality altogether; on the contrary, I adopt the epistemological position that the causal link between motivation and behaviour can be inferred from actors' words and actions (practice).

Narratives and normative interpretations are therefore part of the causality from the institutionalised norm to state practice, and vice versa. This interaction between norm and practice does not take place in a vacuum; it is defined and conditioned by the nature of the international system, in our case, the IHRL regime.

The idea of process in causality is present in Bull's own notion of order, which he understood to be a "*pattern of activity* that sustains the elementary or primary goals of the society of states, or international society" (my own italics).²⁵² By studying the evolution of Western European states' diplomacy and attitude towards international human rights treaties and mechanisms ("secondary institutions"), we can identify "primary institutions" and the

²⁵¹ From Kurki, *Causation in International Relations*.

²⁵² Bull, *The Anarchical Society*, 8.

forces that unite them,²⁵³ as well as the weight that order has in them.²⁵⁴

This thesis is based on the idea that state practices can be patterned out of routines and repetitions,²⁵⁵ just like order can be as the underlying logic of the international system. The notion of “practice” has a key role in English School literature.²⁵⁶ Naturally, not all practices can be observed, just like not all causes can be observed. However, causal relations can be inferred from state practice over time. In more concrete terms, the weight of order and justice in a given country’s decision to promote the global prohibition of torture (or any other norm) can be inferred from its words and deeds, and from the way in which diplomats’ words and state actors’ moves evolve over time.

My epistemological stance is critical, but Order-over-Justice attempts to “solve problems”, in the Coxian sense.²⁵⁷ It does not take delight in deconstruction and endless reflectivism. It aims at understanding why Western European states promote human rights norms in international law, and intends to identify complex causal relations and to deduce practical lessons from the theoretical and empirical analysis (see section 8.3). Doing so requires a critical interpretivist approach but based on the ontological acceptance of a world-out-there ripe to be understood and interpreted. As advised by Colin Wight, “getting things right is a practical, a political, and an ethical imperative, and although achieving it may be impossible, or knowing when we have achieved it extremely difficult, we cannot give up on the aspiration”.²⁵⁸

This epistemological and methodological approach is not exempt of limitations. Conceptually, the interpretivist stance admits a certain degree of

²⁵³ Spandler, *The political international society*.

²⁵⁴ Buzan defines “primary institutions” as “durable and recognised patterns of shared practices rooted in values held commonly by the members of interstate societies, and embodying a mix of norms, rules and principles”; while “secondary institutions” would be those consciously designed by states in international regimes to deal with international affairs (*From International to World Society?*, 181 and xviii).

²⁵⁵ Holsti, *Taming the Sovereigns*, 21.

²⁵⁶ Navari, *The concept of practice in the English School*.

²⁵⁷ Cox, “Social Forces...”.

²⁵⁸ Wight, *A Manifesto for Scientific Realism in IR*, 381.

uncertainty as per the weight of our conclusions. Using Order-over-Justice as a theoretical argument to reinterpret state practice, and following Kurki's critical realism, I combine the realism of the observable with the subjectivism of the observer.

At the same time, the analysis is based on a given normative position about what it means to *comply with* and to *genuinely* promote human rights norms as a matter of justice. I must admit from the outset that I set the bar rather high, higher than normative cosmopolitans (literature in chapter 1 and section 2.1). In other words, I would personally expect to see *more* from states if they were to act in accordance with human rights as global standards of adequate behaviour. This is a normative position, a starting point. Should we apply a lower or less demanding levelling rod, our conclusions and interpretations could be different. However, this is the standard freely chosen and applied by this researcher.

3.2. Research design: Critical interpretivism in Order-over-Justice

In this section I will show that critical interpretivism provides a hermeneutical toolkit that can be applied to Order-over-Justice within certain geographical boundaries (Western Europe), based on a hierarchy of tools (depending on their legal strength or importance) and a hierarchy of norms (depending on their degree of settlement in IHRL).

Order-over-Justice must be operationalised differently for different human rights norms, and this section presents the general framework that will be applied in the following four chapters. First, I will present a hierarchy of international legal tools. Secondly, I will justify the choice of four human rights norms at different stages of development. And thirdly, I will anticipate how I will explore the six propositions of Order-over-Justice in relation to the four human rights norms in chapters 4-7.

A critical study of the politics of international law requires an interpretation

of the discourse and language used in the negotiation and adoption of international norms in order to understand the interests and values at play, as well as the moral implications for the international society.²⁵⁹ IHRL is an international regime, and “regimes are inherently dialogical in character”.²⁶⁰ It is tempting to take for granted the existence and normative power of an international regime by listing existing institutions, treaties and other diplomatic statements pronounced in international forums. However, the analysis of a regime like the one of human rights “demands an interpretive approach that infers norms from the meanings actors attach to their own actions and the actions of others”.²⁶¹

Order-over-Justice is based on the idea that there is a fundamental tension between international order and global justice and that this tension drives the evolution of IHRL. As explained in chapter 2, human rights promotion may adopt many forms, but this thesis focuses on the promotion of human rights norms through international law. Since promises must be kept (*pacta sunt servanda*), the research also looks at the level of state compliance with IHRL, thereby addressing not only discourse, but also state action.

As argued in the introduction (chapter 1), international human rights legal promotion differs from norm compliance. Promotion goes beyond compliance but compliance is part of it. I see compliance as domestication, that is, the incorporation of international human rights norms into national law and policy. Domestication is the strongest form of international human rights norm promotion. Above diplomatic statements and treaty ratification or sponsorship, bringing home an international human rights norm is the most powerful message a government can send about its commitment to such norm internationally. By looking at how states domesticate the

²⁵⁹ Jennifer Milliken, The Study of Discourse in International Relations: A Critique of Research and Methods, *European Journal of International Relations*, 5:2 (1999), 229-233.

²⁶⁰ Friedrich Kratochwil and John Ruggie, International Organization: A State of the Art on an Art of the State, *International Organization*, 40:4 (1986), 774.

²⁶¹ Tony Evans and Peter Wilson, Regime Theory and the English School of International Relations: A Comparison, *Millennium: Journal of International Studies*, 21:3 (1992), 347. Similarly, Andreas Hasenclever, Peter Mayer and Volker Rittberger, Integrating Theories of International Regimes, *Review of International Studies*, 26:1 (2000), 30.

obligations derived from international human rights treaties, we will find out to what extent the diplomatic words are merely rhetorical or an accurate description of states' positions. We must recall at this point that this thesis sees the state as the main unit of analysis, and therefore assumes that states are unitary actors. In principle, the power distribution within countries (separation of powers, federal/state level, etc.) is not treated as an explanatory factor of IHRL promotion by Western European states.

The list below presents a relation of ten available tools to promote human rights norms in international law. Not all tools have the same weight, which is defined by its relative importance in the international legal structure. The theory does not deny that diplomats and government officials, at the personal level, may truly believe in human rights as a matter of justice rather than order. They may in fact make use of their positions to advance certain causes, including the promotion of human rights norms. However, Order-over-Justice expects this hypothetical influence to wane with heavier or more powerful tools, where systemic pressures and national interests are expected to play a more prominent role. The greater the strength or importance of the legal tool, the smaller the influence that state diplomats would have in promoting human rights as a matter of justice rather than order.

From the heaviest to the lightest, the ten available tools to promote IHRL are:

- a) Domestication: Incorporation of the international human rights norm into national law and policy.
- b) Treaty ratification or accession.
- c) Active promotion of the treaty in the *travaux préparatoires*.
- d) Position adopted at the Security Council.
- e) Official statement of the Government.
- f) Position adopted at the General Assembly dealing with the work of the International Law Commission.
- g) Government's dialogue with UN or regional human rights procedures,

in particular, Treaty Bodies, Special Procedures and Universal Periodic Review.

- h) Government's reaction to human rights bodies' decisions on individual cases.
- i) Sponsorship of human rights resolutions at the General Assembly and the Human Rights Council.
- j) Voting on human rights resolutions at the General Assembly and the Human Rights Council.

There are other possible means by which governments could promote human rights abroad, for example by requiring labour and human rights-related clauses in trade agreements, by pursuing quiet diplomacy, publicly supporting human rights defenders in foreign countries, or supporting NGOs and the OHCHR financially. However, this thesis deals with the promotion of human rights *legal* norms and therefore looks at promotion by legal means only. The empirical analysis in chapters 4-7 will explore the ten listed tools, which carry legal weight and can make a difference in the promotion of human rights norms in international law.

This hierarchy of tools must be superimposed to the other hierarchy, that of IHRL norms. Following the automaticity test of authority presented in subsection 2.2.4, we can make a hierarchy of norms based on the extent to which they have been internalised by public officials.²⁶² This test says that most authoritative norms simply cannot be ignored, which does not mean that they will always be respected. Similarly, Frost regards a norm as “settled” when the argument to deny or to override it requires special justification, and/or when the infringement of the norm is undertaken clandestinely.²⁶³

Based on a test of automaticity, I propose this five-stage categorisation of norms depending on their degree of settlement:

- a) A *globally settled norm* is that which is generally accepted by states,

²⁶² Hurd, “Theories and tests of international authority”, 35.

²⁶³ Mervyn Frost, *Ethics in International Relations: A Constitutive Theory* (Cambridge: Cambridge University Press, 1996), 105-106.

even if it is still sometimes violated in practice.

- b) *Regionally settled norms* are accepted as standards of adequate behaviour by European states, but they are not yet globally accepted.
- c) *Norms at an advanced stage of development* are those formally and generally endorsed by states, although some countries still question their practical implications.
- d) *Proto-norms* are promoted by norm entrepreneurs, but they are still a work in progress and are not yet sufficiently supported by states.
- e) A *failed norm* is that in relation to which the entrepreneur could not convince states to embrace the norm.

The empirical reflection of chapters 4-7 looks at four norms at four different stages of development, two of which emerged during the Cold War and the other two after the Cold War. This selection allows us to explore the impact of the passing of time on norms that are very different in nature and yet can be and indeed are conventionally deemed to belong to the human rights regime. These are the norms that will be studied in this research:

- a) Prohibition of torture, a globally settled norm (chapter 4).
- b) Ecocide, a failed norm (chapter 5).
- c) Justiciability of economic, social and cultural rights, a norm at an advanced stage of development (chapter 6).
- d) Responsibility to Protect, a proto-norm (chapter 7).

This selection provides a wide enough range of law and policy areas. The prohibition of torture goes to the core of one of the most fundamental liberal principles, the physical integrity of every individual. Attitudes towards economic, social and cultural right partly define the left-right divide in a political system. And ecocide and R2P could alter or could have agitated the fundamental tenets of *jus in bello* and *jus ad bellum* respectively.

For reasons of research manageability, I did not include the study of a norm settled in the European regional context. Further research could extend the

design to norms at that level of development, for example women's rights or LGBT rights, the use of international criminal law or the prohibition of the death penalty.

Four of the six propositions of Order-over-Justice look at the nature of the norms themselves, and in particular, their clarity (P3), their level of burden (P4), how they fit with liberal principles (P5), and which norm entrepreneurs stood behind them (P6). The other two propositions are directly time-dependent: Countries are expected to support human rights norms particularly in the beginning, when they have greater control over their meaning (P1), while they would resist them progressively less over time (P2). To keep the project manageable regarding propositions P1 and P2, I focus on two countries to examine the evolution of their attitudes towards the mentioned four international human rights norms.

Literature has shown that, despite their modest influence, small states tend to be relatively more proactive in human rights terms.²⁶⁴ This probably has nothing to do with the systemic impulse for order, but with their internal institutions, domestic political changes or the role of political leaders in key moments. Internal factors shape foreign policies in all countries, but the systemic propositions from Order-over-Justice are more likely to be visible in larger states due to their relative centrality in the system. Larger states are therefore most-likely cases, and that is why this theory is explored in relation to larger Western European countries, notwithstanding the possibility that Order-over-Justice may also apply to smaller ones.

Order-over-Justice expects that, regardless of the contrasts between Western European states, ultimately the idea of order in international society will push them to promote human rights law in a similar way. In other words, I do not expect to see big differences between countries, not at least between those that are relatively big for Western European standards.

²⁶⁴ Jan Egeland, *Impotent Superpower – Potent Small State: Potentialities and Limitations of Human Rights Objectives in the Foreign Policies of the United States and Norway* (Oslo: Norwegian University Press, 1988); Forsythe, *Human Rights and Comparative Foreign Policy*; Brysk, *Global Good Samaritans*.

Five countries stand out as large Western European states: Germany, the United Kingdom, France, Italy and Spain (the population of the sixth country, the Netherlands, is one third of that of Spain). The differences between them are noticeable. Germany and France belong to the core of the EU. Spain and Italy are less central, although Italy was one of the founding members of the European Communities. The UK has historically had a sphere of influence much larger than Europe. So has France, but throughout most of the existence of the IHRL regime, the UK has had a stable special relationship with the United States, something no other European country could say about itself. The UK won World War II. Germany and Italy lost. France was split in two. Spain leaned towards Germany and Italy, but unlike them it remained more or less isolated until the end of Franco's dictatorship in 1975-1977. France and the UK are permanent members of the Security Council.

Western Europe as a whole has been an active promoter of IHRL, but I deem it necessary to explore the propositions of the theoretical argument in relation to countries that are potentially dissimilar within the relative homogeneity of this subregion. This dissimilarity could be manifested, among other things, in their responsibility or position in matters of international security (whether they are permanent members of the Security Council), the democratic tradition (given the importance of a free civil society to promote human rights law as a matter of justice), and of course their economic power. Considering these criteria together, we can assemble the relatively large countries in two pairs, UK and France on the one hand, and Spain and Italy on the other, with Germany in between.

The research in relation to the two explicitly time-dependent propositions (P1 and P2) could be explored in relation to all five of them, but the word limit and time constraints require a selection of two among them. I have decided to pick one country from either pair, and these countries are Spain and the UK. The UK is an old democracy with a long history of civil liberties. It has also played a central role in the history of international affairs, in particular at the UN level. To the contrary, Spain is a third-wave democracy, a

condition that according to Landman would make it a more likely candidate to embrace international human rights norms for reputational reasons.²⁶⁵ Spain was only allowed to join the UN in 1955 and had no say in the earliest steps of the international human rights regime. In spite of its strategic geographical and geo-cultural location between Europe, Latin America and North Africa, it is a medium player in global diplomatic affairs.

There are also good reasons to look into these two countries as a result of the choice of the four human rights norms of the empirical analysis. Torture has been reported and documented in both countries when dealing with the specific threat of terrorist violence. The UK is one of the few countries in the world with no written constitution and with a unique bill of rights scattered across centuries since the Magna Carta of 1215. On the contrary, the Spanish constitution contains a whole title devoted to the principles governing economic and social policy, which includes several economic, social and cultural rights. Written soon after the end of World War II, the Italian (1947), German (1948) and French (1958) constitutions do not elaborate as much the proclamation of these rights.²⁶⁶ The legal tradition of the UK is common law while that of Spain (and indeed most other European countries) is civil law. Its permanent seat at the Security Council makes the UK a main character in the normative construction of R2P. This said and despite all the differences, Order-over-Justice anticipates that both Spain and the UK would follow generally similar patterns in the promotion of international human rights standards.

Let me now present the research design of the four human rights norms in chapters 4-7. The ***prohibition of torture*** is an example of a globally settled norm that took a strong root in international law with several resolutions adopted in the 1970s, but more importantly with the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 (CAT). Even though torture and ill-treatment are still reported in most

²⁶⁵ Landman, *Protecting Human Rights*.

²⁶⁶ Comparative Constitutions Project (<http://comparativeconstitutionsproject.org/>) and Toronto Initiative for Economic and Social Rights (<http://www.tiesr.org/>).

countries and almost half the world's population does not feel safe from torture,²⁶⁷ the prohibition of torture in international law is considered a principle of *jus cogens* (peremptory law), and torture is prohibited in the criminal codes of most countries in the world. Universal and regional human rights documents include the prohibition of torture at the outset and there are a number of specific treaties on the subject, ratified by a large number of countries, as well as independent monitoring bodies. The 1948 Universal Declaration (Art. 5) and the 1950 European Convention on Human Rights (Art. 3) prohibit torture, but it is widely accepted that the norm consolidated in the international system after the global campaign initiated by Amnesty International and others in the 1970s.²⁶⁸ That was also the decade when the ICCPR entered into force (in 1976), the Inter-American Court of Human Rights opened its doors (1979) and began the drafting process of the CAT.

Chapter 4 will start by introducing the prohibition of torture in IHRL from the 1948 UDHR to the 1984 CAT and its Optional Protocol of 2002. Secondly, the chapter will examine the level of clarity of the norm, how burdensome it is, the extent to which it fits in liberal parameters, and the role of non-state norm entrepreneurs in prohibiting torture in international law. This will be done by resorting to hermeneutics of the treaties and their negotiations, the opinions expressed by international courts and independent international bodies, as well as relevant secondary literature. The chapter will use specific cases to illustrate the evolution of the interpretation of the prohibition of torture by independent bodies: From the *Northern Ireland case* in the 1970s to the most recent case-law of the European Court of Human Rights, as well as the relevant general comments of the Human Rights Committee and the Committee Against Torture in the 1990s and 2000s, and the relevant international jurisprudence on the *jus cogens* status of the prohibition of torture. The analysis is also based on keyword search in the UN treaty body

²⁶⁷ Amnesty International, *Torture in 2014: 30 years of broken promises* (London: AI, 2014).

²⁶⁸ Jayne Huckerby and Nigel Rodley, "Outlawing Torture: The Story of Amnesty International's Efforts to Shape the UN Convention against Torture", in: Hurwitz, Deena, Satterthwaite, Margaret, and Ford, Doug (eds.), *Human Rights Advocacy Stories* (New York: Thomson Reuters/Foundation Press, 2009).

case-law online database, and on drafting working group annual reports and meeting summary records obtained in archival research from the UN general document database.²⁶⁹

The drafting process in the 1980s gave countries the opportunity to position themselves in their commitment to the global prohibition of torture, more than three decades after the proclamation of the UDHR, and after seeing human rights bodies interpret the meaning of this human rights norm. Unfortunately, there are important methodological limitations in the study of the drafting process of the CAT.

“The *travaux préparatoires* of the Convention cannot be easily studied in UN documents. The principal source materials which have been published are the seven reports submitted by the Working Group to the Commission on Human Rights during the period 1978-1984. No records were made of the deliberations of the Working Group. Most of the proposals tabled in the course of these deliberations had the form of conference room papers that have not been published. Several interesting details of the elaboration of the Convention are registered only in the memories of those who took part in the drafting work”.²⁷⁰

Thankfully, we have access to those memories. Herman Burgers, a member of the Dutch diplomatic delegation who chaired the open-ended working group between 1982 and 1984, and Hans Danelius, a high-ranking official in the Swedish Foreign Office and author of the initial draft, wrote one of the two most authoritative references about the Convention.²⁷¹ The other extremely valuable book is the 1500-page long commentary by Elizabeth McArthur and Manfred Nowak, who was the UN Special Rapporteur on Torture between 2004 and 2010.²⁷² Together with the working group annual reports, these two secondary sources provide a unique foundation to understand the positions adopted by different countries in relation to the global prohibition of torture in the early 1980s.

²⁶⁹ <http://www.un.org/en/documents/index.html>

²⁷⁰ Herman Burgers and Hans Danelius, *A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Dordrecht, Boston and London: Martinus Nijhoff Publishers, 1988), v.

²⁷¹ *Id.*

²⁷² Manfred Nowak and Elizabeth McArthur, *The United Nations Convention Against Torture: A Commentary* (Oxford: Oxford University Press, 2008).

Chapter 4 will also examine the evolution of the practice and discourse of the UK and Spain in relation to the prohibition of torture since the mid 1980s by looking at their respective positions in the drafting process of the CAT, as well as the interaction of the two countries with the UN Human Rights Committee, the Committee Against Torture, the European Committee for the Prevention of Torture, and the UN Special Procedures with torture-related mandates. In the archival research I have gathered all the national reports, civil society reports, meeting official records, and UN final reports since 1987, which are publicly available for research from the general UN documents database or from the website of the UN High Commissioner for Human Rights.²⁷³ Missing documents from this set of sources are the exception, which are noted in footnotes whenever necessary. The mentioned documents, namely the UN reports but also the information provided by governments and civil society, offer the relevant information about the national policies to prevent and adequately sanction torture within their jurisdictions.

Ecocide would be an example of a failed norm. It emerged in the early 1970s and disappeared from the working documents of the UN International Law Commission (ILC) in 1996. In essence, the concept of ecocide means that crimes against the environment should be considered international crimes and be punished accordingly. In recent years, there have been movements to resurrect the term and advocate for the protection of the environment through international criminal law.²⁷⁴ However, this study looks at the norm of ecocide that vanished years ago, regardless of the possibility that it might come back.

Chapter 5 will set the ground with the context of the progressive recognition of environmental concerns in international law, and specifically in IHRL, and a brief introduction of the idea of ecocide, as initially coined in the 1970s. This narrative is built on relevant case-law from international bodies and courts, obtained from the official online databases after careful scrutiny of

²⁷³ <http://www.ohchr.org/>

²⁷⁴ <http://eradicatingecocide.com/>

relevant literature and cited reports from the UN Environmental Programme. The analysis will continue with the application of the propositions of Order-over-Justice to ecocide using the same hermeneutical chisel of the previous chapter. In third place, the chapter will explore the evolution of the international practice of Spain and the UK towards ecocide with three references: firstly, the positions expressed by country delegates during the negotiation of the 1977 Additional Protocol I to the Geneva Conventions and the 1998 Statute to the International Criminal Court (ICC); secondly, their interaction with the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities and with the International Law Commission (ILC); and thirdly, regulation at the domestic level.

Together with secondary literature, primary sources are: ILC yearbooks between 1984 and 1996 (obtained from the UN document database or from the ILC website itself);²⁷⁵ the 1978 and 1985 reports of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities; content analysis of three relevant provisions as discussed in the *travaux préparatoires* of the 1977 Additional Protocols and of the 1998 ICC Statute; and keyword search within the three authoritative in-depth studies of the International Committee of the Red Cross (ICRC), namely, the 1987 commentary to the Additional Protocols, and the two 2005 studies on customary international humanitarian law. These two studies included relevant information about the domestic regulation of ecocide (or lack thereof) in the UK and Spain, enriched by the more up-to-date content from the ICRC website.²⁷⁶

Justiciability of economic, social and cultural rights (ESCR) is a norm at an advanced degree of settlement that emerged in the 1990s. ESCR are recognised in a number of human rights treaties, the most important of which is the 1966 ICESCR, ratified by 165 countries to this day. We say that a

²⁷⁵ <http://legal.un.org/ilc/>

²⁷⁶ <https://ihl-databases.icrc.org/customary-ihl/eng/docs/home> ICRC Customary International Humanitarian Law database

human right is justiciable when courts can enforce it.²⁷⁷ Most constitutions recognise one or more of the ESCR as justiciable,²⁷⁸ and in the last two decades judges from all over the world have shown that at least some elements of these rights are indeed enforceable at court.²⁷⁹ We also have an individual complaints mechanism at the UN level and a collective complaints mechanism in Europe, although only a handful of countries have accepted the jurisdiction. Even though all Western European countries have ratified most of the relevant treaties, practice shows that their governments still resist the full implications of recognising ESCR as human rights.

As with the two previous chapters, after a brief introduction to the proclamation of ESCR in the international legal systems of human rights, chapter 6 will examine the propositions with the assistance of international treaties and the work of independent human rights mechanisms. Subsequently, the chapter will critically interpret the attitude of the UK and Spain since the mid 1990s by looking at the ratification of relevant treaties, their position in the drafting processes of the 2000 EU Charter of Fundamental Rights and the 2008 Optional Protocol to the ICESCR, their responses to independent human rights mechanisms at the UN, and judicial enforceability of ESCR at the internal level.

Together with secondary sources and literature, primary research sources are: Critical content analysis of the relevant provisions of international treaties and general comments from the UN Committee on Economic, Social and Cultural Rights; official reports of the preparation of the Optional Protocol to the ICESCR; Lord Goldsmith's account of the negotiation of the 2000 EU Charter, together with the 2014 House of Commons report on the applicability of the Charter to the UK; and all the national reports, civil

²⁷⁷ “The term ‘justiciability’ refers to the ability to claim a remedy before an independent and impartial body when a violation of a right has occurred or is likely to occur. Justiciability implies access to mechanisms that guarantee recognized rights. Justiciable rights grant right-holders a legal course of action to enforce them, whenever the duty-bearer does not comply with his or her duties” (International Commission of Jurists, *Courts and the Legal Enforcement of ESCR: Comparative experiences of justiciability*, Geneva: International Commission of Jurists, 2008, 6).

²⁷⁸ See the dataset of the Toronto Initiative for Economic and Social Rights: <http://tiesr.org/>

²⁷⁹ See the case-law database of the International Network for Economic, Social and Cultural Rights: <http://www.escr-net.org/caselaw>

society reports, meeting official records, and final reports by the UN Committee on Economic, Social and Cultural Rights, as well as relevant UN Special Procedures concerning Spain and the UK since 1996. For the UN Universal Periodic Review (UPR), I have made use of the publicly available database by the Geneva-based organisation UPR-Info.²⁸⁰ Materialising the 2008 Optional Protocol to the ICESCR took a long time and a great deal of effort. During the drafting process, many of the debates between states were not recorded. However, analysts can resort to the privileged testimony of Catarina de Albuquerque, a member of the Portuguese delegation and the rapporteur of the working group that drafted the Optional Protocol to the ICESCR.²⁸¹ As in the case of the prohibition of torture, the mentioned UN reports, together with the national reports and the alternative evidence from civil society, provide an accurate description of the recognition of ESCR justiciability at the domestic level in both Spain and the UK.

Finally, many have framed the notion of *Responsibility to Protect* (R2P) in terms of human rights since its appearance in the early 2000s. Ultimately, R2P means that the international community of states has the duty to intervene anywhere, even militarily, in order to protect civilians from genocide, war crimes or crimes against humanity. Due to its short life and the controversy about whether it has ever been applied as such, R2P can be preliminarily considered a proto-norm.

Focusing on its third pillar, which potentially covers military action, chapter 7 will first introduce R2P as an evolved and sophisticated version of humanitarian intervention. The chapter will continue with the ascertainment of clarity, burden, liberalism and the role of norm entrepreneurs by relying on the narrative of the diplomatic process of R2P declaration. Some review of the literature helps assessing the degree of adjustment with fundamental

²⁸⁰ <https://www.upr-info.org/>

²⁸¹ Catarina de Albuquerque, Chronicle of an Announced Birth: The Coming into Life of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights – The Missing Piece of the International Bill of Human Rights, *Human Rights Quarterly*, 32:1 (2010). The official documents of the drafting process of the Optional Protocol to the ICESCR are available at: <http://www.ohchr.org/EN/Issues/ESCR/OEWG/Pages/OpenEndedWGIndex.aspx>

liberal principles of state sovereignty and value of human life. Thirdly, the chapter will observe the positions declared by the UK and Spain at the UN Security Council and the General Assembly, as well as other policy statements between 2005 and 2016. The chapter will also examine their positions in relation to Sudan (Darfur), Sri Lanka, Libya, Côte d'Ivoire and Syria.

Primary sources will be: Content analysis of the two 2000 reports of the International Commission on Intervention and State Sovereignty (ICISS), and the UN reports on the notion of R2P generally considered noteworthy by the literature; content analysis of the 2007 ICJ Bosnian genocide ruling, and relevant legal sources, starting from the UN Charter; official records of relevant UN General Assembly and Security Council debates on R2P in general (see list in subsection 7.3.1), and in relation to specific cases (Darfur, Sri Lanka, Libya, Côte d'Ivoire and Syria; 7.3.2); and keyword search from foreign policy and national security strategy position papers of the Governments of Spain and the UK.

Regarding the specific cases, Darfur (Sudan) is often seen as the first case in which the R2P of the World Summit Outcome was used as a general reference. Sri Lanka has been presented as the “sin of omission” of R2P, that is, the only case where compliance with R2P would have clearly required a different response from the international community.²⁸² Libya and (partly) Côte d'Ivoire are the only cases thus far where a military intervention was authorised by the Security Council in application of R2P. Finally, R2P has been mentioned in diplomatic conversations on Syria, but no military action against Assad's regime was ever authorised. Although the dreadful war in Syria is not over at the time of this writing, the analysis for this chapter concluded in December 2016. I have not looked into the world's reaction to the isolated US's missile strike against Assad's forces in April 2017.

The prohibition of torture is a material norm, that is, a norm that determines what is an adequate behaviour and what is not. The other three are

²⁸² Alex Bellamy, *The Responsibility to Protect: A Defense* (Oxford: Oxford University Press, 2014), ch. 7.

procedural norms or mechanisms to implement other material norms. The deliberate destruction of the environment, ESCR, and genocide, war crimes and crimes against humanity would be the material norms in ecocide, justiciability and R2P, respectively. For the purposes of this analysis, however, the difference between material and procedural norms is conceptual and does not hinder the comparability.

This chapter has allowed me to do four things. Firstly, I have introduced the meaning of critical interpretivism and its value to examine states' international practice along the continuum of order and justice. Secondly, I have offered a list of ten possible legal and policy tools of international human rights law promotion by states. Thirdly, I have presented a five-level categorisation of human rights norms based on their degree of settlement in the international human rights regime. And fourthly, I have advanced how I intend to give meaning to Order-over-Justice in relation to four human rights norms at different stages of development (the prohibition of torture, ecocide, justiciability of ESCR, and Responsibility to Protect) and with particular reference to two Western European states (Spain and the UK).

I intend to do precisely this in the following four chapters, where I will use the theoretical argument of Order-over-Justice to reinterpret Western European states' practice of IHRL promotion. The empirical analysis will also help us understand what propositions outlined in subsection 2.2.4 stand out as most relevant explanatory factors.

4. PROHIBITION OF TORTURE

“Why do states give us these whips to flagellate them with?”

*Sir Nigel Rodley, UN Special Rapporteur on Torture 1993-2001.*²⁸³

This chapter re-examines the international prohibition of torture and the way in which Western European states have promoted this prohibition. The chapter begins by introducing the prohibition of torture in IHRL from the 1948 Universal Declaration of Human Rights to the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and its Optional Protocol of 2002 (section 4.1). It continues with a critical analysis of the level of clarity of the norm, how burdensome it is, the extent to which it fits in liberal parameters, and the role of non-state norm entrepreneurs in prohibiting torture in international law (4.2). In third place, the chapter explores the evolution of the practice (action and discourse) of the UK and Spain in relation to this human rights norm in international forums since the mid 1980s (section 4.3): It combines their respective positions in the drafting process of the Convention Against Torture and the interaction of the two countries with international human rights bodies (discourse), with their national policies to prevent and adequately sanction torture within their jurisdictions (action).

4.1. The prohibition of torture in IHRL

Torture can be defined as the “deliberate infliction of severe pain or suffering on a powerless victim, usually a detainee, for a specific purpose, such as the extraction of a confession or information”,²⁸⁴ and it is prohibited in

²⁸³ From Ann Marie Clark, *Diplomacy of Conscience: Amnesty International and Changing Human Rights Norms* (Princeton: Princeton University Press, 2001), 4.

²⁸⁴ Nowak and McArthur, *The United Nations Convention Against Torture*, v.

international human rights law.

Article 5 of the 1948 Universal Declaration of Human Rights (UDHR) leaves little room for interpretation: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”. The prohibition of torture is also categorical in the 1950 European Convention on Human Rights (Article 3), the 1966 International Covenant on Civil and Political Rights (Article 7), the 1969 American Convention on Human Rights (Article 5) and the 1981 African Charter on Human and Peoples’ Rights (Article 5). Torture is also forbidden in international humanitarian law (Common Article 3 of the 1949 Geneva Conventions, and several provisions of these Conventions and of the 1977 Additional Protocols) and in international criminal law (Article 2 of the 1948 Genocide Convention, and Articles 7 and 8 of the 1998 Rome Statute of the International Criminal Court, concerning crimes against humanity and war crimes).

As a human rights issue, the prohibition of torture is quite unique insofar as it has its own international treaty dealing specifically with it. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture or CAT, for short) was adopted on 10 December 1984, and entered into force in 1987 after the 20th ratification (Article 27). 162 countries have ratified it thus far, including all European states.²⁸⁵

The CAT imposes obligations on state parties to prevent and punish torture and other forms of ill-treatment. The Convention also creates an independent Committee countries are obliged to report regularly to. The CAT also establishes three oversight mechanisms of voluntary subscription for states: inquiries, individual complaints and interstate complaints (more on this in section 4.2).

As of August 2016, eleven countries had issued declarations to opt out from the inquiry procedure of Article 20; all of them are non-European.²⁸⁶ 63

²⁸⁵ UN Status of Ratification Interaction Dashboard: <http://indicators.ohchr.org/>

²⁸⁶ The countries that have opted out are: Afghanistan, China, Equatorial Guinea, Israel, Kuwait,

countries have made a declaration accepting the competence of the Committee Against Torture on interstate complaints (Article 21), and 67 in relation to individual complaints (Article 22). With only one exception, all Western European states have accepted the competence of the Committee for both interstate and individual complaints. The exception is the United Kingdom, which has only accepted it for interstate complaints.²⁸⁷ Just like the Human Rights Committee, the Committee Against Torture has never received an interstate complaint.

Parallel to the drafting of the Convention Against Torture, countries in the Americas wrote the Inter-American Convention to Prevent and Punish Torture, adopted in 1985 and which entered into force in 1987. This treaty did not make substantial innovations to the provisions of the UN Convention.²⁸⁸ There is no specific treaty on torture in the African human rights system.

On 26 November 1987, European countries formally adopted the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. Unlike the UN and the Inter-American ones, this treaty focused specifically on prevention, and set up a system to visit detention centres and other places where physical integrity might be at risk. The European Convention has been ratified by all 47 member states of the Council of Europe. The European Committee for the Prevention of Torture started to operate in 1989. The Committee performs a non-judicial preventive role; it does not judge whether human rights violations take place.

Laos, Mauritania, Pakistan, Saudi Arabia, Syria and United Arab Emirates. The inquiry procedure is confidential and requires the cooperation of the concerned state. The report (or a summary of it) is only made public when the state gives its consent. This has happened in the following cases: Turkey (1994), Egypt (1996), Peru (2001), Sri Lanka (2002), Mexico (2003), Serbia and Montenegro (2004), Brazil (2008), Nepal (2012) and Lebanon (2014).

http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Inquiries.aspx

²⁸⁷ Committee Against Torture, Report of the 55th (27 July-14 August 2015), 56th (9 November-9 December 2015) and 57th sessions (18 April – 13 May 2016), UN doc: A/71/44, para. 2; Report of the 53rd (3-28 November 2014) and 54th sessions (20 April-15 May 2015), UN doc: A/70/44, para. 2; Report of the 51st (28 October-22 November 2013) and 52nd sessions (28 April-23 May 2014), UN doc: A/69/44, 215-218.

²⁸⁸ The most noticeable difference is that, unlike the UN text, the American Convention does not require “severity” in its definition of torture (Article 2).

It carries out periodic visits, but it can also make ad hoc visits. The principles of cooperation and confidentiality guide its relationship with states. Reports are not made public unless the government gives its approval or refuses to cooperate with the Committee or to make improvements following its recommendations. The government is supposed to give the Committee unlimited access, including interviewing detainees in private.²⁸⁹

A similar procedure for the whole world had been suggested by the Swiss Committee Against Torture and by Costa Rica in the discussion of the Convention Against Torture. However, it did not penetrate at the UN level in the early 1980s. Formally at the initiative of Costa Rica (again) in 1992, the Commission on Human Rights decided to establish an open-ended Working Group mandated with drafting an optional protocol to the UN Convention Against Torture.²⁹⁰ The Working Group required nearly ten years to conclude its work. According to authoritative observers, this was due to a deliberate strategy by states opposed to the idea of an international monitoring body of such nature.²⁹¹ After years of conversation, in 2001 Mexico and Sweden made two separate proposals that included an innovation, not only in relation to the European Convention, but also in the international human rights regime as a whole. The idea consisted in establishing national preventive mechanisms in addition to the international visiting body, to be known as Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Although some European countries (and beyond) expressed doubts about the mandatory nature of the national preventive mechanism, the idea overall was welcomed by EU states, represented by Spain at that session.²⁹² The final draft would include both mechanisms: the national one and the international one. With different intensity, some states (Cuba, USA, Japan, Egypt...) resisted the adoption of the

²⁸⁹ Historical background and main features of the Convention (CoE doc: CPT/Inf/C (89) 2 [EN]) <http://www.cpt.coe.int/en/documents/historical-background.htm>

²⁹⁰ Commission on Human Rights, Resolution 1992/43, 3 March 1992..

²⁹¹ IIHR and APT, *Optional Protocol to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: A Manual for Prevention* (San José de Costa Rica and Geneva: IIHR and APT, 2011), 44.

²⁹² Nowak and McArthur, *The United Nations Convention Against Torture*, 922.

Optional Protocol to the last minute, but the text was finally adopted by a majority at both the Commission on Human Rights and the ECOSOC; by the time it got to the plenary of the General Assembly, the support was overwhelming, yet not unanimous: 127 votes in favour, 4 against and 42 abstentions. All Western European states were in the first group. In fact, all European states were there, except Russia, which abstained.²⁹³

The Optional Protocol entered into force in June 2006, one month after the 20th instrument of ratification (Article 28). To this day, 83 countries have ratified the Optional Protocol to CAT. Three Western European states have signed but not yet ratified it: Belgium, Ireland and Iceland. Three more have not even signed it: Andorra, Monaco and San Marino.²⁹⁴

4.2. What does Order-over-Justice mean for the prohibition of torture? Clarity, burden, liberalism and norm entrepreneurs

Order-over-Justice predicts that Western European states will give more support to norms whose meaning remains obscure (P3) and to less burdensome norms (P4). The argument also expects that Western European states will be inclined to support norms in line with liberal principles (P5), and norms promoted by strong and resourceful norm entrepreneurs (P6).

4.2.1. Is the meaning of the prohibition of torture clear?

The CAT is based on the premise that torture and cruel, inhuman and degrading treatment and punishment were already outlawed when the Convention was being discussed. As said at the beginning of this chapter, a

²⁹³ Marshall Islands, Nigeria, Palau and USA voted against. Abstentions came from Asia, Africa and the Arab and Caribbean regions. Australia was the only Western country to abstain. (Voting records: <http://www.un.org/en/ga/documents/voting.asp>)

²⁹⁴ <http://indicators.ohchr.org/>

number of treaties had explicitly prohibited torture. “The principal aim of the Convention is to *strengthen* the existing prohibition of such practices by a number of supportive measures”.²⁹⁵

The CAT was the first international treaty to provide a definition of “torture” (Article 1(1)):

“For the purposes of this Convention, the term ‘torture’ means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”

This provision was the result of intricate negotiations and it contributed to set a working definition potentially applicable worldwide. Up to that point in the mid 1980s, for better or for worse, the responsibility to draw the boundaries of the meaning of torture had been tacitly bestowed on the European Court of Human Rights. It is therefore appropriate to evoke the European Court’s appraisal.

In the *Greek case* (1967/69) the no longer existent European Commission of Human Rights became the first international human rights body to conclude that a state had practiced torture and, by doing so, it had infringed international law.²⁹⁶ The shade arrived a few years after this moment of light, when the European Court of Human Rights contradicted the European Commission in the infamous *Northern Ireland case* (1971/78).²⁹⁷ In this case against the United Kingdom initiated by the Republic of Ireland, the Commission had initially applied the criterion that the purpose of the act, and not the severity of the pain, is what distinguishes torture from other forms of

²⁹⁵ Burgers and Danelius, *A Handbook*, 1.

²⁹⁶ European Commission on Human Rights, *Denmark, Norway, Sweden and Netherlands v. Greece*, Report of 5 November 1969; Bates, *The Evolution of the European Convention on Human Rights*, 266.

²⁹⁷ European Court of Human Rights, *Ireland v. UK*, Judgement of 18 January 1978.

inhuman and degrading treatment.²⁹⁸ In its ruling, the Court reversed the Commission's decision as follows:

“In the Court's view, *this distinction* [between torture and inhuman and degrading treatment] *derives principally from a difference in the intensity of the suffering inflicted*. The Court considers in fact that, whilst there exists on the one hand violence which is to be condemned both on moral grounds and also in most cases under the domestic law of the Contracting States but which does not fall within Article 3 of the Convention, it appears on the other hand that it was the intention that the Convention, with its distinction between ‘torture’ and ‘inhuman or degrading treatment’, should by the first of these terms attach a *special stigma* to deliberate inhuman treatment causing very serious and cruel suffering.”²⁹⁹ (italics added)

Accordingly, the Court found that the practices of ill-treatment applied by British military and police in Northern Ireland constituted “inhuman or degrading treatment” but not “torture”, and therefore they did not deserve the opprobrium of “special stigma”.

In relation to this case, Bates notes that “the Court's refusal to find that the five techniques constituted ‘torture’ reflected its conservatism in what was a highly politically-charged case. Here one might recall that *Ireland v. United Kingdom* was only the eighteenth case the Court had heard in its, by then, nearly twenty-year history, and the first ever interstate case it had heard”.³⁰⁰

Even though the jurisprudence of the European Court of Human Rights evolved notably since then, this case left a mark and it has been used by some states in support of restrictive interpretations of the prohibition of torture. As we will see later (subsections 4.2.2 and 4.3.1), both the USA and the UK used it when they tried to define torture as a “extremely severe” form of ill-treatment during the preparation of the Convention Against Torture. The European judgement was also intentionally echoed by the 2002 Bybee Memorandum, where the US Department of Justice attempted to give carte blanche to US forces in their War on Terror. The Bybee Memorandum

²⁹⁸ European Commission of Human Rights, *Denmark, Norway, Sweden and Netherlands v. Greece*, Report of 5 November 1969, Chapter IV, para. 1-2.

²⁹⁹ European Court of Human Rights, *Ireland v. UK*, 1978, para. 167.

³⁰⁰ Bates, *The Evolution of the European Convention on Human Rights*, 274.

selectively added the words “leading case” to refer to *Ireland v. UK*.³⁰¹

The European Court of Human Rights does not apply that yardstick any more in its interpretation of Article 3 ECHR. Human Rights bodies now generally agree with the defunct European Commission of Human Rights more than with the Court of 1978: In order to determine if the practice constitutes torture, they infer intent from the presumptions of fact.³⁰²

The CAT demands states to prevent “acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1” (Article 16). As shown in relation to the *Greek and Northern Ireland* cases in Europe, the borderline between torture and cruel, inhuman and degrading treatment or punishment is one of the most debated issues among human rights bodies and commentators.³⁰³ Both forms of treatment are included in the Convention, but there is disagreement about the applicability of some provisions of the Convention to cruel, inhuman or degrading practices.

Nevertheless, the UN Human Rights Committee does not “consider it necessary to draw up a list of prohibited acts or to establish sharp distinctions between” torture and cruel, inhuman or degrading treatment or punishment.³⁰⁴ The UN Committee Against Torture adopts a similar approach,³⁰⁵ and has emphasised “that elements of intent and purpose in article 1 do not involve a subjective inquiry into the motivations of the

³⁰¹ US Department of Justice, Memorandum for Alberto R. Gonzales, 1 August 2002, 28 (<http://www.justice.gov/sites/default/files/olc/legacy/2010/08/05/memo-gonzales-aug2002.pdf>).

³⁰² Nigel Rodley, The definition(s) of torture in international law, *Current Legal Problems*, 55:1 (2002); Manfred Nowak, What Practices Constitute Torture? US and UN Standards, *Human Rights Quarterly*, 28:4 (2006).

³⁰³ Rodley, The definition(s) of torture in international law; Nowak, What Practices Constitute Torture?; Nowak and McArthur, *The United Nations Convention Against Torture*, 538-576.

³⁰⁴ Human Rights Committee, *General Comment No. 20: Article, 7*, 1992, para. 4.

³⁰⁵ Out of 370 cases concluded up to January 2017, the Committee Against Torture has only established the commission of cruel, inhuman or degrading treatment or punishment (Article 16 of the Convention Against Torture) but not torture (Article 1) in five instances: *Hajrizi Dzemajl et al v. Yugoslavia*, Communication No. 161/2000, Views of 22 November 2002; *Kostadin Nikolov Keremedchiev v. Bulgaria*, Communication No. 257/2004, Views of 11 November 2008; *Besim Osmani v. Serbia*, Communication No. 261/2005, Views of 8 May 2009; *Guerrero Lárez v. Venezuela*, Communication No. 456/2011, Views of 15 May 2015; *F.K. v. Denmark*, Communication No. 580/2014, Views of 23 November 2015. In the Serbian and the Danish cases, the petitioners did not even claim to be a victim of torture, but only of cruel, inhuman and degrading treatment. In the Venezuelan case, the Committee examined the possible violation of Article 16 *ex officio*. UN treaty bodies case-law: <http://juris.ohchr.org/>

perpetrators, but rather must be objective determinations under the circumstances”.³⁰⁶

That is how independent human rights monitoring bodies generally interpret the global prohibition of torture and the distinction between torture and inhuman and degrading treatment. However, as we will see in the cases of Spain and the UK (section 4.3), when states have the opportunity to express their opinion, they do not always share these views.

The case-law of the European Court of Human Rights in the 1960s and 70s generated a substantial degree of the bewilderment in relation to cruel, inhuman and degrading treatment. But its effects have barely lived on to these days, and nowadays it is fair to say that the prohibition of torture in international law is stated in unusually clear terms.

4.2.2. Is the prohibition of torture burdensome?

Michel Foucault wrote in *Discipline and Punish* that the important change introduced in the criminal systems of the 18th century was the result of a transformation in the way society perceived royal power.³⁰⁷ Public torment and executions were no longer effective in spreading fear and loyalty in the population. Other more effective systems of control and punishment had been established that made torture unreliable in the eyes of the authority. As the modern fight against terrorism attests, when it comes to torture and ill-treatment, in practice humanitarian concerns are not disconnected from utilitarian calculations about whether torture works or not.

Yet, the prohibition of torture represents a certain conception of law and of the use of violence in its enforcement. The normative idea beneath prohibiting torture is beautifully captured by Waldron: “Law is not brutal in

³⁰⁶ Committee Against Torture, *General Comment No. 2: Implementation of Article 2 by Sates Parties*, 2008, para. 9.

³⁰⁷ Michel Foucault, *Discipline and Punish: the Birth of the Prison* (London: Penguin Books, 1991[1977]), part 1.

its operation. Law is not savage. Law does not rule through abject fear and terror, or by breaking the will of those whom it confronts”.³⁰⁸ In order to be meaningful, therefore, the prohibition of torture must be absolute.

The prohibition of torture in IHRL is indeed engraved in absolute terms. Notwithstanding the fact that states have challenged the absoluteness of the prohibition time and again (as shown in section 4.3 in relation to Spain and the UK), independent human rights bodies have been clear. The UN Human Rights Committee has recalled that “no justification or extenuating circumstances may be invoked to excuse a violation of article 7 [ICCPR, on the prohibition of torture] for any reasons, including those based on an order from a superior officer or public authority”.³⁰⁹ The nature of the prohibition is also absolute for the European Court of Human Rights, even in “difficult circumstances”, like terrorism and organised crime, and “irrespective of the conduct of the person concerned”.³¹⁰

The absolute nature of this prohibition is reaffirmed in Article 2(2) of the Convention Against Torture: “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture”.

At first sight, the prohibition of torture is not only stated in unambiguous terms; it also imposes a heavy duty on public authorities insofar as it does not know of any possible limitation or exception of any kind.

It was not always clear that the prohibition of torture had to be that burdensome. The drafting process of the Convention Against Torture was tortuous and revealed that in the 1970s and 80s there was no univocal understanding of the implications of making torture absolutely contrary to international law.

³⁰⁸ Jeremy Waldron, Torture and Positive Law: Jurisprudence for the White House, *Columbia Law Review*, 105:6 (2005), 1726.

³⁰⁹ Human Rights Committee, *General Comment No. 20*, para. 3.

³¹⁰ For example, European Court of Human Rights, *Chahal v. UK*, Judgement of 15 November 1996, para. 79, *Ramirez Sanchez v. France*, Judgement of 4 July 2006, para. 115, and *Gäfgen v. Germany*, Judgement of 1 June 2010, para. 107.

In 1973, on the 25th anniversary of the UDHR, Sweden, Netherlands, Austria, Costa Rica and Trinidad and Tobago, submitted a draft resolution on torture for the consideration of the General Assembly. Other countries joined them in sponsoring a similar text in 1974. Both resolutions (3059/XXVIII and 3218/XXIX) obtained overwhelming support. Finally, pushed by the Netherlands and Sweden, on 9 December 1975 the General Assembly adopted without need for a vote the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Resolution 3452/XXX).³¹¹

In January 1978, only two years and one month after the adoption of the General Assembly Declaration, the Government of Sweden and the International Association of Penal Law submitted two separate drafts to spark a conversation among states about the need for an ad hoc treaty on torture and cruel, inhuman and degrading treatment.³¹² Compared to a declaration, a treaty would take a step up in terms of legal obligatory nature. One month earlier, in December 1977, the General Assembly had requested the UN Commission on Human Rights to draw up a draft convention (Resolution 32/62). A number of countries co-sponsored this call for a binding treaty, including many that at the time had a far from clean record in preventing and punishing torture: Angola, Cameroon, Cuba, the German Democratic Republic, Greece, Hungary, Mexico, Poland, Tanzania, Upper Volta (Burkina Faso), Zambia... and Spain.³¹³

The UN Commission on Human Rights decided to set up an open-ended Working Group for this purpose. Open-endedness meant that all member states of the Commission could take part, as well as other states and NGOs with consultative status. Decisions were supposed to be adopted by consensus and majority rule did not apply.

The open-ended Working Group decided to start from the Swedish proposal,

³¹¹ Burgers and Danelius, *A Handbook*, 13-18.

³¹² Find texts in Burgers and Danelius, *A Handbook*, 197-207.

³¹³ Find the list in Burgers and Danelius, *A Handbook*, 34.

which was substantially based on the 1975 Declaration.³¹⁴ The text included both torture and cruel, inhuman or degrading treatment or punishment. It also incorporated the principle of *non-refoulement*, taken from the European case-law, which prevents states from expelling or extraditing a person to a country where there are reasonable grounds to expect that they would be subjected to torture or ill-treatment. The Swedish draft also established the principle of *aut dedere, aut judicare*, which requires states to extradite or prosecute an individual suspected of having committed torture. Finally, the text mandated the UN Human Rights Committee, created under the umbrella of the International Covenant on Civil and Political Rights, to also supervise state compliance with the future treaty on torture, with its existing tools (state reports, interstate complaints and individual complaints), but also with an inquiry procedure wherever torture was being practiced systematically.

While most delegates supported the general idea of the Swedish draft in 1979, some others suggested the possibility of restricting the Convention only to torture, excluding cruel, inhuman or degrading treatment or punishment. The USA and the UK, for example, expressed the opinion that in order to be considered torture, the pain or suffering had to be “extremely severe”, not merely “severe”. Nevertheless, as said earlier, most countries generally supported the Swedish proposal, and during the session, Sweden presented a revised draft integrating the input from the discussion.³¹⁵

The 1980 session of the Working Group focused on *non-refoulement*, domestic criminalisation, jurisdiction, and reparation for victims, among other issues. Some Western countries expressed reservations about the application of universal jurisdiction, that is, a type of jurisdiction that, due to the gravity of the crime, disregards the personal connection with the

³¹⁴ Commission on Human Rights, Report on the 34th Session, 6 February-10 March 1978, UN doc: E/1978/34, 29-34. Unfortunately, the reports of the Commission on Human Rights and of the Working Group seldom mention countries by name. That is why it is necessary to complement the information contained therein with the first-hand testimony on the drafting history of the CAT provided by Burgers and Danelius (*A Handbook*, ch. 3).

³¹⁵ Find texts in Burgers and Danelius, *A Handbook*, 208-212. Report of the Working Group on a Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, 12 March 1979, UN doc: E/CN.4/L.1470.

perpetrator or the victim or the territorial connection with the place where the crime took place.³¹⁶

The Netherlands was one of the Western European states that was critical with universal jurisdiction. It advocated making it contingent upon the failure of extradition attempts, but it changed its position on the matter by 1981, when Western European states seemed to be ready to accept universal jurisdiction for torture. As they had done before, in 1981, the USA and the UK still maintained that torture was an “aggravated and deliberate” form of cruel, inhuman or degrading treatment or punishment. The 1981 session was also the one when states started to address the issue of implementation. Costa Rica and the Netherlands submitted proposals for an international verification mechanism to visit places of detention.³¹⁷ This idea initially came from Jean-Jacques Gautier, one of the founders of the Swiss Committee Against Torture, who had proposed a system of visits following the model of the International Committee of the Red Cross for armed conflicts.³¹⁸ The project did not bear fruit in the 1980s, but it did some time later: first, it inspired the model set up in Europe with the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, adopted in 1987; and secondly, at the UN level, with the adoption of the Optional Protocol to the CAT, adopted in 2002.

Considering the lack of agreement among states, the discussion about implementation had to be continued in 1982. Sweden submitted an alternative proposal regarding the implementation of the Convention.³¹⁹ The idea consisted in creating a new independent monitoring body, a separate “Committee Against Torture”, different from the Human Rights Committee of the ICCPR, but performing similar functions even if only in relation to torture and cruel, inhuman and degrading treatment or punishment, and whose

³¹⁶ Nowak and McArthur, *The United Nations Convention Against Torture*., 262-263. Report of the Working Group on a Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, 5 March 1980, UN doc: E/CN.4/1367.

³¹⁷ Find the Costa Rican draft in Burgers and Danelius, *A Handbook*, 213-217.

³¹⁸ Commission on Human Rights, Report on the 37th Session, 2 February-13 March 1981, UN doc: E/1981/25, 50-69.

³¹⁹ Text in Burgers and Danelius, *A Handbook*, 221-227.

members would be elected by state parties but would act in their personal capacity. Most countries supported the idea of an independent monitoring body. However, some of them refused to accept that such mechanism would have to be mandatory. By 1982, all Western European states, bar Australia, endorsed the Swedish idea of including universal jurisdiction in the CAT. The Junta-led Argentina was the most vocal opponent of universal jurisdiction for torture.³²⁰

Implementation was once again the hot topic in 1983, but this time, according to Burgers and Danelius, “the Working Group conducted its business in a very constructive atmosphere [...] and made remarkable progress”.³²¹ The vast majority of the Working Group agreed to the Swedish proposal, but opted for a simplified regulation in the Convention. The Committee Against Torture would therefore be mandated to examine country reports periodically, to resolve interstate and individual complaints alleging the commission of torture or other forms of forbidden ill-treatment, and to carry out confidential inquiries if it received “reliable information” suggesting that torture was being “systematically practiced” in a state party to the CAT. The Soviet Union, Ukraine and India argued that countries should be allowed to accept such mechanism voluntarily. On the contrary, all Western delegations defended that in order to be effective it had to be mandatory.³²²

In spite of the slow process of previous years, in 1984 the Working Group managed to achieve consensus on the wording of almost all provisions. Importantly, by this time, no country opposed the inclusion of universal jurisdiction any longer. The Argentinean Junta had fallen in 1983. Brazil and Uruguay still had reservations (they dictatorships would end in 1985), but they refused to table them for the sake of consensus. The USA and the UK still opposed the extension of the right to redress and compensation (Article 14)

³²⁰ Commission on Human Rights, Report on the 38th Session - Addendum, 15 March 1982, UN doc: E/1982/12/Add.1, 2-32.

³²¹ Burgers and Danelius, *A Handbook*, 84-85.

³²² Report of the Working Group on a Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, 25 March 1983, UN doc: E/CN.4/1983/63.

for victims of cruel, inhuman or degrading treatment or punishment. Regarding implementation, in the end, both interstate complaints (Article 21) and individual complaints (Article 22) were made optional and dependent upon states' recognition of the competence of the Committee to deal with these kinds of cases.³²³

When the text got to the Commission on Human Rights, most delegations expressed their support, but the Commission did not manage to settle the issue about the mandatory nature of the country reporting procedure (Article 19) and the inquiry procedure (Article 20). The draft was therefore submitted technically unfinished to the consideration of the General Assembly.³²⁴

In the end, at the Third Committee and Plenary of the General Assembly, periodic country reports (Article 19), became the only obligatory mechanism for all state parties: A new provision was included to allow countries to opt out from the inquiry procedure for systematic forms of torture (Article 28 in relation to Article 20). This was the compromise that the Eastern bloc and the Western European states found for the former group to withdraw its final reservations. The Convention was unanimously adopted by the General Assembly on 10 December 1984.³²⁵

Hence, while questioned openly in the 1970s and 80s, torture is now absolutely prohibited in international law. This has been settled in a number of declarations and international treaties, not least by the CAT in 1984.

Torture is also widely prohibited in domestic law. Up to 86% of the countries have even prohibited torture at the constitutional level, although this does not necessarily have a direct impact on the actual disappearance of this

³²³ Report of the Working Group on a Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, 9 March 1984, UN doc: E/CN.4/1984/72.

³²⁴ Commission on Human Rights, 40th session, Summary record of meetings no. 32, 33 and 34, 28-29 February 1984, UN doc: E/CN.4/1984/SR.32 (para. 62-104), E/CN.4/1984/SR.33 and E/CN.4/1984/SR.34 (para. 101-118).

³²⁵ UN General Assembly, 39th session, Official record of the 93rd plenary meeting, UN doc: A/39/PV.93, 10 December 1984, 1665-1668.

practice.³²⁶ According to a study carried by Amnesty International in 2012, at least 85 UN member states (hovering 44% of all) provide for universal jurisdiction over torture in their criminal procedural law.³²⁷

The prohibition of torture has even reached the highest possible moral ground in the international sphere. In the last two decades, international bodies have concluded that the prohibition of torture is a norm of *jus cogens*.³²⁸ This means that the prohibition of torture would be a peremptory norm of general international law from which no derogation is permitted. In other words, the norm would be so important in international law that states' opinion about it would be immaterial. International bodies play a central role in the determination of what norms get to a point of *jus cogens*. By definition, states cannot be entrusted with the responsibility, because the norm reaches that point when it is recognised as such "by the international community" and "no derogation is permitted".³²⁹

However, in spite of the global and national prohibition, 30 years after the adoption of the Convention Against Torture, Amnesty International reports cases of torture and other forms of ill-treatment in at least 141 countries from all regions, and a survey commissioned by this organisation reveals that almost one out of two people does not feel safe from this supposedly absolutely prohibited treatment or punishment.³³⁰ More than a third of the

³²⁶ Adam Chilton and Mila Versteeg, The Failure of Constitutional Torture Prohibitions, *The Journal of Legal Studies*, 44.2 (2015).

³²⁷ Amnesty International, *Universal Jurisdiction: A Preliminary Survey of Legislation Around the World – 2012 Update* (London: AI, 2012), 13.

³²⁸ International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Furundzija*, Judgement of 10 December 1998, para. 144; European Court of Human Rights, *Al-Adsani v. UK*, Judgement of 21 November 2001, para. 61 (although in this case the Court somehow concluded that the peremptory nature of the prohibition of torture did not trump the general principle of state immunity from civil claims for damages; para. 66); Inter-American Court of Human Rights, *Gómez-Paquiyaury Brothers v. Peru*, Judgement of 8 July 2004 (Merits, Reparations and Costs), para. 112; International Court of Justice, *Questions relating to the obligation to prosecute or extradite (Belgium v. Senegal)*, Judgement of 20 July 2012, para. 99.

³²⁹ Article 53 of the 1969 Vienna Convention on the Law of Treaties: "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 recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

³³⁰ AI, *Torture in 2014*. A quantitative analysis conducted by Fariss concludes that "the level of

17,000 people from 16 countries³³¹ surveyed by the International Committee of the Red Cross believed that torture against captured combatants could be acceptable in order to obtain information.³³²

As said earlier (subsection 2.2.4), the automaticity test of norm development means that a norm can be considered settled in the human rights regime when it “has entered into the decision-making calculus of states”.³³³ That would mean that it has been internalised in the thinking process of government officials or, more generally, of those bound by the norm itself. In this sense, a human rights norm can still be breached, as long as states do not ignore the fact that they are breaching the norm. For Hurd, as a standard of adequate behaviour, torture can be a *jus cogens* norm while remaining widely practised.³³⁴ Higgins follows a similar thought: “Because *opinio juris* as to its normative status continues to exist [...] no state, not even a state that tortures, believes that the international law prohibition is undesirable and that it is not bound by the prohibition”.³³⁵

However, even if we accept Hurd’s automaticity test (as we did in chapter 2 to categorise norms based on their degree of settlement in international law), we may still legitimately question its validity for *jus cogens*. The point of declaring a norm *peremptory* is not self-evident when one in two people fear that the norm would not protect them if police detained them.

The announcement of the *jus cogens* status of the prohibition of torture was made in the post-9/11 era, a time when the absolute nature of the prohibition of torture faced an upfront opposition from governments. The formal proclamation of the prohibition of torture as a *jus cogens* norm

repression has decreased in the system over time” (Respect for Human Rights has Improved Over Time, 314).

³³¹ Afghanistan, China, Colombia, France, Iraq, Israel, Nigeria, Palestine, Russia, Switzerland, South Sudan, Syria, UK, Ukraine, USA and Yemen.

³³² ICRC, *People on War: Perspectives from 16 countries* (Geneva: ICRC, 2016).

³³³ Hurd, “Theories and tests of international authority”, 35.

³³⁴ Ian Hurd, “Torture and the politics of legitimation in international law”, in Føllesdal, Andreas, Karlsson Schaffer, Johan and Ulfstein, Geir (eds.), *The Legitimacy of International Human Rights Regimes* (Cambridge: Cambridge University Press, 2014), 182.

³³⁵ Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Oxford University Press, 1994), 22.

thereby became a tool by which international bodies intended to preserve the integrity of this human rights norm, precisely when it was under attack by the states that had agreed to its prohibition in the first place.

As noted by Simmons,³³⁶ the crucial difference between torture and other human rights issues is that torture is perceived to have a critical bearing on states' ability to preserve order and security within borders. As we will see later in relation to Spain and the UK (section 4.3), in the context of the War on Terror, states felt the need to ratchet up security even if at the expense of certain rights and liberties, including the protection of physical and psychological integrity.

In his 2005 address to the UN Commission on Human Rights, the then UN Special Rapporteur on Torture, Manfred Nowak, lamented that "for the first time since World War II, this important consensus of the international community (the prohibition of torture and ill-treatment) seems to have been called into question by some Governments in the context of their counterterrorism strategies".³³⁷ However, history shows that governments have recurrently questioned the absoluteness of the prohibition of torture when they have felt under threat. Western European officials have resorted to utilitarian justifications of torture, normally by defending the legality of mild or moderate physical pressure, which international bodies tend to consider cruel, inhuman or degrading, and therefore prohibited in international law. It happened during the Franco-Algerian war with the 1955 Wuillaume Report, during the so-called Northern Irish "Troubles" with the Compton Committee and the 1971 Parker Report, with the "moderate physical pressure" of the Landau Commission in Israel in 1987, and with the infamous 2002 Bybee report in the USA months after 9/11.³³⁸

A common feature of all these retrogressions in the prohibition of torture is that this practice is framed as necessary in relation to the *other*. The dilemma

³³⁶ Simmons, *Mobilizing for Human Rights*, ch. 7.

³³⁷ Statement of the Special Rapporteur on Torture, Manfred Nowak, to the 61st Session of the UN Commission on Human Rights, 4 April 2005.

³³⁸ Alex Bellamy, No Pain, No Gain? Torture and Ethics in the War on Terror, *International Affairs*, 82:1 (2006).

is not simply *liberty versus security*, but rather, *their liberty versus our security*. From this perspective, Linklater's point is particularly valid when he puts torture in the context of the "civilising process": the global prohibition of torture would be part of the globalisation of the European society and the expansion of the standard of civilisation.³³⁹ Yet, far from being a regular and linear process, the framing of the prohibition of torture as a global civilising process opens the door to the acceptance of a sort of "civilised torture" as long as it is exercised against the "barbarian other", the savage and lawless enemy of civilisation, the terrorist.³⁴⁰

The prohibition of torture is absolute and this imposes a heavy burden on duty bearers. In recent years, nonetheless, some states have openly questioned the absoluteness of the global prohibition of torture, while NGOs and independent bodies have acted as if this norm did no longer need of states' recognition because it has reached the irreversible point of a peremptory norm of general international law. The autonomous development of the prohibition of torture in the first decade of this century shows how, once a norm gets settled in the international human rights regime, states do not have full control over the meaning of the norm anymore. What remains to be seen, though, is whether this means anything of substance when it comes to ensuring that people do not suffer human rights violations on their own skin.

4.2.3. Does the prohibition of torture fit with liberal principles?

The prohibition of torture fits within the liberal framework Western European states claim to be bound by.

According to Morsink's authoritative commentary to the Universal Declaration of Human Rights, "Nazi medical experiments in the concentration

³³⁹ Andrew Linklater, *Torture and Civilisation*, *International Relations*, 21:1 (2007).

³⁴⁰ *Id.*, 115.

camps and other such inhumane practices figured heavily” in the prohibition of torture in the UDHR.³⁴¹ Hence, the adoption of strong language against torture and cruel, inhuman and degrading treatment cannot be disconnected from the Holocaust remembrance.

However, the origins of the prohibition lie in the Enlightenment. Throughout most of history, torture had been deemed a legitimate tool to deter or intimidate, gather information, obtain self-incriminatory statements, or simply to express that the torturer considers the victim to be subhuman.³⁴² In 1764, Cesare Beccaria published *Crimes and Punishments* and joined Montesquieu, Voltaire and others in arguing that torture was both immoral and irrational, and therefore it could not be accepted in a new social contract based on liberal principles; the argument laid down the law to the point that by 1874 Victor Hugo even dared to resolve that torture had ceased to exist.³⁴³ In the very long run the overall level of violence may have decreased over time,³⁴⁴ but the last century and a half proves that Victor Hugo and others were surely well intentioned but no less impetuous in their conclusions.

As said, the roots of the prohibition of torture are located in the Enlightenment and its rational discovery of human dignity and individual freedoms. Either persuaded by the lucidity of thinkers like Beccaria, maybe as a result of the creation of more effective and private forms of punishment,³⁴⁵ or possibly influenced by both, the prohibition of torture became one of the earliest issues framed in the language of natural rights. Perhaps because of this, the European Court of Human Rights stated that the prohibition of torture proclaimed in Article 3 of the European Convention on

³⁴¹ Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (Philadelphia: University of Pennsylvania Press, 1999), 42.

³⁴² Rosemary Foot, Torture: The Struggle over a Peremptory Norm in a Counter-Terrorist Era, *International Relations*, 20:2 (2006), 134.

³⁴³ James Ross, “A History of Torture”, in Roth, Kenneth and Worden, Minky (eds.), *Torture: A Human Rights Perspective* (New York: The New Press, 2005), 12-13. Not all philosophers in the 18th century held the same views about torture. In the 1770s Jeremy Bentham justified torture on utilitarian grounds (from W. L. Twining and P. E. Twining, Bentham on Torture, *Northern Ireland Legal Quarterly*, 24:3, 1973).

³⁴⁴ This is main conclusion of Steven Pinker, *The Better Angels of Our Nature: A History of Violence and Humanity* (London: Penguin Books, 2012).

³⁴⁵ Foucault, *Discipline and Punish*, part 1.

Human Rights “enshrines one of the most fundamental values of democratic society”.³⁴⁶

This of course would not have prevented Western countries from developing sophisticated methods to make torture more difficult to detect.³⁴⁷ That said, bearing in mind the resonance with liberal principles, Western European states would be particularly willing to advocate the global prohibition of torture.

4.2.4. Have strong and resourceful norm entrepreneurs endorsed the international prohibition of torture?

Human rights organisations, like the Swiss Committee Against Torture, the International Association of Penal Law, the International Commission of Jurists and Amnesty International, played a significant role in making the CAT happen in the 1970s and 80s; delegates of at least the second two ones got involved in the actual drafting of some provisions, even if they did so in their personal capacity; Amnesty International began a global campaign for the abolition of torture in 1972, and published in 1973 a 200-page report on the reality of torture worldwide.³⁴⁸

In the late 1980s and early 1990s, norm entrepreneurs held colloquiums and consultations to recover the idea of a global independent mechanism to monitor national practices of prevention of torture at the local and national levels. The Swiss Committee Against Torture and other organisations under the umbrella of the International Commission of Jurists, played a significant role; so did scholars like Manfred Nowak, Antonio Cassese, and the first UN Special Rapporteur on Torture, Peter Kooijmans.³⁴⁹

³⁴⁶ European Court of Human Rights, *Chahal v. UK*, 1996, para. 79

³⁴⁷ Darius Rejali, *Torture and Democracy* (Princeton: Princeton University Press, 2007).

³⁴⁸ Huckerby and Rodley, “Outlawing Torture...”.

³⁴⁹ IHR and APT, *Optional Protocol to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 42; Rachel Murray *et al*, *The Optional Protocol to the UN Convention Against Torture* (Oxford: Oxford University Press, 2011), 6-10.

As explained earlier (4.2.2), the CAT evolved partly from a 1978 proposal from the International Association of Penal Law, and the draft by the Swiss Committee Against Torture in 1981 was the basis of its Optional Protocol. More recently, since the mid 1990s, international criminal tribunals, international human rights bodies and the International Court of Justice have sustained that the prohibition of torture is not only absolute, but it is also a peremptory norm of international law, a norm so important that states' consent or lack thereof makes no difference.

Western European states would be more inclined to endorse norms promoted by stronger and more resourceful norm entrepreneurs (P6). Practitioners' influence has persisted in their advocacy with independent human rights bodies. A survey carried out by the World Organization Against Torture (OMCT in French) found traces of their reports in between 19 and 53% of the recommendations of the Committee Against Torture.³⁵⁰ There is probably no other issue more salient than torture in reports and campaign materials of international human rights groups. Thus, it is reasonable to expect from the perspective of Order-over-Justice that the prohibition of torture would get more support than other human rights norms from Western European countries.

Contrary to the propositions related to clarity (P3) and burden (P4), the connection with liberal principles (P5) and the role of norm entrepreneurs (P6) foresee that the prohibition of torture would be strongly endorsed by Western European states. Section 4.3 will shed light on this and identify whether burden and clarity together are more influential than liberalism and human rights activists when it comes to Western European state promotion of the international prohibition of torture.

³⁵⁰ From Tobias Kelly, The cause of human rights: doubts about torture, law, and ethics at the United Nations, *Journal of the Royal Anthropological Institute*, 17:4 (2011), 736.

4.3. Spain and the UK: How do they prohibit torture and encourage others to do the same?

Notwithstanding the fact that some states explicitly disagreed about the sort of physical and psychological treatment that can be considered cruel, inhuman or degrading, the prohibition of torture is established in both global and regional treaties in very clear terms. Countries all around the world have domesticated the prohibition in their criminal codes, and in some cases even in their constitutions. “No government today would seriously dispute that torture is illegal”.³⁵¹ International bodies have even proclaimed that the prohibition of torture is a norm of *jus cogens*, the highest possible point for an international norm. Even though torture is still very much real in too many parts of the world, the prohibition of torture is a globally settled norm.

In light of Order-over-Justice, Western European states would have made use of the strongest normative tools in the early years of the norm (P1), adopting a more reactive approach later in time (P2). All other conditions remaining equal, they would have opposed this norm, and independent bodies’ interpretations of it, less vigorously in the most recent past. Considering that the *travaux préparatoires* of the Convention Against Torture lasted about six years and those of its Optional Protocol a whole decade, the proposition of less resistance in later years would also be visible throughout drafting processes. Dubious, sceptical or reluctant states would be more willing to express their views openly in early stages of the drafting process.

This section looks at two case studies within Western Europe, Spain and the UK, to explore the way in which they have implemented the prohibition of torture at the domestic level and have encouraged others to do so as well.

The critical interpretation of state practice on torture is subdivided in two subsections. First, the section starts with a review of the position expressed

³⁵¹ Huckerby and Rodley, “Outlawing Torture...”, 40.

by both countries in the drafting process of the Convention Against Torture. Doing so will illustrate how these two countries interpreted the prohibition of torture in the late 1970s and early 1980s, bearing in mind that the prohibition of torture had been established much earlier in the 1948 UDHR and in the 1950 European Convention on Human Rights.

And secondly, this section exhibits the main torture-related issues affecting Spain and the UK since the mid 1980s. It does so after a careful analysis of the periodic reports issued by independent human rights bodies: The UN Human Rights Committee and the Committee Against Torture, the European Committee for the Prevention of Torture, and the reports of UN Special Rapporteurs with torture-related mandates (for the UK, the Working Group on Arbitrary Detention in 1998; for Spain, the Special Rapporteur on Torture in 2004 and the Special Rapporteur on Counter-Terrorism and Human Rights in 2008).³⁵²

The analysis intends to examine the most salient problems in both countries, and the way the governments interact with international bodies and frame the meaning of the prohibition of torture at the internal level. Therefore, the study cannot be limited to the reports issued by the human rights bodies: it also looks at the governments' original reports, shadow reports submitted by NGOs, government's responses and, when available, the summary records of the meetings with county delegates.

4.3.1. Ratification of relevant treaties and drafting process of the Convention Against Torture

Spain ratified the Convention Against Torture in 1987, when it also accepted the Committee's jurisdiction both for interstate complaints and for individual complaints. The UK ratified the CAT in 1988. It accepted the jurisdiction of

³⁵² The UN Subcommittee on the Prevention of Torture, which started working in 2007, has not yet visited either Spain or the UK.

the Committee Against Torture for interstate complaints, a jurisdiction the Committee has never used thus far in relation to any country. The UK is the only Western European state not to give individuals under its jurisdiction the opportunity to appeal to the Committee Against Torture if they consider to be victims of a violation of their right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment.

The UK signed and ratified the Optional Protocol to CAT in 2003. Spain ratified it in 2006. 20 independent bodies designated by the British Government constitute the National Prevention Mechanism in the UK.³⁵³ In the case of Spain, that responsibility was given to the Ombudsman (*Defensor del Pueblo*).³⁵⁴

Both countries ratified the European Convention on Prevention of Torture on 1 February 1989, precisely the day when the treaty entered into force.

As introduced in section 4.2, the study of the drafting process of the Convention Against Torture is particularly challenging because there are no summary records of the sessions of the open-ended Working Group, the annual reports of this Working Group seldom mention any country by name, and many of the proposals tabled and ideas expressed are only knowable from the testimony of those actually present in the room during the deliberations.³⁵⁵

Unfortunately, neither Burgers and Danelius nor Nowak and McArthur provide much insight about the official position adopted by Spain in the drafting process of the Convention. We know, however, that in the second session (1979), at the very infancy of its democracy, Spain joined East Germany and the USA in suggesting that the then future Convention had to be restricted only to torture, leaving other forms of ill-treatment out of scope.³⁵⁶ However, in 1984, Spanish representatives proposed the application of the

³⁵³ <http://www.nationalpreventivemechanism.org.uk/>

³⁵⁴ <https://www.defensordelpueblo.es/mnp/mecanismo-nacional-de-prevencion-de-la-tortura/>

Organic Law 1/2009, of 3 November.

³⁵⁵ Burgers and Danelius, *A Handbook*.

³⁵⁶ Id, 40; Nowak and McArthur, *The United Nations Convention Against Torture*, 31-32.

principle of *non-refoulement* (Article 3) and of the doctrine of the tainted fruit of the poisonous tree (Article 15) not only to torture, but also to the other forms of ill-treatment or punishment.³⁵⁷ The Spanish delegation later withdrew the proposal, and in the end, neither Article 3, nor 14 or 15 were included in the clause on cruel, inhuman or degrading treatment or punishment (Article 16). In its declaration at the Commission on Human Rights in 1984, Spain stated that it “would have preferred a convention that was broader in scope”, with an adequate coverage of cruel, inhuman and degrading treatment, and with a binding monitoring mechanism in the hands of the Committee Against Torture; “in the spirit of compromise”, however, Spain had nevertheless accepted the text as it had come out of the Working Group.³⁵⁸

The record is more detailed in relation to the UK. In 1979, together with the USA, the UK insisted that the definition of torture in the Convention had to be limited to “systematic” and “intentional” infliction of “extreme pain or suffering”. These positions drew from the *Northern Ireland case* controversially resolved by the European Court of Human Rights only one year before.³⁵⁹

As said earlier (4.2.1), the European Commission of Human Rights had unanimously established in 1976 that, when combined, the so-called “five techniques” (wall-standing, hooding, subjection to noise, deprivation of sleep and deprivation of food and drink) used by British forces in Northern Ireland amounted to torture in violation of Article 3 ECHR. The European Court of Human Rights, however, considered that the techniques did not attain the level of severity implied in the idea of torture, and ruled that the UK had only incurred in cruel, inhuman and degrading treatment.

³⁵⁷ Burgers and Danelius, *A Handbook*, 95. The doctrine of the tainted fruit of the poisonous tree says that statements obtained as a result of torture should not be admissible as evidence against the person who is subjected to this sort of treatment or punishment.

³⁵⁸ Commission on Human Rights, Summary record of the 32nd meeting, 40th session, 28 February 1984, UN doc: E/CN.4/1984/SR.32, para. 75-82.

³⁵⁹ Nowak, *What Practices Constitute Torture?*, 820; Nowak and McArthur, *The United Nations Convention Against Torture*, 37 ff.

Official documents unveiled in 2013 that the UK did not disclose all the relevant information to the European Court of Human Rights. One of those documents would be a communication from 1977 between the then Home Secretary Merlyn Rees and the Prime Minister James Callaghan, where the former explicitly admits that “torture” had been applied as a result of a decision taken in 1971 “by ministers – in particular Lord Carrington, then secretary of state for defence”.³⁶⁰ Considering that torture is the deliberate infliction of severe pain or suffering, we will never know if the European Court of Human Rights would have ruled the way it did had it known that the application of torture in Northern Ireland had been endorsed by the UK Government.

Going back to the negotiation of the Convention Against Torture, British delegates also disagreed about the inclusion of any reference to discrimination among the grounds on which ill-treatment could equate to torture. The British delegate made the following statement: “The United Kingdom shares the concern to eliminate all forms of torture, including any motivated by discrimination. The United Kingdom is doubtful of the need to isolate this particular motivation and in particular terms the United Kingdom thinks that there will in any case be difficulties in doing so with the necessary degree of precision for a criminal offence”.³⁶¹ In 1980, the UK was among the Western European states that had reservations about the inclusion of universal jurisdiction in the Convention.³⁶² In 1981, the UK still maintained that torture was an “aggravated and deliberate” form of cruel, inhuman or degrading treatment or punishment.³⁶³ In 1982, the UK doubted whether a mandatory supervisory mechanism was needed, but by then its delegates had already accepted the inclusion of universal jurisdiction in the treaty.³⁶⁴ In 1983, the UK accepted the mandatory nature of the mechanism for the inquiry procedure in relation to those countries where there are reasons to

³⁶⁰ The scandal was aired by the Irish TV in June 2014 with the documentary “The Torture Files”: <http://www.rte.ie/news/player/prime-time-web/2014/0604/>

³⁶¹ Report of the Working Group on a Draft CAT, 1979, para. 27.

³⁶² Nowak and McArthur, *The United Nations Convention Against Torture*, 262-263.

³⁶³ Burgers and Danelius, *A Handbook*, 73.

³⁶⁴ *Id.*, 78 and 82.

believe that torture is practiced systematically.³⁶⁵ Finally, in its declaration at the Commission on Human Rights in 1984, the UK delegate appreciated the “necessary flexibility” showed by delegations in order to build consensus, but expressed regret for what he considered an insufficiently clear definition of the word “torture” in the Convention, which in the British Government’s opinion ought to “relate specifically to aggravated forms of maltreatment which deliberately caused intense pain and suffering”.³⁶⁶

This narrative illustrates how, over the drafting process, even if not entirely enthusiastic about the final draft, both countries showed an increasing willingness to support an inclusive proclamation of the prohibition of torture and a more protectionist set of guarantees. This evolution is particularly noticeable in the case of the UK.

4.3.2. Implementation of the prohibition of torture: Interaction with international human rights bodies

United Kingdom

The Bill of Rights banned the infliction of “cruel or unusual punishment” in 1689. However, torture never fully disappeared from the British Isles. And, as we have seen in the previous section, historically the UK Government did not adopt the most proactive approach in fostering a protectionist interpretation of the prohibition of torture in international law.

The UN Human Rights Committee has examined the UK seven times. The first two reviews took place in 1979 and 1985, before the entry into force of the Convention Against Torture in 1987, which is the starting point of this analysis.³⁶⁷ The Committee Against Torture has examined the UK five times,

³⁶⁵ Id, 89.

³⁶⁶ E/CN.4/1984/SR.33, para. 24-25.

³⁶⁷ This thesis focuses on the human rights situation in Great Britain and Northern Ireland, and not the Crown Dependencies and Overseas Territories, for which human rights bodies often make specific recommendations.

the first one dating from 1992. The UN Working Group on Arbitrary Detention visited the UK in 1998. The European Committee on the Prevention of Torture visited the UK approximately every other year between 1990 and 2016, issuing 19 reports.³⁶⁸

The first report from the Human Rights Committee after the entry into force of the Convention Against Torture was issued in 1991. The Committee expressed concerns in relation to the measures taken by the British Government to counter terrorism in Northern Ireland, in particular considering the risk posed by extended detention during the state of emergency, detention that could last up to seven days without access to court. The Government assured the Human Rights Committee that evidence obtained under duress was not admissible in court. However, the Committee would question the state about it based on NGO reports that would suggest otherwise. The Committee also criticised the non-prohibition of corporal punishment in privately funded schools.³⁶⁹ Corporal punishments in schools were only going to be totally outlawed in the UK in 2004.³⁷⁰

In 1992, the Committee Against Torture expressed concerns about incommunicado detention in cases of terrorism. The Committee relied on NGO sources to point out the alleged reliance on confessions in convictions for terrorism-related activities in Northern Ireland. Knowing that the UK had advocated a restrictive interpretation of the international notion of torture in relation to other forms of ill-treatment, the Committee also wanted to make sure that the UK defined “torture” in domestic law in accordance with the Convention.³⁷¹ To this the Government responded that the domestic definition of torture “was very close in substance and form to” the one of the Convention. This issue would come up regularly in the dialogue between the

³⁶⁸ See reports here: <http://www.cpt.coe.int/en/states/gbr.htm> The report of the mission of March 2016 had not been made public in March 2017.

³⁶⁹ Human Rights Committee, Report to the General Assembly, Supplement No. 40, UN doc: A/46/40, 1991, para. 351-414, particularly para. 370-371, 381-383 and 411.

³⁷⁰ UK Government, 6th periodic report to the Human Rights Committee, UN doc: CCPR/C/GBR/6, 18 May 2007, para. 364.

³⁷¹ Torture is a criminal offence in the UK under section 134 of the Criminal Justice Act 1988, and it carries a maximum penalty of life imprisonment.

Committee and the state in the following years. Relying expressly on NGO information, the Committee expressed concerns about the alleged lack of accountability for police and military abuse in Northern Ireland: “The implementation of the Convention in Northern Ireland was far from satisfactory”. It also recalled the rule of *non-refoulement*, which the Government assured to respect. This would also be another recurrent topic in the interaction between the Committee and country delegates for the following quarter of a century.³⁷²

When asked by the Committee to consider accepting its jurisdiction on individual complaints (via Article 22), the UK has regularly responded making reference to the two European mechanisms it is already bound by: the European Court of Human Rights and the European Committee for the Prevention of Torture. In the Government’s view, accepting the jurisdiction of the Committee Against Torture on individual complaints would not add anything important to the implementation of the prohibition of torture within the UK.

The European Committee for the Prevention of Torture travelled to the UK for the first time in 1990, visiting five prisons and five police stations. The Committee did not find any evidence of torture, but concluded that the “cumulative effect of overcrowding, lack of integral sanitation and inadequate regimes amounts to inhuman and degrading treatment”.³⁷³ The UK Government disagreed strongly with this appraisal and issued two reports (in 1991 and 1993) in response to the views of the European Committee. In its second visit, of 1993, the Committee visited Northern Ireland, where it did not hear allegations of torture and “hardly any allegations of other forms of ill-treatment”.³⁷⁴ Yet, it made some recommendations that, broadly speaking, were going to be shared by other human rights bodies in subsequent reviews.

³⁷² Committee Against Torture, Report to the General Assembly, Supplement No. 44, UN doc: A/47/44, 1992, para. 93-125.

³⁷³ ECPT, Report to the UK (29 July-10 August 1990), CoE doc: CPT/Inf (91) 15, 26 November 1991, para. 32 and 57.

³⁷⁴ ECPT, Report to the UK (20-29 July 1993), CoE doc: CPT/Inf (94) 17, 17 November 1994, para. 112.

In 1995, the UN Human Rights Committee repeated concerns about detention conditions in Northern Ireland, the lack of independent investigation in case of police or military abuse, the use of excessive force in the deportation of immigrants and asylum-seekers, and the admissibility of corporal punishments in private schools.³⁷⁵

In its report to the Human Rights Committee, the Government detailed the measures adopted in relation to torture.³⁷⁶ Among other issues, it included information about the way in which the Government had implemented the recommendations of the European Committee for the Prevention of Torture. The Government also spoke about the Independent Commission for Police Complaints for Northern Ireland, the training received by police and prison officers, or the fact that confessions obtained from torture were inadmissible in court. It assured the Committee that crimes and abuses committed by army officers in Northern Ireland were not left unpunished, but argued that terrorism posed a threat that required the adoption of exceptional measures, for example in relation to police detention. In relation to corporal punishment in private/independent schools, the Government defended its position by reference to a recent decision by the European Court of Human Rights, which had ruled that on this particular issue the UK was not in breach of Article 3 ECHR, which prohibits torture and other forms of ill-treatment.³⁷⁷

Also in 1995, the UN Committee Against Torture welcomed the establishment of the Independent Commission for Police Complaints for Northern Ireland, but expressed concerns for the nearly permanent state of emergency and the “practice of vigorous interrogation”. It also criticised the forcible returns or deportations that in some circumstances may put the *non-refoulement* at jeopardy. Corporal punishment in schools was also mentioned in the report. So was the general concern about the way in which torture was defined in

³⁷⁵ Human Rights Committee, Concluding Observations: UK, UN doc: CCPR/C/79/Add.55, 27 July 1995, para. 11, 13, 15 and 19.

³⁷⁶ UK Government, 4th periodic report to the Human Rights Committee, UN doc: CCPR/C/95/Add.3, 19 December 1994, para. 113-170.

³⁷⁷ European Court of Human Rights, *Costello-Roberts v. UK*, Judgement of 25 March 1993.

domestic legislation.³⁷⁸ In its interaction with Government officials, the Committee rapporteur “said that he had never seen such a long report [from a state], just as he had never received so much NGO material”.³⁷⁹ Such meticulous information contributed to a very thorough conversation about the challenges facing the UK in relation to torture. Committee members echoed NGO reports about lack of investigation of alleged cases of ill-treatment by the police in Northern Ireland and elsewhere. The UK argued that, in spite of the temporary cease-fire, it was not possible to put an end to the exceptional legislation in Northern Ireland until a peace agreement had been reached. Nonetheless, the Government assured the Committee to be re-examining the situation constantly and willing to consider lifting some of the exceptions by 1996.³⁸⁰

In the third reporting period, of 1998, the Committee Against Torture praised the UK for the enactment of the Human Rights Act and for the peace agreement in Northern Ireland. It repeated concerns about the definition of torture in internal law, the infringement of the *non-refoulement*, living conditions in prisons and refugee/migrant detention centres,³⁸¹ the injuries caused by rubber bullets used by police, and the need to reassure that evidence obtained as a result of torture in Northern Ireland was never admissible at court. Since the exam coincided with the indictment of General Pinochet by a Spanish judge, the Committee recommended the UK to either prosecute Pinochet or extradite him to Spain.³⁸²

The UN Working Group on Arbitrary Detention visited several detention centres for migrants and refugees in the UK in September 1998, and made its report public less than three months later. The Working Group appreciated

³⁷⁸ Committee Against Torture, Report to the General Assembly, Supplement No. 44, UN doc: A/51/44, 1996, para. 58-65.

³⁷⁹ Committee Against Torture, Summary record of the 234th meeting, of 17 November 1995 (morning), CAT/C/SR.234, 22 November 1995, para. 22.

³⁸⁰ Committee Against Torture, Summary record of the 235th meeting, of 17 November 1995 (afternoon), CAT/C/SR.235, 27 November 1995, para. 6 and 15-16.

³⁸¹ The European Committee for the Prevention of Torture had visited immigration detention facilities for the first time in its third trip to the UK, in 1994. (ECPT, Report to the UK (15-31 May 1994), CoE doc: CPT/Inf (96) 11, 5 March 1996)

³⁸² Committee Against Torture, Report to the General Assembly, Supplement No. 44, UN doc: A/54/44, 1999, para. 72-77.

the full cooperation of British authorities and assured to have been able to carry out its work without limitations. The Working Group lamented the common policy of detaining asylum seekers and refugees, with no time limit and without judicial oversight, and regardless of whether they could be deported to their home country, for example, due to the inexistence of extradition treaties or the impossibility to determine their nationality. That said, the Working Group wrote in its report that it had the “distinct impression” that the New Labour Government, “on the one hand, wishes to help genuine asylum seekers by making it easier for them to seek entry into the United Kingdom, but, on the other hand, seeks to make the legal regime tighter for those who set out to seek asylum on unfounded grounds. The Government is seeking to make the law sufficiently accessible and precise in order to avoid all risk of arbitrary detention”.³⁸³

The European Committee for the Prevention of Torture visited Northern Ireland in 1999. It observed that the detention conditions were just as bad as in 1993, when it had visited Northern Ireland for the last time. The European Committee advocated the immediate closure of that centre, and the UK Government complied with the recommendation in a matter of days.³⁸⁴

In the Concluding Observations of 2001, adopted only weeks after 9/11, the UN Human Rights Committee warned about the risks of restricting human rights in the fight against terrorism. The Committee also expressed concerns about the way in which asylum-seeker dispersal policies may negatively affect their physical security. In relation to Northern Ireland, the Human Rights Committee criticised the delays in the investigation of murders, incidents about religious hatred and issues related to fair trial, but not torture per se.³⁸⁵

The UK issued a response to the Human Rights Committee, saying that

³⁸³ Working Group on Arbitrary Detention, Report on the visit to the United Kingdom on the issue of immigrants and asylum seekers, UN doc: E/CN.4/1999/63/Add.3, 18 December 1998, para. 19.

³⁸⁴ ECPT, Report to the UK (29 November-8 December 1999), CoE doc: CPT/Inf (2001) 6, 3 May 2001, 9.

³⁸⁵ Human Rights Committee, Concluding Observations: UK, UN doc: CCPR/CO/73/UK, 6 December 2001, para. 6, 8, 14, 16 y 18.

Islamist terrorism had created a public emergency that required exceptional measures regarding human rights: “We believe that there is a public emergency threatening the life of the nation”. The prohibition of torture is absolute and is not among the rights that can be suspended in exceptional circumstances (Article 4). However, the tone set by that sentence was followed by another paragraph related to the expulsion of suspected terrorists, where the Government mysteriously said that, even though the principle of *non-refoulement* stood firm, the Anti-terrorism, Crime and Security Act 2001 sought a balance “between the interests of the individual suspected terrorist and the general community”.³⁸⁶

This Act permitted the detention of foreign nationals who were suspected of being involved in international terrorism, and who were believed to present a risk to national security, but could not be expelled from the UK. Insofar as this form of detention could clash with foreigners’ right to liberty and security, the UK made a reservation to Article 5 ECHR. This reservation lasted until 2005, because in December 2004 the House of Lords declared the Anti-terrorism, Crime and Security Act incompatible with the human rights obligations of the UK.³⁸⁷

Yet, while the exception was in force, the European Committee for the Prevention of Torture visited the UK twice (in 2002 and 2004) precisely to monitor the application of that Act and its impact on the rights of suspected terrorists. In 2002, the European Committee did not hear any allegation of physical ill-treatment by police, and only one in relation to prison officers.³⁸⁸ However, when visiting the venues two years later, the Committee concluded that the detention conditions had seriously damaged the mental health of the detainees, and in some cases even their physical well-being, based on what it resolved that their situation “could be considered as amounting to inhuman

³⁸⁶ UK Government, Comments on the Concluding Observations of the Human Rights Committee of 2001, UN doc: CCPR/CO/73/UK/Add.2, 4 December 2002, para. 5 and 17.

³⁸⁷ House of Lords, *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department*, Ruling of 16 December 2004.

³⁸⁸ ECPT, Report to the UK (17-21 February 2002), CoE doc: CPT/Inf (2003) 18, 12 February 2003, para. 10-11.

and degrading treatment”.³⁸⁹

The fourth report from the UN Committee Against Torture came out in 2004. The Committee welcomed the “responsiveness” of the UK to some of the recommendations made by the Committee before, such as the closure of certain problematic prison facilities or the cease of use of baton rounds by army and police in Northern Ireland. The decision of the House of Lords in the Pinochet case was also well received.³⁹⁰ The Committee also congratulated the UK Government for the extension of independent police complaint commissions to other parts of the UK beyond Northern Ireland. However, it still insisted on old concerns: the need to make sure that evidence obtained from torture is inadmissible at court, and the need to adapt the domestic definition of torture to international human rights standards. The Committee also disagreed with the Government’s restrictive interpretation of the extraterritorial application of the Convention to territories where UK forces hold effective control de facto. The Committee also called on the state not to rely on “diplomatic assurances” in cases of deportation to countries where supposed terrorists may be subjected to torture.³⁹¹

During the discussion with the Committee, the state delegation argued that no other European country had accepted as many asylum seekers as the UK in previous years. Also, the UK had stopped using prisons to hold immigrants prior to deportation, using only ad hoc detention centres. A new topic on the table was the issue of female genital mutilation, which had not been raised by the Committee before. The Government assured the Committee that British forces in Afghanistan and Iraq were fully aware of the legal implications of

³⁸⁹ ECPT, Report to the UK (14-19 March 2004), CoE doc: CPT/Inf (2005) 10, 9 June 2005, para. 19.

³⁹⁰ In 1999, the House of Lords had established that former heads of state have no immunity for crimes of torture, and that British courts had jurisdiction over such acts committed abroad. (House of Lords, *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet* and *Regina v. Evans and Another and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet (On Appeal from a Divisional Court of the Queen's Bench Division)*, Ruling of 24 March 1999).

³⁹¹ Committee Against Torture, Concluding Observations: UK, UN doc: CAT/C/CR/33/3, 10 December 2004.

the Convention for the conduct of their activities.³⁹² However, in spite of these assurances, in 2007 the parliamentary Joint Committee on Human Rights received evidence that indicated that British forces in Iraq had made use of practices that had been outlawed in compliance with the *Ireland v. UK* 1978 ruling of the European Court of Human Rights, such as hooding and stress positioning.³⁹³

The UK delegation did not avoid the criticism from the perspective of non-*refoulement*, but justified its reliance on diplomatic assurances as follows:

“The United Kingdom was concerned to abide by its international obligations and its policy was not to return any person to another State where there were substantial grounds for believing that they would be in danger of being subjected to torture, or to return anyone to a country where there was a real risk that the death penalty would be applied. However, if the United Kingdom Government considered that securing assurances from another State would enable it to remove a person in a manner consistent with its international obligations, it believed it was worth trying to do so. It was clearly a difficult area but, properly handled, such assurances could make it possible for justice to take its course while fully complying with human rights obligations. Clearly, the nature of any assurances and the level at which they were provided -usually ambassadorial or ministerial level- must be sufficient to satisfy both the Government and the courts.”³⁹⁴

In 2005 and 2006, together with other countries, the UK Government tried to open up a discussion within the Council of Europe on the development of guidelines about the admissibility of diplomatic assurances on cases dealing with terrorism. After strong criticism from NGOs and human rights bodies, the initiative was dropped before it bore any fruit.³⁹⁵

Prior to the 2008 review, the Human Rights Committee received a relatively high number of shadow reports (22) from national civil society organisations,

³⁹² Committee Against Torture, Summary record of the 624th meeting, of 17 November 2004 (morning), CAT/C/SR.624, 24 November 2004, para. 13-15, 18 and 22-28, and Summary record of the 627th meeting, of 18 November 2004 (afternoon), CAT/C/SR.627, 24 November 2004, para. 22-29.

³⁹³ Joint Committee on Human Rights, *UN Convention Against Torture: Discrepancies in Evidence Given to the Committee About the Use of Prohibited Interrogation Techniques in Iraq, Twenty-eighth Report of Session 2007-08* (London: House of Commons, 2008).

³⁹⁴ Committee Against Torture, Summary record of the 627th meeting, of 18 November 2004 (afternoon), UN doc: CAT/C/SR.627, para. 47.

³⁹⁵ Nowak and McArthur, *The United Nations Convention Against Torture*, 216

international NGOs, and national human rights institutions (the Equality and Human Rights Commission and the Northern Ireland Human Rights Commission), which informed the conversation between the Committee and the UK delegation.

During that conversation, the UK explained the position defended at the *Saadi v. Italy case* (2008), ruled by the European Court. The UK had intervened in support of Italy arguing “that account must be taken not only of the possible risks to the persons threatened with expulsion but also, to a certain extent, of the risks that those same persons posed to others. It had also requested that, in view of the gravity of the cases in question, a higher level of proof should be required to attest the risks to which such persons were exposed”.³⁹⁶ Judges in Strasbourg, however, did not agree with the UK.³⁹⁷ In relation to the applicability of international human rights law in armed conflict, the UK delegation also explained the Government’s official position that the ICCPR “could only have effect outside the territory of the United Kingdom in very exceptional circumstances”. In relation to CIA rendition flights in the context of the War on Terror, the UK formally “condemned any practice of extraordinary rendition leading to torture and never used torture for any purpose”; however, “as it was not possible to check every flight, an intelligence-led approach should be used”.³⁹⁸

The report of the Human Rights Committee was very much focused on the challenges posed to human rights by the fight against terrorism. First, the Committee criticised the UK’s reluctance to apply “appropriate safeguards” to avoid returning suspect terrorists to countries where they may not be free of torture, relying excessively on diplomatic assurances. Secondly, it denounced allegations that the UK was allowing transit through British Indian Ocean Territory (Chagos Archipelago) for CIA rendition flights. And thirdly, it

³⁹⁶ European Court of Human Rights, *Saadi v. Italy*, Judgement of 28 February 2008, para. 117-123.

³⁹⁷ Human Rights Committee, Summary record of the 2541st meeting, of 7 July 2008 (afternoon), UN doc: CCPR/C/SR.2541, 17 July 2008, para. 31.

³⁹⁸ Human Rights Committee, Summary record of the 2542nd meeting, of 8 July 2008 (morning), CCPR/C/SR.2542, 21 July 2008, para. 36 and 42.

criticised the Government's position that the protection of the ICCPR does not apply in relation to suspects in custody by the British armed forces in detention facilities in Iraq and Afghanistan.³⁹⁹

In 2013, its latest session thus far, the Committee Against Torture received 22 shadow reports from NGOs and national human rights institutions. The Committee congratulated the House of Lords, in its old judicial capacity, for making explicit the prohibition of use of evidence obtained from torture, although the Committee made clear that the burden of proof in these cases must lie on the state, and not on the alleged victim. It disagreed one more time with the UK's interpretation of the extraterritorial applicability of the Convention, and called "on the state party to publicly acknowledge that the Convention applies to all individuals who are subject to the State party's jurisdiction or control", and recommended the state to carry out inquiries into allegations of torture overseas in Iraq and Afghanistan. It reiterated issues raised in previous sessions, such as the definition of torture in domestic law, the overreliance on diplomatic assurances, or the living conditions in migrant detention centres.⁴⁰⁰ It also added new ones to the discussion, related to the necessary inquiries of past abuses of children committed in residential institutions, the need to raise the age of criminal responsibility, and the need to control the use of Taser electric guns.⁴⁰¹

The situation of children in residential institutions and their criminal responsibilities had been raised at least by five NGOs in their respective shadow reports, and by the national human rights institutions of Scotland and England/Wales. Also, in 2008, the European Committee for the Prevention of Torture had recommended the UK to ensure that 17-year-olds

³⁹⁹ Human Rights Committee, Concluding Observations: UK, UN doc: CCPR/C/GBR/CO/6, 30 July 2008, para. 12-14.

⁴⁰⁰ In 2012, the European Committee for the Prevention of Torture examined for the first time the treatment of foreign nationals during an operation of deportation by air, from London to Colombo, Sri Lanka. (ECPT, Report to the UK (22-24 October 2012), CoE doc: CPT/Inf (2013) 14, 18 July 2013).

⁴⁰¹ Committee Against Torture, Concluding Observations: UK, UN doc: CAT/C/GBR/CO/5, 24 June 2013. In 2001, the European Committee for the Prevention of Torture visited children detention centres in the UK for the first time. (ECPT, Report to the UK (4-16 February 2001), CoE doc: CPT/Inf (2002) 6, 18 April 2002).

detained by the police are treated as juveniles, not as adults.⁴⁰²

The Committee had asked about the measures taken to tackle violence against women, an issue brought up by NGO shadow reports. However, after receiving the Government's response,⁴⁰³ the Committee did not make any recommendation in this regard. One Committee member recommended the state to lodge an interstate complaint against the USA in relation to the case of a British citizen held in Guantánamo since 2002. The country delegation responded that "it was the Government's position that intense bilateral engagement with the Government of the United States of America remained the most effective way of securing his release and return from Guantanamo".⁴⁰⁴ It is important to recall that no country has ever lodged an interstate complaint to the Committee Against Torture.

In the latest session, in 2015, the Human Rights Committee received shadow reports from 26 NGOs and from the national human rights institutions in Scotland, Northern Ireland and England/Wales. The Committee expressed concern about the lack of accountability for conflict-related violations of human rights in the past in Northern Ireland, including "police misconduct". It also called for strong accountability mechanisms for the violations committed by British military beyond British borders. The Committee also admitted to be worried about self-inflicted deaths and injuries by detainees in custody. It repeated concerns about the accordancy between the definition of torture in international law with that in domestic law, about the lack of adequate prohibition of corporal punishments at home,⁴⁰⁵ the excessive reliance on diplomatic assurances in case of extradition, and allegations of torture and ill-treatment in immigration detention facilities. There were two novelties related to women's rights on this occasion: The Committee framed

⁴⁰² ECPT, Report to the UK (18 November-1 December 2008), CoE doc: CPT/Inf (2009) 30, 8 December 2008, para. 19.

⁴⁰³ United Kingdom, Replies to the list of issues of the Committee Against Torture, UN doc: CAT/C/GBR/Q/5/Add.1, 2 May 2013, para. 10.1-10.6.

⁴⁰⁴ Committee Against Torture, Summary record of the 1139th meeting, of 8 May 2013 (afternoon), CAT/C/SR.1139, 15 May 2013, para. 59.

⁴⁰⁵ "The UK Government does not wish to criminalise parents for administering a mild smack." (UK Government, 7th periodic report to the Human Rights Committee, UN doc: CCPR/C/GBR/7, 29 April 2013, para. 571).

both the restriction of access to safe abortion services in Northern Ireland and the state responsibility in addressing violence against women as issues related to the prevention of torture and other forms of ill-treatment.⁴⁰⁶ The issue of abortion in Northern Ireland was raised by two NGOs in their shadow reports: Amnesty International and the Committee on the Administration of Justice. The connection between Article 7 (on torture and ill-treatment) and violence against women is explicit in three shadow reports: The Human Rights Consortium of Scotland, and the national human rights institutions of Northern Ireland and England/Wales.

The UK Government accepted the interpretation of the European Court of Human Rights about the extraterritorial application of international human rights standards, although in relation to the ICCPR it still maintained that the obligations are “primarily territorial”, in the sense that in principle they were in force mainly within the borders of the internationally recognised United Kingdom. However, the Government did not accept the idea that British military presence abroad automatically generates a situation of effective control over a foreign territory, and that is the reason why it refused to accept that the ICCPR may be applicable to British forces around the world.⁴⁰⁷ Arguing in front of the European Court of Human Rights, the UK maintained the same position in relation to the applicability of the European Convention on Human Rights.⁴⁰⁸ Highly questionable from a legal viewpoint, the UK Government announced in late 2016 its intention to derogate the Convention to avoid its extraterritorial application to armed forces.⁴⁰⁹

Only a few days after the discussion with the country delegates, the Human Rights Committee received a communication from the British Ministry of

⁴⁰⁶ Human Rights Committee, Concluding Observations: UK, UN doc: CCPR/C/GBR/CO/7, 17 August 2015, para. 8, 9, 13 and 16-21.

⁴⁰⁷ Human Rights Committee, Summary record of the 3168th meeting, of 1 July 2015 (afternoon), UN doc: CCPR/C/SR.3168, 8 July 2015, para. 53-54. However, in its 2016 response to the Concluding Observations, the UK provided information about the way it was implementing the recommendations concerning the prohibition of torture (para. 28-46).

⁴⁰⁸ European Court of Human Rights, *Al-Skeini and others v. UK*, Judgement of 7 July 2011, and *Al-Jedda v. UK*, Judgement of 7 July 2011.

⁴⁰⁹ Correspondence between the Chair of the Parliamentary Joint Committee on Human Rights, Harriet Harman MP, and the Secretary of State for Defence, Michael Fallon MP, regarding derogation from the European Convention on Human Rights, October and November 2016.

Justice with further details. In relation to the regulation of abortion in Northern Ireland, the UK Government engaged in the discussion, stating that “the Northern Ireland Department of Justice will continue to consider the issue of abortion in the case of sexual crime, but as noted any change to the law on abortion in Northern Ireland will require cross party consent in the Assembly”.⁴¹⁰

Spain

The UN Human Rights Committee has examined Spain six times, but the first two took place in 1979 and 1985, before the entry into force of the Convention Against Torture. The Committee Against Torture has also examined Spain six times, the first one dating from 1990 and the latest one, from 2015. The Special Rapporteur on Torture issued its report on Spain in 2004, and the Special Rapporteur on Counter-terrorism and Human Rights did so in 2008. The European Committee for the Prevention of Torture visited Spain 16 times between 1991 and 2016.⁴¹¹

The Committee Against Torture reported on Spain for the first time in 1990. The Committee found the state’s report too focused on the legal regime, and requested the Spanish delegation to share information about the challenges in the implementation of the Convention at the domestic level. Committee members also wanted to know more about incommunicado detention, other restrictions in the context of counter-terrorism, compliance with the principle of *non-refoulement*, regulation of universal jurisdiction and extradition in case of torture, and also how was torture defined in internal criminal law and how many prosecutions had been pursued.⁴¹² In general, these issues would come up time and again the following reporting years.

In 1991, the Human Rights Committee delivered its third periodic report on Spain. This was the first one since the entry into force of the CAT. Members of

⁴¹⁰ Response of the UK Government to the Human Rights Committee – outstanding questions following the UK’s UN ICCPR examination, Letter of 6 July 2015.

⁴¹¹ See reports here: <http://www.cpt.coe.int/en/states/esp.htm> The report of the last visit of 2016 remained confidential in March 2017.

⁴¹² Committee Against Torture, Report to the General Assembly, Supplement No. 44, UN doc: A/46/46, 1991, para. 57-86.

the Committee expressed a particular interest on the regulation of the state of emergency, and the special detention regime for people suspected of terrorism, mostly the Basque group ETA (active until 2011) and a much smaller far-left organisation called GRAPO (until late 1990s-early 2000s). They also asked about incommunicado detention and whether there had been any prosecutions for officers accused of torture.⁴¹³

The Committee Against Torture examined Spain again in 1993. This Committee was worried by the apparent inconsistency between the Convention and the way in which torture was defined in Spanish law. It also echoed NGO reports of cases where detainees had been subjected to torture in police stations during questioning. The Committee also regretted the use of incommunicado detention for suspects of terrorism, and the extension of official pardons to police officers convicted of torture and ill-treatment. In its interaction with the state delegation, the Committee said to be disappointed by the lack of detail and clarity of the written and oral report submitted by the Government.⁴¹⁴

The Spanish Government only agreed to the publication of the findings of the European Committee for the Prevention of Torture in 1996, after this body had visited the country three times, in 1991 and twice in 1994. In its first visit, the European Committee heard a number of allegations of torture and other forms of ill-treatment, mostly from people accused of crimes related to terrorism. Concerns would remain in the two subsequent visits. The Committee refused to give credit to the Government's dismissal of these allegations as some sort of smokescreen, and demanded effective action from the state.⁴¹⁵ Torture in the context of counter-terrorism would be a persistent concern for the European Committee.

⁴¹³ Human Rights Committee, Report to the General Assembly, Supplement No. 40, UN doc: A/46/40, 1991, para. 142-185, particularly para. 150-152 and 158-161.

⁴¹⁴ Committee Against Torture, Report to the General Assembly, Supplement No. 44, UN doc: A/48/44, 1993, para. 430-458.

⁴¹⁵ ECPT, Reports to Spain (1-12 April 1991, para. 18 and 25) (10-22 April 1994, para. 16) (10-14 June 1994, para. 5), Coe doc: CPT/Inf (96) 9, 5 March 1996. According to the Secretariat of ECPT, the response of the Spanish Government to the first report was never made public (email received on 24 September 2015).

“Numerous reports” of ill-treatment and even torture inflicted on people suspected of terrorism were the first reason of concern for the UN Human Rights Committee in 1996. The Committee also lamented “that investigations are not always systematically carried out by the public authorities and that when members of the security forces are found guilty of such acts and sentenced to deprivation of liberty, they are often pardoned or released early, or simply do not serve the sentence. Moreover, those who perpetrate such deeds are seldom suspended from their functions for any length of time”. Furthermore, “proofs obtained under duress are not systematically rejected by courts”. The Committee also expressed concern about incommunicado detention for terrorist suspects, who did not have access to a lawyer of their choice.⁴¹⁶

The Committee devoted a lot of attention to torture in their interaction with the Spanish delegation. Some members requested the Spanish delegation to provide more information about the way in which Spain intended to implement the recommendations of the Committee Against Torture and the European Committee for the Prevention of Torture. The Spanish representatives responded by saying that “propaganda was the weapon of choice of terrorists”, although they also admitted that not all torture reports could be false, giving some credit to the findings of the European Committee. Spain also defended the use of pardons as a governmental prerogative, and assured that they “were not granted systematically in cases of mistreatment or torture of prisoners”.⁴¹⁷

In 1997, the Committee Against Torture congratulated Spain for the way in which it had defined torture in Article 174 of the Criminal Code of 1995. In the Committee’s view, the new definition provided “citizens with greater protection” than the Convention itself. On the negative side, nonetheless, the Committee denounced the lengthy and ineffective investigations in torture-

⁴¹⁶ Human Rights Committee, Concluding Observations: Spain, UN doc: CCPR/C/79/Add.61, 3 April 1996, para. 10-12.

⁴¹⁷ Human Rights Committee, Summary record of the 1481st meeting, of 21 March 1996 (afternoon), CCPR/C/SR.1481, 9 May 1996, particularly para. 3, 37-38 and 42.

related cases, the indulgence with which judges treated officers accused of having committed torture, the reports of racial discrimination, and the admission of evidence obtained under duress or torture, if not for self-incrimination, at least for the incrimination of co-defendants.⁴¹⁸ In the dialogue with the state representatives, some Committee members expressed concerns about reported cases of breach of the principle of *non-refoulement* with questionable deportations of immigrants to Morocco. The state delegation warned the Committee that it should not believe ETA detainees: “It was routine for such persons to allege ill-treatment, and [...] at no stage in their detention had they been ill-treated”.⁴¹⁹

In 2001, after its seventh visit to the country, the European Committee for the Prevention of Torture remained disappointed because the Spanish Government had not delivered on the promises made to implement some of its previous recommendations, particularly regarding incommunicado detention.⁴²⁰ In its response, however, the Spanish Government maintained that it believed the legal safeguards already in place were sufficient to comply not only with the fundamental rights recognised in the Constitution, but also with Spain’s international human rights obligations.⁴²¹

The UN Committee Against Torture reviewed Spain again in 2002. The Committee noted the obvious disagreement between the concerns expressed by numerous human rights bodies and the state’s assertion that torture and ill-treatment do not occur in Spain, “isolated cases apart”.⁴²² It also denounced xenophobic and racist attacks against migrants, and recommended a change in the criminal legislation to include discrimination

⁴¹⁸ Committee Against Torture, Report to the General Assembly, Supplement No. 44, UN doc: A/53/44, 1998, para. 119-136.

⁴¹⁹ Committee Against Torture, Summary record of the 311th meeting, of 18 November 1997 (morning), CAT/C/SR.311, 20 November 1997, para. 25 and 38.

⁴²⁰ ECPT, Report to Spain (22-26 July 2001), Coe doc: CPT/Inf (2003) 22, 13 March 2003, para. 8.

⁴²¹ Spain, Response to ECPT report of 2001, Coe doc: CPT/Inf (2003) 23, 13 March 2003, particularly 5-6.

⁴²² In 2000, the Committee Against Torture had established that France should not have extradited an alleged ETA member to Spain because there were “substantial grounds for believing that he would be in danger of being subjected to torture”, in the language of Article 3 CAT. (Committee Against Torture, *Arana v. France*, Communication No. 63/1997, UN doc: CAT/C/23/D/63/1997, Views of 9 November 1999, para. 11.4)

as one of the protected grounds. The Committee also pointed out delays and failures in investigations of torture, excessive force in the expulsion of migrants, particularly minors, and severe living conditions in prisons.⁴²³ One more time, the Committee made the point that “regardless of the legal safeguards for its application, (incommunicado detention) facilitates the commission of acts of torture and ill-treatment”, and it recommended, the video and audio recording of police interrogations, as well as joint examinations by a forensic physician and a physician chosen by the detainee held incommunicado.⁴²⁴ As it had done before, the Spanish delegation warned the Committee that terrorists systematically lie about being victims of torture, arguing that by doing so they spark an international public reaction in favour of their cause; in the Government’s opinion, terrorists’ only intention would be to justify their terrorist acts by defaming Spanish police forces.⁴²⁵

In October 2003, the then UN Special Rapporteur on Torture, Theo van Boven, visited Spain. The Special Rapporteur examined issues related to the legal framework and existing safeguards for the protection of detainees, paid attention to reports about the occurrence and extent of torture, and scrutinised the investigation and punishment of acts of torture, mostly but not only against ETA members.⁴²⁶ This report received an unusually aggressive reaction from the Spanish Government. The introductory paragraph gives a good sense of the tone of the 81-page response: In the opinion of the Spanish Government, van Boven’s report “contains so many major factual errors that the conclusions drawn by the Special Rapporteur are seriously undermined, with the result that the report is virtually unacceptable in its entirety, being unfounded and lacking in rigour, substance

⁴²³ The European Committee for the Prevention of Torture visited migrant detention centres for the first time in 1997 (ECPT, Report to Spain (21-28 April 1997), Coe doc: CPT/Inf (98) 9, 19 May 1998).

⁴²⁴ Committee Against Torture, Concluding Observations: Spain, UN doc: CAT/C/CR/29/3, 23 December 2002, para. 8-11 and 14.

⁴²⁵ Committee Against Torture, Summary record of the 533rd meeting, of 13 November 2002 (afternoon), CAT/C/SR.533, 10 January 2003, para. 5.

⁴²⁶ Special Rapporteur on Torture, Report on the visit to Spain, UN doc: E/CN.4/2004/56/Add.2, 6 February 2004.

and method”.⁴²⁷ In an unprecedented way, the Spanish delegation left the meeting room while van Boven was presenting his conclusions at the 59th session of the Commission on Human Rights. Van Boven later said not to have recollections of any other government reacting “as strongly” as the Spanish one did with his report.⁴²⁸

The fifth report of the Human Rights Committee came out in 2008, 12 years after the previous one. This was due to a considerable delay of about seven years in the state’s submission. The conservative government (PP) had had a bad experience with the Special Rapporteur on Torture, but in March 2004, the social-democratic party (PSOE) won the national elections and got back to power after eight years in opposition. However, it took the new government three more years to submit its report to the attention of the Human Rights Committee, even though by 2004 it was four years late already.

In the meantime, in 2005 and 2007, the European Committee for the Prevention of Torture had delivered two disturbing reports with serious allegations of ill-treatment against foreigners in Melilla, unaccompanied minors in Canary Islands and people held incommunicado in application of the anti-terrorist law.⁴²⁹

In its 2008 report, the Human Rights Committee reiterated the need to put a definitive end to incommunicado detention (up to 13 days), which the Committee considers incompatible with the absolute prohibition of torture. It also made other recommendations to prevent torture in detention centres. For the first time, the Committee made specific recommendations regarding Franco-era dictatorship: it proposed repealing the 1977 Amnesty Law, not applying statutes of limitations for crimes against humanity, and setting up a commission to establish the “historical truth” about the crimes committed during the 1936-1939 civil war and the 1939-1975 dictatorship. For the first

⁴²⁷ Government of Spain, Response to the Special Rapporteur on Torture, UN doc: E/CN.4/2004/G/19, 4 March 2004, 1.

⁴²⁸ From Teresa Whitfield, *Endgame for ETA: Elusive Peace in the Basque Country* (London: Hurst & Company, 2014), 127-128.

⁴²⁹ ECPT, Report to Spain (12-19 December 2005), Coe doc: CPT/Inf (2007) 30, 10 July 2007; Report to Spain (19 September-1 October 2007), Coe doc: CPT/Inf (2011) 11, 25 March 2011.

time, the Committee made specific recommendations for the state to adopt effective measures to prevent violence against women.⁴³⁰ In their communications, at least two NGOs made the connection between Article 7 ICCPR, which prohibits torture and ill-treatment, and the crimes against humanity committed during Franco's time. Amnesty International did so in relation to violence against women. Most of the 16 NGO shadow reports dealt with Article 7 ICCPR. Several NGOs also raised the issue of xenophobia and racism, illegal repatriations and police treatment of migrants at the border with Morocco, in the enclaves of Ceuta and Melilla.

The Spanish Government particularly disliked the recommendation to scrap the Amnesty Law and to ensure accountability for past crimes. It regretted the inclusion of these issues in the report, because in the Government's opinion, they are not grounded in any provision of the ICCPR. Furthermore, the Spanish Government defended the 1977 Amnesty Law as a key contribution to the transition to democracy in Spain: "Not only Spanish society, but also public opinion worldwide knows about and has always supported the transition process in Spain, which was made possible in part by this law".⁴³¹

In 2008, Spain was visited by the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin. The Special Rapporteur expressed concerns about the restrictions to freedom of expression and association, the broad definition of "terrorism" in criminal law and in the law regulating political parties, and the allegations of commission of torture in counter-terrorism activities.⁴³² The 41-page response written by the Spanish Government was a straight rejection of most if not all the points made by the Special Rapporteur. The Government started by saying that, in the European context, Spain had "a

⁴³⁰ Human Rights Committee, Concluding Observations: Spain, UN doc: CCPR/C/ESP/CO/5, 5 January 2009, para. 9, 12 and 14.

⁴³¹ Government of Spain, Comments on the Concluding Observations of the Human Rights Committee of 2008, UN doc: CCPR/C/ESP/CO/5/Add.1, 26 January 2009, para. 7-10.

⁴³² Special Rapporteur on Human Rights and Counter-terrorism, Report on the visit to Spain, UN doc: A/HRC/10/3/Add.2, 16 December 2008.

very specific situation” when it comes to terrorism, due to the existence of an internal threat (ETA) as well as an external one (Madrid bombings of 11 March 2004). In spite of numerous reports that said otherwise, the Spanish Government assured that “Spain has never adopted special legislation to fight against terrorism”. The Spanish Government also criticised the Special Rapporteur for relying too much on “non-corroborated” reports by NGOs and groups that advocate the independence of the Basque Country. The Government claimed that ETA terrorist suspects systematically denounce being victims of torture, which in the Government’s opinion would make their allegations unreliable. Furthermore, Spain explicitly challenged the Special Rapporteur’s view, also shared by other human rights bodies, that incommunicado detention per se infringes the right to be free from torture and other forms of ill-treatment.⁴³³

In 2009, the Committee Against Torture welcomed the modification of Article 174 of the Criminal Code to include discrimination as one of the grounds for torture, but made new recommendations to align that particular provision to Article 1 CAT. It also required a higher penalty for people convicted for the commission of torture.⁴³⁴ The Committee also called on the state to ensure that evidence obtained from the practice of torture is never admissible at court. It required the abolition of incommunicado detention, and warned about reliance on diplomatic assurances. On this, based on Article 3 CAT, the Committee made clear that “under no circumstances must diplomatic guarantees be used as a safeguard against torture or ill-treatment where there are substantial grounds for believing that a person would be in danger of being subjected to torture or ill-treatment upon return”. The Committee was particularly concerned about reports that suggested that minors

⁴³³ Government of Spain, Response to the Special Rapporteur on Human Rights and Counter-terrorism, UN doc: A/HRC/10/G/2, 18 February 2009, 2-3, 20 and 29-30.

⁴³⁴ In 2005, in a case in which the Government pardoned police officers who had been convicted for torturing an ETA member, the UN Committee Against Torture condemned Spain because “the imposition of lighter penalties and the granting of pardons to the civil guards are incompatible with the duty to impose appropriate punishment” (*Urra Guridi v. Spain*, Communication No. 212/2002, UN doc: CAT/C/34/D/212/2002, Views of 17 May 2005, para. 6.7). As noted earlier, in 1997 the Committee had considered that the Spanish Criminal Code definition of torture was in line with the Convention Against Torture (Report to the General Assembly, 1998, para. 119-136).

returned to Morocco had suffered ill treatment by police. The Committee wanted to know more from the state about the use of Spanish airports in the extraordinary rendition flights of the CIA. It also recommended not applying statutes of limitations and the 1977 Amnesty Law to the crimes against humanity allegedly committed during Franco-era dictatorship, and it warned about the proposed restriction of universal jurisdiction in Spain and its likely impact on the prosecution of torture. Finally, the Committee raised more concerns about detention conditions, human trafficking, violence against women, racial violence, and the use of Taser electric guns.⁴³⁵

14 shadow reports were submitted to the consideration of the Committee Against Torture, including one from the Ombudsman as the national human rights institution. Several reports addressed the issue of torture and counter-terrorism. As it had done with the Human Rights Committee only one year earlier, Amnesty International made the explicit link between the prohibition of torture and violence against women. At least one Committee member raised this issue in front of the state delegates making a reference to Amnesty International's shadow report.⁴³⁶ The International Commission of Jurists joined Amnesty International in bringing both the role of Spain in the CIA rendition flights and the restrictions to universal jurisdiction to the attention of the Committee. Accountability for gross violations of human rights committed in Franco's dictatorship was demanded by Amnesty International and one national NGO.

The latest report by the Committee Against Torture was published in 2015 and reiterated most of the issues covered in the previous report of 2009: domestic definition and adequate criminalisation of torture, incommunicado detention, non-applicability of statutes of limitations to torture and of the 1977 Amnesty Law to crimes against humanity, reliance on diplomatic assurances in case of deportation, restrictions to universal jurisdiction, and

⁴³⁵ Committee Against Torture, Concluding Observations: Spain, UN doc: CAT/C/ESP/CO/5, 9 December 2009.

⁴³⁶ Committee Against Torture, Summary record of the 913th meeting, of 12 November 2009 (afternoon), UN doc: CAT/C/SR.913, 9 July 2010, para. 38.

violence against women.⁴³⁷ In line with some of the concerns raised by the European Committee for the Prevention of Torture in 2011, 2014 and 2016,⁴³⁸ the Committee also singled out the human rights of migrants: the summary forced return of migrants in Ceuta and Melilla (known as “hot expulsion” in Spain), the excessive use of force by border police, or the living conditions in migrant detention centres.⁴³⁹ The human rights situation of migrants was particularly present at least in three of the nine shadow reports, two from national groups and the one submitted by Amnesty International.

As in previous sessions, Article 7 ICCPR was particularly prominent in the latest review of Spain by the Human Rights Committee. Violence against women was again an issue. This time, however, the Committee also expressed concerns in relation to a bill that intended to restrict access to safe abortion for teenager women and women with disabilities.⁴⁴⁰ The Committee also reprimanded the state for the excessive force by police in handling peaceful anti-austerity demonstrations, and for the application of official pardons to officers who had been found guilty of torture or ill-treatment. For the first time, the Human Rights Committee also condemned the reported living conditions in detention centres for migrants. Once again, the Committee called for the elimination of incommunicado detention, particularly considering that ETA declared a permanent ceasefire in 2011, and regretted the lack of investigation of allegations of torture, which had led to convictions by the European Court of Human Rights.⁴⁴¹ The Committee expressed worries about Spain’s regular practice of conducting collective expulsions of migrants to Morocco, with excessive use of force in some cases,

⁴³⁷ Committee Against Torture, Concluding Observations: Spain, UN doc: CAT/C/ESP/CO/6, 29 May 2015.

⁴³⁸ ECPT, Report to Spain (31 May-13 June 2011), CoE doc: CPT/Inf (2013) 6, 30 April 2013; Report to Spain (14-18 July 2014), CoE doc: CPT/Inf (2015) 19, 9 April 2015; ECPT, Report to Spain (17-19 February 2016), CoE doc: CPT/Inf (2016) 35, 15 December 2016.

⁴³⁹ Committee Against Torture, Summary record of the 1302nd meeting, of 28 April 2015 (morning), UN doc: CAT/C/SR.1302, para. 17, and Summary record of the 1305th meeting, of 29 April 2015 (afternoon), UN doc: CAT/C.SR.1305, para. 36 and 43-45.

⁴⁴⁰ The bill eventually became Organic Law 11/2015, of 21 September, “to reinforce the protection of minors and judicially incapacitated women in the voluntary interruption of pregnancy”.

⁴⁴¹ European Court of Human Rights, *Etxebarria Caballero v. Spain*, Judgement of 7 October 2014, *Ataun Rojo v. Spain*, Judgement of 7 October 2014, and *Arratibel Garciandia v. Spain*, Judgement of 5 May 2015.

and breaches of the principle of *non-refoulement*. It reiterated the concerns about the need for truth, justice and reparations for victims of human rights abuses during Franco's dictatorship.⁴⁴² The new issues included in the Committee's report had been brought to its attention by some NGOs, including Amnesty International and Human Rights Watch. As in 2008, the Spanish delegation openly disagreed with the Committee with regard to the compatibility of the 1977 Amnesty Law and Spain's international human rights obligations.⁴⁴³

In 2016, Spain provided extensive responses to several of the points raised by both the Committee Against Torture and the Human Rights Committee one year before. In particular, in relation to incommunicado detention, Spain informed that, since ETA had stopped acting, the Government had proposed and the Parliament had adopted legal changes to restrict the application of incommunicado detention; none of the 172 terrorism-related detainees (28 linked to ETA, 94 to Jihadism, and 50 to others) had been held in incommunicado detention between January 2015 and April 2016.⁴⁴⁴

4.4. Conclusions

The prohibition of torture is a globally settled norm in the international human rights regime. Human rights bodies have even established that it has reached the point of being a peremptory norm, that is, a norm whose applicability does not depend upon states' consent anymore. Yet, despite international law and existing international and national monitoring mechanisms, torture is still a more or less regular practice in too many places.

Even countries with a rather poor human rights record supported the idea of

⁴⁴² Human Rights Committee, Concluding Observations: Spain, UN doc: CCPR/C/ESP/CO/6, 14 August 2015, para. 12-21.

⁴⁴³ Human Rights Committee, Summary record of the 3174th meeting, of 6 July 2015 (afternoon), CCPR/C/SR.3174, 13 July 2015, para. 32.

⁴⁴⁴ Spain, Follow-up on the Concluding Observations of the Committee Against Torture, UN doc: CAT/C/ESP/CO/Add.1, 20 May 2016, para. 2-14; and Follow-up on the Concluding Observations of the Human Rights Committee, UN doc: CCPR/C/ESP/CO/6/Add.1, 26 September 2016.

an international treaty against torture in the 1970s. Spain was among the ones that endorsed the earliest General Assembly resolutions, even though institutional support for democracy and fundamental rights was still far from strong.

During the drafting process of the Convention Against Torture, some Western European states, the UK among them, attempted to restrict the meaning of the prohibition of torture by excluding cruel, inhuman or degrading treatment, or by setting limits to the implementation of the norm. However, country delegates showed willingness to compromise in their positions and eventually all Western European states subscribed to the standards as set out in the Convention. By the late 1990s and early 2000s, Western Europe did not set obstacles to the adoption of the Optional Protocol to CAT, because after all this Protocol essentially replicated a monitoring mechanism that had been functioning in Europe since 1990. As confirmed by witnesses, European states forged “new, firm and surprising” alliances with NGOs and with countries in other regions, which created “a snowball effect” that made the Optional Protocol look inevitable after ten years of awkward conversations.⁴⁴⁵

These observations would confirm the propositions P1 and P2, according to which support for a human rights norm at a discursive level does not require a profound conviction from government officials or a high level of acceptance or internalisation of the norm. Dubious or sceptical countries would be more willing to express their views openly in early stages of the drafting process, but over time would go along with the flow and adapt to the birth and development of the norm. Drafting processes, as long and bureaucratic as they can sometimes be (as in the case of the Optional Protocol to CAT), can provide the necessary space to smooth out state resistance to human rights norms.

Finding its roots in Enlightenment, the prohibition of torture resonates

⁴⁴⁵ IIHR and APT, *Optional Protocol to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 57-58

clearly with liberal principles that define the self-perception of Western Europe, which partly explains their willingness to endorse the norm at the international level (P5).

It is reasonable to expect more support for norms advocated by resourceful groups and advocates (P6), and existing literature shows that the prohibition of torture has also received a considerable support from them. Amnesty International launched its first global campaign on torture in the early 1970s, and together with other NGOs and with influential legal scholars and practitioners, they lobbied government officials during the drafting processes of the relevant treaties. The case studies of Spain and the UK show that independent human rights bodies at the UN and the Council of Europe influence each other in framing an increasing number of grievances as issues connected to the prohibition of torture. There is also a strong link between the concerns and recommendations of the Committees and the issues denounced in NGOs' shadow reports, particularly from well-known and respected human rights groups.

Certain issues have regularly appeared in reports and conclusions of UN and European bodies. It is certainly the case of torture in the context of counter-terrorism: in the UK, in relation to Northern Ireland first and then in the global War on Terror; for Spain, basically the internal threat posed by ETA. Additionally, the conditions of the detention facilities in the UK and governmental pardons to officers convicted of torture in Spain are also recurrent topics.

However, the number of issues covered by the general prohibition of torture has grown significantly in the last quarter of a century. Fed by NGO reports, in recent years independent bodies have also expressed an interest in sexual and reproductive rights (in Northern Ireland and most recently in Spain), violence against women and accountability for past crimes (in relation to Northern Ireland and Franco's dictatorship). This practice is likely to continue in the future. For example, in the list of issues the Committee Against Torture wants to see covered in the next periodic report of the UK,

for the first time the Committee has included questions about measures to prevent cruel, inhuman or degrading treatment of persons with disabilities.⁴⁴⁶

Generally speaking, both Spain and the UK have accepted the frame developed by human rights bodies. However, in some cases, they have also openly challenged their interpretation about the meaning and extension of the prohibition of torture. We can observe this at least in four instances in relation to the UK: The UK does not accept that its domestic definition of the prohibition of torture does not match that of the Convention Against Torture; the state defends the need to adopt a more flexible approach to legal safeguards when it comes to fighting terrorism; the UK strongly resists the extraterritorial application of its human rights obligations; and it considers that, under certain circumstances, diplomatic assurances may suffice to comply with the principle of *non-refoulement*. Spain has adopted a similar approach to that of the UK as regards terrorism and diplomatic assurances. Apart from these two issues, Spain has complained about the credit that human rights bodies seem to give to certain groups that, in the Government's opinion, play into terrorists' hands. Also, Spain does not accept the incompatibility of its Amnesty Law with international human rights standards or the need to investigate the crimes committed during Franco's time. These disagreements have persisted over time, and no significant changes were observable when different political parties came to power in either country. Changes to anti-terrorism legislation may come, nevertheless, from the fact that ETA does no longer pose a threat in Spain. On top of this, unlike Spain and all other Western European states, the UK does not accept the jurisdiction of the Committee Against Torture on individual complaints (Article 22 CAT). In the past, Spain showed a more aggressive tone and attitude than the UK in making its disagreement known to UN human rights bodies.

⁴⁴⁶ Committee Against Torture, List of issues prior to submission of the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland, UN doc: CAT/C/GBR/QPR/6, 7 June 2016.

The prohibition of torture is formulated in clear and absolute terms in international law. Therefore, from the perspective of Order-over-Justice, other factors remaining equal, torture would not be a likely candidate to get the support of Western European states (P3 and P4). However, the analysis shows that, beyond some initial doubts, broadly speaking Western European states advocated the global prohibition of torture in absolute terms. In principle, this would contradict the propositions that countries would be more willing to back blurrier and less onerous human rights norms. However, the case studies of Spain and the UK show that, in certain circumstances, governments would not shy away from defying independent bodies, with rather hostile and undiplomatic language if necessary, as Spain did with the Special Rapporteur on Torture in 2004. This could indicate that Spain and the UK agreed to promote the prohibition of torture insofar as the prohibition was light enough or flexible enough for them to make exceptions in tricky areas.

The prohibition of torture in international human rights law suggests that the passing of time (P1 and P2), the compatibility with liberal principles (P5) and strong advocacy by resourceful norm entrepreneurs (P6) are key factors in explaining Western Europeans' willingness to raise the profile of a given issue as a human rights norm. However, when the interpretation of the norm touches upon sensitive areas, such as those related to armed forces, terrorism or accountability for serious crimes committed in the past, even with a globally settled norm like the prohibition of torture, states may still openly resist the burden imposed by human rights bodies. Level of burden and clarity (P3 and P4) would therefore be less prominent factors than the other four, as long as they do not affect core and strategic policy decisions related to national security.

5. ECOCID

"God blessed them and said to them, 'Be fruitful and increase in number; fill the earth and subdue it. Rule over the fish in the sea and the birds in the sky and over every living creature that moves on the ground'."

The Bible, Genesis 1:28

The definition of ecocide has never been conclusively settled in legal and academic circles. That said, unless specified otherwise, in this thesis ecocide is understood as the attempt to treat the deliberate destruction of the natural environment as a distinct international crime against peace and security. There is a well-established principle in international law by which nations must refrain from causing damage to the environment of other nations. However, this chapter does not look at interstate responsibility, but at the legal and political efforts, mostly between the early 1970s and mid 1990s, to frame environmental damage in the language of international criminal law and international humanitarian law.

The chapter begins with the context of the progressive recognition of environmental concerns in international law, and specifically in international human rights law, and a brief introduction of the idea of ecocide, as initially coined in the 1970s (section 5.1). The analysis continues with the application to ecocide of the propositions related to the clarity and burden of the norm, its effective fit within liberal principles, and the role of norm entrepreneurs (section 5.2). In third place, the chapter takes the case studies of the UK and Spain to explore the evolution of Western European states' practice towards ecocide by looking at: a) the positions expressed by country delegates during the negotiation of the 1977 Additional Protocol I to the Geneva Conventions and the 1998 Statute to the International Criminal Court, b) their interaction with the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities and the International Law Commission, in 1978 and early 1990s,

and c) state practice regarding criminalisation of ecocide at the domestic level (section 5.3).

5.1. How environment met human rights in international law and the birth of ecocide

The idea of ecocide was born in the 1970s, the decade when the environment entered into the room of international law and international politics.⁴⁴⁷ The principle that states are not allowed to damage each other's environment had been established decades earlier;⁴⁴⁸ and at least since the beginning of the 20th century, customary international humanitarian law loosely restricted the use of force with no military purpose, and did not permit the destruction of private or public property in occupied territories.⁴⁴⁹ However, the starting point of international environmental law is conventionally set in the first international conference on environment, held in Stockholm in 1972.

Some time earlier, the realist George Kennan had made a proposal "to prevent a world wasteland".⁴⁵⁰ He was calling for a multilateral convention to agree on international standards, promote coordination of research and its widest possible dissemination, and to set up an international "watchdog" to oversee the conservation of global nature.

Kennan's proposal was not materialised, but at least in hindsight the time seemed ripe for international regulation on environmental issues. Among others, the following universal treaties have been adopted since the 1970s: 1973 Convention on International Trade in Endangered Species of Wild

⁴⁴⁷ Although the roots of the international environmental regime can be traced back to the 19th century, the 1970s were a key milestone, "starting from the rise of much international nongovernmental association and discourse and leading to interstate treaties and later to intergovernmental organization" driven by compelling scientific research on environmental issues (John Meyer *et al*, The Structuring of a World Environmental Regime, 1870–1990, *International Organization*, 51:4, 1997, 623).

⁴⁴⁸ Dixon and McCorquodale, *Cases and Materials on International Law*, 466-467.

⁴⁴⁹ UNEP, *Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law* (Nairobi: UNEP, 2009), 19-21.

⁴⁵⁰ George Kennan, To Prevent a World Wasteland, *Foreign Affairs*, 48:3 (1970), 401.

Fauna and Flora; 1982 Montego Bay Convention on the Law of the Sea; 1985 Vienna Convention for the Protection of the Ozone Layer; 1992 Convention on Biological Diversity; or the 1992 Framework Convention on Climate Change, with its 1998 Kyoto Protocol.

In international humanitarian law, two novelties are worth emphasising from the first decade of global environmental awareness: the 1976 Convention on the Prohibition of Military or Any Other Hostile Use of Environment Modification Techniques (Environmental Modification Convention or ENMOD), and Articles 35 and 55 of the 1977 Protocol I to the Geneva Conventions, with two specific provisions on environmental protection in international armed conflicts.

In the 1990s, Europe witnessed one case of failure and one of success. On the one hand, the Council of Europe adopted the 1993 Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment, but rather unprecedentedly, no country has ratified this treaty yet, and therefore it is not in force.⁴⁵¹ On the other hand, the UN Economic Commission for Europe pushed forward the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. Its preamble recalls the 1972 Stockholm Declaration and recognises that “adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself”; the preamble also establishes that “every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations”. The Convention entered into force in 2001, and has been ratified by 47 Central Asian and European states, including Spain and the UK.⁴⁵²

International environmental law has also evolved outside treaty making. No

⁴⁵¹ See list of signatories at: http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/150/signatures?p_auth=iRfhVgMH

⁴⁵² Find the Convention and the list of signatories at: <https://www.unece.org/env/pp/treatytext.html>

other ruling represents better the difficult equilibrium between states' interests, on the one hand, and human rights and environmental concerns, on the other, than the *Advisory Opinion* of the International Court of Justice *on the Legality of the Threat or Use of Nuclear Weapons* (1996).⁴⁵³ In that case, the Court reiterated states' general obligation to respect each other's environment,⁴⁵⁴ and called on them to take the environment into account when determining what they deem necessary and proportionate use of force.⁴⁵⁵ That said, in an exercise of hermeneutical juggling, the Court concluded by a majority of none but with the President's casting vote that, while nuclear weapons "would generally be contrary to the rules" of international humanitarian law, "in the view of the current state of international law", the threat or use of nuclear weapons may still be admissible "in an extreme circumstance of self-defence, in which the very survival of a State would be at stake".⁴⁵⁶ The dissenting judges, however, did not share the appraisal of the majority of the Court, stating among other things that the use of nuclear weapons would by definition threaten life and cause long-term and very severe damage to the environment, and therefore these weapons cannot be admissible "in the view of the current state of international law".⁴⁵⁷

In the 1980s, but more strongly in the 1990s, the environment started to get a foothold in IHRL. The 1981 African Charter on Human and Peoples' Rights included the collective right of "all peoples" to a "general satisfactory environment favourable to their development" (Art. 24), and the 1988 Additional Protocol to the American Convention on Human Rights ("Protocol of San Salvador") stated that "everyone shall have the right to live in a healthy environment" (Art. 11(1)).⁴⁵⁸ However, the appearance of

⁴⁵³ ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996.

⁴⁵⁴ *Id.*, para. 29.

⁴⁵⁵ *Id.*, para. 30.

⁴⁵⁶ *Id.*, para. 105.

⁴⁵⁷ Find separate opinions at: <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&p3=4&case=95>

⁴⁵⁸ There is a stress on the principle of active participation of rights-holders in the protection of the environment, most visible in the 1989 ILO Convention No. 169 on Indigenous and Tribal Peoples (Art. 6), the 1992 Rio Declaration on Environment and Development (Principle 10), and one of the

environmental concerns into the international human rights regime is not so much due to states' desires expressed in international conventions, but due to the exegesis by international human rights bodies. Since the 1990s, the European Court of Human Rights, the European Committee of Social Rights, the Inter-American Commission and Court of Human Rights and the African Commission on Human and Peoples' Rights have extended human rights standards on the right to life, health and private and family life to environmental concerns.⁴⁵⁹ At the UN level, since late 1990s and early 2000s the former Commission on Human Rights, the successor Human Rights Council, and Special Procedures have tried to use human rights standards to protect the environment.⁴⁶⁰

Considering this hermeneutical bond between environment and human rights, only one year after the ICJ *Nuclear Weapons case*, Judge Weeramantry, who had been a dissenting voice in that decision, wrote in his Separate Opinion of the *Danube Dam case* (1997) that "the protection of the environment is a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments".⁴⁶¹ Despite these words, however, the place of environmental concerns in IHRL was far from guaranteed back then, and remains so to this day. As noted by the UN Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment in his first

three pillars of the mentioned 1998 Aarhus Convention.

⁴⁵⁹ For example, European Court of Human Rights, *López Ostra v. Spain*, Judgement of 9 December 1994, *Guerra and Others v. Italy*, Judgement of 19 February 1998, *Taskin and Others v. Turkey*, Judgement of 10 November 2004; European Committee of Social Rights, *Complaint No. 30/2005, Marangopoulos Foundation for Human Rights v. Greece*, Decision on the merits of 6 December 2006; African Commission of Human and Peoples' Rights, *SERAC v. Nigeria, Communication No. 155/96*, Ruling of 27 May 2002; Inter-American Court of Human Rights, *Kichwa Indigenous People of Sarayaku v. Ecuador*, Merits of 27 June 2012.

⁴⁶⁰ Alan Boyle, Human Rights and the Environment: Where Next?, *European Journal of International Law*, 23:3 (2012); UNEP, *UNEP Compendium on Human Rights and the Environment: Selected international legal materials and cases* (Nairobi: UNEP, 2013).

⁴⁶¹ Christopher Weeramantry, *Separate Opinion, ICJ Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgement of 25 September 1997, 92.

report, in spite of the growing recognition of environmental rights at the constitutional level, starting with Portugal in 1976, “no global agreement sets out an explicit right to a healthy (or satisfactory, safe or sustainable) environment”, and states have not been short of opportunities to do so in the last four decades, if they had wanted to.⁴⁶² Some time earlier, another independent voice appointed by the same Human Rights Council, the Special Rapporteur on the illicit movement and dumping of toxic and dangerous products and wastes, complained about “the lack of attention” paid to his mandate, and admitted that country delegates often reacted to his inquiries by arguing that “issues of toxic waste management are more appropriately discussed in environmental forums than at the Human Rights Council”.⁴⁶³

In sum, the environment has been a matter of international legal and political concern at least since the 1972 Stockholm Conference. Since the 1990s, IHRL has taken effect on environmental issues with both material and procedural contributions. Materially, independent human rights bodies expanded the range of the rights to life, health and private and family life. Procedurally, incipient rules and principles call on states to recognise individuals’ access to justice and active participation on environmental issues.

That said, UN human rights databases show that no human rights treaty-body or Special Procedure mandate holder, and no Human Rights Council resolution has advocated the idea that the deliberate destruction of the natural environment ought to be treated as a serious human rights violation, comparable to genocide, war crimes or crimes against humanity.⁴⁶⁴ In other words, ecocide is foreign to contemporary institutional human rights

⁴⁶² John Knox, *Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, 2012, para. 12-14.

⁴⁶³ Okechukwu Ibeanu, *Report of the Special Rapporteur on the adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights*, 2008, para. 34.

⁴⁶⁴ Universal Human Rights Index: <http://uhri.ohchr.org/> Human Rights Council resolutions and reports: <http://right-docs.huritech.org/> UN treaty body case law: <http://juris.ohchr.org/> Perhaps less unexpectedly due to their more constrained judicial task, ecocide is also absent in case-law from regional human rights courts (European Court of Human Rights: <http://hudoc.echr.coe.int/>; Inter-American Court of Human Rights: <http://www.corteidh.or.cr/cf/Jurisprudencia2/index.cfm?lang=en>; African Commission on Human and Peoples’ Rights: <http://caselaw.ahrda.org/>).

vocabulary. This might appear surprising considering that the idea of ecocide was born precisely at the time when the international community started to build a collective awareness about the environment.

The term ecocide was first used in 1970 by Professor Arthur Galston.⁴⁶⁵ Months later, who was to become American Ambassador L. Craig Johnstone made an argument in *Foreign Affairs* in favour of US's ratification of the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare.⁴⁶⁶ The article used the word 'ecocide' in the title, but nowhere did it specify what the author meant by it.

By 1972, however, the term had acquired certain prominence, and in fact the Swedish Prime Minister Olof Palme put ecocide in the forefront of international diplomacy when he said in his inaugural speech of the Stockholm Conference:

"The immense destruction brought about by indiscriminate bombing, by large-scale use of bulldozers and herbicides is an outrage sometimes described as ecocide, which requires urgent international attention. [...] It is of paramount importance [...] that ecological warfare cease immediately".⁴⁶⁷

One year later, Richard Falk made public a draft international convention on the crime of ecocide.⁴⁶⁸ This is how ecocide was born as a potential human rights norm, in the broadest sense of the word. As we will see (section 5.2), for about two decades, ecocide survived in the corridors of the United Nations, being considered by the Sub-Commission on Prevention of Discrimination and Protection of Minorities and the International Law Commission, until the idea dropped out of the agenda in 1996. And that is how ecocide passed away, or nearly passed away, because since 2010, a second generation of norm entrepreneurs have been campaigning to

⁴⁶⁵ From Anja Gauger *et al*, *The Ecocide Project: 'Ecocide is the missing 5th Crime Against Peace'* (London: Human Rights Consortium SAS, 2012), 6.

⁴⁶⁶ Craig Johnstone, Ecocide and the Geneva Protocol, *Foreign Affairs*, 49:4 (1971).

⁴⁶⁷ From Tord Björk, *The emergence of popular participation in world politics – United Nations Conference on Human Environment 1972* (Stockholm: University of Stockholm, 1996), 19.

⁴⁶⁸ Richard Falk, Environmental Warfare and Ecocide: Facts, Appraisal, and Proposals, *Security Dialogue*, 4:1 (1973).

resurrect this old idea to address contemporary environmental challenges, notably climate change.

Section 5.2 will explore four of the six propositions of Order-over-Justice to explain how Western European states reacted to the proposed norm of ecocide (the other two propositions will be examined in section 5.3).

Although this thesis is about why Western European states promote certain norms but not others, and not about how good they are at it (in other words, impact), their discourse and (in)action against the norm can explain the failure of Ecocide I, and perhaps also shed some light on the possibly murky future of its revival, Ecocide II.

5.2. What does Order-over-Justice mean for ecocide? Clarity, burden, liberalism and norm entrepreneurs

5.2.1. Was the meaning of ecocide clear?

It was never categorically established if ecocide was to become an international crime in its own right, or if the goal was to protect the environment in international humanitarian law by treating the deliberate destruction of natural environment as a form of war crime.

The article in which Falk presented his proposal framed the issue within the confines of international armed conflict; not in vain, the article had for title “Environmental Warfare and Ecocide – Facts, Appraisal, and Proposals”. Professor Galston had spoken at a conference on war. Johnstone argued in favour of the ratification of a legal treaty to regulate military conduct in armed conflict. Palme explicitly referred to ecological warfare. And all this was happening, not only at a time of growing environmental awareness in Western countries, but also in the context of very controversial use of

dangerous and toxic chemicals by the American military in South East Asia.⁴⁶⁹

However, Falk left the door ajar for the expansion of the applicability of the idea of ecocide beyond the battlefield; the first article of his draft read as follows: “The Contracting Parties confirm that ecocide, *whether committed in time of peace or in time of war*, is a crime under international law which countries undertake to prevent and to punish” (emphasis added).⁴⁷⁰

If ecocide were a call to protect the environment in times of war, one would expect the campaign for the recognition of ecocide to finish in 1976 and 1977, with the adoption of the Environmental Modification Convention (ENMOD), which prohibited the use of environmental modification techniques as a means of warfare, and of the Additional Protocol I to the 1949 Geneva Conventions. Art. 35(3) of this Protocol establishes the basic rule according to which “it is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment”. Article 55, on the “Protection of the natural environment” states that: “1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population. 2. Attacks against the natural environment by way of reprisals are prohibited”. Although it may appear as an unnecessary duplication, Article 35(3) is constrained to methods of warfare, while Article 55 intends to ensure the survival and health of the population.⁴⁷¹

Additional Protocol I concerns only with international armed conflicts, and not civil wars or non-international armed conflicts, which are regulated by Protocol II, also of 1977. This other Protocol does not have equivalent clauses for environmental protection, although the idea was on the table for some

⁴⁶⁹ Ludwik Teclaff, *Beyond Restoration – The Case of Ecocide*, *Natural Resources Journal*, 34:4 (1994).

⁴⁷⁰ Falk, *Environmental Warfare and Ecocide*, 93.

⁴⁷¹ ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Dordrecht: ICRC/Martinus Nijhoff Publishers, 1987), 414.

time.⁴⁷² That said, again, if ecocide was about the protection of natural environment in and around the battlefield, in 1977 the campaign should have shifted from norm promotion to advocacy for the widest possible ratification and effective implementation of Protocol I, and perhaps a prompt revision of Protocol II in order to provide equivalent level of environmental protection in non-international armed conflicts.

However, official discussions ensued after 1977, both at the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, and at the International Law Commission.

The UN Sub-Commission on Prevention of Discrimination and Protection of Minorities discussed ecocide in two instances, in 1978 and in 1985. Just like Falk five years earlier with his draft convention, in 1978 the Special Rapporteur on genocide, Nicodème Ruhashyankiko, also contributed to the quandary by talking about ecocide, on the one hand, “as an international crime similar to genocide”, and on the other hand, “as a war crime”, together with “the prohibition to act against the environment and the climate for military purposes”.⁴⁷³ Ruhashyankiko’s open-ended formulation is understandable because his role as Special Rapporteur was not to make a choice, but to frame the general debate and to help the Sub-Commission addressing the prevention and punishment of genocide. However, by doing so, perhaps unintentionally the report maintained the uncertainty about the nature of ecocide.

The question surfaced again in 1985. The new Special Rapporteur, Benjamin Whitaker, did not answer it in the one paragraph devoted to ecocide in his 62-page report on prevention and punishment of genocide. Whitaker briefly admitted that some members of the Sub-Commission were in favour of broadening the definition of genocide to cover environmental concerns. He

⁴⁷² ICRC, *Customary International Humanitarian Law. Volume I: Rules* (Cambridge: Cambridge University Press, 2005), 156. In spite of a lonely proposal by Australia (Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict, Vol. XV, 324, CCDH/215/Rev.1, 3 February – 18 April 1975).

⁴⁷³ Nicodème Ruhashyankiko, *Study of the Question of the Prevention and Punishment of the Crime of Genocide*, 1978, para. 462-478.

argued that this would be particularly important for indigenous peoples, and recommended that “further consideration should be given to this question, including if there is no consensus, the possibility of formulating an optional protocol”.⁴⁷⁴

The Sub-Commission never talked officially again about ecocide until its closure in 2006, when the Human Rights Council replaced the Commission on Human Rights. The Sub-Commission’s mission was to make recommendations to the old Commission, made out of state delegates, on how to protect and promote human rights. However, in relation to ecocide, the Sub-Commission did not manage to adopt a common position on whether the definition of genocide had to be broadened to cover environmental damage, or in other words, whether ecocide was a type of war crime, or a distinct international crime.

The second UN body to study the idea of ecocide was the International Law Commission (ILC), constituted by independent legal experts working on the codification of international law. In the 1980s and 1990s, the ILC considered the possibility of adding ecocide to its list of international crimes against peace and security. In 1984, ILC Member and Special Rapporteur Doudou Thiam proposed a second draft code of offences against peace and security. For the Special Rapporteur, the new draft code had to incorporate “certain violations of international law recognized by the international community since 1954”, the year when the first draft code had been made public; among those violations he included “acts causing serious damage to the environment”.⁴⁷⁵

Although ILC members agreed that serious damage to the environment had to be treated as an international crime, they had different views about whether it should be a crime against humanity, insofar as these crimes can be

⁴⁷⁴ Benjamin Whitaker, *Revised and updated report on the question of the prevention and punishment of the crime of genocide*, 1985, para. 33.

⁴⁷⁵ ILC, *Yearbook of 1984, Vol. II, Part I*, UN doc: A/CN.4/SER.A/1984/Add.1 (Part 1), 89-100, para. 79.

committed in peacetime.⁴⁷⁶ In 1986 and 1989, the Special Rapporteur included the “serious breach” of international environmental obligations and “serious harm to a vital human asset, such as the human environment” in his two draft lists of crimes against humanity. Both attempts provoked positive and negative reactions among his colleagues in the ILC.⁴⁷⁷

The ILC set up a drafting committee that submitted a text for the consideration of the Commission in 1991. The drafting committee deleted serious environmental damage from the list of crimes against humanity, but included one separate clause, the very last one of the list, number 26, “on wilful and severe damage to the environment”. ILC members expressed reservations mostly in relation to the threshold drawn by the words “widespread, long-term and severe”, but in the end the ILC adopted the draft with a minor change. Article 26 would read: “An individual who wilfully causes or orders to cause widespread, long-term and severe damage to the natural environment shall, on conviction thereof, be sentenced [to...]”.⁴⁷⁸ Thereby, the ILC appeared ready to extend the environmental protection that international law attempted to provide in times of war also to times of peace. This would have raised the profile of ecocide from a type of violation of international humanitarian law (in the 1977 Additional Protocol I) to an international crime in its own right.

However, Thiam admitted that Article 26 was among those that were “strongly opposed” by Western governments.⁴⁷⁹ He added that, “from a political standpoint, any codification exercise must, in order to be successful, be supported by a clearly expressed political will”. As a result, Thiam simply deleted Article 26 from his final report to the International Law

⁴⁷⁶ ILC, *Yearbook of 1984, Vol. II, Part 2*, UN doc: A/CN.4/SER.A/1984/Add.1 (Part 2), 16, para. 58.

⁴⁷⁷ See summary in ILC, *Yearbook of 1996, Vol. II, Part 1*, UN doc: A/CN.4/SER.A/1996/Add.1 (Part 1), 15-28, para. 6-7.

⁴⁷⁸ ILC, *Yearbook of 1991, Vol. I*, UN doc: A/CN.4/SER.A/1991, 186-241; On Article 26, 2241st meeting, para. 59-93.

⁴⁷⁹ ILC, *Yearbook of 1993, Volume II, Part 1*, UN doc: A/CN.4/SER.A/1993/Add.1 (Part 1), 59-109. The most critical countries were Denmark, Finland, Iceland, Norway, Sweden, the Netherlands, the UK and the USA.

Commission.⁴⁸⁰ With it, the Special Rapporteur sent ecocide back to the realm of armed conflict.

And that is where ecocide was to remain from then onwards, because the International Law Commission decided to drop entirely the idea that ecocide may be an international crime of its own.⁴⁸¹ The ILC included environmental damage as a form of war crime in Article 20(g) of the Code.⁴⁸² In its statement to the General Assembly, the International Law Commission said that it had “acted in response to the interest of adoption of the Code and of obtaining support by Governments”.⁴⁸³ Christian Tomuschat, ILC Member in favour of ecocide as a distinct international crime or at least as a crime against humanity, wrote at the time that nuclear weapons were in the back of the mind of ILC members and state delegates that opposed the recognition of an entirely different crime of a status similar to that of genocide, war crimes or crimes against humanity.⁴⁸⁴

For more than one decade, the International Law Commission engaged with the idea of ecocide, and even considered the possibility of declaring it a separate crime against peace and security. However, in the end, the pressure exercised by some Western countries bore fruit and environmental damage was remitted to the sphere of international humanitarian law in the form of war crimes. Two years after the adoption of the Draft Code, the 1998 Statute of the International Criminal Court did not give this Court the power to know of cases of ecocide in peacetime, but recognised serious environmental

⁴⁸⁰ ILC, *Yearbook of 1995, Vol. II, Part I*, UN doc: A/CN.4/SER.A/1995/Add.1 (Part 1), 33-50, para. 6-8.

⁴⁸¹ Gauger *et al* (*The Ecocide Project*, 11) berate the decision to the then ILC Chair, Ahmed Mahiou, but the truth is that it was not responded with much resistance either within the Commission or beyond.

⁴⁸² Article 20(g) of the Draft Code: “In the case of armed conflict, using methods or means of warfare not justified by military necessity with the intent to cause widespread, long-term and severe damage to the natural environment and thereby gravely prejudice the health or survival of the population and such damage occurs.”

⁴⁸³ Final Draft Code of Crimes against the Peace and Security of Mankind, as adopted by the International Law Commission at its 48th session: ILC, *Yearbook of 1996, Vol. II, Part 2*, UN doc: A/CN.4/SER.A/1996/Add.1 (Part 2), 15-56, para. 46.

⁴⁸⁴ Christian Tomuschat, Crimes Against the Environment, *Environmental Policy and Law*, 26:6 (1996), 243.

damage as a form of war crime in Article 8(2)(b)(iv),⁴⁸⁵ in line with the Draft Code of Crimes Against Peace and Security of the ILC.

The meaning of ecocide is not clear. Neither initial norm entrepreneurs in the 1970s nor UN high-ranking officials in the 1980s and 1990s stated clearly if ecocide was a distinct international crime, a form of genocide, a form of crime against humanity, or indeed a form of war crime. The Sub-Commission on Prevention of Discrimination and Protection of Minorities left the question unanswered, and the International Law Commission finally decided to narrow environmental damage to the serious violations of humanitarian law that constitute war crimes. This was not a revolution from customary practice after what the international community had agreed to in Additional Protocol I in 1977.

5.2.2. Was ecocide burdensome?

The inclusion of ecocide in the list of international crimes against peace and security would have made of it one of the most burdensome norms in the international human rights regime. Genocide, war crimes and crimes against humanity are widely considered the worst kinds of human rights violations. Their prohibition is a peremptory norm of international law. Countries are supposed to outlaw these crimes in their national legislation. They can trigger international prosecutions by the International Criminal Court, international tribunals or hybrid courts, as well as national courts in application of universal jurisdiction. For some, these crimes may even justify a military intervention with humanitarian purposes (see chapter 7, on the Responsibility to Protect).

As we have seen, in the end ecocide did not reach the status of international

⁴⁸⁵ Article 8(2)(b)(iv): “Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated”.

crime against peace. However, environmental damage was prohibited in Protocol I in 1977, and it was treated as a form of war crime by the International Law Commission in 1996, and confirmed as such in the 1998 Statute of the International Criminal Court. If war crimes are the most serious violations of international humanitarian law, and if they are one of the international crimes against peace, they must unleash the legal and political consequences mentioned in the previous paragraph. Therefore, one would expect that the prohibition of intentional environmental damage, when occurring in armed conflict, would be a very burdensome norm for states. But reality is quite different.

Firstly, although the International Law Commission did not specify it in 1996, both customary international humanitarian law and the Statute of the International Criminal Court restrict the prohibition only to international armed conflicts, not to non-international ones, which are the majority of conflicts nowadays.⁴⁸⁶

Secondly, according to the authoritative interpretation of the International Committee of the Red Cross, the wording of Article 8(2)(b)(iv) of the ICC Statute would be more restrictive than customary international humanitarian law on the protection of the environment.⁴⁸⁷ On a more positive note, unlike the ILC Draft Code, the ICC Statute may be considered ecocentric and not anthropocentric, insofar as it does not seem to require harm to human health or survival to meet the threshold of the crime. However, the provision is full of vague terms, such as “*widespread, long-term and severe damage*”, “*clearly excessive*” or “*overall military advantage*”, and the intentionality is entirely subjective since the perpetrator is supposed to “*know*” the environmental consequences of their attack, all of which makes it too difficult not to deem the environmental damage compensated by military necessity (emphasis added).⁴⁸⁸

⁴⁸⁶ ICRC, *Customary International Humanitarian Law. Volume I*, 575.

⁴⁸⁷ *Id.*, 583.

⁴⁸⁸ Time will tell about the effects of Prosecutor’s Office’s announcement of their intention to prioritise cases where environmental damage played a significant role, in the form of “illegal

Thirdly, and most importantly, post-conflict environmental assessments conducted by the UN Environmental Programme between 1999 and 2009 show that international humanitarian law has been ineffective in protecting the environment “due to the stringent and imprecise threshold required to demonstrate damage”; and, in the absence of a precautionary approach, the general international humanitarian principles of distinction, necessity and proportionality are impracticable to limit environmental damage in the face of the all-powerful requirements of military necessity.⁴⁸⁹

In conclusion, at least when it happens in the context of an international armed conflict, the prohibition of deliberate environmental damage in international humanitarian law could in principle be a burdensome norm for the state. However, this has hardly been the case in practice due to the rigorous language with which the prohibition has been written in international humanitarian and criminal law.

5.2.3. Did ecocide fit with liberal principles?

According to Order-over-Justice, Western European states would promote norms that are aligned with liberalism. One of liberal principles is that individual human beings are the rights-holders. This fundamental premise of the international human rights regime is not held in the case of ecocide.

Contemporary norm entrepreneurs argue that ecocide is more in line with Lemkin’s original notion of genocide than with the idea of genocide proclaimed in the 1948 Convention.⁴⁹⁰ Lemkin had advocated the protection of social groups from “cultural destruction”.⁴⁹¹ Genocide would not only be

exploitation of natural resources or the illegal dispossession of land” (Office of the Prosecutor of the International Criminal Court, *Policy paper on case selection and prioritization*, 15 September 2016, para. 41).

⁴⁸⁹ UNEP, *Protecting the Environment During Armed Conflict*, 4-5.

⁴⁹⁰ For example, Martin Crook and Damien Short, Marx, Lemkin and the genocide-ecocide nexus, *International Journal of Human Rights*, 18:3 (2014), 304.

⁴⁹¹ Raphaël Lemkin, “Les actes constituent un danger général (interétatique) considérés comme délites des droit des gens”, in Pedone, A., *Librarie de la cour d’appel et de l’ordre des avocates*

committed with the physical destruction of a group by killing all or most of its members, but also by attempting to disintegrate “the economic existence” of such group.⁴⁹² However, by reading Lemkin’s own appraisal of the then ongoing drafting process of the 1948 Convention on Genocide, it is very hard to believe that he had the protection of nature in mind.⁴⁹³ His focus was rather on the effective protection of minorities and on states’ obligations to prevent and punish attacks against them wherever these attacks took place.

Be that as it may, the fact that some ecocide promoters refer to Lemkin as one of their intellectual forefathers suggests that they adopt an anthropocentric approach to nature. In other words, they would see the prohibition of ecocide as a tool to protect nature inasmuch as a healthy environment is in humans’ interests because nature conditions humans’ existence. This anthropocentric approach is followed in the 1977 Additional Protocol I to the Geneva Conventions, whose Article 55(1) prohibits the use of certain means of warfare that may damage the environment and “prejudice the health or survival of the population”.

Nonetheless, while human rights law intends to “protect existing individuals within a given society”, environmental law tries to “sustain life globally by balancing the needs and capacities of the present with those of the future”.⁴⁹⁴ Just like military necessity and the protection of the environment in the ecocide-lite of the international humanitarian law (subsection 5.2.2), it is not difficult to fathom situations where protecting nature may recommend not going forward with a large development project that could otherwise favour the general enjoyment of socioeconomic rights, for instance the right to work. If the international human rights regime contains a set of claims humans hold against public authorities within a certain jurisdiction, it is not self-evident

(Paris, 1933).

⁴⁹² Raphaël Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation – Analysis of Government – Proposals for Redress* (Washington DC: Carnegie Endowment for International Peace, 1944), 79.

⁴⁹³ Raphaël Lemkin, Genocide as a Crime under International Law, *American Journal of International Law*, 41:1 (1947).

⁴⁹⁴ Dinah Shelton, Human Rights, Environmental Rights, and the Right to Environment, *Stanford Journal of International Law*, 28 (1991), 111.

who is to be protected by ecocide, who holds the right not to be a victim of ecocide.

Some norm promoters make a radical proposal. The British barrister Polly Higgins says she decided to work on ecocide when she realised that “the Earth needs a good lawyer”.⁴⁹⁵ For her, the Earth would therefore be the rights-holder to be protected by the global prohibition of ecocide. This approach would probably be shared by indigenous peoples, whose identity and collective existence is not only linked but depends on nature, on the Earth and land they step on and live through.⁴⁹⁶ It is worth-noting the 2008 Constitution of Ecuador, which has a whole chapter on the “Rights of Nature” or “Pacha Mama”, as the Earth is known in indigenous languages in Latin America. Indeed, at the Paris Conference on Environmental Change in November 2015, President Correa made an appeal for a “universal declaration of the rights of nature”, and for the creation of an “international court of environmental justice” to sanction attacks against the rights of nature and to enforce obligations regarding the “environmental debt”.⁴⁹⁷ Another example is Bolivia, which adopted a Law of Rights of Mother Earth in 2010.⁴⁹⁸ The Government of Bolivia also drafted a Universal Declaration of the Rights of Mother Earth in 2009, which did not pass at the General Assembly, but since then, Bolivia has sponsored annual UN General Assembly resolutions on “harmony with nature”.⁴⁹⁹

With the progressive recognition of indigenous peoples’ different cosmologies, the discourse of *rights of nature* or *rights of Mother Earth* is gaining momentum in some parts of South America. Yet, it is hard to imagine it seriously endorsed by Western European states, whose industrialisation

⁴⁹⁵ Polly Higgins, “Ecocide, the 5th Crime Against Peace”, talk at TEDxExeter, 2 May 2012.

⁴⁹⁶ The connection to the land is of paramount importance in the 1989 Convention No. 169 of the ILO on Indigenous and Tribal Peoples and in the 2007 UN Declaration on the Rights of Indigenous Peoples.

⁴⁹⁷ President Correa’s speech of 30 November 2015: <http://www.presidencia.gob.ec/wp-content/uploads/downloads/2016/01/DISCURSO-COP21-FRANCIA.pdf>

⁴⁹⁸ From Alan Vargas Lima, El derecho al medio ambiente sano en la Nueva Constitución Política del Estado Plurinacional de Bolivia, *Anuario de Derecho Constitucional Latinoamericano*, 18 (2012).

⁴⁹⁹ Carlos Mamani and Bartolomé Clavero, *Study on the need to recognize and respect the rights of Mother Earth*, 15 January 2010.

was only possible thanks to the systemic exploitation of natural resources and the prospect of limitless consumption. Derived from liberalism, Western European states have a very different tradition and understanding of the idea of human rights. This does not mean that Western European countries cannot build institutions and cooperate on environmental matters, but only that they would not use international human rights standards or mechanisms to do so. This is notwithstanding the fact that some Western norm entrepreneurs, like Polly Higgins, may campaign for a different notion of human rights.

It is therefore uncertain how proclaiming the Earth as rights-holder can be compatible with the liberalism behind Western European states' idea of IHRL. Seeking ways to ensure that economic growth is sustainable is one thing; putting limits to capitalist accumulation because the Earth has rights is quite another. It is no less challenging for those who argue that "future generations" can have rights.⁵⁰⁰ The 1972 Stockholm Declaration on the Human Environment, and the more recent international law of indigenous peoples, refer loosely to the obligations that present generations have vis-à-vis future ones, but they do not treat future generations as rights-holders and present ones as corresponding duty bearers. It is hardly conceivable that Western European states would proactively uphold such approach to international human rights.

Apart from this indeterminacy regarding the rights-holder, ecocide also poses a challenge to the human rights regime because environmental damage often has extraterritorial effects. Internationally recognised human rights impose obligations on states within their jurisdiction. Particularly since the 1990s, human rights bodies have defended the idea that jurisdiction does not have to be exclusively territorial, but states often resist the extension of obligations beyond their borders.⁵⁰¹ Insofar as nature does not know of customs and checkpoints, if they were to take ecocide seriously, states would

⁵⁰⁰ Like Edith Brown-Weiss, Our Rights and Obligations to Future Generations for the Environment, *American Journal of International Law*, 84:1 (1990).

⁵⁰¹ As seen in chapter 4 regarding the UK's position on the application of international human rights standards in armed conflict. See also the 2011 Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights (chapter 6).

have to be willing to accept that human rights naturally unfold extraterritorial obligations for duty bearers. In other words, they would have to agree that the justice-based goal of protecting human rights globally trumps the order-based principle by which human rights are a shield to sovereign power exercised within a certain jurisdiction, generally (yet not solely) equated to territory.

In sum, because of the lack of definition of the rights-holder and the intrinsic extraterritoriality of environmental damage, it is extremely hard to make ecocide fit within Western European states' idea of the international human rights regime, defined by liberalism and by international order more than by global justice.

5.2.4. Did strong and resourceful norm entrepreneurs endorse the international criminalisation of ecocide?

Order-over-Justice expects that Western European states will be keener to promote norms that are endorsed by strong and resourceful entrepreneurs. Ecocide did not benefit from them.

As explained earlier (5.2.1), some scientists and legal scholars advanced the idea of ecocide in the 1970s, and there is no doubt that the highest point of ecocide came quite soon with Olof Palme's remarks at the opening ceremony in Stockholm in 1972. However, Palme was absolutely clear in keeping his words contained to the scope of armed conflict, which would eventually result in the known provisions of Additional Protocol I. The idea was also briefly explored in two reports on the prevention and punishment of genocide of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, in 1978 and in 1985, but the Sub-Commission did not take the issue any further. And for about one decade the International Law Commission considered formulating ecocide as an international crime of its own, or at least as a form of crime against humanity, but the idea was

discarded for good in 1996, which led to no consequence other than the word 'ecocide' rotting in oblivion for nearly 15 years.

If the norm entrepreneurs that endorsed Ecocide I in the 1970s were not great in number or in influence, neither are for now the ones behind Ecocide II. Similar to Falk with his draft international convention on ecocide,⁵⁰² in 2010, Polly Higgins wrote an amendment to include ecocide in the ICC Statute.⁵⁰³ To this day, no country or major environmental NGO has endorsed Higgins's call.⁵⁰⁴ In January 2013, a group of activists drafted an EU directive and campaigned for a European Citizens Initiative "to give the Earth rights" and to outlaw ecocide.⁵⁰⁵ The initiative was finally archived when it failed to reach the target of one million signatures required to make the European Commission react in any way.⁵⁰⁶

No regional human rights court, UN human rights treaty-body, or Human Rights Council Special Procedure mandate holder has ever mentioned ecocide in their reports (section 5.1). In 1994, the Special Rapporteur on human rights and the environment appointed by the Sub-Commission on Prevention of Discrimination and Protection of Minorities made a link between the environment and international peace and security, echoing the then ongoing work of the ILC as well as the question on nuclear weapons that had been posed to the consideration of the International Court of Justice.⁵⁰⁷ She also made a reference to applicable international humanitarian standards on armed conflict.⁵⁰⁸ However, in 2012, the UN Independent Expert on human rights obligations relating to the environment, John Knox, said nothing about international humanitarian or criminal law, and in relation to corporate responsibility he chose to draw attention to the much

⁵⁰² Falk, *Environmental Warfare and Ecocide*.

⁵⁰³ Polly Higgins, *Eradicating Ecocide: Laws and Governance to Stop the Destruction of the Planet* (London: Shephard-Walwyn, 2010), ch. 5 and 6.

⁵⁰⁴ Website of Higgins's campaign: <http://eradicatingecocide.com/>

⁵⁰⁵ Sailesh Mehta and Prisca Merz, *Ecocide – a new crime against peace?*, *Environmental Law Review*, 17:1 (2015). Text of the directive: <http://eradicatingecocide.com/the-law/ecocide-directive/> Campaign website: www.endecocide.eu

⁵⁰⁶ Details at: <http://ec.europa.eu/citizens-initiative/public/initiatives/obsolete/details/2013/000002>

⁵⁰⁷ Fatma Zohra Ksentini, *Human Rights and the Environment*, 1994, para. 111-116.

⁵⁰⁸ *Id.*, 95-110.

laxer Guiding Principles on Business and Human Rights.⁵⁰⁹

In sum, while human rights bodies and activists have advocated a human rights-based approach to environmental protection, ecocide was not supported by resourceful and well-targeted campaigns endorsed by key players.

5.3. Spain, the UK and ecocide: Evolution over time

According to the idea of Order-over-Justice, considering the importance of the passage of time in states' endorsement of human rights norms, Western European countries would be more likely to promote human rights-related norms at the early stage of their life (P1), and less likely to challenge them once these norms have become part of the human rights regime (P2).

A caveat is necessary at this point, because as we have seen in section 5.2, the idea of ecocide as a distinct crime was never engrained in international law. However, ecocide-lite was enshrined in international humanitarian law, first in the form of prohibition of deliberate environmental damage that may affect human interests (in Additional Protocol I of 1977), and progressively in customary law until being included in the list of war crimes in the ICC Statute of 1998, as had been recommended by the International Law Commission in 1996.

Since ecocide never got to a point of advanced development, it is only possible to assess the extent to which countries did not challenge the norm in relation to the ecocide-lite, the only version of the norm that ultimately received some sort of recognition in international law. In other words, considering that ecocide is an example of a failed norm, P1 can be explored adequately, but P2 only in relation to ecocide-lite, which is the version of ecocide that stood the test of time.

⁵⁰⁹ Knox, *Report of the Independent Expert*, para. 50.

Focusing on Spain and the UK, this section will explore the evolution of Western European states' practice (action and discourse) towards ecocide, understood both as a crime in its own and as a war crime. The analysis will start from the drafting processes of the Protocol I to the Geneva Conventions in 1977 and of the Statute to the International Criminal Court in 1998. It will continue with states' interaction with the work of the Sub-Commission on Prevention of Discrimination and Protection of Minorities and the International Law Commission in particular in 1978 and early 1990s. The last subsection will look into state practice regarding criminalisation of ecocide at the domestic level.

As will be seen, unlike the UK, when it had the opportunity in the relevant international forums Spain did not make its opinion known about the international prohibition of ecocide. Hence, the analysis in subsections 5.3.1 and 5.3.2 looks more to the UK, with references to other countries as well. Subsection 5.3.3, on national legislation and practice, however, is informed by both cases.

5.3.1. From 1977 Additional Protocol I to 1998 ICC Statute

Additional Protocol I has two protective provisions of the natural environment in international armed conflicts. Articles 35(3) and 55 prohibit the use of methods or means of warfare that may cause "widespread, long-term and severe damage" to the natural environment putting at risk the health and life of the population; they also forbid carrying out reprisals against natural environment.

In its official Commentary on Additional Protocol I, the International Committee of the Red Cross admits that the initial draft had not contained specific provisions to protect the environment specifically, and the inclusion of these two provisions in the treaty was due to concerns expressed by several state delegations: Australia, Czechoslovakia, German Democratic

Republic, Hungary, Sweden and Yugoslavia.⁵¹⁰

After long deliberation and drafting committees, the inclusion of Articles 35(3) and 55 was adopted by consensus at a plenary meeting.⁵¹¹ The UK was the only country to oppose Article 35(3) because it considered the paragraph superfluous. It did so with the following statement:

"We regard this paragraph as otiose repetition of Article 48 bis [Article 55 in the final version] and would have preferred that paragraph 3 not be included in this Article. We consider that it is basically in order to protect the civilians living in the environment that the environment itself is to be protected against attack. Hence the provision on protection of the environment is in our view rightly placed in the section on protection of civilians. Now that Article 33 has been adopted with paragraph 3, we shall interpret that paragraph in the same way as Article 48 bis, which in our view is a fuller and more satisfactory formulation."⁵¹²

The *travaux préparatoires* do not show contributions or engagement from Spanish delegates regarding Article 35(3) or Article 55. Spain ratified the 1977 Additional Protocol I in 1989, and its few interpretative declarations did not concern any of the two articles.

The UK, on the other hand, ratified it in 1998, but issued interpretations regarding the two provisions related to environmental damage. Firstly, the UK said that "the risk of environmental damage [...] is to be assessed objectively on the basis of the information available at the time"; the UK also interpreted Articles 51-55 under the premise of reciprocity from any other party the UK may be militarily engaged with.⁵¹³

After nearly fifty years of deliberation about international crimes under the roof of the International Law Commission, the official records of the Rome Conference of June-July 1998 show that the inclusion of Article 8(2)(b)(iv) in the Statute of the International Criminal Court did not generate much

⁵¹⁰ Official Records, Vol. III, 220-221, CDDH/III/60 and 64, 19 March 1974; Vol. V, 105, CDDH.SR.11, para. 22, 139, CDDH/SR.13, para. 61, 141, CDDH/SR.14, para. 3, 5-7 March 1974.

⁵¹¹ ICRC, *Commentary on the Additional Protocols*, 419 and 662-663.

⁵¹² Id, 420. Official Records, Vol. VI, 118, CDDH/SR.39, Annex, 25 May 1977. The Argentinian delegate said they would have abstained had it been put to a vote (p. 113).

⁵¹³ Ratifications, reservations and declarations at: https://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=470

controversy among states.⁵¹⁴ This might come as a surprise considering that the ICC Statute does not require the environmental damage to harm human health or survival. Therefore, one could consider it more protective of the environment than the more anthropocentric Additional Protocol I (see above, subsection 5.2.3). On the other hand, Article 8(2)(b)(iv) is written in such cryptic and ambiguous terms that it would make the case very difficult for the prosecution, and vice versa, very easy for the defence, would it ever be applied (subsection 5.2.2).

Spain ratified the ICC Statute in 2000, and the UK did so in 2001. In one of its declarations, the UK confirmed and drew to the attention of the Court the declarations it had made, inter alia, to the Additional Protocol I to the Geneva Conventions.

We can observe that, in spite of not being persuaded in 1977 by the idea of environmental protection in international humanitarian law, the UK finally ratified the Additional Protocol in 1998, and furthermore accepted its status in the list of war crimes when ratifying the ICC Statute in 2001, notwithstanding the caveats in the form of interpretive declarations.

5.3.2. States' interaction with UN bodies

In 1978 and 1985, the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities considered whether ecocide could be a distinct international crime or at least a form of a more broadly defined genocide. According to the 1978 report, apart from the Vatican, only one country expressed support to the idea: Romania.⁵¹⁵ However, a number of states rejected the possibility of revisiting the 1948 Convention on Genocide. The UK was the only one to make a very emphatic statement against the

⁵¹⁴ ICRC, *Customary International Humanitarian Law. Volume I*, 583. Official records are available at: <http://legal.un.org/diplomaticconferences/icc-1998/icc-1998.html>

⁵¹⁵ Ruhashyankiko, *Study of the Question of the Prevention and Punishment of the Crime of Genocide*, para. 465-466.

international criminalisation of ecocide:

“There is no definition of the term ‘ecocide’ and it would appear that the term is incapable of carrying any precise meaning. The term has been used in certain debates for the purposes of political propaganda and it would be inappropriate to attempt to make provisions in an international Convention for dealing with matters of this kind.”⁵¹⁶

The 1985 Special Rapporteur of the Sub-Commission had received input from a number of countries, including Spain, but not the UK.⁵¹⁷ However, the Special Rapporteur only referred to ecocide in passing in one paragraph, and the Sub-Commission never addressed the issue again.⁵¹⁸

For its part, the International Law Commission also debated for more than one decade whether ecocide could be considered an international crime, or perhaps a form of war crime or even a crime against humanity. All options were on the table at one point or another.

In 1993, the ILC received 12 written comments from 16 countries (Denmark, Finland, Iceland, Norway and Sweden submitted a joint document) in relation to proposed Article 26, which prohibited ecocide in peacetime. Australia, Austria, Belgium, Greece, Paraguay and Uruguay expressed their support, and even defended the removal of the word “wilfully” from the clause, which they deemed too restrictive. The UK, together with the Netherlands, the Nordic countries and the USA, rejected it. Brazil and Poland expressed more ambiguous positions.⁵¹⁹

On the other hand, when the ILC Special Rapporteur got rid of Article 26, the decision received negative feedback from country delegates at the UN General Assembly Sixth Committee (Legal) in 1995. The states that defended the inclusion of a provision on ecocide in the Draft Code of Crimes Against Peace and Security came from different continents: Guatemala, Bulgaria, Croatia, Switzerland, Chile, Slovenia, Belarus, Trinidad and Tobago, Morocco,

⁵¹⁶ Id, para. 468.

⁵¹⁷ Whitaker, *Revised and updated report on the question of the prevention and punishment of the crime of genocide*, para. 10.

⁵¹⁸ Id, para. 33.

⁵¹⁹ ILC, *Yearbook of 1993, Volume II, Part I*, UN doc: A/CN.4/SER.A/1993/Add.I (Part 1), 59-109.

Egypt, Jamaica, Burkina Faso, Malaysia, Italy and Bangladesh. However, most of those who endorsed its removal, or at least expressed doubts about the pertinence of its inclusion, were Western countries: France, Brazil, the Czech Republic, United States, New Zealand and Germany.⁵²⁰

The interaction with the Sub-Commission on Minorities and with the International Law Commission shows that the UK expressed a clearly negative view of ecocide in 1978, and reiterated it in 1993. Other countries in Western Europe and elsewhere adopted a more sympathetic attitude towards the idea in the 1990s.

5.3.3. Domestic law and practice on ecocide

Not surprisingly, most countries do not criminalise ecocide in their domestic legislation. Vietnam and a number of ex Soviet countries are the exception: Armenia, Belarus, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Ukraine and Vietnam.⁵²¹

Of course, many other countries, including European ones, adopt protective measures of the environment in their criminal law. Of particular importance in this regard is Directive 2008/99/EC of the European Parliament and the Council, of 19 November 2008, on the protection of the environment through criminal law, which had to be transposed in all 28 Member States.⁵²²

However, in line with the development of international criminal law presented above and with the list of international crimes against peace and security, according to the most authoritative database of state practice of the

⁵²⁰ ILC, *Yearbook of 1996, Vol. II, Part 1*, UN doc: A/CN.4/SER.A/1996/Add.1 (Part 1), 15-28, para. 10.

⁵²¹ ICRC, *Customary International Humanitarian Law. Volume II: Practice* (Cambridge: Cambridge University Press, 2005), ch. 14, 876-903, para. 189, 192, 204, 205, 207, 212, 215, 217 and 219. Oddly enough, during NATO intervention in Kosovo in 1999, a Minister of the Government of the then Federal Republic of Yugoslavia accused NATO forces of committing an “ecocide” in his country (Id, 896-897).

⁵²² Official Journal of the European Union L-328, 6 December 2008, 28–37. Find out more about domestic implementation at: http://ec.europa.eu/environment/legal/crime/legis_en.htm

International Committee of the Red Cross, no European country includes ecocide as a distinct international crime in their national legislation.

Ecocide does not appear in Title 24 of the 1995 Spanish Criminal Code, devoted to “crimes against international community”, but the Code sanctions the deliberate environmental damage in armed conflict, international or not, with ten to 15 years in prison.⁵²³ Spain’s 2007 Manual on the Law of Armed Conflict referred to the Additional Protocol I and to the 1976 Environmental Modification Convention, as did the 1996 version.⁵²⁴ The 2009 Royal Ordinances of the Armed Forces affirm that these Forces must not use means or methods of warfare prohibited in international law that may cause widespread, long-term and severe damage to the natural environment.⁵²⁵ The current Criminal Code is therefore in line with the Statute of the International Criminal Court, and the Manual of Law of Armed Conflict and the Royal Ordinances of the Armed Forces follow Additional Protocol I and customary international humanitarian law. By contrast, the old 1973 Criminal Code was frugal in relation to crimes of international law, and did not sanction war crimes or crimes against humanity.⁵²⁶

The UK does not single out ecocide either, but since 2001 war crimes are punishable in accordance with the definition of the ICC Statute; before 2001, the definition of war crimes was that of the Geneva Conventions Act, which did not cover environmental concerns.⁵²⁷ The UK made clear in its 1981 Manual of the Law of Armed Conflict and in the statement to the International Court of Justice in 1995 on the occasion of the *Nuclear Weapons case* that it considered the restriction of use of means and methods to apply only to

⁵²³ ICRC, *Customary International Humanitarian Law. Volume II*, 907. Article 610 of the Criminal Code (Organic Law 15/2003, of 25 November, modifying Organic Law 10/1995, of 23 November, Official Gazette No. 283).

⁵²⁴ Updated state practice on customary international humanitarian law: https://www.icrc.org/customary-ihl/eng/docs/v2_rul_rulP35

⁵²⁵ Article 114 of the Royal Decree 96/2009, of 6 February, adopting the Royal Ordinances of the Royal Forces (Official Gazette No. 33).

⁵²⁶ Decree 3096/1973 (Official Gazette, 12 December 1973).

⁵²⁷ Article 50(1) of the International Criminal Court Act (2001, c. 17); Geneva Conventions Act (1957, c. 52, Regnal. 5 and 6 Eliz 2).

conventional weapons, not nuclear weapons.⁵²⁸ The 2004 Manual, however, does not mention this exception.⁵²⁹

In sum, ecocide is not a crime in most countries. Ecocide-lite, on the other hand, has been domesticated in the UK and Spain. And, considering the ICRC's analysis of state practice of customary international humanitarian law, many other countries seem to have done so too.

5.4. Conclusions

This chapter leads to one firm conclusion. While the window of opportunity was half open, between the 1970s and 1990s, no country volunteered to champion the cause of ecocide as a distinct international crime, and some of them were particularly vocal in their opposition, especially the UK. The international criminalisation of the deliberate destruction of the environment, either in peacetime or at war, was mostly the concern of a handful of norm entrepreneurs. Only a few states showed some willingness to consider it, but they did so with diplomatically and normatively weak tools, in the form of statements made at the UN General Assembly Sixth Committee, and communications sent to independent UN rapporteurs. With a few relatively exotic exceptions, ecocide is not recognised as a crime at the national level either.

On the other hand, the protection of natural environment in international armed conflict proved more successful, and it did so rather quickly, in the very first decade of the campaign in the 1970s. According to *travaux préparatoires*, the ICRC analysis of evolving state practice and UN consultations with member states, Western Europe was no more proactive than others in seizing the opportunity of the negotiation of the Additional Protocol I to prohibit ecocide in international humanitarian law. The

⁵²⁸ ICRC, *Customary International Humanitarian Law. Volume II*, 882 and 894.

⁵²⁹ https://www.icrc.org/customary-ihl/eng/docs/v2_rul_rulP35

exception would be Sweden, whose Prime Minister Olof Palme had actually put ecocide at the vanguard of environmental diplomacy with his speech at the Stockholm Conference. The UK was the only country to reject the inclusion of Article 35(3) in the 1970s because it considered it superfluous. By 1998, the UK ratified the Additional Protocol, and although its declarations when ratifying the Protocol, and again with the ICC Statute in 2001, may water down the effectiveness of the treaty vis-à-vis British forces, at least the UK did not introduce a reservation to any of the relevant provisions.

With their practice and national legislation, both the UK and Spain have been showing for a number of years that they accept that the deliberate destruction of natural environment in armed conflict, at least in international armed conflict, is a war crime.

The analysis confirms the proposition of Order-over-Justice according to which, despite some possible doubts at earlier stages, Western European states would not resist a human rights norm once it has reached a point of settlement in international law.

Order-over-Justice predicts that Western European states would be more inclined to support unclear and weaker norms that fitted with liberalism and were promoted by powerful norm entrepreneurs. This chapter shows that ecocide suffered from serious problems of clarity, since the same term has been used to refer to a form of war crime, a crime against humanity, genocide and a new and different international crime against peace and security. The prohibition of ecocide could have imposed burdensome obligations on states, but the vagueness of the legal terminology and the apparent high threshold made it insufficiently effective. It is difficult to match ecocide with some liberal principles of the human rights regime regarding the definition of the rights-holder and the territorial confines where rights are meant to be protected. Ecocide did not enjoy the support of strong norm entrepreneurs, and never resonated in the corridors of independent human rights bodies in Geneva, Strasbourg or elsewhere. In other words, ecocide met one of the four

non-temporal propositions, that of clarity, but undoubtedly did not meet two other, those on liberalism and norm entrepreneurs, and was at the very least ambiguous in relation to the fourth one, on burden.

The natural environment is the home of all commons, and the story of ecocide attests that taking it seriously poses a radical challenge to our international society. That may explain why ecocide and related environmental campaigns such as the frustrated declaration on the rights of Mother Earth have so far had a hard time in the international human rights legal framework.

Contemporary promoters of the revival of ecocide (Ecocide II) do not agree that international criminal law on environmental protection should be confined to armed conflict. This second wave of norm entrepreneurs wants to apply ecocide to peacetime situations,⁵³⁰ and refers to it as “the missing 5th crime against peace”.⁵³¹ They see in ecocide a potentially effective tool to address contemporary environmental problems, ranging from water and air pollution, deforestation, climate change, violations of indigenous peoples’ rights, financial investment in non-renewable energy sources, or land-grabs by extractive industries. I do not question the moral standing of the protection of the global environment, or the case for recognising the Earth as a rights-holder. Time will tell if this second campaign does not run into the sand, but the new generation of ecocide promoters ought to beware that their predecessors faced unequivocal opposition from states.

⁵³⁰ Allan Gray, The International Crime of Ecocide, *California Western International Law Journal*, 26 (1996).

⁵³¹ Higgins, *Eradicating Ecocide*; Gauger *et al*, *The Ecocide Project*, 11; Polly Higgins, Damien Short and Nigel South, Protecting the Planet: A Proposal for a Law of Ecocide, *Crime, Law and Social Change*, 59:3(2013); Mehta and Merz, Ecocide – a new crime against peace?

6. JUSTICIABILITY OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

“Equality has become a dirty word because it has come to be associated with the worst aspects of pointless political correctness and social engineering. [...] Government will no longer dictate how people should behave. Instead we will put in place an architecture to support business and wider society to do the right thing.”

Theresa May, 17 November 2010.⁵³²

This chapter begins with a brief introduction to the proclamation of economic, social and cultural rights (ESCR) in the international legal systems of human rights (section 6.1). This is followed by the analysis of the level of clarity of the norm, how burdensome it is, the extent to which it fits in liberal parameters, and the role of non-state norm entrepreneurs in defending the need to make economic, social and cultural rights justiciable (6.2). Then, the chapter critically interprets the attitude of the UK and Spain, in the Western European context, vis-à-vis the justiciability of ESCR since the mid 1990s, by looking at the ratification of relevant treaties, their position in the drafting processes of the 2000 EU Charter of Fundamental Rights and the 2008 Optional Protocol to the International Covenant on ESCR, their responses to independent human rights mechanisms at the UN and the Council of Europe, and judicial enforceability of ESCR at the internal level (6.3).

6.1. ESCR and their justiciability in international law

ESCR are covered by Articles 22-28 of the 1948 Universal Declaration of Human Rights (UDHR). Article 23 recognises the right to work, Article 24, the right to rest and leisure, Article 25, the right to social security and an

⁵³² Theresa May, “Socio-economic duty to be scrapped”, 17 November 2010: <https://www.gov.uk/government/news/socio-economic-duty-to-be-scrapped--2>

adequate standard of living (from which many ESCR derive), Article 26, the right to education, Article 27, the right to take part in cultural life and to enjoy the outcome of cultural production, and finally Article 28 requires a “social and international order” in favour of human rights.

ESCR are also recognised in a number of treaties ratified by countries from all over the world, the most important of which is the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), which entered into force in 1976.⁵³³ Some years later the UN set up an independent body to oversee states’ compliance with it: the UN Committee on Economic, Social and Cultural Rights (CESCR).

ESCR were also proclaimed at the European level. However, while the European Convention on Human Rights provided protection to civil and political rights as early as 1950, ESCR had to wait until 1961, when Member States of the Council of Europe adopted the European Social Charter. All Western European states, with the exception of Switzerland and Liechtenstein, have ratified it.⁵³⁴ The Charter is very much labour-focused, with a long list of rights related to work (Articles 1-10 and 18-19), the protection of health, social security and welfare (Articles 11-14), protection of people with disabilities (Article 15) and protection of family, mothers and children (Articles 16-17). This list of rights was extended in 1988 with an Additional Protocol that has only been ratified by ten countries, Spain among them, but not the UK. A revised version of the European Social Charter was adopted in 1996, but several European countries have failed to ratify it, including Spain and the UK.

After years of negotiations, under the UN umbrella the Optional Protocol to the ICESCR was adopted in 2008, and entered into force in 2013. The main innovation of this treaty is that it allows individuals under the jurisdiction of a State party to lodge a complaint to the CESCR for the violation of any of the

⁵³³ Other human rights treaties also contain provisions on ESCR. It is the case of the 1965 Convention on the Elimination of Racial Discrimination, the 1979 Convention on the Elimination of Discrimination against Women, or the 1989 Convention on the Rights of the Child.

⁵³⁴ The ratification scorecard is available at:

http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/TreatiesIndex_en.asp

rights recognised in the ICESCR. A similar procedure had been working for civil and political rights for four decades. Section 6.2 will explain the political and normative reasons behind this different treatment.

6.2. What does Order-over-Justice mean for the justiciability of ESCR? Clarity, burden, liberalism and norm entrepreneurs

Order-over-Justice predicts that, within the human rights regime, Western European states prefer norms that are less clear (P3) and less burdensome (P4), norms matching liberal principles (P5), and that are promoted by strong and resourceful norm entrepreneurs (P6).

6.2.1. Is the meaning of justiciability of ESCR clear?

The inclusion of ESCR into the UDHR and its subsequent recognition in international law was a complex process where Western European states played a significant role.

The Commission on Human Rights, a subsidiary body of the UN Economic and Social Council (ECOSOC), had been established in February 1946. Conformed by states elected by the Members of ECOSOC, its first mission was to draft an international bill of rights.⁵³⁵ Small nations wanted a treaty that would bind large and small nations alike, but the US and the Soviet Union were satisfied with a declaration of the General Assembly.⁵³⁶ The UK was one of the strongest advocates of a binding treaty. In the end, a Chinese and

⁵³⁵ ECOSOC Resolution 9 (II), of 21 June 1946, adopting the terms of reference of the Commission on Human Rights, para. 7.

⁵³⁶ Morsink, *The Universal Declaration of Human Rights*, 15-20. The legal nature of General Assembly resolutions is a matter of academic dispute (see Blaine Sloan, General Assembly Resolution Revisited (Forty Years Later), *British Yearbook of International Law*, 58:1, 1987). At the very least, it is generally accepted that they have declaratory value (*opinio juris*), but they lack the binding nature of international treaties, which are sources of international law (Article 38 of the Statute of the ICJ).

French proposal gained momentum and, in July 1947, the Commission decided to proceed first with a declaration, and to move later to a formal treaty with measures of implementation.⁵³⁷

Article 22 UDHR sets the tone of the proclamation and future implementation of ESCR:

“Everyone, as a member of society, has the right to social security and is entitled to *realization*, through *national effort* and *international co-operation* and in accordance with the *organization and resources* of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.” (italics added)

This language is carefully carved. In his masterful commentary to the UDHR, Morsink writes that drafters carefully chose their words in order to blur the meaning of the obligations derived from Article 22: “entitlement to realization”, “national effort”, “international co-operation”, “in accordance with the organization and resources” of the state... were all vague enough to allow different and even contradictory interpretations within it.⁵³⁸

No similar language was used for civil and political rights (Articles 3-21 UDHR). For example, the prohibition of torture was stated in clear-cut terms (Article 5): “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”.

The UDHR was negotiated quickly and finally adopted on 10 December 1948, but the adoption of international legal obligations took considerably more time, up until 1966. In fact, in the end the General Assembly decided there were going to be two treaties, one on civil and political rights (ICCPR) and one on ESCR (ICESCR).⁵³⁹

After a long drafting process, the International Covenant on Civil and Political Rights (ICCPR) and the ICESCR were adopted in 1966. Both treaties were discussed in parallel and adopted on the same day, 16 December 1966, via

⁵³⁷ Report of the Drafting Committee on an International Bill of Rights to the Commission on Human Rights, UN doc. E/CN.4/21, 1 July 1947.

⁵³⁸ Morsink, *The Universal Declaration of Human Rights*, 222-232.

⁵³⁹ General Assembly, Resolution 543 (VI), Preparation of two draft international covenants on human rights, 5 February 1952.

one single UN General Assembly text (Resolution 2200 (XXI)). Both of them entered into force in 1976, three months after the 35th ratification (Articles 49 ICCPR and 27 ICESCR), only a few weeks apart. To this day, 169 countries have ratified the ICCPR, and 165 have ratified the ICESCR. Basically all European countries have ratified both covenants.⁵⁴⁰

The two treaties were adopted the same day, included in the same legal document, entered into force the same year and have achieved a similar number of ratifications. However, there are fundamental differences between them, both in terms of semantics and of implementation.

Firstly, the different treatment of ESCR and civil and political rights is clear in the words chosen for the second articles of their respective treaties, with important semantic implications. Article 2(1) ICCPR states plainly that:

“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

Yet, Article 2(1) ICESCR uses a much more cryptic language which, just like Article 22 UDHR, waters down the level of protection of the rights proclaimed therein:

“Each State Party to the present Covenant undertakes to *take steps*, individually and through international assistance and co-operation, especially economic and technical, to the *maximum of its available resources*, with a view to *achieving progressively* the full realization of the rights recognized in the present Covenant by *all appropriate means*, including particularly the adoption of legislative measures.”
(italics added)

Article 2(1) ICESCR is one of the most extensively interpreted clauses in international human rights law. Commentators and country delegates would regularly refer to its wording (“to take steps”, “maximum available resources”, “progressive achievement”, “all appropriate means”...) to question the standing of ESCR as opposed to civil and political rights. Regardless of

⁵⁴⁰ Andorra is the only European country that has not ratified the ICESCR. It has ratified the ICCPR, though. UN Status of Ratification Interaction Dashboard: <http://indicators.ohchr.org/>

academic interpretations, the truth remains that UN Member States chose a less than resolute language for ESCR.

The language of Article 22 UDHR and Article 2(1) ICESCR makes the meaning of the recognition of ESCR far from clear. Nonetheless, over time, scholars, practitioners and human rights bodies would try to build the case that judicial enforceability is one of those “appropriate means” to achieve the full realisation of ESCR (see more in subsection 6.2.4). This is an academic and jurisprudential construction, and the idea of justiciability is nowhere to be found in the treaties. That aside, assuming one accepts that international human rights treaties are living instruments and therefore justiciability could be derived from Article 2(1), its meaning would be relatively clear and operational.

6.2.2. Is making ESCR justiciable a burdensome requirement?

When compared with the norms examined in the other chapters, the justiciability of the ESCR recognised in international law appears far from onerous. This is due to three main reasons: a) the words used in international treaties; b) the existing compliance mechanisms; and c) the limited transformative potential of courts and tribunals in front of structural socioeconomic conditions in society.

Whelan and Donnelly have challenged the still widely spread view among academics that, in the context of the Cold War, ESCR were endorsed by the East while the West favoured civil and political rights.⁵⁴¹ Focusing on the institutionalisation of international human rights as an object of study, Whelan concludes that the summary records of UN negotiations, treaty and

⁵⁴¹ Jack Donnelly, “The West and Economic Rights”, in Hertel, Shareen and Minkler, Lanse (eds.), *Economic Rights: Conceptual, Measurement, and Policy Issues* (Cambridge: Cambridge University Press, 2007); Daniel Whelan and Jack Donnelly, The West, Economic and Social Rights, and the Global Human Rights Regime: Setting the Record Straight, *Human Rights Quarterly*, 29:4 (2007); Daniel Whelan, *Indivisible Human Rights: A History* (Philadelphia: University of Pennsylvania Press, 2010).

declaration drafting procedures and timelines “clearly challenge the orthodoxy of a socialist genealogy of economic and social rights”.⁵⁴²

The *travaux préparatoires* of the UDHR shows that “no Western state pressed for a Declaration without economic and social rights”.⁵⁴³ However, the *travaux* of the ICESCR also show that no country, on either side of the Cold War aisle, adopted an upfront position in favour of strong implementation mechanisms for ESCR.⁵⁴⁴ Whelan’s sources make him conclude with confidence that “not a single delegation believed that a violations approach would be appropriate for economic, social and cultural rights”.⁵⁴⁵ The Soviet Union argued that implementation was “a matter which solely concerns the domestic jurisdiction of the State, and accordingly [there is] no need for any international agreements on the subject”.⁵⁴⁶ The UK voted against a joint Danish, Egyptian, French and Lebanese resolution at the Commission on Human Rights because, in the opinion of the British delegation, “the resolution gave the impression that the only way to secure economic and social rights was through legally binding instruments”.⁵⁴⁷ The Netherlands also questioned the inclusion of ESCR in a binding treaty, considering the different “political, social, financial and economic conditions prevailing in each country”,⁵⁴⁸ and Canada showed concern about the recognition of ESCR, because, given their condition of “moral obligations or social goals”, it would be “difficult to maintain that [civil and political rights] imposed strict and precise obligations”.⁵⁴⁹ Nations that had recently become independent did not make a move in favour of the international justiciability of ESCR in the

⁵⁴² Whelan, *Indivisible Human Rights*, 54. A position also defended by Christopher N. J. Roberts, *The Contentious History of the International Bill of Human Rights* (Cambridge: Cambridge University Press, 2014), ch. 6.

⁵⁴³ Jack Donnelly, “The West and Economic Rights”, 40.

⁵⁴⁴ Find a collection of legal drafting documents and procedural history at the UN online library of international law: <http://legal.un.org/avl/ha/humanrights.html>

⁵⁴⁵ Whelan, *Indivisible Human Rights*, 114.

⁵⁴⁶ Union of Soviet Socialist Republics, *Comments of Governments on the Draft International Covenant on Human Rights and Measures of Implementation*, UN doc: E/CN.4/353, 29 December 1949.

⁵⁴⁷ Commission on Human Rights, Summary record of the 186th meeting, 6th session, UN doc: E/CN.4/SR.186, 19 May 1950, 21.

⁵⁴⁸ General Assembly – Third Committee, Official record 297th meeting, UN doc. A/C.3/SR.297, 30 October 1950, 173.

⁵⁴⁹ *Id.*, 175.

form of an independent complaints procedure.⁵⁵⁰

Post-World War diplomacy shows that UN Member States in general, and Western European states in particular, favoured the proclamation of ESCR in international law, but only as long as this recognition did not entail strong accountability mechanisms or a formal acknowledgment of the justiciability of these rights. As discussed in chapter 2, one must also bear in mind that, at the time, countries felt much more protected than they do now by the principle of non-intervention in domestic affairs (Article 2(7) of the UN Charter).

Regarding implementation, the ICCPR put in place three monitoring tools: a) periodic state reporting to an independent body, the Human Rights Committee (Article 40);⁵⁵¹ b) interstate complaint procedure (Articles 41-43), which has never been used so far; and c) an individual complaint procedure, by which individuals can submit a communication directly to the Committee if they consider themselves to be victims of a violation. This third procedure is only applicable in relation to countries that have acceded to the Optional Protocol of the ICCPR, which was also adopted on 16 December 1966 and entered into force in 1976 as well. 116 countries have ratified the Optional Protocol to this day, including all European nations with three exceptions: The UK, Switzerland and Monaco.

Initially, none of the mentioned three mechanisms was established for ESCR. Unlike the ICCPR, the ICESCR did not set up an independent monitoring body. Instead, it entrusted the task of monitoring state compliance to a working group of the ECOSOC, which is conformed by UN Member States. At first, a working group carried out the oversight of the implementation of the provisions of the ICESCR, but in 1985, the ECOSOC decided to create an independent body following the example of the Human Rights Committee of the ICCPR.⁵⁵² This was the birth of the UN Committee on Economic, Social and

⁵⁵⁰ Whelan, *Indivisible Human Rights*, 124.

⁵⁵¹ The fact that this Committee received such a name even though it only deals with civil and political rights, and not *all* human rights, is also a telling sign of the second-class status of ESCR.

⁵⁵² ECOSOC Resolution 1985/17, of 28 May 1985, Review of the Composition, Organization and

Cultural Rights.

ECOSOC Resolution 1985/17, which established the Committee on ESCR, was passed overwhelmingly. The United States was the only country that voted against it, adducing reasons of cost; the other country that took the floor to explain the vote was the UK, whose delegate said that it was “important for the Covenant [the ICESCR] to be treated with due respect, seriousness, and diligence”, adding that, in his opinion, “the proposed changes would enhance the application of the Covenant and the attitude of States toward it”.⁵⁵³

The marked institutional differences between ESCR and civil and political rights are also displayed at the regional level. In the Americas, ESCR are part of the 1948 American Declaration on the Rights and Duties of Man, and the 1969 American Convention on Human Rights. States have even developed these rights in an ad hoc treaty: The 1988 Additional Protocol on ESCR (“Protocol of San Salvador”). However, the meaning of ESCR in the Inter-American system is constrained by the language of Article 26 of the 1969 Convention, which resembles considerably the mentioned Article 2(1) ICESCR.⁵⁵⁴ Furthermore, the Protocol of San Salvador only allows individual petitions related to the right to education and to the right of workers to organise trade unions (Article 19(6)). The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have somehow bypassed some of these limitations in their case-law,⁵⁵⁵ but it is clear that Latin American countries intended to set limits to the justiciability of ESCR in their regional system of human rights. ESCR are also recognised in the 1981

Administrative Arrangements of the Sessional Working Group of Governmental Experts on the Implementation of the International Covenant on Economic, Social and Cultural Rights. For a critique of ECOSOC examination of state compliance with the ICESCR, read Philip Alston, *Out of the Abyss: The Challenges Confronting the New UN Committee on Economic, Social and Cultural Rights*, *Human Rights Quarterly*, 9:3 (1987).

⁵⁵³ Id, 349.

⁵⁵⁴ Article 26: “The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.”

⁵⁵⁵ Mónica Fera-Tinta, *Justiciability of Economic, Social and Cultural Rights in the Inter-American System of Protection of Human Rights: Beyond Traditional Paradigms and Notions*, *Human Rights Quarterly*, 29:2 (2007).

African Charter on Human and Peoples' Rights, but the African Commission in charge of monitoring the Charter has denounced several times that African governments inadequately protect these rights at the domestic level.⁵⁵⁶

The separation between civil and political rights and ESCR was even more evident in the European case. The 1950 European Convention on Human Rights only includes civil and political rights, and the rights to private property, to education and to free elections were added in 1952 (Protocol I). These are the only criteria by which the Strasbourg-based European Court of Human Rights can assess states' performance.⁵⁵⁷ For Pierre-Henri Teitgen, who produced a draft for the consideration of the Assembly of the Council of Europe in the late 1940s, if the Council of Europe was meant to impose sanctions for the breach of the Convention, it was necessary to retain from the UN list only those rights and individual freedoms deemed "unquestionably fundamental".⁵⁵⁸ Clearly ESCR were not considered in that list.

The European Social Charter was only adopted in 1961. The Charter set up a monitoring system of biennial state reports involving both the Governmental Social Committee and a committee of independent experts, known as the European Committee of Social Rights. The reporting procedure did not work well, because each body offered its own interpretation and evaluation of states' performance.⁵⁵⁹ A new protocol was adopted in 1991 to reform the supervisory mechanism, clarifying the powers of the European Committee of Social Rights. In practice, to a large extent the work of this Committee is

⁵⁵⁶ Manisuli Ssenyonjo, Analysing the Economic, Social and Cultural Rights Jurisprudence of the African Commission: 30 years since the adoption of the African Charter, *Netherlands Quarterly of Human Rights*, 29:3 (2011).

⁵⁵⁷ Elle Palmer, Protecting Socio-Economic Rights Through the European Convention on Human Rights: Trends and Developments in the European Court of Human Rights, *Erasmus Law Review*, 2:4 (2009); Ingrid Leijten, "Defining the Scope of Economic and Social Guarantees in the Case Law of the ECtHR, in Brems, Eva and Gerards, Janneke (eds.), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (Cambridge: Cambridge University Press, 2014).

⁵⁵⁸ Pierre-Henri Teitgen, "*Faites entrer le témoin suivant*". 1940-1958. *De la Résistance à la Vème République* (Rennes: Ouest France, 1988), 481.

⁵⁵⁹ Hilde Reiding, The Netherlands Gradually Changing Views on International Economic and Social Rights Protection, *Human Rights Quarterly*, 34:1 (2012), 127-128.

currently based on the 1991 Protocol, but this treaty is technically not in force because it requires the ratification of all State Parties to the 1961 Charter and a number of countries (among others, Germany, the UK and Denmark) refused to increase the powers of an independent body at the expense of the governmental one.⁵⁶⁰

Another Protocol was negotiated and finally adopted in 1995 to create a system of collective complaints. This Protocol permits trade unions, employers' organisations and some NGOs to submit communications to the European Committee of Social Rights. A number of Western European states have not ratified the 1995 Protocol (Austria, Denmark, Germany, Iceland, Switzerland, Spain and the UK), so it is not applicable to them.

Finally, the European Social Charter was revised in 1996 to compile the rights enshrined in the previous documents (adding an explicit recognition of the right to housing in Article 31), and to establish the collective complaints procedure. All but two Members of the Council of Europe have signed the 1996 Revised European Social Charter (those two being Liechtenstein and Switzerland), but not all of them have ratified it, including Denmark, Germany, Iceland, Spain and the UK in Western Europe. These countries are therefore not bound by the extended list of ESCR or by the collective complaint mechanism.

The third reason to doubt that the justiciability of ESCR can truly impose heavy duties on public authorities lies in the necessarily limited powers at judges' disposal.

While not synonymous, the advocacy for ESCR justiciability is connected to the so-called "violations approach" to ESCR, proposed initially by Audrey Chapman.⁵⁶¹ In a nutshell, the violations approach attempts to identify laws, policies and actions that have a direct causal relationship with the infringement of the principle of non-discrimination and the minimum core

⁵⁶⁰ Id, 127-131, for details of the diplomatic negotiations.

⁵⁶¹ Audrey Chapman, A "Violations Approach" for Monitoring the International Covenant on Economic, Social and Cultural Rights, *Human Rights Quarterly*, 18:1 (1996)..

content of ESCR. Many human rights groups working on ESCR have subscribed to the violations approach in one form or another.⁵⁶² They try to identify pieces of legislation or policies that result in specific and individualised negative effects directly attributable to public authorities. These are the kind of cases that can be potentially brought to justice through litigation.

The violations approach is useful but it is also necessarily narrow. The fulfilment of ESCR requires looking at the extent to which public authorities are adopting all necessary measures to achieve progressively the full satisfaction of these rights (Article 2(1) ICESCR).⁵⁶³ This requires the use of disaggregated data to identify the impact that public policies have on different groups. It also demands the analysis of taxation, public debt and macroeconomic policy. Justiciability and the violations approach do not address these fundamental issues. Compared to the mere proclamation of rights, justiciability intensifies the burden of ESCR (P4), but it is certainly less burdensome than other implementation mechanisms related to taxation and economic policies.

Furthermore, researchers have not yet identified a clear correlation between the judicial recognition of ESCR and an increase in terms of social justice.⁵⁶⁴ “Litigation necessarily resolves relatively narrow issues; underlying structural factors are generally left unaddressed”.⁵⁶⁵ Judgements on ESCR cases do not contradict the “market friendly” and “neo-liberal” structures in Western societies and the international system,⁵⁶⁶ leaving unaddressed many “root causes” of the lack of compliance with ESCR.⁵⁶⁷ As important as

⁵⁶² As defended by Roth on behalf of Human Rights Watch (Kenneth Roth, *Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization*, *Human Rights Quarterly*, 26:1, 2004).

⁵⁶³ CESCR, *General Comment No. 3: The nature of State parties' obligations*, 1990.

⁵⁶⁴ Adam Chilton and Mila Versteeg, *Rights Without Resources: The Impact of Constitutional Social Rights on Social Spending*, *University of Virginia School of Law. Law and Economics Research Paper Series 2016-20* (2016).

⁵⁶⁵ Alicia Yamin, *The Future in the Mirror: Incorporating Strategies for the Defense and Promotion of Economic, Social, and Cultural Rights into the Mainstream Human Rights Agenda*, *Human Rights Quarterly*, 27:4 (2005), 1220.

⁵⁶⁶ Paul O'Connell, *The Death of Socio-Economic Rights*, *Modern Law Review*, 74:4 (2011).

⁵⁶⁷ Susan Marks, *Human Rights and Root Causes*, *Modern Law Review*, 74:1 (2011).

justiciability is for the implementation of ESCR, its effects are therefore insufficient, and this must make the human rights movement reflect on its strategic choices.

6.2.3. Does the justiciability of ESCR fit with liberal principles?

One particular academic debate in recent years serves a twofold objective. Firstly, it shows why, taken seriously, the justiciability of economic and social rights would go against some of the liberal assumptions engrained in Western legal thinking. Secondly, it also helps us introduce the contribution that Order-over-Justice can make to our understanding of state-promotion of ESCR and their justiciability. I am talking about the debate between Daniel Whelan and Jack Donnelly, on the one hand, and their critiques, on the other.

By the decade prior to the Second World War, Nordic countries had elevated welfare state “to a core principle of their legitimacy, largely defining the idea of nationhood for these countries”.⁵⁶⁸ After the War, Western European countries followed the path with Keynesian economic policies and an increase in social spending. However, the Nordic model of welfare state was not necessarily accompanied by the support of strong accountability mechanisms on ESCR. Whelan’s excellent historical review shows that neither the countries with a socialdemocratic welfare model nor socialist states were willing to go all the way down in the adoption of strong implementation mechanisms for ESCR in international law. Whelan explains their decision in this way:

“It is my conclusion that many states tried to take seriously the task of building on this ideal, but they also recognized how difficult it was to translate state duties and obligations for the promotion of human economic and social progress into rights. The division of the Covenants was clearly not about the denigration of economic and social rights. It was about the practical implications of taking on

⁵⁶⁸ Laust Schouenborg, The rise of the welfare state in international society, *Cambridge Review of International Affairs*, 28:4 (2015), 599.

international and national obligations and being truly accountable for meeting those obligations in good faith.”⁵⁶⁹

It is Whelan’s opinion, then, that Western European states’ decision not to bet for strong international mechanisms to oversee ESCR had nothing to do with their alleged lack of conviction for these rights. It was, rather, a practical decision, since they were not sure whether international tools would serve the purpose of “being truly accountable for meeting those obligations in good faith”, as Whelan puts it in the very last paragraph of his outstanding book.

Following this line of thought, Donnelly and Whelan engaged in a passionate discussion with Kang and with Kirkup and Evans. Donnelly and Whelan attempt to dismantle what they call the “myth” of Western opposition to ESCR. Looking at the negotiation of the UDHR, Whelan and Donnelly stress that “not a single Western state pressed for a Declaration without economic and social rights”.⁵⁷⁰ The *travaux préparatoires* of the ICESCR show that, while Western states did not believe ESCR to be justiciable, this was the general feeling in the rest of the world as well.⁵⁷¹ Whelan and Donnelly contend that the absence of an independent monitoring body for nearly ten years was “indeed unjustifiable”, but they blame countries from the “Third World, and especially African” states.⁵⁷² The existence of the European Social Charter would be another piece of evidence of the mythical character of Western opposition to ESCR, because, in their opinion, this treaty “provides a substantively more demanding list of rights” than the ICESCR or any other regional system.⁵⁷³ Finally, in Whelan and Donnelly’s view, the incipient welfare state of the time clearly contradicts the claim that ESCR “are largely

⁵⁶⁹ Whelan, *Indivisible Human Rights*, 214.

⁵⁷⁰ Whelan and Donnelly, *The West, Economic and Social Rights, and the Global Human Rights Regime*, 917. Statements made by delegates from the US, the UK, Australia, India and Lebanon would show ambivalence, but not explicit opposition. Way claims that even the US officially defended the inclusion of ESCR in the UDHR, and it only changed its position later on (Sally-Anne Way, *The “Myth” and Mystery of US History on Economic, Social, and Cultural Rights: The 1947 “United States Suggestions for Articles to be Incorporated in an International Bill of Rights”*, *Human Rights Quarterly*, 36:4, 2014).

⁵⁷¹ Whelan and Donnelly, *The West, Economic and Social Rights, and the Global Human Rights Regime*, 933.

⁵⁷² *Id.*, 936.

⁵⁷³ *Id.*, 944.

dismissed in the West”.⁵⁷⁴

In her response, Kang doubts whether Western welfare states could be accounted for as a proof of the centrality of ESCR in the West. Kang basically questions the assumption that statements made at diplomatic forums are truly indicative of the level of support and internalisation of a human rights norm. Kang argues that Western European states had the capacity to protect ESCR with stronger legal tools had they wanted to.⁵⁷⁵ Contra Donnelly and Whelan, for Kang the formation of the International Labor Organisation in 1919 was not an example of the West’s internalisation of ESCR, but the “result of domestic political compromise, largely motivated by fears over the spread of communism”.⁵⁷⁶ Kang also blames Western European states for the artificial separation between the ICCPR and the ICESCR, which in her view followed the European model of the European Convention on Human Rights and the European Social Charter.⁵⁷⁷ Kang concludes that part of the West may have pushed for the inclusion of ESCR in international law, as Donnelly and Whelan argue, but this does not mean that Western European states are genuine promoters of these norms, because this would have required a stronger commitment and acceptance of normative and practical implications.⁵⁷⁸

Kirkup and Evans follow a different path to that of Kang. Their critique essentially questions Donnelly and Whelan’s epistemology and methodology. They argue that Donnelly and Whelan present a distorted or partial look of Western support for ESCR because they take “the global human rights regime at face value [and do not] question the role of politics in the regime’s construction and day-to-day existence”.⁵⁷⁹ Kirkup and Evans denounce the devastating effects that structural adjustment programmes encouraged by

⁵⁷⁴ Id, 910.

⁵⁷⁵ Susan Kang, The Unsettled Relationship of Economic and Social Rights and the West: A Response to Whelan and Donnelly, *Human Rights Quarterly*, 31:4 (2009), 1012-1013.

⁵⁷⁶ Kang, The Unsettled Relationship of Economic and Social Rights and the West, 1017.

⁵⁷⁷ Id, 1022-1023.

⁵⁷⁸ Id, 1028-1029.

⁵⁷⁹ Alex Kirkup and Tony Evans, The Myth of Western Opposition to Economic, Social and Cultural Rights? A Reply to Whelan and Donnelly, *Human Rights Quarterly*, 31:1 (2009), 222.

Western European states have had in debt-ridden countries. They claim that neoliberalism and the Washington Consensus posed serious threats to human rights in general and to ESCR in particular. In sum, they criticise Donnelly and Whelan for their lack of acknowledgement of the fact that it is perfectly possible to proclaim human rights in the law and to violate them in practice. In their opinion, “the central role of human rights discourse in the post-war order was to legitimize the expansion of global markets through universal and inclusive claims of individual freedom”.⁵⁸⁰

Donnelly and Whelan’s response to Kang is much more receptive than that for Kirkup and Evans. They start by claiming that social spending in Western countries has progressively risen over time, which in their view would confirm that ESCR are taken seriously. They somehow excuse Western European states for their lack of support for strong accountability mechanisms in the drafting process of the ICESCR, reminding that no other country or region supported them,⁵⁸¹ and making the case that renouncing to justiciability was a sort of compromise Western Europe had to admit at the time in order to get ESCR formulated in international law: “Were all provisions to be mandatory, they would have to be watered down, often substantially”.⁵⁸²

To the contrary, Donnelly and Whelan do not yield any ground to Kirkup and Evans. Part of the reason of their disagreement is that the two pairs look for sources of explanation in two different fields: Donnelly and Whelan explore the realm of international law and treaty making, while Kirkup and Evans seek answers in international political economy. Plus, epistemologically speaking, Kirkup and Evans adopt a critical approach while Donnelly and Whelan make a closed defence of mainstream empiricism and positivism.⁵⁸³

The arguments of the academic debate between Whelan-Donnelly and their

⁵⁸⁰ Id, 225.

⁵⁸¹ Daniel Whelan and Jack Donnelly, The Reality of Western Support for Economic and Social Rights: A Reply to Susan L. Kang, *Human Rights Quarterly*, 31:4 (2009), 1048.

⁵⁸² Id, 1051.

⁵⁸³ Daniel Whelan and Jack Donnelly, Yes, a Myth: A Reply to Kirkup and Evans, *Human Rights Quarterly*, 31:1 (2009), 240-241.

critiques are full of silences and implicit assumptions. There is enough evidence to claim that Western European states have been active promoters of the institutionalisation of ESCR. The open question, though, is whether institutionalisation can be considered proof of a given state's belief in or identification with a human rights norm. Promoting IHRL is not the same as promoting human rights, and promoting IHRL is not necessarily the only way to promote human rights. For example, in relation to ESCR, one may legitimately argue that adopting a strong welfare state is a strong way of supporting socioeconomic rights, even if this is not accompanied by judicial enforceability or by an official state position in favour of an international individual complaints mechanism.

Based on Order-over-Justice, Western European states would be more inclined to promote norms that are more in line with liberal values, such as individual freedom, rule of law, formal equality, private property and market freedom (P5).

Taking ESCR seriously would impose significant requirements on public policy making. At least to some degree, certain tax level or social benefits would not be a matter of legitimate political debate, but minimum requirements established in the law. In the language of the rule of law, a fundamental liberal tenet, the principle of justiciability means that judges would have the power to oversee government's allocation of resources. From the classical liberal perspective, this may seem like an undue interference with the separation of powers. In this sense, the justiciability of ESCR challenges some Western liberal assumptions. Hence, as an international human rights norm, it would not be the most likely candidate to receive the endorsement of European democracies.

6.2.4. Have strong and resourceful norm entrepreneurs endorsed the justiciability of ESCR?

In the last decades, UN bodies, human rights advocates and scholars have asserted the justiciable nature of ESCR as a normative claim and a strategic tool in order to cut short the degrees of separation between these rights and the civil and political ones.

From the early start, the CESCR issued general interpretations of the rights contained in the ICESCR. These papers, known as 'General Comments', are what the Committee itself deems to be authentic interpretations of the Covenant. The Committee has adopted 23 General Comments thus far, among which we can highlight 1990 General Comment No. 3, on the nature of state obligations and the meaning of Article 2(1) ICESCR, and 1997 General Comment No. 9, on the domestic application of the ICESCR. 2000 General Comment No. 14, on the right to health, is also noteworthy because with it the Committee proposed to engage in a more systematic application of indicators and benchmarks for the monitoring of state compliance with the ICESCR.⁵⁸⁴

Even though the ICESCR does not demand the domestic recognition of ESCR as justiciable rights, the CESCR has expressed the opinion that, "among the measures which might be considered appropriate, in addition to legislation, is the provision of judicial remedies with respect to rights which may, in accordance with the national legal system, be considered justiciable".⁵⁸⁵ Later on, the Committee insisted that making ESCR justiciable is a way of ensuring an effective remedy, adding that:

"A State party seeking to justify its failure to provide any domestic legal remedies for violations of economic, social and cultural rights would need to show either that such remedies are not "appropriate means" within the terms of article 2, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights or that, in view of the other means used, they are unnecessary. It will be difficult to show this and the Committee considers that, in many cases, the other means used could be rendered ineffective if they are not reinforced or complemented by judicial remedies. [...] Whenever a Covenant right cannot be made fully effective without some role for the judiciary,

⁵⁸⁴ See also OHCHR, *Human Rights Indicators: A Guide to Measurement and Implementation* (New York and Geneva: UN, 2012).

⁵⁸⁵ CESCR, *General Comment No. 3*, para. 5.

judicial remedies are necessary. [...] While the respective competences of the various branches of government must be respected, it is appropriate to acknowledge that courts are generally already involved in a considerable range of matters which have important resource implications. The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.”⁵⁸⁶

This is the opinion of the UN Committee on ESCR, opinion by which it appraises states’ compliance with the ICESCR. As we will see later (section 6.3), however, states may not necessarily agree with the Committee’s interpretation of the obligations derived from the ICESCR.

Special Rapporteurs and Independent Experts (so-called Special Procedures) of the Human Rights Council (previously, the Commission on Human Rights), whose mandate is decided by Member States, have also contributed to define the meaning of many ESCR. Practitioners and an increasing number of scholars interested in this particular set of rights have also helped in this regard. Three contributions are especially significant: the 1987 Limburg Principles on the Implementation of the ICESCR, the 1997 Maastricht Guidelines on Violations of ESCR, and the 2011 Maastricht Principles on Extraterritorial Obligations of States in the area of ESCR.⁵⁸⁷

States played no role in the adoption of any of them, beyond possible consultations in the drafting processes. States drafted and voluntarily chose to ratify the ICESCR and other human rights treaties. They also voluntarily agreed to set up the UN Committee on ESCR and the Special Procedures of the Human Rights Council. Yet, once these independent bodies were in full swing,

⁵⁸⁶ CESCR, *General Comment No. 9: The domestic application of the Covenant*, 1997, para. 3, 9 and 10.

⁵⁸⁷ Commission on Human Rights, *Note verbale dated 5 December 1986 from the Permanent Mission of the Netherlands to the United Nations Office at Geneva addressed to the Centre for Human Rights ("Limburg Principles")*, UN doc: E/CN.4/1987/17, 8 January 1987; Victor Dankwa *et al*, Commentary to the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, *Human Rights Quarterly*, 20:3 (1998); Olivier de Schutter *et al*, Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, *Human Rights Quarterly*, 34:4 (2012).

states lost control over their hermeneutical work, based on which these same bodies judge state performance in the implementation of the ICESCR and the socioeconomic rights proclaimed in the UDHR.

The justiciability of ESCR has been gaining traction in legal regimes around the world for decades,⁵⁸⁸ whilst it has not reached the level of acceptance granted to civil and political rights. Comparative data shows that constitutional recognition of civil and political rights and of ESCR has followed a similar progression since the 1970s; most countries have constitutionalised ESCR; yet, at the same time, ESCR are justiciable only in 69% of sampled countries, and all the rights proclaimed in the ICESCR are justiciable in 38% of the countries.⁵⁸⁹

On the other hand, comparative analyses show that states still tend to proclaim ESCR in aspirational terms at the domestic level, as divorced as possible from strong enforcement mechanisms.⁵⁹⁰ This suggests that, while states are willing to formally proclaim ESCR in their constitutions, they are not so eager to give judges the power to oversee compliance with those rights, although admittedly the tide has gone in favour of the justiciability of ESCR.

A strong push for justiciability of ESCR came with the adoption of the Optional Protocol to the ICESCR in 2008. As explained earlier (subsection 6.2.2), one of the main differences between the ICESCR and the ICCPR is that, while the latter (via its 1966 Optional Protocol) established an individual complaint mechanism for the violation of civil and political rights, the former did not have such a procedure. In fact, it was only in 1985 when the ECOSOC

⁵⁸⁸ As shown in the case-law database of the International Network for ESCR (<https://www.escr-net.org/caselaw/list>) and on the collection of national and international cases documented by the International Commission of Jurists (*Adjudicating Economic, Social and Cultural Rights at National Level: A Practitioners Guide*, Geneva: International Commission of Jurists, 2014, 232-244).

⁵⁸⁹ Malcolm Langford, “Judicial Review in National Courts: Recognition and Responsiveness”, in Riedel, Eibe, Giacca, Gilles and Golay, Christophe (eds.), *Economic, Social, and Cultural Rights in International Law: Contemporary Issues and Challenges* (Oxford: Oxford University Press, 2014), 420-422. Based on data from the Comparative Constitutions Project (<http://comparativeconstitutionsproject.org/>) and the Toronto Initiative for Economic and Social Rights (<http://www.tiesr.org/>).

⁵⁹⁰ Wade Cole, Strong Walk and Cheap Talk: The Effect of the International Covenant of Economic, Social, and Cultural Rights on Policies and Practices, *Social Forces*, 92:1 (2013), 187.

created the independent mechanism to oversee state compliance with the ICESCR. This gap was closed with the 2008 Optional Protocol to the ICESCR, which allows individuals to lodge complaints to the United Nations following a procedure similar to the one applicable to civil and political rights since the 1970s.

The CESCR had publicly talked of the need for an optional protocol as early as 1991. Further calls in the same direction were made at the 1993 Vienna World Conference on Human Rights. The Committee produced its first draft of an optional protocol in 1997. The proposal did not get much attention from states until the Commission on Human Rights decided to set up an independent expert first (in 2001) and then a working group (2002) to explore the possibilities of an optional protocol and to take the temperature of Member States' level of support for such a mechanism. The first meeting of the working group took place in early 2004, and after several sessions, finally states agreed to the Optional Protocol in December 2008.⁵⁹¹

With the exceptions of Australia and the USA, no country explicitly challenged the justiciability of ESCR.⁵⁹² However, even though the Optional Protocol only needed ten ratifications to enter into force (Article 18(1)), it took more than four years to hit that target: It entered into force in May 2013. By May 2017, the Committee had made public its views on the merits of only two cases, both of them concerning Spain.⁵⁹³ Hitherto, 22 countries have ratified the treaty, including Belgium, Finland, France, Italy, Luxembourg, Portugal and Spain in Western Europe. The UK has not even signed it.

By and large, when discussing the Optional Protocol to the ICESCR, countries did not oppose the international norm of the justiciability of ESCR. However, as in the case of the Revised European Social Charter, many Western European states have not taken the necessary steps to ratify the treaty, which

⁵⁹¹ General Assembly, Resolution 63/117, Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, 10 December 2008.

⁵⁹² Albuquerque, Chronicle of an Announced Birth; Whelan, *Indivisible Human Rights*, 201.

⁵⁹³ CESCR, *I.D.G. v. Spain*, Communication 2/2014, UN doc: E/C.12/55/D/2/2014, Views of 13 October 2015; *López Rodríguez v. Spain*, Communication 1/2013, UN doc: E/C.12/57/D/1/2013, Views of 20 April 2016.

would have entailed a more explicit endorsement of the norm. We will return to states' positions in the drafting process of the Optional Protocol in section 6.3.

Order-over-Justice foretells that the support of norm entrepreneurs is key for the international recognition of human rights norms (P6). Independent international bodies like UN Special Procedure mandate holders and the UN Committee on ESCR have promoted the justiciability of ESCR. Similarly, lawmakers, judges and lawyers have pushed the agenda of justiciability forward at the domestic level, which ultimately led to concrete examples of judicial enforceability in the last two decades. The idea that ESCR are not justiciable has lost support.⁵⁹⁴

The norm of justiciability of ESCR has settled over time. IHRL has gone from three degrees of separation between these rights and the civil and political ones (different wording, different treaties, different tools of implementation), to the creation of an individual complaint mechanism at the UN level and a collective complaints mechanism in Europe. This said, the first tool has only been accepted by 22 countries in the whole world, and seven Western European states have not subscribed to the second one yet: Denmark, Germany, Iceland, Liechtenstein, Spain, Switzerland and the UK. The constitutional recognition of ESCR has also evolved upwards, and we have an increasing number of examples of judicial enforceability of these rights worldwide. Also, official diplomatic records show that Western European states played a significant role in the international legal recognition of ESCR. We can conclude that, as an international human rights norm, the justiciability of ESCR has reached a point of advanced stage of development.

⁵⁹⁴ Some commentators in the human rights community still question the recognition of ESCR on an equal footing with civil and political rights, expressing serious doubts about their justiciability (Tomuschat, *Human Rights*, 47; Aryeh Neier, *Social and Economic Rights: A Critique*, *Human Rights Brief*, 13:2, 2006). Roth (Defending Economic, Social and Cultural Rights), Executive Director of Human Rights Watch, also believes that human rights advocacy should not adapt to ESCR; our conception of ESCR should instead adapt to human rights advocates' uses and practices. Find a thought-provoking conversation among scholars and practitioners at: <https://www.opendemocracy.net/openglobalrights/debating-economic-and-social-rights>

6.3. Spain and the UK in the promotion of the justiciability of ESCR

Order-over-Justice expects states' support for human rights norms to evolve over time. Countries would be more willing to support human rights norms in the beginning, when the implications of the norm are less clear and the implementation mechanisms are weaker (P1). At the same time, they would show less resistance against a norm the longer it has remained in the international system (P2).⁵⁹⁵

Justiciability is an implementation mechanism of ESCR that has progressively settled. We would expect countries to more willingly support the international institutionalisation of ESCR in the beginning than in more recent years.

This section reinterprets the way in which Spain and the UK have promoted the norm of the judicial enforceability of ESCR. The analysis explores states' actions and discourses at both domestic and international levels. In other words, I try to establish if ESCR have been granted enforceability at the domestic level, and whether states' words and deeds can be interpreted as manifestations of international endorsement of the norm of justiciability of ESCR.

In temporal terms, the analysis begins in the mid 1990s, the time when the UN Committee on ESCR made public its first concrete proposal for an international individual complaint mechanism. Subsection 6.3.1 examines each country's ESCR treaty ratification scorecard, together with their respective positions at the drafting process of two relevant treaties adopted in recent years: The 2000 EU Charter of Fundamental Rights, which is binding for all EU countries since the entry into force of the Treaty of Lisbon in 2009, and the Optional Protocol to the ICESCR, which was adopted in 2008

⁵⁹⁵ Based on the case of the Netherlands, Reiding (The Netherlands Gradually Changing Views on International Economic and Social Rights Protection) concludes that Western support for the inclusion of ESCR as full-fledged human rights has increased gradually since World War II. The nuance of Order-over-Justice is that it is not that norm support increases, but that norm resistance decreases over time.

and entered into force in May 2013. Secondly, I look at the responses given by the UK and Spain to the reporting process of the UN Committee on ESCR, the UN Special Procedures on ESCR who visited both countries since the mid 1990s, and the Universal Periodic Review (UPR) in the first two reporting cycles (subsection 6.3.2).⁵⁹⁶ Finally, since domestication is the strongest form of promotion of a human rights norm (see chapter 3), subsection 6.3.3 disentangles the extent to which ESCR are judicially enforceable in the domestic legislation of both Spain and the UK.

6.3.1. Treaty ratification and positions expressed in drafting processes

International Covenant on Economic, Social and Cultural Rights

All European countries, except Andorra, have ratified the 1966 ICESCR. The UK ratified it in 1976, the year of its entry into force, and so did Spain in 1977, in the middle of its transition to democracy. The UK declared its reservations about the admissibility of self-determination as a full-fledged right, and made some additional reservations regarding the applicability of some provisions in its then colonies, the Channel Islands and the Isle of Man. Spain ratified the treaty with no reservations.⁵⁹⁷

European Social Charter

With the exception of Switzerland and Liechtenstein, which have signed but not yet ratified it, most Western European states ratified the European Social Charter by 1980. Belgium did so in 1990, and Finland, Portugal and Luxembourg, in 1991. The UK ratified the Charter in 1962, and Spain in 1980. Both of them issued interpretative declarations in relation to some clauses, but no reservations.⁵⁹⁸

Spain ratified the 1988 Protocol in 2000 without reservations. This Protocol

⁵⁹⁶ The 3rd cycle UPR report concerning the UK, of May 2017, has not been considered in the analysis.

⁵⁹⁷ Find reservations and declarations to UN human rights treaties here: <http://indicators.ohchr.org/>

⁵⁹⁸ Ratification scorecard of the Council of Europe at: <http://www.coe.int/en/web/conventions>

extended the list of rights. The UK has not even signed it. In 2000, Spain also ratified the 1991 Protocol, which was supposed to ratchet up the powers of the European Committee of Social Rights. This Protocol is not yet in force because it requires the ratification by all State Parties, and some have not done so yet, the UK among them. Neither Spain nor the UK has signed or ratified the 1995 Protocol on collective complaints procedures. They both signed the 1996 Revised Social Charter (UK in 1997 and Spain in 2000), which also includes the collective complaints procedures, but none of them has ratified it. 14 Member States of the Council of Europe are not parties to the Revised Charter, for 33 that have acceded to it.

Optional Protocol to the ICESCR

Spain and the UK adopted very different positions in the drafting process of the Optional Protocol.

Spain is among the seven Western European countries that have ratified the Optional Protocol to the ICESCR, which gives individuals the chance to submit complaints to the UN Committee on ESCR. The other countries are Belgium, Finland, France, Italy, Luxembourg and Portugal. Spain was in fact the first European country and third country in the world to ratify this treaty. The UK has not even signed it.

It is important to remember that, compared to its neighbours, the UK had a tradition of scepticism towards the international recognition of ESCR. During the drafting process of the UDHR, the UK delegate made an attempt to leave ESCR for a later convention, arguing that these rights were not amenable to the same kind of treatment of civil and political rights, and expressing a dim view regarding their justiciability.⁵⁹⁹ During the preparation of the ECHR, the UK Foreign Office insisted on the policy that it should only include rights that were undoubtedly enforceable by courts, which excluded ESCR.⁶⁰⁰ Spain did not play any role in the discussion of these documents, since it had been excluded from the global human rights regime due to the dictatorial

⁵⁹⁹ Morsink, *The Universal Declaration of Human Rights*, 108, 118 and 223.

⁶⁰⁰ Simpson, *Human Rights and the End of Empire*, 666.

character of its government.

The UN Commission on Human Rights set up an open-ended working group in 2002 “with a view to considering options regarding the elaboration” of an Optional Protocol to the ICESCR.⁶⁰¹ As a result of the lack of agreement among Commission Members, the working group was initially mandated to “consider options”, and not directly to write a draft,⁶⁰² although that is precisely what it ended up doing. The group began working in 2004 and held one session per year until the final adoption of the Protocol in 2008.

The annual reports and Albuquerque’s insider view show that there were a variety of positions among Western European states. In the first session, February-March 2004, some delegations argued that ESCR lacked the necessary clarity to make them justiciable, while others referred to the case-law in their own countries to make the counter-argument.⁶⁰³

In the second session, January 2005, Spain was among the countries that supported an optional protocol, which were the majority and included other Western European states, like Belgium, Finland, France, Germany and Portugal. Spain expressed interest about the possible interpretation of the word “family” in the treaty,⁶⁰⁴ and insisted on the general rule of exhaustion of domestic remedies prior to bringing a case to an international body. The UK expressed the concern that an individual complaint mechanism would allow the Committee to examine domestic policies; together with other countries, it argued that international cooperation was “an important moral obligation but not a legal entitlement”; it “noted that some domestic remedies would be political in nature”; and called for clear and careful criteria on standing and jurisdiction. According to the report, “while the United Kingdom was still sceptical of the need to elaborate an optional protocol, its

⁶⁰¹ Commission on Human Rights, Resolution 2002/24: Question of the realization in all countries of ESCR, 22 April 2002.

⁶⁰² Albuquerque, *Chronicle of an Announced Birth*, 156.

⁶⁰³ Report of the open-ended working group to consider options regarding the elaboration of an optional protocol to the ICESCR on its 1st session, 15 March 2004, UN doc: E/CN.4/2004/44, para. 17-26.

⁶⁰⁴ Spain modified its Civil Code in 2005 to recognise same-sex marriage, becoming one of the first countries in the world to legalise equality in marriage.

representative noted that the deliberations in the working group had been helpful and it was willing to continue dialogue in a constructive manner". Five countries "had yet to be convinced" about the need for an optional protocol: Australia, Canada, Japan, Poland and the USA.⁶⁰⁵

The third session, February 2006, circulated around a working paper drafted by Albuquerque based on the mandate given by the working group one year earlier.⁶⁰⁶ This session "marked a significant turning point" in the negotiations, because many countries expressed their support for an optional protocol.⁶⁰⁷ The Latin American and Caribbean states and the African states made their endorsement explicit, and so did some European countries, Spain among them. Australia, Japan, India, South Korea and the USA remained unconvinced. The UK expressed an opinion in favour of an *à la carte* approach, as opposed to the comprehensive inclusion of all the rights enshrined in the ICESCR. It also suggested the Committee should focus only on minimum core obligations, and defended a wide margin of appreciation for states.⁶⁰⁸ However, the UK did not seem to be among the sceptical countries anymore.

The fourth session, July 2007, followed one of the first resolutions of the newly created Human Rights Council, which, acknowledging the work of the open-ended working group thus far, directly called for the development of a draft, thereby giving a decisive impetus to the process.⁶⁰⁹ Albuquerque submitted a draft for the consideration of the working group.⁶¹⁰ African, Latin American and Caribbean states, together with some European ones, including

⁶⁰⁵ Report of the open-ended working group to consider options regarding the elaboration of an optional protocol to the ICESCR on its 2nd session, 10 February 2005, UN doc: E/CN.4/2005/52, para. 101, 62, 92, 63, 76, 92, 94 and 103.

⁶⁰⁶ *Id.*, para. 109. Elements for an optional protocol to the ICESCR, Analytical paper by the Chairperson-Rapporteur, Catarina de Albuquerque, UN doc: E/CN.4/2006/WG.23/2, 30 November 2005.

⁶⁰⁷ Albuquerque, *Chronicle of an Announced Birth*, 163.

⁶⁰⁸ Report of the open-ended working group to consider options regarding the elaboration of an optional protocol to the ICESCR on its 3rd session, 14 March 2006, UN doc: E/CN.4/2006/47, para. 6, 7, 10, 11, 124, 29, 84 and 92.

⁶⁰⁹ Human Rights Council, Resolution 1/3: Open-ended Working Group on an Optional Protocol to the ICESCR, 29 June 2006.

⁶¹⁰ 1st draft: UN doc: A/HRC/6/WG.4/2, 23 April 2007.

Spain, defended a comprehensive approach against the hierarchy between rights that an *à la carte* approach would impose. The UK, on the contrary, opposed a comprehensive approach.⁶¹¹

Based on the input of the fourth session, Albuquerque shared a second draft with the working group weeks before its fifth and final session, February and April 2008.⁶¹² Spain expressed a position favourable to the draft, making a statement that was summarised as follows:

“Spain would have liked a higher threshold for protection of Covenant rights, but recognized that the text reflected a consensus and was a significant step towards the effective protection of these rights. It addressed an historic inequality between artificially created categories of rights”.⁶¹³

To the contrary, the UK made specific linguistic suggestions to limit the scope of the optional protocol, not all of which were included in the final version. In its final statement:

“[T]he United Kingdom reserved its position on the draft. It remained sceptical about the practical benefits of the protocol, considering that economic, social and cultural rights did not lend themselves to adjudication in the same way as civil and political rights. It favoured an *à la carte* approach, and questioned whether the comprehensive approach was the best way to ensure an effective mechanism which would be ratified by the widest number of States”.⁶¹⁴

The right to self-determination, which is recognised in the ICESCR, was included at the last minute in the Optional Protocol. The Human Rights Council adopted the text in May 2008 without a vote,⁶¹⁵ and the General Assembly confirmed it December 2008.⁶¹⁶

The detail of the drafting process shows a progressive trend towards the

⁶¹¹ Report of the open-ended working group to consider options regarding the elaboration of an optional protocol to the ICESCR on its 4th session, 30 August 2007, UN doc: A/HRC/6/8, para. 33 and 36-38.

⁶¹² 2nd draft: UN doc: A/HRC/8/WG.4/3, 25 March 2008.

⁶¹³ Report of the open-ended working group to consider options regarding the elaboration of an optional protocol to the ICESCR on its 5th session, 6 May 2008, UN doc: A/HRC/8/7, para. 227, 35, 59, 61, 71, 91 and 246.

⁶¹⁴ Id.

⁶¹⁵ Human Rights Council, Resolution 8/2: Optional Protocol to the ICESCR, 18 June 2008.

⁶¹⁶ General Assembly, Resolution 63/117.

acceptance of the international justiciability of ESCR. The number of outliers was small, and most Western European states, and clearly Spain among them, leaned towards the group of norm promoters. However, the UK adopted a much more sceptical approach, which explains the fact that it has neither signed nor ratified the treaty, and there are no prospects that it would do it in the foreseeable future.

EU Charter of Fundamental Rights

Together with the Optional Protocol to the ICESCR, the second international document that is relevant for our discussion is the EU Charter of Fundamental Rights. The EU Charter was drafted over 18 months between Cologne (European Council summit in June 1999) and Nice (European Council summit in December 2000). A convention was established with Member States, the European Parliament and the European Commission as drafters, and other EU institutions as observers. The then Spanish conservative MEP Iñigo Méndez de Vigo chaired the delegation of the European Parliament.

The quick and relatively fluid drafting process was only somewhat disturbed by the UK. Valuable testimony by Lord Goldsmith, who was the UK representative at the convention, sheds light over the two key goals of his Government at the time: making fundamental rights “more visible” in the EU, but avoiding the “creation” of “new rights”, in reference to ESCR.⁶¹⁷ The problem was that the European Council had already established in Cologne that economic and social rights had to be part of the future Charter. Interestingly, Goldsmith says that prior to the beginning of the drafting process, he believed the Charter was going to be a “political declaration”, not a legally binding instrument.⁶¹⁸ However, it was soon made clear to him that the future Charter was going to unfold legal effects. Lord Goldsmith had the mandate of the British Government to do his best so the Charter did not “make economic and social rights justiciable where they are not already

⁶¹⁷ Lord Goldsmith, A Charter of Rights, Freedoms and Principles, *Common Market Law Review*, 38:5 (2001), 1207.

⁶¹⁸ *Id.*, 1215.

justiciable”.⁶¹⁹ In Goldsmith’s view, this was achieved by the distinction between rights and principles, ESCR belonging to this second group.⁶²⁰ In other words, the UK was going to accept the inclusion of ESCR in the Charter as long as they were not given the same status of civil and political rights.

Article 52(5) of the Charter makes clear that for principles to be implemented, they require legislative and executive acts, and that principles may be justiciable only in the interpretation of such acts. Two additional safeguards were established just in case the distinction between rights and principles was not sufficiently clear. First, the proclamation of ESCR in several provisions of the Charter was nuanced by the words “under the conditions established by national laws and practices” (or similar jargon) to ensure that ESCR are not treated as justiciable by judges when states clearly did not intend them to be justiciable.⁶²¹ And secondly, the UK and Poland demanded (and the rest of Member States accepted) the attachment of a protocol (No. 30) about the application of the Charter to them. Protocol No. 30 confirms that ESCR will not be justiciable in the UK and Poland unless these rights have been recognised as such by their national laws and practices.

All EU Member States formally signed the European Charter of Fundamental Rights at the Nice European Council in December 2000. The Charter has “the same legal value as the Treaties”, since the entry into force of the Lisbon Treaty in 2009 (Article 6(1) of the Treaty of the European Union).⁶²² Furthermore, bearing in mind the standing case-law of the European Court of

⁶¹⁹ European Scrutiny Committee, *The application of the EU Charter of Fundamental Rights in the UK: a state of confusion* (London: House of Commons, 2014), para. 29.

⁶²⁰ *Id.*, para. 41-42.

⁶²¹ It is the case of Articles 27 (workers’ right to information and participation), 28 (collective bargaining), 30 (protection in case of unjustified dismissal), 34 (social security) and 35 (health). No such specification was deemed necessary for civil and political rights, or for the right to private property (Article 17).

⁶²² Another example of the different treatment of ESCR and civil and political rights is that while the Treaty of Lisbon established that the EU had to ratify the European Convention on Human Rights (Article 6(2)), it did not establish an equivalent mandate in relation to the European Social Charter. (Find an appeal for EU’s ratification of the European Social Charter in Olivier de Schutter, *L’adhésion de l’Union européenne à la Charte sociale européenne*, Brussels: Université Catholique de Louvain, 2014[2004]).

Justice before and after the adoption of the Charter, it is clear that the Charter is directly effective in the UK, with supremacy over national legislation, in relation to all areas that fall within the scope of EU law. Protocol No. 30 is therefore not an “opt-out” from the Charter, and the UK Government did admit its binding nature when British authorities act within the scope of EU law.⁶²³

6.3.2. Interaction with international human rights mechanisms on ESCR

UN Committee on Economic, Social and Cultural Rights

Since 1996, both Spain and the UK have been examined three times by the UN Committee on ESCR. This kind of examinations is supposed to happen every five years. However, governments often incur in delays in the submission of their reports.

In the case of the UK, the issue of justiciability came up right from the beginning. Pushed by one Committee member, in the dialogue between the UK delegation and the Committee in 1997, the UK expressed its position on the matter as follows:

“The rights enshrined in the Covenant [the ICESCR] were not applied in the United Kingdom by incorporating the Covenant as it stood into domestic law. Although the Government accepted the obligations contained therein, the British preference was for hard law on specific issues rather than for law setting out general principles, with the result that the principles and programmes contained in the Covenant were given effect by a large body of existing law dealing with many social, economic and, less frequently, cultural, issues. [...] The United Kingdom had already seen how the Convention [the European Convention on Human Rights] operated in practice, through its experience of the individual petition procedure since 1968, and had concluded that its provisions were capable of incorporation into domestic law, unlike the Covenant, where the wording of some articles did not readily lend themselves to passage into such law.”⁶²⁴

⁶²³ European Scrutiny Committee, *The application of the EU Charter*, para. 112.

⁶²⁴ CESCR, Summary record: E/C.12/1997/SR.36, 27 November 1997, para. 45-46. See other summary records in E/C.12/1997/SR.37 and E/C.12/1997/SR.38. Country report: E/C.12/4/Add.8,

With these words, the UK was making clear that it believed ESCR to be ontologically different from civil and political rights, and that difference explained that while the latter group of rights could benefit from judicial enforceability, the former cannot, inasmuch as “their wording does not readily lend themselves to passage into such law”. In its final report, the Committee on ESCR praised the British Government for the then Human Rights Bill, which was going to be limited to civil and political rights, “which constitutes a considerable departure from the traditional approach not to incorporate international human rights treaties”. However, the Committee also said to be “disturbed” by the mentioned UK position “that provisions of the Covenant, with certain minor exceptions, constitute principles and programmatic objectives rather than legal obligations, and that consequently the provisions of the Covenant cannot be given legislative effect”.⁶²⁵

This concern was reiterated in 2002.⁶²⁶ In its dialogue with the Committee, the UK delegation insisted on its position:

“[The] Government was determined to comply with its obligations under the International Covenant on Economic, Social and Cultural Rights, but considered that the rights enshrined therein were not justiciable and that it was not for British judges to interpret the provisions of the Covenant. Unlike the European Convention on Human Rights, whose provisions were very specific, the Covenant was primarily concerned with more general commitments.”⁶²⁷

Naturally, justiciability also came up in the 2009 Concluding Observations, regretting that the UK saw ESCR as “mere principles and values”.⁶²⁸ The UK responded to the Committee’s report as follows:

“How to ensure compliance with the Covenant is a matter for each State, as confirmed by general comment No. 9. There is no provision in the Covenant obligating its comprehensive incorporation or requiring it to be accorded any specific type of status in national law. We consider that the United Kingdom’s method of implementation

28 February 2001.

⁶²⁵ CESCR, Concluding Observations: E/C.12/1/Add.19, 12 December 1997, para. 4.b and 10.

⁶²⁶ CESCR, Concluding Observations: E/C.12/1/Add.79, 5 June 2002, para. 11.

⁶²⁷ Summary record: E/C.12/2002/SR.11, para. 21. Other Summary record: E/C.12/2002/SR.12 and E/C.12/2002/SR.13.

⁶²⁸ CESCR, Concluding Observations: E/C.12/GBR/CO/5, 12 June 2009, para. 13.

ensures the fulfilment of the obligations under the Covenant.”⁶²⁹

In its 2014 report to the Committee, the UK insisted that the ICESCR does not require states to incorporate the treaty into domestic legislation, and consequently felt confident its method of implementation satisfied the requirements of the ICESCR.⁶³⁰ This is something the CESCR voiced regret about in its 2016 Concluding Observations, because it “may restrict access to effective legal remedies for violations of Covenant rights”.⁶³¹

While justiciability has been part of the on-going discussion between the UK and the Committee for a number of years, it did not come up for Spain until 2012.

In its Concluding Observations of 1996, the Committee did not address the issue of justiciability, and the summary records show that no Committee member raised it in front of the Spanish delegation.⁶³² In the 2004 Concluding Observations, the Committee reiterated some of the concerns expressed in previous reports (on unemployment, equality between men and women, migrants’ living conditions, discrimination against Roma population...), and raised new ones (related to housing or foreign aid, for example), but did not mention justiciability, which was not included in the written list of issues sent to the delegation in advance or in the Government’s report.⁶³³

In its latest Concluding Observations, the Committee congratulated Spain for the ratification of the Optional Protocol to the ICESCR, and for the first time, it expressed concerns about the lack of justiciability of ESCR in the country:

“The Committee is concerned that, with the exception of the right to education, which is one of the fundamental rights enshrined in the Constitution, economic, social and cultural rights are considered by

⁶²⁹ Comments by the UK on the concluding observations, E/C.12/GBR/CO/5/Add.1, 23 July 2009, 2. The point had been made in the country report: E/C.12/GBR/5, 31 January 2008, para. 73-74.

⁶³⁰ Country report: E/C.12/GBR/6, 25 September 2014, para. 11.

⁶³¹ CESCR, Concluding Observations: UK, UN doc. E/C.12/GBR/CO/6, 14 July 2016, para. 5-6.

⁶³² CESCR, Concluding Observations: E/C.12/1/Add.2, 28 May 1996. Meeting Summary record: E/C.12/1996/SR.3, E/C.12/1996/SR.5, E/C.12/1996/SR.6 and E/C.12/1996/SR.7.

⁶³³ CESCR, Concluding Observations: E/C.12/1/Add.99, 7 June 2004. List of issues: E/C.12/Q/ESP/2, 24 June 2003. Summary record: E/C.12/2004/SR.12, E/C.12/2004/SR.13 and E/C.12/2004/SR.14. Country report: E/C.12/4/Add.11, 14 January 2003.

the State party only as “guiding principles” of social and economic policy, legislation and judicial practice. The Committee is also concerned that the provisions of the Covenant have rarely been invoked or applied in the courts of the State party.

The Committee urges the State party, in light of the indivisibility, universality and interdependence of human rights, to take the necessary legislative measures to ensure that economic, social and cultural rights enjoy the same level of protection as civil and political rights. The Committee also recommends that the State party take appropriate measures to ensure that the provisions of the Covenant are fully justiciable and applicable by domestic courts.”⁶³⁴

Justiciability does not appear in the list of issues submitted by the Committee to the Spanish Government in advance, or in the summary records of the discussion between the Committee and state delegates.⁶³⁵ The issue had only been raised by Amnesty International and by a coalition of 19 national civil society organisations in their shadow reports.⁶³⁶ Most likely, the Committee finally expressed concerns about the lack of justiciability of ESCR in Spain as a result of the advocacy work of the NGOs.

The next review will take place in late 2017 or in 2018. In its list of issues prior to the state’s report, the CESCR has requested the Spanish Government to “explain how [Spain] ensures access to effective remedies in cases of violations of economic, social and cultural rights”, and to provide specific examples from domestic courts.⁶³⁷

UN Special Procedures

Three ESCR-related Special Procedure mandate holders have visited the UK in the last few years: the Special Rapporteur on the human rights of migrants, Jorge Bustamante, in 2009,⁶³⁸ the Working Group of Experts on People of

⁶³⁴ CESCR, Concluding Observations: E/C.12/ESP/CO/5, 6 June 2012, para. 4 and 6.

⁶³⁵ CESCR, List of issues: E/C.12/ESP/Q/5, 2 September 2011. Summary record: E/C.12/2012/SR.12, E/C.12/2012/SR.13 and E/C.12/2012/SR.14.

⁶³⁶ Amnesty International, *Información para el Comité de Derechos Económicos, Sociales y Culturales de la ONU, 48 Periodo de Sesiones, mayo de 2012* (London: AI, 2012); Center for Economic and Social Rights *et al*, *Informe Conjunto al Comité de Derechos Económicos, Sociales y Culturales con motivo del examen del quinto informe periódico de España* (Madrid: CESR *et al*, 2012).

⁶³⁷ CESCR, List of issues prior to submission of the sixth periodic report of Spain, UN doc: E/C.12/ESP/QPR/6, 4 March 2016, para. 7.

⁶³⁸ A/HRC/14/30/Add.3, 16 March 2010

African Descent, in 2012,⁶³⁹ and the Special Rapporteur on Adequate Housing, Raquel Rolnik, in 2013.⁶⁴⁰ None of these reports makes explicit references to the justiciability of ESCR.

Although not directly related to justiciability, the UK has quarrelled with UN Special Procedures in relation to ESCR in particular. The UK Government responded with unusual starkness to Rolnik's report, because it believed that the report contained "a number of inaccuracies and omissions".⁶⁴¹ Beforehand, the then Chairman of the Conservative Party had sent a letter to the UN Secretary General accusing Rolnik of "political bias".⁶⁴²

A more recent report of a treaty-body was also received with a harsh tone. In November 2016, the Government "disagreed strongly" with the conclusions of the inquiry procedure of the UN Committee on the Rights of Persons with Disabilities, the first one of its kind by this Committee.⁶⁴³ The UN's report required the Government's approval to be published. The report was leaked to *The Daily Mail* only a couple of days before this authorisation; the newspaper deemed the report "controversial" and suggested, by echoing words of a Conservative MP, that the Committee was concerned with the sex life of persons with disabilities, and access to sex work in particular, something the UN's report did not talk about.⁶⁴⁴

Since the mid 1990s, two UN Special Procedure mandate holders on ESCR-related issues visited Spain: the Special Rapporteur on Adequate Housing, Miloon Kothari, in 2006, and the Working Group on Discrimination Against Women in Law and in Practice, in 2014. This second Working Group did not

⁶³⁹ A/HRC/24/52/Add.1, 5 August 2013.

⁶⁴⁰ A/HRC/25/54/Add.2, 30 December 2013.

⁶⁴¹ Comments by the UK on the report of the Special Rapporteur: A/HRC/25/54/Add.4, 5 March 2014, para. 3.

⁶⁴² The Guardian, "Grant Shapps accuses United Nations housing rapporteur of political bias", 11 September 2013,

⁶⁴³ Committee on the Rights of Persons with Disabilities, Report on the inquiry on the UK, UN doc: CRPD/C/15/R.2/Rev.1, 6 October 2016. Response of the UK to the Committee's report, UN doc: CRPD/C/17/R.3, 6 October 2016.

⁶⁴⁴ The Daily Mail, "Controversial UN task force slams Britain's welfare cuts and says disabled people are 'unfairly bearing the brunt' of austerity", 5 November 2016.

issue recommendations related to justiciability,⁶⁴⁵ but the Special Rapporteur on Housing did:

“The Special Rapporteur believes that the State should ensure justiciability of the right to adequate housing contained in the Spanish Constitution and relevant international instruments, through accessible complaint mechanisms available to all. A timely implementation of the recommendations of treaty bodies and Special Rapporteurs is necessary.”⁶⁴⁶

The Spanish Government responded to Kothari at the 7th session of the Human Rights Council (March 2008) politely appreciating his report, subtly complaining about the late submission, and presenting a list of measures implemented since the Special Rapporteur’s visit to the country.⁶⁴⁷ The official response did not touch on the point about justiciability of ESCR.

Universal Periodic Review

Both the UK and Spain made and received ESCR-related recommendations in the two reporting cycles until 2016 at the Universal Periodic Review of the Human Rights Council.⁶⁴⁸ For comparative purposes, the UK’s third periodic review, which took place on 4 May 2017, has not been considered in the analysis.

Altogether, the UK received 172 recommendations in 2008 and 2012. In the latest review, Spain recommended the ratification of the Optional Protocol,⁶⁴⁹ but the UK government rejected this recommendation because it “remains unclear about the practical benefits of the right to individual petition to the UN”.⁶⁵⁰ The government used similar words when the issue was raised by the CESCR in June 2016.⁶⁵¹ The UK mysteriously accepted a recommendation from Qatar to “continue to ensure that human rights principles are integrated

⁶⁴⁵ Working Group report on Spain: A/HRC/29/40/Add.3, 17 June 2015.

⁶⁴⁶ Special Rapporteur report on Spain: A/HRC/7/16/Add.2, 7 February 2008, para. 97.

⁶⁴⁷ Note verbale – Reply of Spain to the report of the Special Rapporteur on adequate housing, A/HRC/7/G/13, 18 March 2008.

⁶⁴⁸ Find official documents and recommendations made and received at <http://www.ohchr.org/EN/HRBodies/UPR/Pages/Documentation.aspx> and at <http://www.upr-info.org/>

⁶⁴⁹ Report of the Working Group on the Universal Periodic Review: United Kingdom of Great Britain and Northern Ireland, UN doc. A/HRC/21/9, 6 July 2012, para. 110.26.

⁶⁵⁰ UK, Mid Term UPR Report 2014, 9 and 28.

⁶⁵¹ CESCR, Summary record, UN doc. E/C.12/2016/SR.36, 21 June 2016, para. 13.

in domestic law”, but in its explanation the UK only referred to the Human Rights Act, which shows that the country delegates in Geneva had only civil and political rights in mind when they read the expression “human rights principles”. The UK made 979 recommendations by January 2017, only ten of which are general ESCR-related, targeted essentially at small countries that have not yet ratified the ICESCR.⁶⁵²

Spain received a total of 229 recommendations in both cycles, in 2010 and 2015. In the first cycle, it accepted two recommendations from Afghanistan and Portugal to ratify the Optional Protocol to the ICESCR, which, as we know, it did that year itself (and ironically Afghanistan has not done yet), and it “noted” (a diplomatic euphemism for “rejected”) a recommendation from Uruguay calling to “ensure that all migrants have effective access to services related to ESCR, irrespective of their migration status”. In the second cycle, Spain heard recommendations from ten countries in relation to the negative impact of austerity-led policies on ESCR, particularly a 2012 healthcare reform that had restricted access to healthcare for migrants in an irregular situation.⁶⁵³ With the exception of Norway, no European country was among those making ESCR-related recommendations. Spain accepted all these recommendations, even though civil society organisations would probably not agree that Spain has already reversed the retrogressive measures on the right to health and other socioeconomic rights. Spain is one of the most proactive countries at the UPR process. It made 1515 recommendations by January 2017, 116 of which are about ESCR in general, including the ratification of the ICESCR and its Optional Protocol.

6.3.3. Justiciability of ESCR in domestic legal regimes

United Kingdom

⁶⁵² Find relevant UPR statistics at: <https://www.upr-info.org/database/statistics/>

⁶⁵³ Algeria, Brazil, Egypt, India, Macedonia, Moldova, Nicaragua, Norway, Thailand and Uruguay.

As is well known, the UK does not have a written constitution. The constitution derives from legislation, case law and customary practice. As noted in the common core document submitted by the UK Government to all UN human rights bodies,⁶⁵⁴ the two main principles underpinning the UK constitution are the rule of law and parliamentary supremacy, which means that “an Act of Parliament cannot be overridden by other bodies”. This is a subtle way of warning any international body that may feel the temptation to oppose a domestic law to its own interpretation of a given treaty. The core document also states that “the UK implements its international human rights obligations through appropriate legislation and administrative measures. International instruments do not, however, apply directly in UK law”.⁶⁵⁵

The traditional dualist separation between international and national laws is no longer that clear-cut in the opinion of some members of the highest judicial authority of the land. In *R (SG & Ors) v. Secretary of State for Work and Pensions [2015]*, a case related to the indirectly discriminatory impact of austerity-led welfare cuts, Lord Reed admitted that the welfare reform might infringe the Convention on the Rights of the Child, but since this Convention has not been domesticated, it would be “inappropriate for the courts to purport to decide whether or not the Executive has correctly understood an unincorporated treaty obligation”.⁶⁵⁶ Lord Carnwath reached a similar conclusion: He was ready to “declare” that the regulation was not “compatible” with the Convention of the Rights of the Child, but “it is in the political, rather than the legal arena, that the consequences of that must be played out”.⁶⁵⁷ But other Justices saw it differently. Lady Hale expressed the view that the UK’s international obligations “have the potential to illuminate our approach to both discrimination and justification”.⁶⁵⁸ Lord Kerr added that, “despite the seemingly comprehensive ban on the use by the courts of

⁶⁵⁴ UK, Common core document forming part of the reports of States parties, UN doc: HRI/CORE/GBR/2014, 29 September 2014, para. 4.

⁶⁵⁵ *Id.*, para. 25.

⁶⁵⁶ Supreme Court, *R. v. Secretary of State for Work and Pensions* (2015) UKSC 16, 18 March 2015, para. 78-91.

⁶⁵⁷ *Id.*, para. 112 and 133.

⁶⁵⁸ *Id.*, para. 218.

unincorporated international treaties to recognise rights on the domestic law plane, there are three possible ways which have been considered by the courts in which such treaties may have an impact on national law – (i) as an aid to statutory interpretation; (ii) as an aid to development of the common law; and (iii) as a basis for legitimate proposition” that authorities will take ratified human rights treaties into account in the exercise of their powers; therefore, at least some treaties should be “directly enforceable in UK domestic law” regardless of the lack of an Act of Parliament.⁶⁵⁹

The Human Rights Act 1998 made the rights contained in the European Convention of Human Rights directly enforceable by UK courts. However, this Convention only includes civil and political rights. As denounced by the UN Committee on ESCR in several occasions (see subsection 6.3.2), ESCR are not justiciable in the UK.

In 2009, the UK Government opened up a process of revision of the Human Rights Act. The framing document of the consultation made clear that the Government did not intend to make ESCR justiciable in a possible new Bill of Rights:

“Decision-making in economic, social and cultural matters usually involves politically sensitive resource allocation and if the courts were to make these decisions, this would be likely to impinge on the principles of democratic accountability as well as the separation of powers between the judiciary, the legislature and the executive which underpins our constitutional arrangements.

In drawing up a Bill of Rights and Responsibilities, the Government would not seek to create new and individually enforceable legal rights in addition to the array of legal protections already available. However, it welcomes discussion on whether there could be advantages in articulating constitutional principles, which can be drawn from existing welfare provisions. It might be possible to distil the values which frame our welfare system in order to reflect, in one coherent document, certain social and economic guarantees and the responsibilities and conduct expected of individuals.”⁶⁶⁰

A year earlier, the Parliamentary Joint Committee on Human Rights had

⁶⁵⁹ Id, para. 238 and 257.

⁶⁶⁰ UK Government, *Rights and Responsibilities: developing our constitutional framework*, 2009 (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228938/7577.pdf), para. 3.52-3.53.

advised the improvement of the Human Rights Act to incorporate the duty of progressive realisation of ESCR with a limited judicial role.⁶⁶¹ And as far as 2004 the Joint Committee had actually recommended the use of the ICESCR as a framework for government policy development, including a discussion of the compatibility of each Bill with the rights contained in the Covenant.⁶⁶² None of these suggestions was taken any further.

The reform of the Human Rights Act was eventually called off by the coalition Government (2010-2015), but a Conservative Government might reopen the discussion about its replacement by a “British Bill of Rights”.⁶⁶³ Whatever a new text might bring, it is unlikely to see a significant change in a policy that has consistently treated ESCR as non-justiciable rights.

Spain

ESCR are essentially not justiciable in Spain. Article 53 of the 1978 Spanish Constitution makes a hierarchy within the constitutional bill of rights. According to that provision, civil and political rights recognised in Chapter Two of Title One “are binding for all public authorities”, and may only be regulated by law, which shall respect their essential content. Some among them (Articles 14-29 and part of Article 30) are enforceable in a preferential and summary judicial procedure, and are even protected by individual appeal to the Constitutional Court (“*recurso de amparo*”). The right to education and the right to form and to join a trade union are the only socioeconomic rights in this list (Articles 27 and 28).⁶⁶⁴ All other ESCR are included in Chapter Three of Title One, on “governing principles of economic and social policy”.⁶⁶⁵

⁶⁶¹ Joint Committee on Human Rights, *A Bill of Rights for the UK? Twenty-ninth Report of Session 2007–08* (London: House of Commons, 2008), p. 53.

⁶⁶² Joint Committee on Human Rights, *The International Covenant on Economic, Social and Cultural Rights, Twenty-first Report of Session 2003–04* (London: House of Commons, 2004), pp. 30 and 32.

⁶⁶³ Financial Times, “PM plots British Bill of Rights ahead of EU referendum”, 24 July 2015.

⁶⁶⁴ Unionisation and education are also the only socioeconomic rights the European Court was given jurisdiction over, via Article 11 in the first case and via Protocol I in the second one. The right to private property is also included in this Protocol but it is conventionally considered a civil right.

⁶⁶⁵ Chapter Three of Title One deals with protection of family and children (Article 39), right to

Article 53(3) of the Constitution makes clear that the rights included in that Chapter “may only be invoked in the ordinary courts in the context of the legal provisions by which they are developed”. In other words, the Constitution does not establish the justiciability of ESCR, but it does so for civil and political rights.

The Spanish constitutional and legal regime follows the path paved by Articles 22 UDHR and 2(1) ICESCR, and treats ESCR as second-class rights. The Constitution leaves the recognition of judicial enforceability to future legal development, but in general neither federal nor regional legislation guarantees a minimum core content of ESCR or has established their justiciability.⁶⁶⁶

Article 10(2) of the Constitution says that the bill of rights must be interpreted in accordance with international human rights law, and especially the UDHR. However, this is only an interpretive tool and the Constitutional Court has established that IHRL does not give constitutional status to human rights, unless they are already included in the Constitution itself.⁶⁶⁷ With the partial exception of the judgements of the European Court of Human Rights, the Spanish judiciary does not consider the decisions of international bodies to be legally binding.⁶⁶⁸ This will most certainly constrain the impact of future decisions of the UN Committee on ESCR on individual complaints in application of the Optional Protocol to the ICESCR.

In spite of the general lack of justiciability of ESCR in the Spanish

work and rights at work (Articles 40 and 42), social security (Article 41), right to health (Article 43), protection of culture and heritage (Articles 44 and 46), protection of the environment (Article 45), right to housing (Article 47), youth participation (Article 48), rights of people with disabilities (Article 49), protection of the elderly (Article 50), consumers’ rights (Article 51) and professional organisations (Article 52).

⁶⁶⁶ AI, *Información para el Comité DESC de la ONU*. An exception would be the new Housing Law of the Basque Country (Law 3/2015), adopted on 18 June 2015, which explicitly establishes the justiciability of this right. However, the Spanish Government appealed this Law to the Constitutional Court, which suspended its application until a final ruling.

⁶⁶⁷ For example, Constitutional Court Judgements 36/1991, 14 February, 64/1991, 22 March, 372/1993, 13 December, 199/1996, 3 December, and 41/2002, 25 February.

⁶⁶⁸ Constitutional Court Judgements 70/2002, 3 April, 240/2005, 10 October; Supreme Court Judgements 953/2011, 9 March, and 330/2015, 19 May; Council of State of Spain, Ruling 318/2015, 11 June 2015, 9, in relation to the following case heard by the Committee on the Elimination of Discrimination Against Women: *González Carreño v. Spain*, Communication 47/2012, UN doc: CEDAW/C/58/D/47/2012, 15 August 2014.

constitutional and legal framework, and the non self-executing nature of international human rights treaties, the Constitutional Court has sometimes contributed to the legal protection of ESCR. Three cases stand out. In 2007, the Court established that all foreigners, regardless of their administrative status, are entitled to some of the rights recognised in the Constitution, including socioeconomic rights like the right to education and the right to join unions.⁶⁶⁹ And in 2012 and 2014, the Constitutional Court noted the close connection between the social right to health and the civil rights to life and to physical and moral integrity, allowing the Basque Country and Navarre to ensure healthcare protection for migrants in an irregular administrative situation, in spite of a recent federal reform that had restricted the right to health for them.⁶⁷⁰ However, in 2016 the Constitutional Court concluded, with three dissenting votes out of 12, that the Spanish regressive health reform was in line with the constitutional bill of rights.⁶⁷¹

6.4. Conclusions

Order-over-Justice presages that Western European states will be ready to support human rights norms whose meaning is relatively blurry, whose implications are relatively light, whose liberal foundations are well established, and whose supporters include strong and resourceful norm entrepreneurs.

Justiciability of ESCR is only a partially suitable candidate from this perspective. Justiciability is an easily understandable implementation mechanism (P3) that has been strongly advocated by social rights groups and independent international bodies for more than two decades now (P6). On the other hand, the analysis in relation to burden (P4) and liberalism (P5) leads to more nuanced conclusions.

⁶⁶⁹ Constitutional Court Judgement 236/2007, 7 November.

⁶⁷⁰ Constitutional Court Decisions (“Autos”) 239/2012, 12 December, and 114/2014, 8 April.

⁶⁷¹ Constitutional Court Judgement 139/2016, 21 July.

Order-over-Justice essentially downplays the differences between Western European countries. However, in relation to this norm, there is clearly no single policy among these states with regard to ESCR treaty ratification. They all have ratified the main global treaty, the ICESCR, but have adopted different positions in relation to the European ones. The UK and Spain are among the least willing states when it comes to international implementation commitments at the European level. However, surprisingly, Spain was one of the first countries to ratify the Optional Protocol to the ICESCR. It is difficult to explain why Spain was so quick to accept individual complaints at the UN level, but still unwilling to do the same thing with collective complaints at the Council of Europe. Spain and the UK expressed very different views on the justiciability of ESCR in the drafting process of the Optional Protocol to the ICESCR, and the UK made clear that it did not want justiciable ESCR in the EU Charter of Fundamental Rights.

Even though the justiciability of ESCR has reached an advanced degree of settlement in international law and politics, our two countries have a poor record in the domestication of this norm, even if Spain has been more proactive than the UK in its promotion globally. While Spain appears to follow an internationalist agenda, the UK is a zealous protector of its national sovereignty.

Order-over-Justice does not grant much importance to internal political and democratic changes. This remains a valid proposition as regards the two countries examined here. Since ESCR are closely connected to welfare state, one could expect state practice to be somehow shaped by changes in government. Yet, there is no compelling reason to believe that this influenced the approach to ESCR justiciability in Spain or in the UK. In the last two decades, a conservative party has ruled Spain for 12 years and a social-democratic party, for eight. In the case of the UK, (New) Labour was in power for 13 years, a Liberal Democrat–Conservative coalition, for five, and now Conservatives are back in power on their own. During this time, Spain endorsed the justiciability of ESCR at the UN, but not at the Council of Europe,

and clearly not internally, while the UK has been consistent in not promoting the norm at any level. In any case, even if the UK clearly does not support the norm, aware of its progressive settlement, it has not opposed its international recognition either.

Justice influenced-actors like domestic courts, NGOs and international human rights bodies have played a significant role in the progressive recognition of the justiciability of ESCR. However, ESCR-related Special Procedures did not raise the issue in their recent missions to Spain and the UK, with the exception of the Special Rapporteur on Adequate Housing in Spain. Justiciability has been a recurrent concern in the last four reporting cycles of the UN Committee on ESCR on the UK, and in the latest report on Spain, precisely when two NGO alternative reports brought the issue to the Committee's attention.

As said in the first paragraph of these conclusions, there are reasons to believe that justiciability is a liberal norm that imposes a burdensome requirement, but only to some degree. On the one hand, justiciability could give judges the power to assess the executive allocation of resources to fulfil ESCR. On the other hand, as an implementation mechanism, justiciability leaves unattended systemic and structural conditioning factors for the fulfilment of ESCR. As proclaimed in Article 2(1) ICESCR, the progressive realisation of ESCR requires the adoption of all the necessary measures to the maximum of available resources. This probably means the adoption of fiscal and economic policies that may be at odds with certain trends experienced in Western Europe in the last decades, particularly austerity-led policies since 2008. Inasmuch as it deals with individual cases, compared with binding monetary, fiscal or socioeconomic guidelines, justiciability is likely to be one of the least burdensome of the necessary mechanisms to implement ESCR.

In sum, since the adoption of the UDHR, Western European states have promoted ESCR. However, Western European states tried to keep control over the meaning of these rights by refusing to establish strong accountability mechanisms. As time went by, justiciability became an integral

part of ESCR as a result of the advocacy and hermeneutics of non-state and justice-motivated actors. Western European states reluctantly accepted this normative change by endorsing the norm but mostly in its poorest form, that is, with weak international accountability mechanisms as opposed to giving their national judges the means to oversee administrative compliance with these rights.

7. RESPONSIBILITY TO PROTECT

“The notion that because a régime is detestable foreign intervention is justified and forcible overthrow is legitimate is extremely dangerous. That could ultimately jeopardize the very maintenance of international law and order and make the continued existence of various régimes dependent on the judgement of their neighbours.”

French Ambassador to the UN in response to Vietnam’s intervention in Cambodia, 12 January 1979.⁶⁷²

Focusing on the third pillar, which potentially covers military action, this chapter starts by introducing the Responsibility to Protect (R2P) as an evolved and sophisticated version of humanitarian intervention (section 7.1). The chapter continues with the propositions on clarity, burden, liberal principles and the role of norm entrepreneurs (7.2). Thirdly, it observes the practice (action and discourse) of the UK and Spain between 2005 and 2016. It does so by looking at states’ general position on R2P as declared at the Security Council, General Assembly and other statements, and the position adopted in relation to Sudan (Darfur), Sri Lanka, Libya, Côte d’Ivoire and Syria (7.3). The information in this third section is principally nourished by the UK case due to the availability of sources.

7.1. From the right to intervene to the responsibility to protect?

Developed at the dawn of the millennium, R2P is a call to protect civilian populations from gross violations of human rights. It is often understood to be comprised of three pillars: firstly, it recalls governments’ responsibility to protect their own people; secondly, it calls on them to cooperate to build

⁶⁷² UN Security Council, Official record of the 2109th meeting, of 12 January 1979, UN doc: S/PV.2109, para. 36.

capacities to protect the population in all countries; and thirdly, and most controversially, it establishes that the international community should take collective action, even with military means if necessary, to protect civilians if a national government is manifestly failing to take care of its people.

R2P was coined in December 2001 by the International Commission on Intervention and State Sovereignty (ICISS), which was functionally independent albeit sponsored by the Canadian government. The ICISS report attempted to “shift the terms of the debate” from the *right* to intervene to the *responsibility* to protect.⁶⁷³ More than 400 pages of supplementary and valuable research, bibliography and background information on morality, international law and the history of humanitarian interventions accompanied the report.⁶⁷⁴

Based on the idea that sovereignty entails responsibility, ICISS advocated that the state holds the “primary responsibility” to protect its people, but “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”.⁶⁷⁵ Thus, the responsibility to protect would not only befall national authorities, but the international community as a whole. This opens the question about who in the international community should decide about an intervention. Controversially, the ICISS report recommends that other options must be explored “when the Security Council fails to act”: the General Assembly under the “Uniting for Peace” procedure (used for Korea in 1950), regional organisations like NATO or the African Union, or even so-called coalitions of the willing as last resort.⁶⁷⁶ In other words, ICISS endorsed the idea that legality and legitimacy are two different things: A humanitarian intervention *manu militari* may be legitimate even when it

⁶⁷³ ICISS, *The Responsibility to Protect* (Ottawa: International Development Research Centre, 2001), 16-18.

⁶⁷⁴ ICISS, *The Responsibility to Protect: Research, Bibliography, Background* (Ottawa: International Development Research Centre, 2001).

⁶⁷⁵ ICISS, *The Responsibility to Protect*, xi.

⁶⁷⁶ *Id.*, 53-55.

does not follow the legally established procedure of Chapter VII of the UN Charter.

Throughout history, a number of military interventions have been presented, perceived and sometimes disguised as humanitarian in nature. In the 19th century, Russia and Western powers intervened in Greece and Eastern Europe to protect Christians from the Ottoman Empire.⁶⁷⁷ Frequently mentioned examples from the 20th century are India's intervention in East Pakistan (now Bangladesh), Vietnam in Cambodia and Tanzania in Uganda, all of them in the 1970s.⁶⁷⁸

Albeit the interventions in East Pakistan, Cambodia and Uganda were not formulated in humanitarian terms, but as self-defence, the literature regularly categorises them as such. On the contrary, the Cuban intervention against the illegal⁶⁷⁹ South African occupation of Angola in the 1970s and 80s normally does not feature as an example of humanitarianism, even though it contributed to break "the myth of the invincibility of the white oppressors" according to Nelson Mandela.⁶⁸⁰

The end of the Cold War paved the way for an expansionist interpretation of the mandate of the Security Council in relation to international peace and security.⁶⁸¹ By doing so, over the last quarter of a century the Security

⁶⁷⁷ Martha Finnemore, "Constructing Norms of Humanitarian Intervention", in Katzenstein, Peter (ed.), *The Culture of National Security: Norms and Identity in World Politics* (New York: Columbia University Press 1996); Wheeler, *Saving Strangers*, 46; Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All* (Washington DC: Brookings Institution Press, 2008), 19.

⁶⁷⁸ Finnemore, "Constructing Norms of Humanitarian Intervention"; Wheeler, *Saving Strangers*, ch. 2, 3 and 4; ICISS, *The Responsibility to Protect: Research, Bibliography, Background*, ch. 4; Evans, *The Responsibility to Protect*, 23-25.

⁶⁷⁹ According to the ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971.

⁶⁸⁰ Nelson Mandela's speech on the occasion of the 38th anniversary of the start of the Cuban revolution, 26 July 1991. The only time the ICISS mentioned Cuba in the 400-page report was to say that "interventions during the Cold War were far more likely to be undertaken by a single state (for example, the United States [US] in Vietnam, the Soviet Union in Afghanistan, and South Africa and Cuba in Angola), whether directly or by proxy, than they were to be multilateral" (*The Responsibility to Protect: Research, Bibliography, Background*, 18). Considering that the Cuban intervention in Angola is coupled with that of South Africa, and with the wars in Vietnam and Afghanistan, I assume the ICISS did not deem Cuba's motivations sufficiently humanitarian.

⁶⁸¹ ICISS, *The Responsibility to Protect: Research, Bibliography, Background*, ch. 5; Bruce Cronin and Ian Hurd (eds.), *The UN Security Council and the Politics of International Authority* (London:

Council has appeared much more willing to intervene in the domestic affairs of a number of countries where serious violations of human rights were taking place. In the 1990s, this happened in Northern Iraq (1991), Somalia (1991), Liberia (1992), Bosnia-Herzegovina (1993), Haiti (1994), Sierra Leone (1997) and Timor-Leste (1999). In Liberia and Sierra Leone, the Security Council endorsed the interventions of the Economic Community of West African States (ECOWAS) in hindsight.

These interventions were unable to prevent some of the most serious human rights violations. Even more, UN troops were accused of committing human rights violations of their own, a good number of which went unpunished.⁶⁸² Shortcomings, inconsistencies and serious missteps aside, the message from the 1990s was that the international community could not sit on the fence while people were being slaughtered.

The aforementioned cases were examples of Security Council action, but two cases of inaction in that decade stand out for the purposes of explaining normative development. First, Rwanda in 1994, when the world stayed put while genocide killed 800,000 people in three months. Second, Kosovo in 1998, where the Serbian government was reportedly targeting the Kosovar population, but the Security Council failed to agree on any sort of action because of the Russian pledge to veto. NATO forces intervened in spite of the lack of endorsement of the Security Council. This intervention was, at least procedurally, illegal.⁶⁸³ Nonetheless, for those who argue that legality and

Routledge, 2008); Aidan Hehir, Natasha Kuhrt and Andrew Mumford (eds.), *International Law, Security and Ethics: Policy Challenges in the post-9/11 World* (London: Routledge, 2011); Carrie Walling, Human Rights Norms, State Sovereignty, and Humanitarian Intervention, *Human Rights Quarterly*, 37:2 (2015).

⁶⁸² This grave concern was raised by the two panels on UN Peace Operations established so far: the “Brahimi Report” of 2000 (UN doc: A/55/305-S/2000/809), and the High-level Independent Panel of 2015 (UN doc: A/70/95-S/2015/446).

⁶⁸³ Nigel Rodley and Basak Çali, Kosovo Revisited: Humanitarian Intervention on the Fault Lines of International Law, *Human Rights Law Review*, 7:2 (2007). Soon after India’s incursion in Bangladesh in the early 1970s, Franck and Rodley expressed their profound scepticism about the notion of *humanitarian intervention*: “Nothing would be a more foolish footnote to man’s demise than that his final destruction was occasioned by a war to ensure human rights”; “a usable general definition of ‘humanitarian intervention’ would be extremely difficult to formulate and virtually impossible to apply rigorously; [...] the kind of unilateral military intervention which has occurred in the past is usually not to be encouraged, that those kinds of intervention which it would be desirable to encourage have for reasons of self-interest almost never occurred in the past and that

legitimacy are not necessarily the same thing in international affairs,⁶⁸⁴ the alleged humanitarianism legitimised the intervention and put it in line with the spirit or the “ideology” of international law,⁶⁸⁵ although not with its letter per se.

In April 2000, in the aftermath of the intervention in Kosovo, the G-77, which brings together about 130 countries from the Global South, met in Havana and stated firmly its opposition to what they believed was an imposition of Western powers: “We reject the so-called ‘right’ of humanitarian intervention, which has no legal basis in the United Nations Charter or in the general principles of international law.”⁶⁸⁶ Russia was therefore not alone in its opposition to NATO intervention in Kosovo.

However, while they met in Cuba with other delegates from the Global South, African countries were negotiating the Constitutive Act of the new African Union, which was finally adopted in July 2000. Article 4 of the Constitutive Act, on the principles of the African Union, mentions peaceful resolution of conflicts and the prohibition of use of force; yet, a novelty was included in letter (h), proclaiming “the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity”. This “norm of non-indifference”⁶⁸⁷ would, in Acharya’s opinion, provide evidence of the African roots of R2P.⁶⁸⁸

Still in 2000, UN Secretary General Kofi Annan, who had been the head of UN

this pattern is unlikely to be altered by a change in the law” (After Bangladesh: The Law of Humanitarian Intervention by Military Force, *American Journal of International Law*, 67:2, 1973, 300 and 305). In 2007, however, the main criticism of Rodley and Çali focuses on the fact that the intervention in Kosovo was unilateral, not so much on the reliability of the declared intention of the intervener.

⁶⁸⁴ Like Richard Falk, “Introduction: Legality and Legitimacy”, in Falk, Richard, Juergensmeyer, Mark and Popovski, Vasselin (eds.), *Legality and Legitimacy in Global Affairs* (Oxford: Oxford University Press, 2012).

⁶⁸⁵ Shirley Scott and Olivia Ambler, Does Legality Really Matter? Accounting for the Decline in US Foreign Policy Legitimacy Following the 2003 Invasion of Iraq, *European Journal of International Relations*, 13:1 (2007).

⁶⁸⁶ Group of 77, Declaration of the South Summit, Havana 10-14 April 2000, para. 54.

⁶⁸⁷ Ben Kioko, The right of intervention under the African Union’s Constitutive Act: From non-interference to non-intervention, *International Review of the Red Cross*, 85:852 (2003), 819.

⁶⁸⁸ Amitav Acharya, The R2P and Norm Diffusion: Towards A Framework of Norm Circulation, *Global Responsibility to Protect*, 5:4 (2013).

peacekeeping operations during the Rwandan genocide, posed this question: “If humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica –to gross and systematic violations of human rights that offend every precept of our common humanity?”.⁶⁸⁹

The ICISS took up Annan’s gauntlet. Recalling Rwanda, Kosovo, Bosnia and Somalia, the ICISS report observed that “for some, [these interventions] herald a new world in which human rights trump state sovereignty; for others, it ushers in a world in which big powers ride roughshod over the smaller ones, manipulating the rhetoric of humanitarianism and human rights”.⁶⁹⁰ R2P was a sort of middle ground “solution” to this confrontation.⁶⁹¹

Considering its immediate past, one may say that, in 2001, R2P was a norm whose time had come. Considering its immediate future, on the other hand, timing could not have been worse.

The ICISS report was published just three months after 9/11, the beginning of a an era defined by governments’ obstinacy with the threat of global terrorism, and by the ensuing human rights retrogression worldwide (see chapter 4 on the prohibition of torture). It was also the time of the US-led war in Iraq bypassing the Security Council. Some ardent R2P supporters justified this intervention on humanitarian grounds,⁶⁹² but most saw it as a great disservice to R2P. Recalling the 1991 intervention to protect the Kurds in the north of the country, Foley insinuates that “it all started in Iraq and perhaps it finished in Iraq as well”.⁶⁹³

Evans admits that the ICISS report “seemed likely to disappear without a trace”, and if that did not happen it was greatly thanks to Kofi Annan.⁶⁹⁴ In

⁶⁸⁹ Kofi Annan, *We the Peoples’: The Role of the United Nations in the 21st Century* (New York: United Nations, 2000), 48.

⁶⁹⁰ ICISS, *The Responsibility to Protect*, 2.

⁶⁹¹ Evans, *The Responsibility to Protect*, ch. 2.

⁶⁹² Michael Ignatieff, Why Are We In Iraq? (And Liberia? And Afghanistan?), *The New York Times* (7 September 2003).

⁶⁹³ Conor Foley, The Evolving Legitimacy of Humanitarian Interventions, *Sur: International Journal on Human Rights*, 10:19 (2013), 79.

⁶⁹⁴ Evans, *The Responsibility to Protect*, 5.

2004, Annan appointed his first Special Adviser to the Secretary General on the Prevention of Genocide, Juan Méndez, who upon Ban Ki-moon's arrival to the UN Secretariat in 2007 would be replaced by Francis Deng, credited with coining "sovereignty as responsibility".⁶⁹⁵ In 2003, Annan commissioned a High-level Panel on Threats, Challenges and Change, of which Gareth Evans was one of its members. In their report, this group of eminent individuals endorsed R2P as an "emerging norm" that must be exercised by the Security Council as a last resort.⁶⁹⁶ Note that the ICISS had considered the involvement of the Security Council desirable, but not a necessary requirement for the application of R2P. In a more moderate fashion, in his preparatory report for the 2005 World Summit, the Secretary General urged Member States to "embrace the responsibility to protect" following the report of the High-level Panel.⁶⁹⁷

R2P supporters argue that the World Summit of September 2005 was a key milestone, the moment when R2P was institutionalised in international affairs. The World Summit Outcome Document highlighted three points in relation to R2P. Firstly, it stressed the idea that primary responsibility lies on the authorities of the country where gross human rights violations are taking place; states would be supposed to assist each other in capacity building; and if the authorities fail in their responsibility, the international will have to be "prepared to take collective action".⁶⁹⁸ Secondly, the Outcome Document circumscribed what must be understood as gross human rights violations: genocide, war crimes, crimes against humanity and ethnic cleansing. Thirdly,

⁶⁹⁵ See Deng's End of Assignment Note of 31 July 2012:

<http://www.un.org/en/preventgenocide/adviser/pdf/Francis%20Deng%20-%20End%20of%20Assignment%20Note%20-%20English.pdf#zoom=100>

⁶⁹⁶ High-level Panel on Threats, Challenges and Change, *A more secure world: Our shared responsibility* (New York: United Nations, 2004), para. 203.

⁶⁹⁷ Secretary General, *In larger freedom: towards development, security and human rights for all*, 2005, para. 135.

⁶⁹⁸ General Assembly, Resolution 60/1, 2005 World Summit Outcome, 20 October 2005, para. 138-140. The three pillars were articulated as such in the 2009 Secretary General's report. Only a few days before the 2005 Summit, US Ambassador to the UN John Bolton sent a letter to his counterparts announcing that the US did "not accept that either the United Nations as a whole, or the Security Council, or individual states, have an obligation to intervene under international law [and that the US believed] that what the United Nations does in a particular situation should depend on the specific circumstances". (Letter by Ambassador John Bolton of 30 August 2005)

world leaders agreed at the Summit that R2P does not give a carte blanche to one country to intervene in another for humanitarian purposes. Unlike the ICISS, the Outcome Document only recognises the Security Council as the legitimate body to authorise the use of force. The Outcome Document outlawed unilateral humanitarian intervention. This is why for Weiss, the world leaders agreed upon was not really R2P, but “R2P-lite”.⁶⁹⁹

In Resolution 1674 (2006), the Security Council reaffirmed these paragraphs. This Resolution has been recalled several times ever since. That said, one thing is to establish a general principle in a diplomatic statement in New York, and a very different thing is to apply this principle in a real case scenario, with imperfect information, conflicting national interests and a rapidly growing death toll of innocent civilians. As noted by the Special Adviser to the Secretary General on the Responsibility to Protect, “those who ultimately gave their stamp of approval to Articles [sic] 138 and 139 were playing a very different role from that which would be assumed by representatives of states in the Security Council, or the political leaders in key states, when faced with subsequent humanitarian crises”.⁷⁰⁰

Since 2005, the Security Council has used the words “responsibility to protect” in the justificatory paragraphs of resolutions in relation to the Central African Republic, Côte d’Ivoire, Democratic Republic of Congo and Great Lakes Region, Libya, Mali, Sudan (including Darfur), South Sudan, Somalia, Syria and Yemen.⁷⁰¹

⁶⁹⁹ Thomas Weiss, R2P after 9/11 and the World Summit, *Wisconsin International Law Journal*, 24:1 (2005), 750.

⁷⁰⁰ Jennifer Welsh, Norm Contestation and the Responsibility to Protect, *Global Responsibility to Protect*, 5:4 (2013), 381.

⁷⁰¹ The International Coalition for the Responsibility to Protect (<http://www.responsibilitytoprotect.org/index.php/component/content/article/136-latest-news/5221--references-to-the-responsibility-to-protect-in-security-council-resolutions>) and the Global Centre for the Responsibility to Protect (<http://www.globalr2p.org/resources/335>) do a wonderful job with up-to-date databases of relevant official documents on R2P.

7.2. What does Order-over-Justice mean for R2P? Clarity, burden, liberalism and norm entrepreneurs

7.2.1. Is the meaning of R2P clear?

Order-over-Justice expects Western European states to give more support to norms defined in unclear terms (P3). This is the case of R2P. Because of its lack of clarity, it is difficult to ascertain if states comply with the norm or not. This may explain why, as shown in subsection 7.2.4, some authors believe there is a broad “consensus” in support of this “emerging norm”,⁷⁰² while others claim that R2P is still disputed among states and commentators.⁷⁰³

Lack of clarity also complicates the assessment of whether R2P is even being implemented in a particular scenario. Bellamy only finds one example in which the international community failed to react to gross human rights violations against civilians: Sri Lanka in 2008-2009.⁷⁰⁴ Again, however, this is a matter of interpretation, and one may legitimately wonder if there cannot have been other cases since 2005, cases where the application of R2P might have been the most appropriate response: Gaza, North Korea, Bahrain, Syria, etc.⁷⁰⁵ In any case, due to its lack of clarity, it is relatively easy to disguise pure national interests with humanitarian arguments, as was done in the USA

⁷⁰² Evans, *The Responsibility to Protect*; Mónica Serrano, The Responsibility to Protect and its Critics: Explaining the Consensus, *Global Responsibility to Protect*, 3:4 (2011); Edward Luck, The Responsibility to Protect: The First Decade, *Global Responsibility to Protect*, 3:4 (2011); Bellamy, *The Responsibility to Protect*.

⁷⁰³ Robert Knox, Civilizing interventions? Race, war and international law, *Cambridge Review of International Affairs*, 26:1 (2013); Edward Newman, R2P: Implications for World Order, *Global Responsibility to Protect*, 5:3 (2013); Derek McDougall, Responsibility While Protecting: Brazil's Proposal for Modifying Responsibility to Protect, *Global Responsibility to Protect*, 6:1 (2014); Oliver Stuenkel, The BRICS and the Future of R2P: Was Syria or Libya the Exception?, *Global Responsibility to Protect*, 6:1 (2014).

⁷⁰⁴ Bellamy, *The Responsibility to Protect*, ch. 7.

⁷⁰⁵ On North Korea, see Timmoneri (Responsibility to protect and ‘peacetime atrocities’: the case of North Korea, *International Journal of Human Rights*, 19:8, 2015); on Bahrain, Hehir (Bahrain: an R2P blind spot?, *International Journal of Human Rights*, 19:8, 2015); on Gaza, Ercan (Responsibility to protect and interstate crises: why and how R2P applies to the case of Gaza, *International Journal of Human Rights*, 19:8, 2015).

and the UK in relation to Iraq (2003), and by Russia in Georgia (2008) and in Ukraine (2014).⁷⁰⁶

The very notion of R2P has different meanings, insofar as the R2P endorsed by the General Assembly in the 2005 World Summit differs from the one proposed by ICISS in 2001. Furthermore, in its 2005 UN formulation, R2P would be applicable to respond specifically to “ethnic cleansings”, but the meaning of this term remains unclear in international criminal law. The reference to “ethnic cleansings” in paragraph 138 is not at all self-evident. It is difficult to imagine what may amount to ethnic cleansing but not to genocide or to a crime against humanity, depending on the perpetrator’s intent to destruct the group.⁷⁰⁷ Moreover, the World Summit Outcome Document gives an undefined mandate to the “international community [to] take collective action [...] through the Security Council”. By diffusing responsibility in such an indeterminate way, the General Assembly accepted a responsibility nobody could really be held accountable for.

Even R2P supporters admit to the lack of clarity of R2P. As noted by the Special Adviser to the UN Secretary General, “R2P is particularly susceptible to contestation, given its inherently indeterminate nature, and the erroneous tendency to measure its impact in terms of whether or not military intervention occurs in particular cases”.⁷⁰⁸ This indeterminacy poses a methodological challenge when attempting to distinguish between behaviour

⁷⁰⁶ On Georgia, see Bellamy (*The Responsibility to Protect*, ch. 7) and Knox (Civilizing interventions?, 126-127); on Ukraine, see Kurowska (Multipolarity as resistance to liberal norms: Russia’s position on responsibility to protect, *Conflict, Security & Development*, 14:4, 2014). Ignatieff (Why Are We In Iraq?) supported the intervention in Iraq based on R2P, and Tony Blair did so by reference to the “Kosovo option” (Committee of Privy Counsellors, *The Report of the Iraq Inquiry (“Chilcot Report”)*, 6 July 2016, Section 3.5, para. 1102).

⁷⁰⁷ The ICJ ruled on the Bosnian genocide: “Whether a particular operation described as ‘ethnic cleansing’ amounts to genocide depends on the presence or absence of acts listed in Article II of the Genocide Convention, and of the intent to destroy the group as such. In fact, in the context of the Convention, the term ‘ethnic cleansing’ has no legal significance of its own. That said, it is clear that acts of ‘ethnic cleansing’ may occur in parallel to acts prohibited by Article II of the Convention, and may be significant as indicative of the presence of a specific intent (*dolus specialis*) inspiring those acts.” (*Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgement of 26 February 2007, para. 190).

⁷⁰⁸ Welsh, Norm Contestation and the Responsibility to Protect, 390.

that is compliant with R2P and behaviour that is not.⁷⁰⁹

In sum, R2P is a particularly unclear norm. Its level of obscurity is only comparable to that of ecocide (chapter 5), given the fact that both norms have been interpreted in both wide and restricted senses: Ecocide-lite and R2P-lite. In light of Order-over-Justice, considering its lack of clarity, Western European states are likely to support R2P.

7.2.2. Is the idea of R2P burdensome?

Order-over-Justice expects that Western European states will give more support to less onerous norms (P4). It might seem that R2P is a very demanding norm, because it requires states to be ready to send troops to protect civilians far away from their borders. However, in its 2005 formulation, R2P is not really burdensome. States do not want to be “legally bound to save strangers”,⁷¹⁰ as shown by the downgrade from the more ambitious ideas of the ICISS in 2001 to the more manageable terms of the General Assembly in 2005.

This may also explain why the UN Secretary General felt the need to make clear in his first report on the subject that R2P “does not alter, indeed it reinforces, the legal obligations of Member States to refrain from the use of force except in conformity with the Charter”.⁷¹¹ Three years later, he insisted: “the protection of civilians is a legal concept based on international humanitarian, human rights and refugee law, while the responsibility to protect is a political concept”.⁷¹²

In other words, R2P does not create new legal obligations. It is not a material norm in human rights terms; it is not a new right. One might see R2P as a rule

⁷⁰⁹ Ian Hurd, Is Humanitarian Intervention Legal? The Rule of Law in an Incoherent World, *Ethics & International Affairs*, 25:3 (2011), 310.

⁷¹⁰ Theresa Reinold, The responsibility to protect – much ado about nothing?, *Review of International Studies*, 36.S-1 (2010), 57.

⁷¹¹ Secretary General, *Implementing the responsibility to protect*, 2009, para. 3.

⁷¹² Secretary General, *Protection of civilians in armed conflict*, 2012, para. 21.

of implementation of norms that have existed for decades, i.e., the ones that prohibit genocide, war crimes, ethnic cleansing and crimes against humanity. Be that as it may, I argue that R2P does not even implement anything new either. The first pillar (national responsibility to protect) is the very point of existence of international humanitarian law and of the international human rights regime as a whole. In fact, with IHRL states accept the mandate to protect people under their jurisdiction from any human rights abuse, not only from the most serious ones. The second pillar (cooperation and capacity-building between states) is not revolutionary either: Interstate cooperation is the very reason why the United Nations and other international organisations were created in the first place. And the third pillar (global commitment to intervene even militarily) is at most a guideline to the Security Council, the only international body that can legitimately authorise the use of force.⁷¹³

Evans argued some years ago that R2P has “the potential to evolve further into a full-fledged rule of customary international law”,⁷¹⁴ but for the reasons just given, R2P does not have that potential. As we will see later (subsection 7.3.2), with the exception of Libya, R2P has been framed in Security Council debates in terms of state responsibility (first pillar), and not humanitarian intervention (third pillar). The Security Council has only reiterated the basic IHRL principle that states must protect people within their jurisdiction. And it has done so in line with primary institutions of international law, not the least non-use of force and respect for territorial integrity.

R2P brings limited, if any, legal consequences. More importantly, it is highly unlikely that the national sovereignty of a Western country would ever be

⁷¹³ Arbour (The responsibility to protect as a duty of care in international law and practice, *Review of International Studies*, 34:3, 2008) and Glanville (The Responsibility to Protect Beyond Borders, *Human Rights Law Review*, 12:1, 2012) argue that the 2007 ICJ Ruling in the case concerning the Bosnian genocide would constitute a powerful endorsement of R2P. The ICJ established that states have an “obligation of conduct [...] to employ all means reasonably available to them, so as to prevent genocide as far as possible” (para. 430). However, as could not have been otherwise, the Court also said that “the State’s capacity to influence must also be assessed by legal criteria, since it is clear that every State may only act within the limits permitted by international law” (also para. 430), and those limits include Chapter VII of the UN Charter.

⁷¹⁴ Evans, *The Responsibility to Protect*, 52.

affected by it. R2P is a norm for the rest of the world; endorsing R2P does not compromise the European fortress. Moreover, nobody can seriously expect a country to intervene militarily in another one only for humanitarian purposes against its national interests.⁷¹⁵ R2P is not a burdensome norm, and as a consequence, for a Western European state, R2P is an easy norm to agree with.

7.2.3. Does R2P fit with liberal principles?

Order-over-Justice expects Western European states to support human rights norms that are in line with liberal principles (P5). R2P does not challenge the classical Western notion of an ordered international society based on national sovereignty. Furthermore, the idea of humanitarian intervention R2P stems from has historically lied right in the middle of the discursive confrontation between state-centric and cosmopolitan liberals.

Since 1948 international law has proclaimed human rights without renouncing to the principle of national sovereignty. In fact, IHRL is a collection of institutions and documents negotiated by governments in exercise of their sovereignty. It would seem that these two constructs, international human rights and national sovereignty, are doomed to understand each other.

The UN is not supposed to interfere with the internal affairs of its Member States (Art. 2(7) UN Charter), who must refrain from threatening to use force against each other (Art. 2(4)), except in self-defence, or whenever the Security Council determines the existence of a threat to peace and security (Chapter VII). The principles of national sovereignty and territorial integrity were later restated by the General Assembly in Resolutions 1514/XV and 2625/XXV, respectively in 1960 and 1970, of capital importance in the

⁷¹⁵ “Complete disinterestedness—the absence of any narrow self-interest at all—may be an ideal, but it is not likely always to be reality: mixed motives, in international relations as everywhere else, are a fact of life” (ICISS, *The Responsibility to Protect*, 36).

process of decolonisation. In 1981, the General Assembly solemnly declared that “no State or group of States has the right to intervene or interfere in any form or for any reason whatsoever in the internal and external affairs of other States” (Resolution 36/103).

Yet, as shown in previous chapters, the principle of non-interference with domestic affairs had to give way to flexible interpretations as the international human rights regime gained weight over time. Influenced by international organisations and NGOs, states agreed to a set of human rights treaties and monitoring bodies at the regional level and at the UN. From the very beginning, international law moved to prohibit the worst imaginable forms of aggression to human beings: genocide (with a specific convention adopted on 9 December 1948), crimes against humanity and war crimes (in treaty-based and customary international humanitarian law). The underlying idea is that, together, these three crimes shock the conscience of humanity; nowadays, all three of them constitute the sphere of action of the International Criminal Court (Articles 6-8 of the 1998 Rome Statute).

The kind of criminal investigations the ICC could conduct might have a deterrent effect, but by definition prosecutions take place *ex post facto*, when thousands of lives have been spared irremediably. R2P was born out of the urge to do *whatever necessary* to stop gross violations of human rights before it is too late; whatever necessary, even allowing an outsider to use military force against the consent of the *de jure* authorities unwilling or unable to protect the civilian population.

Even though historically national sovereignty never constituted a fortress from external interference,⁷¹⁶ for Gareth Evans, former Australian minister of Foreign Affairs and one of the co-chairs of the ICISS, R2P was meant to

⁷¹⁶ Krasner, *Sovereignty*; John Hobson and J. C. Sharman, The Enduring Place of Hierarchy in World Politics: Tracing the Social Logics of Hierarchy and Political Change, *European Journal of International Relations*, 11:1 (2005); Luke Glanville, *Sovereignty and the Responsibility to Protect: A New History* (Chicago: Chicago University Press, 2014). Reus-Smit (Struggles for Individual Rights) and Donnelly (State Sovereignty and International Human Rights) recall that the idea of sovereignty has evolved over time, influenced by the social construction of the international human rights regime.

challenge the way in which sovereignty had been understood “for an insanely long time”, i.e., as “a licence to kill”.⁷¹⁷

R2P was coined at the turn of the century, but its roots can be traced much further back in history. Western liberalism is proud of its defence of both state autonomy and human rights. When it comes to humanitarian interventions, liberals have faced a profound internal debate.

On the one hand, some liberal thinkers extended the domestic analogy to suggest that states, like individuals, hold the right to be respected in their autonomy, as awful and self-destructive as their behaviour may be.

Following the principle of natural equality of sovereign entities, in the 17th century Locke became a robust champion of limited use of force, ideally constrained to self-defence and punishment of aggression.⁷¹⁸ In the 18th century, Vattel articulated a legal defence of the rule of non-intervention in his *Law of Nations*,⁷¹⁹ and Kant was sceptical about interventions as well.⁷²⁰ In the 20th century, in the absence of a common morality and a shared idea of justice in the world, Bull found humanitarian interventions problematic for the maintenance of order in international society.⁷²¹

On the other hand, we have the group that we may call *liberal cosmopolitans*, united by a belief in equal deservedness of all human beings and in the moral unity of humankind as a whole.⁷²² For them, morality cannot be contained or separated by national boundaries, and therefore, at least when fundamental

⁷¹⁷ Gareth Evans, *The Responsibility to Protect: An Idea Whose Time Has Come... and Gone?*, *International Relations*, 22:3 (2008), 284.

⁷¹⁸ See Lee Ward, *Locke on the Moral Basis of International Relations*, *American Journal of Political Science*, 50:3 (2006).

⁷¹⁹ Vattel, *The law of nations*, 155.

⁷²⁰ Immanuel Kant, *Perpetual Peace: A Philosophical Essay* (London: George Allen & Unwin Ltd, 1917[1795]), 112.

⁷²¹ See Wheeler, *Pluralist or Solidarist Conceptions of International Society*.

⁷²² Kant is often presented as a cosmopolitan. However, considering the language of his “definitive articles of perpetual peace” (*Perpetual Peace*), particularly the third one, at least when it comes to humanitarian intervention, I believe his cosmopolitanism is much more state-centric than that of *liberal cosmopolitans*. Similarly: Andrew Hurrell, *Kant and the Kantian Paradigm in International Relations*, *Review of International Studies*, 16:3 (1990); Thomas Walker, *The Forgotten Prophet: Tom Paine’s Cosmopolitanism and International Relations*, *International Studies Quarterly*, 44:1 (2000), 66-69. Contra: Martin Wight, *An Anatomy of International Thought*, *Review of International Studies*, 13:3 (1987).

liberal principles (like life and liberty) are seriously under attack, all other considerations must give way, including territorial integrity.

In the 17th century, Grotius, considered by many the intellectual forefather of the solidarist branch of the English School, defended the right to use force to stop a tyrant from tormenting his subjects.⁷²³ In the 19th century, John Stuart Mill made a famous plea for non-intervention but only between “civilised” Western nations; the others, the “uncivilised” or “barbarians”, are not entitled to that protection, and therefore intervention can be justified to prevent aggression or lingering civil wars in those countries.⁷²⁴ Beitz and later Rawls would make similar distinctions in the 20th century. For Beitz, a state that is “neither just nor likely to become just if left to its own devices” is not entitled to the right of non-intervention;⁷²⁵ and for Rawls, “outlawed” states are not fit to join the “society of peoples”, and liberal states are allowed to intervene “in severe cases to protect human rights”.⁷²⁶

Michael Walzer also belongs to the group of 20th century liberal cosmopolitans. His starting principle is that, in light of grave and systematic attacks on innocent people, that who can do something about it, should try, even if unilaterally.⁷²⁷ “Just wars are limited wars”;⁷²⁸ in other words, the intervening army must have one goal, and one goal only: to stop the killing. For Walzer, humanitarian intervention is a political goal, not a matter of international law: “intervention is a political and military process, not a legal one, and it is subject to the compromises and tactical shifts that politics and

⁷²³ Grotius granted the right of other sovereigns to intervene, but he did not believe the subjects had the right to revolt against the oppressor (Vincent, “Grotius, Human Rights, and Intervention”, 245). In spite of his human rights convictions, in the late 1980s and early 90s Vincent did not believe the international society was “as solidarist as” to “issue a general license for intervention” (*Human Rights and International Relations*, 152; “Grotius, Human Rights, and Intervention”, 255-256).

⁷²⁴ John Stuart Mill, *The Collected Works of John Stuart Mill, Volume XXI – Essays on Equality, Law, and Education*, Robson, John M. (ed.) (Toronto: University of Toronto Press, 1984[1859]), 109-124.

⁷²⁵ Charles Beitz, *Political Theory and International Relations* (Princeton: Princeton University Press, 1999[1979]), 92.

⁷²⁶ John Rawls, *The Law of Peoples* (Cambridge (USA): Harvard University Press, 1999), 5 and 49.

⁷²⁷ Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 2015[1977]), ch. 6.

⁷²⁸ Id., 122.

war require”.⁷²⁹ Given that national interests are also at stake, for Walzer consistency is desirable, but not a requirement per se; for him, “that a rule has been selectively applied may cause us to question a particular decision, but it does not invalidate the rule itself”.⁷³⁰

R2P is tightly defined within the confines of liberal principles, which is another reason why European states may sympathise more with it. R2P promoters share a profound conviction on the universal supremacy of the right to life and liberty, and on the basic notion that sovereignty entails responsibility and that whoever is in a position to protect civilians from gross violations of human rights, must do something about it. Promoting and protecting human rights even with the use of force would be part of the European “*mission civilisatrice*”.⁷³¹ Although some authors have made a remarkable effort to stress the non-Western roots of R2P,⁷³² and so did the ICISS itself, as understood in the UN dialect, R2P fits well in the liberal agenda of the West.⁷³³

In its 2005 formulation, which is much more sensitive to national sovereignty and the legal rules of the international society, R2P is very much in line with liberalism. As a consequence, we must expect Western European states to be ready and willing to promote R2P internationally.

7.2.4. Have strong and resourceful norm entrepreneurs endorsed the idea of R2P?

Order-over-Justice expects that Western European states will be more

⁷²⁹ Michael Walzer, *The Argument About Humanitarian Intervention*, *Dissent* (2002), 36.

⁷³⁰ Terry Nardin, *From Right to Intervene to Duty to Protect: Michael Walzer on Humanitarian Intervention*, *European Journal of International Law*, 24:1 (2013), 71.

⁷³¹ Roland Paris, *International peacebuilding and the ‘mission civilisatrice’*, *Review of International Studies*, 28:4 (2002).

⁷³² Acharya How Ideas Spread; Francis Deng, *From ‘Sovereignty as Responsibility’ to the ‘Responsibility to Protect’*, *Global Responsibility to Protect*, 2:4 (2010).

⁷³³ Similarly, Jason Ralph and Adrian Gallagher, *Legitimacy faultlines in international society: The responsibility to protect and prosecute after Libya*, *Review of International Studies*, 41:3 (2015), 554.

inclined to endorse norms promoted by strong norm entrepreneurs (P6).

In the 1980s and 1990s, the French Bernard Kouchner, one of the founders of Médecins Sans Frontières and Médecins du Monde, socialist minister of Health in the 1990s and conservative minister of Foreign Affairs between 2007 and 2010, proactively defended the right to intervene and interfere in domestic affairs when humanitarian concerns are at stake.⁷³⁴ In 1999, the British premier Tony Blair announced a “doctrine” based on five principles derived from “just war values”.⁷³⁵ A few years earlier, Francis Deng, a Sudanese (now South Sudanese) diplomat working in New York, developed the notion of “sovereignty as responsibility”, which ICISS admitted to be inspired by.⁷³⁶ One of the co-chairs of the ICISS, Gareth Evans, had been Australian Foreign Minister in the early 1990s. Kofi Annan and Ban Ki-moon made a key difference, starting with the creation in 2004 of Special Advisory positions to the UN Secretary General on the Prevention of Genocide and on R2P. The ICJ 2007 Ruling on the Bosnian Genocide was also interpreted by some as a push for the cause of R2P, among others by Louise Arbour, who at the time was the UN High Commissioner for Human Rights.⁷³⁷ There are two resourceful advocacy groups explicitly dedicated to the cause of promoting R2P: the International Coalition for R2P and the Global Centre for R2P. Human Rights Watch is a member of the first one, and a founding member of the second one.⁷³⁸

R2P also receives considerable attention in academic circles, with substantially funded research projects, one academic journal dedicated entirely to R2P (*Global Responsibility to Protect*, launched in 2009), special issues in other journals, and two major handbooks published by Routledge

⁷³⁴ Evans, *The Responsibility to Protect*, 32-33.

⁷³⁵ Id, 33-34. 1) Are we sure of our case?; 2) Have we exhausted all diplomatic options; 3) Are there military operations we can sensibly and prudently undertake?; 4) Are we prepared for the long term?; and 5) Do we have national interests involved? (The Blair doctrine, speech delivered in Chicago on 22 April 1999: http://www.pbs.org/newshour/bb/international-jan-june99-blair_doctrinP3-23/).

⁷³⁶ Evans, *The Responsibility to Protect*, 35-37; Deng, From ‘Sovereignty as Responsibility’ to the ‘Responsibility to Protect’.

⁷³⁷ Arbour, The responsibility to protect as a duty of care in international law and practice.

⁷³⁸ Amnesty International, the other major gatekeeper in the human rights community, however, does not have a policy on R2P.

and by Oxford University Press.⁷³⁹

A strong epistemic community of donors, think-tanks, academic institutions and the UN has pushed the normative agenda of R2P forward.⁷⁴⁰ Considering the role of norm entrepreneurs, it is reasonable to expect that Western European states would support R2P.

Nonetheless, commentators have hitherto been unable to agree on whether there is a sort of R2P consensus in international society.

In Bellamy's opinion, "if the first ten years of [R2P] were primarily about establishing the norm, the next ten should be about its implementation".⁷⁴¹ Thanks partly to R2P, international society is now more focused on civilian protection, a number of states are acting as norm entrepreneurs, and the Security Council and regional organizations have repeatedly proven willing to use force to protect civilians.⁷⁴² Alex Bellamy is not alone in being optimistic about the status reached by R2P in just over a decade.⁷⁴³

Other analysts, however, still question R2P on normative, epistemological or systemic grounds. For the first group, there is something morally wrong about R2P. For the second group, either R2P has not yet been applied or, because of the way the norm is built, it is not possible to establish whether it has ever been applied. Finally, those in the third group call attention to the fact that R2P is constrained by the existing international society, with rules

⁷³⁹ Andy Knight and Frazer Egerton (eds.), *The Routledge Handbook of the Responsibility to Protect* (London: Routledge, 2012); Alex Bellamy and Tim Dunne (eds.), *The Oxford Handbook of the Responsibility to Protect* (Oxford: Oxford University Press, 2016).

⁷⁴⁰ John Karlsrud, Responsibility to Protect and Theorising Normative Change in International Organisations: From Weber to the Sociology of Professions, *Global Responsibility to Protect*, 5:1 (2013).

⁷⁴¹ Alex Bellamy, The Responsibility to Protect Turns Ten, *Ethics & International Affairs*, 29:2 (2015), 182.

⁷⁴² Alex Bellamy and Paul Williams, The new politics of protection? Côte d'Ivoire, Libya and the responsibility to protect, *International Affairs*, 87:4 (2011), 826.

⁷⁴³ Arbour, The responsibility to protect as a duty of care in international law and practice; Evans, *The Responsibility to Protect*; The Responsibility to Protect: An Idea Whose Time Has Come... and Gone?; Serrano, The Responsibility to Protect and its Critics; Luck, The Responsibility to Protect; Acharya, The R2P and Norm Diffusion; Glanville, *Sovereignty and the Responsibility to Protect*; Chiara de Franco, Christoph Meyer and Karen Smith, 'Living by Example?' The European Union and the Implementation of the Responsibility to Protect (R2P), *Journal of Common Market Studies*, 53:5 (2015); Chiara de Franco and Annemarie Rodt, Is a European Practice of Mass Atrocity Prevention Emerging? The European Union, Responsibility to Protect and the 2011 Libya Crisis, *Politics and Governance*, 3:4 (2015).

and hegemonies that cannot be fundamentally altered. Understanding these critiques helps positioning Order-over-Justice in the R2P literature.

On normative grounds, critics regret the militaristic nature of R2P, “the legalisation of modern warfare”.⁷⁴⁴ Peace is the best environment for human rights to flourish and R2P walks away from peace.⁷⁴⁵ R2P puts the blame on the countries that suffer directly the gross human rights violations, while the West is “divested” of the responsibility to promote financial and economic justice to favour the Global South.⁷⁴⁶ Others denounce the imperialistic legacies of liberal internationalism,⁷⁴⁷ as well as the neo-colonial scent of humanitarian interventions carried out by a masculine, heroic and paternalistic North that arrogates to itself the mission to rescue abandoned victims savaged by ruthless rulers of the South.⁷⁴⁸ They echo the correspondence between international peacekeeping missions and the old imperial belief that European powers had a “*mission civilisatrice*” towards their colonies.⁷⁴⁹ In a nutshell, for this group of critics, “humanitarian intervention is not an antidote to international power relations, but its latest product”;⁷⁵⁰ “might makes right – precisely the condition which law is supposed to curtail”.⁷⁵¹

The second group of critics exploit a weakness that R2P supporters do not

⁷⁴⁴ David Kennedy, *On War and Law* (Princeton: Princeton University Press, 2006).

⁷⁴⁵ Mary Ellen O’Connell, Responsibility to Peace: A Critique of R2P, *Journal of Intervention and Statebuilding*, 4:1 (2010); Garrett Wallace Brown and Alexandra Bohm, Introducing Jus ante Bellum as a cosmopolitan approach to humanitarian intervention, *European Journal of International Relations*, 22:4 (2016).

⁷⁴⁶ David Chandler, “Understanding the gap between the promise and reality of the responsibility to protect”, in Cunliffe, Philip (ed.), *Critical Perspectives on the Responsibility to Protect: Interrogating Theory and Practice* (London: Routledge, 2011).

⁷⁴⁷ Beate Jahn, Kant, Mill, and Illiberal Legacies in International Affairs, *International Organization*, 59:1 (2005).

⁷⁴⁸ Anne Orford, Muscular humanitarianism: reading the narratives of the new interventionism, *European Journal of International Law*, 10:4 (1999); Makau Mutua, Savages, Victims, and Saviors: The Metaphor of Human Rights, *Harvard International Law Journal*, 42:1 (2001); Mahmood Mamdani, Responsibility to Protect or Right to Punish?, *Journal of Intervention and Statebuilding*, 4:1 (2010); Philip Cunliffe, Dangerous duties: power, paternalism and the ‘responsibility to protect’, *Review of International Studies*, 36:S-1 (2010); Hilary Charlesworth, Feminist Reflections on the Responsibility to Protect, *Global Responsibility to Protect*, 2:3 (2010).

⁷⁴⁹ Paris, International peacebuilding and the ‘mission civilisatrice’; Philip Cunliffe, Still the Spectre at the Feast: Comparisons between Peacekeeping and Imperialism in Peacekeeping Studies Today, *International Peacekeeping*, 19:4 (2012).

⁷⁵⁰ Mamdani, Responsibility to Protect or Right to Punish?, 59.

⁷⁵¹ Cunliffe, Dangerous duties: power, paternalism and the ‘responsibility to protect’, 82.

mind to admit: That the general agreement on the threshold of a norm “does not guarantee agreement on whether the thresholds have been breached or on what is the most appropriate response in actual cases”.⁷⁵² For R2P supporters, this level of generality is a sign of virtue insofar as it allows for the progressive construction of identities and interests around the norm; for critics, on the other hand, regardless of good intentions, the lack of clarity makes it impossible to infer the causal relationship between the norm and states’ behaviour.⁷⁵³ This is the reason why it is possible to read entirely contradictory appraisals of the normative power of R2P. While Bellamy firmly believes that “in a remarkably short space of time R2P has been transformed from the catchphrase of an international commission into an international principle unanimously endorsed by the world’s governments and usefully employed in more than a dozen practical situations”,⁷⁵⁴ for Chandler R2P is doomed to fall into the “gap between promise and reality”.⁷⁵⁵ Was regime change in Libya a distortion of R2P? Or was it just necessary in order to protect civilians effectively? Have Syrians, whose uprising began the same week the Security Council decided to intervene in Libya, “paid the price of NATO excesses in Libya”?⁷⁵⁶ Or was military intervention never to be considered for Syria? Counterfactuals are a persistent problem of R2P, because the costs of intervening are much clearer than the benefits,⁷⁵⁷ and therefore it is impossible to get a defined picture of what would have happened if the circumstances had been different. The response to these and other questions are a matter of judgement and interpretation, not of lab-style value-free analysis. This poses fundamental empirical and epistemological problems when judging the normative power of R2P.

⁷⁵² Alex Bellamy, The Responsibility to Protect and the problem of military intervention, *International Affairs*, 84:4 (2008), 627.

⁷⁵³ Hurd, Is Humanitarian Intervention Legal?

⁷⁵⁴ Alex Bellamy, *The Responsibility to Protect*, 11.

⁷⁵⁵ Chandler, “Understanding the gap between the promise and reality of the responsibility to protect”.

⁷⁵⁶ Ramesh Thakur, R2P after Libya and Syria: Engaging Emerging Powers, *The Washington Quarterly*, 36:2 (2013), 70.

⁷⁵⁷ Roland Paris, The ‘Responsibility to Protect’ and the Structural Problems of Preventive Humanitarian Intervention, *International Peacekeeping*, 21:5 (2014).

The third group of critics examine R2P from a systemic approach. Following a neo-Marxist perspective, so-called humanitarian interventions would have more to do with imperialism than with universal morality. In this sense, R2P would be a Western reaction to a growing Southern counter-hegemonic discourse ironically based on international institutions that Northern countries had created when they suited them, like the principle of non-interference, but now were ready to disdain.⁷⁵⁸ From a non-Marxist but still structuralist approach, R2P could also be a reflection of the failure of the West to foster global consensus over new international norms; as such, R2P would be a sign of weakness of the West.⁷⁵⁹

Still within the group of systemic critics, other scholars make a call for pragmatism. This could be because R2P would set the bar too low in allowing the use of force in international affairs,⁷⁶⁰ or because R2P may be accidentally detrimental to the cause of humanitarian intervention, since now states must take into account that their behaviour can be interpreted as support or opposition to an abstract norm.⁷⁶¹ Others make an anti-cosmopolitan call to bring politics back to provide concrete responses to specific political problems with a mixture of realist politics and liberal principles.⁷⁶²

A third type of systemic critics are those who vivisection R2P from the perspective of the role of law in an ordered international society. It is difficult to make humanitarian interventions compatible with the pluralist and order-based rules of the existing international society.⁷⁶³ From this perspective, an

⁷⁵⁸ Knox, *Civilizing interventions?*

⁷⁵⁹ Tara McCormack, *The Responsibility to Protect and the End of the Western Century*, *Journal of Intervention and Statebuilding*, 4:1 (2010).

⁷⁶⁰ Robert Pape, *When Duty Calls: A Pragmatic Standard of Humanitarian Intervention*, *International Security*, 37:1 (2012).

⁷⁶¹ Stephen Hopgood, *The Last Rites for Humanitarian Intervention: Darfur, Sri Lanka and R2P*, *Global Responsibility to Protect*, 6:2 (2014).

⁷⁶² Jeremy Moses, *Sovereignty as irresponsibility? A Realist critique of the Responsibility to Protect*, *Review of International Studies*, 39:1 (2013); Newman, *R2P: Implications for World Order*; Matt Sleat, *The politics and morality of the responsibility to protect: Beyond the realist/liberal impasse*, *International Politics*, 53:1 (2016). Devetak makes a similar point combining cosmopolitanism and critical theory: *Between Kant and Pufendorf: humanitarian intervention, statist anti-cosmopolitanism and critical international theory*, *Review of International Studies*, 33:S-1 (2007).

⁷⁶³ Mohammed Ayoob, *Humanitarian Intervention and State Sovereignty*, *International Journal of Human Rights*, 6:1 (2002).

international norm cannot really challenge the fundamental tenets of the system. This systemic deconstruction suggests that, in spite of the multiple times the Security Council has mentioned R2P and states have reaffirmed their commitment to it, it would not be possible to consider R2P a success story, as it would be very difficult to imagine how state behaviour would be any different as a result of the emergence of R2P.⁷⁶⁴ R2P has limited or no influence on international law. The intervention in Libya would not prove the normative status of R2P; it would only be another example of Security Council inconsistency.⁷⁶⁵ In sum,

“It is difficult to conceive how the contemporary variant of R2P endorsed in 2005 and reasserted in 2009 can possibly achieve [the goal of preventing future Rwandas] given that, in effect, it does not alter the existing structure of international law regarding sovereign responsibility, the authority to use force or the thresholds for intervention, and is ultimately based on a highly idealistic belief in the capacity of moral pressure to alter the disposition of world’s states.”⁷⁶⁶

Order-over-Justice draws from many of the critical insights of the literature just presented, particularly from the third group of systemic critics, and especially its third subgroup, the one focussing on international law and the nature of international society. I do not doubt the good intentions of the vast majority of supporters of R2P and humanitarian interventions, who are truly committed to do whatever necessary to protect people from gross human rights violations. However, to the extent that R2P does not and cannot modify the fundamental principles of international law and the structure of international society, for the purposes of full disclosure, I agree with Ayoob, Hehir and others in questioning the normative power of R2P.

⁷⁶⁴ Aidan Hehir, The Responsibility to Protect: ‘Sound and Fury Signifying Nothing’?, *International Relations*, 24:2 (2010).

⁷⁶⁵ Aidan Hehir, The Permanence of Inconsistency: Libya, the Security Council, and the Responsibility to Protect, *International Security*, 38:1 (2013).

⁷⁶⁶ Aidan Hehir, “The responsibility to protect and international law”, in Cunliffe, Philip (ed.), *Critical Perspectives on the Responsibility to Protect: Interrogating Theory and Practice* (London: Routledge, 2011), 97.

7.3. Spain and the UK: How much do they promote R2P?

This section presents what we expect to see in Western European states' behaviour in relation to R2P from the viewpoint of Order-over-Justice. Prior to that, it is important to recall the epistemological concerns presented earlier (see subsection on clarity 7.2.1 and critique in 7.2.4). It is particularly difficult to evaluate the extent to which states behave in accordance with R2P. A critical reinterpretation of state practice (discourse and action) is therefore required.

Considering the importance of the passage of time in Western European states' endorsement of human rights norms, as with previous chapters, we would expect stronger language and tools in the beginning (P1), and less resistance in challenging the norm in later years (P2). This would mean that states were particularly willing to support R2P when it was formulated in general and abstract terms at the 2005 World Summit. It would also mean that they did not resist the framing of R2P when dealing with specific conflicts since 2006, in Darfur (Sudan), Sri Lanka, Libya, Côte d'Ivoire or Syria. As in other chapters, this section looks at the way Spain and the UK, as case studies taken from Western Europe, have promoted R2P internationally.

The analysis, which sets 2016 as deadline, pays attention both to states' declared position on R2P in general (7.3.1), and to the positions adopted in relation to specific cases (7.3.2). The first subsection is based on "programmatic implementation",⁷⁶⁷ relying on statements made at the Security Council (discussion of Resolutions 1674 (2006) and 1894 (2009)) and the General Assembly (2005 World Summit and informal interactive debate of 2009), as well as other foreign policy documents. It is easier to agree on a general principle formulated in vague terms than on its application in specific cases. This is why the second subsection examines the positions adopted in relation to Darfur (2006), Sri Lanka (2008-2009), Libya

⁷⁶⁷ Franco, Meyer and Smith, 'Living by Example?'; Franco and Rodt, Is a European Practice of Mass Atrocity Prevention Emerging?

(2011), Côte d'Ivoire (2011) and Syria (2012-2016).

While the UK is a Permanent Member of the Security Council, since 2001 Spain has only been a non-Permanent Member in 2003-2004 and 2015-2016. Therefore, this second subsection is necessarily skewed towards the analysis of the UK's discourse and action. This is a research limitation that must be acknowledged.

7.3.1. Support for R2P in general

The UN General Assembly adopted the World Summit Outcome, whose paragraphs 138 and 139 were devoted to R2P, on 16 September 2005 in what was going to become **Resolution 60/1**. In his address to the General Assembly, Prime Minister Blair spoke of the global fight against terrorism, the need for stronger cooperation to tackle extreme poverty, the policy of non-proliferation of nuclear weapons, international development, and the newly created Human Rights Council, but not of the idea of R2P. Neither did the Spanish King Juan Carlos I, nor Prime Minister Rodríguez-Zapatero in their addresses. Upon the formal passing of the Resolution, which was adopted unanimously, only three countries took the floor to explain their partly critical positions on the Outcome Document as a whole: the USA, Cuba and Belarus. It is true that R2P was formally included in the World Summit Outcome Document, even if watered down from the initial idea of the ICISS in 2001. However, only 12 of the then 192 UN Member States singled it out in their statements. Half of them were Western European, but the UK and Spain were not in this group.⁷⁶⁸

On 28 April 2006, the UN Security Council endorsed paragraphs 138 and 139 in **Resolution 1674 (2006)**. The meeting lasted five minutes, and no

⁷⁶⁸ UN General Assembly, 60th session, Official records of the 1st-8th plenary meetings, of 13-16 September 2005, UN doc: A/60/PV.1-8. The heads of state and government of the following countries made explicit references to the idea of R2P: Sweden, Botswana, Mauritius, Italy, France, Monaco, Lithuania, Bulgaria, Estonia, Switzerland, Iceland, Belgium and the delegate from the Vatican. President Chávez from Venezuela was the only one to strongly criticise R2P as a concept.

statements were made on that occasion.⁷⁶⁹ However, in December, the Security Council held one of its regular meetings on the protection of civilians in armed conflict. All countries spoke about Resolution 1674 (2006), with a particular insistence on the fact that primary responsibility lies on the government where gross human rights violations are taking place. The Chinese and the Russian Ambassadors made clear that R2P could not be used to undermine territorial integrity and that Resolution 1674 (2006) had only restated a general principle established by the General Assembly in 2005. Strangely enough, the British delegate was one of the only three Ambassadors that forgot to mention Resolution 1674 (2006) in his speech.⁷⁷⁰ Spain was not a member of the Security Council in 2006.

In July 2009, the General Assembly held its first *informal interactive debate* on R2P. 92 Member States intervened with statements that mostly subscribed to the idea of R2P as written in the World Summit Outcome Document.⁷⁷¹ The British delegate used highly favourable words: “As an achievement, it was nothing short of groundbreaking and one of which we should be rightly proud. And we should give thanks to our African colleagues for showing us the way with their own commitment to the principle of non-indifference, as enshrined in the African Union Constitutive Act”. Spain did not express an opinion on the matter.⁷⁷²

On 14 September 2009, the UN General Assembly adopted **Resolution 63/308**, the first one devoted to R2P. Both Spain and the UK sponsored it, together with 65 other states. The resolution was carried with no need for a vote. Venezuela, Cuba, Syria, Sudan, Iran, Ecuador and Nicaragua expressed their fears that R2P could be manipulated to disguise the imperialist whim of

⁷⁶⁹ UN Security Council, Official record of the 5430th meeting, of 28 April 2006, UN doc: S/PV.5430.

⁷⁷⁰ UN Security Council, Official record of the 5577th meeting, of 4 December 2006, UN doc: S/PV.5577. The other two delegates were the one from Israel, who used his time to condemn the tactics of “Palestinian terrorists”, and that from Myanmar, who made similar remarks in relation to insurgents in his country.

⁷⁷¹ See ICRtoP, *Report on the General Assembly Plenary Debate on the Responsibility to Protect* (New York: ICRtoP, 2009).

⁷⁷² UN General Assembly, 63rd session, Official records of the 97th-101st plenary meetings, of 23-24 and 28 July 2009, UN doc: A/63/PV.97-101.

some countries. Bolivia adopted a subtler attitude, stressing the importance of the General Assembly in the determination of whether a particular scenario required an international response in application of R2P. Rwanda was the only country that spoke in favour of R2P straight out. No European country took the floor.⁷⁷³

Security Council **Resolution 1894 (2009)**, on the protection of civilians in armed conflict, was adopted unanimously on 11 November, reaffirming again the principle of R2P contained in the 2005 World Summit Outcome Document. The UK was one of the sponsoring countries of this resolution. Other sponsoring Western European states were Austria, Belgium, Finland, France, Germany, Greece, Italy, Liechtenstein, Luxembourg, the Netherlands, Norway, Sweden and Switzerland. Spain was not in this list, and it was not a member of the Security Council either. Although it passed without dissent, official records show that most countries insisted on the principle that primary responsibility lies on the state where human rights violations are taking place. Furthermore, delegates chose to focus on the responsibility of peacekeeping operations in protecting civilians, rather than on the principle of humanitarian intervention.

Of the 62 countries present in the deliberations (15 members of the Security Council plus 47 invited countries), only seven made explicit reference to R2P as proclaimed in the World Summit Outcome and Resolution 1674 (2006): Japan, Croatia, France, Burkina Faso, Sweden (speaking on behalf of the EU), Italy and, ironically, Libya. The Libyan Ambassador actually regretted that, “in spite of the substantial progress achieved in the sphere of the codification of international humanitarian law and in spite of the endorsement of the general principles of the protection of civilians in armed conflict, the tangible results in terms of implementation have not yet reached the target”.⁷⁷⁴ Only one and a half years later Libya would host the first military intervention in

⁷⁷³ UN General Assembly, 63rd session, Official records of the 105th plenary meeting, of 14 September 2009, UN doc: A/63/PV.105.

⁷⁷⁴ UN Security Council, Official record of the 6216th meeting, of 11 November 2009, UN doc: S/PV.6216.

application of the third pillar of R2P. The UK representative did not mention UN-type R2P in her statement, and Spain was not present in the room.

The **UK** has often supported humanitarian interventions, even without the mandate of the UN Security Council, as in the case of Kosovo.⁷⁷⁵ In fact, in 1998, the Foreign and Commonwealth Office distributed a legal memo to other NATO countries making the argument that “force can also be justified on the ground of overwhelming humanitarian necessity without” a UN Security Council resolution.⁷⁷⁶ In 1999, Tony Blair made a “liberal interventionist” speech in Chicago, and PM Brown subsequently followed his approach. Parliamentary library research shows that, “in practice, the UK has been a strong supporter of the Responsibility to Protect within the UN”, a position shared by Conservatives, Labourites (before Corbyn) and Liberal Democrats.⁷⁷⁷ For example, at the 20th anniversary of the Rwandan genocide, the British representative at the United Nations admitted that Rwanda had been “one of several instances in which the Security Council has failed to act”, but he felt confident the international community had got better at taking collective responsibility for the protection of civilians in armed conflict, and he mentioned Resolutions 1674 (2006) and 1894 (2009).⁷⁷⁸ However, R2P was missing in the 2010 National Security Strategy and in the integrated strategy on crisis response,⁷⁷⁹ and the 2015 National Security Strategy only makes the vague promise that the UK “will use UN mechanisms such as the Responsibility to Protect”.⁷⁸⁰ The 2016 Chilcot Report after the Inquiry on the UK’s military intervention in Iraq did not give legal credit to PM Blair’s

⁷⁷⁵ Wheeler, *Saving Strangers*, 289-290.

⁷⁷⁶ From Adam Roberts, NATO’s ‘Humanitarian War’ over Kosovo, *Survival*, 41:3 (1999), 106.

⁷⁷⁷ House of Commons, *Reinventing Humanitarian Intervention: Two Cheers for the Responsibility to Protect?* (London: House of Commons Research Paper 8/55, 2008), 48-50; House of Lords, *The ‘Responsibility to Protect’ and the Application of this International Norm by the UK and the UN* (London: House of Lords Library Note, 2015), 17-18.

⁷⁷⁸ UN Security Council, Official record of the 7155th meeting, of 16 April 2014, UN doc: S/PV.7155.

⁷⁷⁹ Government of the UK, *A Strong Britain in an Age of Uncertainty: The National Security Strategy* (London: Government of the UK, 2010); *Building Stability Overseas Strategy* (London: DFID, FCO and Ministry of Defence, 2011). See also Jason Ralph, *Mainstreaming the responsibility to protect in UK strategy* (London: United Nations Association – UK, 2014), ch. 3.

⁷⁸⁰ Government of the UK, *National Security Strategy and Strategic Defence and Security Review 2015: A Secure and Prosperous United Kingdom* (London: Government of the UK, 2015), 63.

attempts to bypass the Security Council, but made no reference to R2P in the analysis.⁷⁸¹

Spain has been less prone to the use of military force abroad, even for humanitarian purposes. Spanish delegates have made statements in support of R2P in diplomatic forums at least since 2011.⁷⁸² However, the current National Defence Strategy does not mention R2P in any of its 68 pages,⁷⁸³ and the Foreign Action Strategy only makes an ambiguous call “to develop the concept of Responsibility to Protect”.⁷⁸⁴ That said, during its non-permanent membership of the Security Council in the biennium 2015-2016, Spain adopted a slightly more proactive approach. The fifth meeting of the Global Network of R2P focal points took place in Madrid in June 2015,⁷⁸⁵ and “bolstering the effective application of [R2P] in all three of its pillars” was one of Spain’s priorities for the 2015 session of the General Assembly.⁷⁸⁶

7.3.2. Support for R2P in relation to specific cases

The Security Council said that governments have “a primary responsibility to protect their population” for the first time on 27 January 2006 when it adopted Resolution 1653 (2006), on the Great Lakes region and the Democratic Republic of Congo. However, Resolution 1706 (2006), of 31 August, was the first one to extend the language of the World Summit Outcome and of Resolution 1674 (2006), passed only four months earlier, to a country-specific situation. The Council did so in relation to *Darfur*, which

⁷⁸¹ Committee of Privy Counsellors, “*Chilcot Report*”, Section 3.5, para. 1080-1118, and Section 5, para. 955-957.

⁷⁸² See: <http://www.responsibilitytoprotect.org/index.php/component/content/article/35-r2pcs-topics/5723-spains-statements-on-rtop-2011-to-present->

⁷⁸³ Government of Spain, *Estrategia de Seguridad Nacional: Un proyecto compartido* (Madrid: Presidencia del Gobierno, 2013).

⁷⁸⁴ Government of Spain, *Estrategia de Acción Exterior* (Madrid: Ministerio de Asuntos Exteriores, 2014), 50.

⁷⁸⁵ Letter dated 22 October 2015 from the Permanent Representatives of Chile and Spain to the United Nations addressed to the President of the Security Council, UN doc: S/2015/815, of 26 October 2015.

⁷⁸⁶ Government of Spain, “Spain’s Priorities at the United Nations 70th Session of the General Assembly” (Madrid: Ministerio de Asuntos Exteriores, 2015).

expanded the mandate of the UN mission in that Sudanese region. Not all Members of the Security Council did accept this reference to R2P. China, Qatar and Russia expressed reservations and abstained. Spain was not a member of the Security Council. The British representative supported R2P in his address:

“Almost one year ago, the heads of State of the countries members of the Council signed the World Summit Outcome document, noting the responsibility of each United Nations Member State to protect its citizens and the international community’s responsibility to assist in this if the State could not provide for such protection alone. The United Kingdom was at the forefront of efforts to secure this. We are very pleased that this is the first Security Council resolution mandating a United Nations peacekeeping operation to make an explicit reference to this responsibility. It has always been, and it remains, the primary responsibility of the Government of the Sudan to ensure the security of its own citizens. Over the past few years, it manifestly has not done so.”⁷⁸⁷

Between mid 2008 and mid 2009, tens of thousands of civilians were killed in the last year of a bloody civil war that had shredded *Sri Lanka* since 1983. According to the Panel of Experts appointed by the Secretary General, most of these deaths were caused by the government, not by the Tamil Tigers (LTTE), whose defeat was merely a matter of time by then.⁷⁸⁸ “During the crisis itself, the Security Council steadfastly refused to place the issue on its agenda and rejected all but informal briefings on the humanitarian situation”.⁷⁸⁹ The Council’s only press statement, issued in May 2009, expressed “grave concern over the worsening humanitarian crisis”, called “for urgent action by all parties to ensure the safety of civilians”, “strongly” condemned the Tamil Tigers, and acknowledged “the legitimate right of the Government of Sri

⁷⁸⁷ UN Security Council, Official record of the 5519th meeting, of 31 August 2006, UN doc: S/PV.5519. Note that in March 2005, the Security Council had referred the case to the ICC Prosecutor (Resolution 1593 (2005)), with the abstentions of China and the USA, even though none of these two countries have ratified the Statute of the International Criminal Court. ICC Prosecutor issued an arrest warrant against Sudanese President Al-Bashir in 2008. Nevertheless, this has not prevented him from travelling to several African countries and he remains in his post ever since.

⁷⁸⁸ Secretary General’s Panel of Experts on Accountability in Sri Lanka, *Report* (New York: United Nations, 2011).

⁷⁸⁹ Bellamy, *The Responsibility to Protect*, 144-145.

Lanka to combat terrorism”.⁷⁹⁰

That month itself, the Human Rights Council held a special session at the end of which it adopted the infamous Resolution S-11/1, of 27 May, on Assistance to Sri Lanka in the promotion and protection of human rights. The text congratulated the Sri Lankan government and ignored the fact that precisely the government was behind most of the human rights violations. It passed by 29 votes to 12; all Western European states that were members of the UN Human Rights Council rejected the text: France, Germany, Italy, the Netherlands, Switzerland and the UK.⁷⁹¹ Their negative vote at the Human Rights Council suggests that Western European states probably did not pursue the inaction of the Security Council. Yet, even though the Council was briefed several times in the early months of 2009,⁷⁹² Western European members of the Security Council did not see fit to print the language of R2P in blue (colour of draft resolutions in final stage), perhaps because they expected it to be vetoed by China.

As opposed to Sri Lanka, where it failed to take action confronted by one year of gross human rights violations perpetrated mostly by the government, in the case of *Libya* the Security Council responded promptly. Revolts began early in 2011, and on 26 February, the Security Council adopted unanimously Resolution 1970 (2011), the first one to refer expressly to the R2P framework in four and a half years, since Darfur. Resolution 1970 (2011) imposed an arms embargo as well as some personal restrictions on Gaddafi, his family and members of his government. As in the case of Darfur, the Security Council also referred the situation to the International Criminal Court, even though some of the members of the Council had not (and have not yet) ratified the ICC Statute. Resolution 1970 (2011) was formally submitted by a number of countries,⁷⁹³ but reportedly the initiative was led

⁷⁹⁰ Security Council Press Statement on Sri Lanka, 13 May 2009, UN doc: SC/9659.

⁷⁹¹ Report of the Human Rights Council on its 11th Special Session, UN doc: A/HRC/S-11/2, 26 June 2009. Bosnia-Herzegovina, Canada, Chile, Mexico, Slovakia and Slovenia also voted against.

⁷⁹² Security Council Report, “Update Report: Sri Lanka – No. 5” (New York: Security Council Report, 2009).

⁷⁹³ UN Security Council, Official record of the 6491st meeting, of 26 February 2011, UN doc:

by the UK.⁷⁹⁴

The Security Council met regularly in the following days to be briefed about the implementation of Resolution 1970 (2011). The Council felt that the non-military measures authorised by the Resolution were not taking effect, and on 17 March the Council adopted Resolution 1973 (2011), also under Chapter VII. This one was sponsored by France, the UK, Lebanon and the USA. Resolution 1973 (2011) reiterated the principle of R2P, established a no-fly zone and authorised Member States to take “all necessary measures [...] to protect civilians and civilian populated areas under threat [...] while excluding a foreign occupation force of any form on any part of the Libyan territory”. No country voted against Resolution 1973 (2011), but even before knowing how the intervention was going to turn out, Brazil, China, Germany, India and Russia abstained in the vote.⁷⁹⁵ The UK delegate did not take the floor in the session, but the countries that did, starting with France, explicitly mentioned R2P in support of their position; this was done even by those abstaining.⁷⁹⁶ PM Cameron told Parliament one day after the adoption of Resolution 1973 (2011): “Now that the UN Security Council has reached its decision there is a responsibility on its members to respond, and that is what Britain, with others, will now do”.⁷⁹⁷

Libya was the greatest leap for R2P, although it is not yet clear if it was a leap forward or a free fall. According to Bellamy and Williams, “consensus on the use of force against Libya was enabled by several exceptional factors, in particular a putative regional consensus and the poor international standing of Qadhafi’s regime, as well as the clarity of the threat and short timeframe for action”.⁷⁹⁸ As is well known, the intervention in Libya led to the

S/PV.6491.

⁷⁹⁴ Security Council Report, “Update Report: Libya – No. 3” (New York: Security Council Report, 2011).

⁷⁹⁵ UN Security Council, Official record of the 6498th meeting, of 17 March 2011, UN doc: S/PV.6498.

⁷⁹⁶ UN Security Council, Official record of the 6498th meeting, of 17 March 2011, UN doc: S/PV.6498.

⁷⁹⁷ PM statement on the UN Security Council Resolution on Libya, oral statement to Parliament, 18 March 2011.

⁷⁹⁸ Bellamy and Williams, *The new politics of protection?*, 825.

overthrow of Gaddafi and the demise of his regime, whose replacement has not yet been settled to this day. Soon after the adoption of Resolution 1973 (2011), Barack Obama, David Cameron and Nicolas Sarkozy announced that regime change was the ultimate goal of NATO operation in Libya (2011), exceeding the mandate given by the Security Council.⁷⁹⁹ This is a decision that Obama at least has admitted to regret.⁸⁰⁰ After a detailed inquiry, the House of Commons Foreign Affairs Committee reached damning conclusions: The UK's decision had been informed by inaccurate intelligence, the Government had been driven into action by the French President, alternatives to military force had not been explored, and the threat to the civilian population had been overstated.⁸⁰¹

NATO's overstretch in Libya and the supposedly unintended consequences of the application of R2P outraged the foreign offices of Brazil, Russia, India, China, South Africa and others.⁸⁰² Russia and South Africa explicitly referred to Libya when voting against a military intervention in Syria,⁸⁰³ and Brazil announced the idea of "Responsibility While Protecting" in November 2011, partly as a response to the Libyan experience.⁸⁰⁴ The Brazilian proposal

⁷⁹⁹ Barak Obama, David Cameron and Nicolas Sarkozy, Libya's Pathway to Peace, *International Herald Tribune* (14 April 2011); Hugh Roberts, Who said Gaddafi had to go?, *London Review of Books*, 33: 22 (2011); Jeffrey Bachman, R2P's 'Ulterior Motive Exemption' and the Failure to Protect in Libya, *Politics and Governance*, 3:4 (2015).

⁸⁰⁰ Jeffrey Goldberg, The Obama Doctrine, *The Atlantic*, 317:3 (2016).

⁸⁰¹ Foreign Affairs Committee, *Libya: Examination of intervention and collapse and the UK's future policy options* (London: House of Commons, 2016), 39-42.

⁸⁰² Ruan Zongze, Responsible Protection: Building a Safer World, *China Institute of International Studies*, 34 (2012); Thakur, R2P after Libya and Syria; Stuenkel, The BRICS and the Future of R2P; Tiewa Liu and Haibin Zhang, Debates in China about the responsibility to protect as a developing international norm: a general assessment, *Conflict, Security & Development*, 14:4 (2014); Harry Verhoeven, C. S. R. Murthy and Ricardo Soares de Oliveira, Ricardo, 'Our identity is our currency': South Africa, the responsibility to protect and the logic of African intervention, *Conflict, Security & Development*, 14:4 (2014); Kurowska (Multipolarity as resistance to liberal norms; Andrew Garwood-Gowers, China's "Responsible Protection" Concept: Reinterpreting the Responsibility to Protect (R2P) and Military Intervention for Humanitarian Purposes, *Asian Journal of International Law*, 6:1 (2016); Sumit Ganguly, India and the Responsibility to Protect, *International Relations*, 30:3 (2016).

⁸⁰³ UN Security Council, Official record of the 6627th meeting, of 4 October 2011, UN doc: S/PV.6627.

⁸⁰⁴ Bellamy, The Responsibility to Protect, ch. 10; McDougall, Responsibility While Protecting; Oliver Stuenkel and Marcos Tourinho, Regulating intervention: Brazil and the responsibility to protect, *Conflict, Security & Development*, 14:4 (2014); Marcos Tourinho, Oliver Stuenkel and Sarah Brockmeier, 'Responsibility while Protecting': Reforming R2P Implementation, *Global Society*, 30:1 (2016).

stressed prevention over the use of force, asked for a case-by-case decision-making model and called for an on-going accountability mechanism to ensure that the intervening force complies with the mandate given by the Security Council.

Another major crisis unravelled in March 2011, this time in *Côte d'Ivoire*, after the incumbent President Gbagbo refused to acknowledge his defeat to the challenger Ouattara. Armed clashes between supporters of both sides soon snowballed into a humanitarian crisis with hundreds of civilians killed. After several attempts, the Security Council finally agreed on Resolution 1975 (2011) on 30 March, less than two weeks after the adoption of the Libyan text.⁸⁰⁵ Resolution 1975 (2011) recognised Ouattara as the legitimate winner of the election, adopted targeted measures against Gbagbo and his acolytes, and warned that the attacks against civilians could constitute crimes against humanity.⁸⁰⁶ The resolution was submitted by France and Nigeria, and was carried unanimously. As others, the UK delegate made a short statement in support of the text in line with the principle of R2P.⁸⁰⁷

One could feel tempted to reach the conclusion that Resolution 1975 (2011) reinforced the Security Council's commitment to R2P expressed in Libyan Resolution 1973 (2011), particularly when it had been adopted unanimously, unlike the Libyan one. However, we must bear two important points in mind. Firstly, the resolution on Côte d'Ivoire only gave authorisation to the UN mission UNOCI to "use all necessary means" to protect civilians. The Security Council did not authorise Member States per se, unlike in Libya. France sent troops to the country, but a Chapter VII resolution was not necessary because Ouattara, proclaimed President in Resolution 1975 (2011), had requested

Letter dated 9 November 2011 from the Permanent Representative of Brazil to the United Nations addressed to the Secretary-General, UN doc: A/66/551-S/2011/701.

⁸⁰⁵ See Security Council Report, "Monthly April Forecast" (New York: Security Council Report, 2011), 3-5.

⁸⁰⁶ Unlike in the Libyan case, referral to the ICC was not required in this case because Côte d'Ivoire had formally accepted the Court's jurisdiction in the territory, even when it would only ratify the Statute in 2013 (Open Society Foundations, "The Trial of Laurent Gbagbo and Charles Blé Goudé at the ICC", New York: Open Society Foundations, 2016).

⁸⁰⁷ UN Security Council, Official record of the 6508th meeting, of 30 March 2011, UN doc: S/PV.6508.

French support. And secondly, the campaign for regime change in Libya had not been made explicit yet. Obama, Cameron and Sarkozy only published their letter in several major papers on 14 April, two weeks after the adoption of Resolution 1975 (2011).

The impact of Libya is more visible in *Syria*. Protests in the country also began in March 2011. Between then and December 2016, the Security Council loosely mentioned R2P in relation to Syria at least four times: Resolutions 2139 (2014), 2165 (2014), 2254 (2015), which endorses the political roadmap for the peace talks, and 2258 (2015). However, in spite of the unstoppable death toll and the fact that about one in two people are either internally displaced or seeking refuge elsewhere, the Security Council failed to agree on any text comparable to those on Libya and Côte d'Ivoire to respond to the crimes committed by al-Assad's forces.⁸⁰⁸ Russia vetoed resolutions on Syria six times between 2011 and 2016, all of which except the one of October 2016 were also vetoed by China.⁸⁰⁹

The UK has been particularly proactive in attempting to mobilise the Security Council in relation to Syria. In August 2013, PM Cameron even tabled a motion to get the approval of Parliament to intervene militarily in Syria after al-Assad's use of chemical weapons. As in the case of Kosovo 15 years before, the Foreign and Commonwealth Office issued a legal position arguing that military force for humanitarian purposes is allowed by international law even when not authorised by the Security Council.⁸¹⁰ The Government's

⁸⁰⁸ Russia began bombing so-called Islamic State in Syria in September 2015, followed by France, USA, UK, Canada and some Arab states since November. This intervention might be considered humanitarian insofar as the Islamic State is being accused of serious human rights violations in the territories under its control. Yet, one must take into account that the Islamic State fights against al-Assad, that Russia is al-Assad's most powerful ally, and that the Islamic State killed more than 130 people in Paris in November 2015. Rather than humanitarianism, the intervention against the so-called Islamic State is generally framed in the language of collective self-defence due to the inability or unwillingness of the national government/s to deal successfully with the threat posed by terrorism (UK Attorney General, "Speech at the International Institute for Strategic Studies: The modern law of self-defence", 11 January 2017).

⁸⁰⁹ Global Centre for the Responsibility to Protect, "R2P Monitor: issue 24" (New York: GCR2P, 2015), 3. UN Security Council, Official record of the 7785th meeting, of 8 October 2016, UN doc: S/PV.7785; Official record of the 7825th meeting, of 5 December 2016, UN doc: S/PV.7825.

⁸¹⁰ Government of the UK, "Chemical Weapon Use by Syrian Regime – UK Government Legal Position" (London: FCO, 2013).

motion failed with 272 ayes and 285 noes.⁸¹¹ After Parliament's rejection, the UK kept pursuing the R2P agenda at the Security Council, but the military option was off the table. After their fourth veto in May 2014, the British Ambassador to the UN said in an unusually tough English that "Russia and China will have to justify their behaviour to the Syrian people, who continue to suffer under Assad's brutal regime".⁸¹² Immediately after the fifth veto in October 2016, the British Ambassador kept a hard tone, presenting the Russian attitude as "a cynical abuse of the privileges and responsibilities of permanent membership", deeming Russian commitment to the Syrian conflict resolution process as "hollow" and "a sham", and concluding like this: "Thanks to your actions today, Syrians will continue to lose their lives in Aleppo and beyond to Russian and Syrian bombing. Please stop now."⁸¹³

Spain was a non-permanent member of the Security Council in 2015-2016. In relation to Syria, Spain voted for the two resolutions mentioning R2P in 2015, and was among the 11 countries that sponsored the second one. The Spanish Ambassador at the UN did not mention R2P in the session where the first one was discussed (no other country delegate did either, although the text mentions R2P), and did not even take the floor on the second occasion.⁸¹⁴ Spain tabled one draft resolution in October 2016 together with France, calling for an end to all military flights over Aleppo, but this text was vetoed by Russia. On this occasion, the French Ambassador referred indirectly to the responsibility to protect, but Spain's representative did not.⁸¹⁵ Less than two months later, on 5 December, Spain tabled another resolution, this time together with Egypt and New Zealand. It was vetoed by Russia and China, which referred to the three proponents as a "humanitarian troika [...]"

⁸¹¹ House of Commons, Hansard, 29 August 2013, column 1551.

⁸¹² Explanation of Vote by Ambassador Lyall Grant of the UK Mission to the UN, to the Security Council meeting on Syria (speech), 22 May 2014. The speech is available on the UK Government's website (<https://www.gov.uk/government/speeches/russia-and-china-will-have-to-justify-their-behaviour-to-the-syrian-people-who-continue-to-suffer-under-assads-brutal-regime>), but does not appear in the official record of the 7180th meeting of the Security Council of that day (UN doc: S/PV.7180).

⁸¹³ UN Security Council, Official record of the 7785th meeting, 6-7.

⁸¹⁴ UN Security Council, Official records of the 7588th and 7595th meetings, of 18 and 22 December 2015, UN doc: S/PV.7588 and S/PV.7595.

⁸¹⁵ UN Security Council, Official record of the 7785th meeting, 2-4.

shamelessly pressured” by the USA, the UK and France. In his intervention, the French ambassador talked about the “responsibility [...] to save lives”. Albeit formally one of the fathers of the frustrated resolution, the Spanish delegate did not take the floor on this occasion.⁸¹⁶

7.4. Conclusions

All six propositions of Order-over-Justice indicate that Western European states would promote a norm that is as light, unclear, liberal and resourcefully defended by stakeholders as R2P. As a general point, we can conclude that Western European states have indeed programmatically endorsed the idea of R2P of the 2005 World Summit Outcome. Others have reached similar conclusions before.⁸¹⁷

Order-over-Justice also expects that Western European states would have been more inclined to promote R2P in abstract terms in the beginning, and less resistant to its development in later years. The analysis of the British and Spanish programmatic promotion of R2P does not give enough support to such conclusion. Both countries have made abstract references to R2P in a number of statements, but so far R2P is not that prominent in diplomatic speeches or in foreign policy documents. This is more so the case for Spain, whose foreign office started to make more statements on R2P in 2015-2016, the biennium when Spain was a non-permanent member of the Security Council. It can be said that the UK was an advocate of the R2P-framing in Libya in 2011 and in Syria in 2013-2014, where the government was even ready to intervene without the approval of the Security Council. The UK and other Western European states were not behind the lack of action in Sri Lanka, but they did not submit a draft resolution on the matter either,

⁸¹⁶ UN Security Council, Official record of the 7825th meeting.

⁸¹⁷ Sarah Brockmeier, Gerrit Kurtz and Julian Junk, Emerging norm and rhetorical tool: Europe and a responsibility to protect, *Conflict, Security & Development*, 14:4 (2014); Franco, Meyer and Smith, ‘Living by Example?’; Franco and Rodt, Is a European Practice of Mass Atrocity Prevention Emerging?

resolution that could have been vetoed in any case.

Nevertheless, there does not seem to be enough support to argue that Western European states were more willing to promote R2P when it remained an abstract principle, and less willing to resist it over time. There may be several reasons for this. Firstly, not enough time has passed since the UN General Assembly endorsed R2P in 2005. Secondly, proclamation in abstract terms has been contemporary with application in specific cases: Darfur (2006) and Sri Lanka (2008-2009) approximately coincided in time with the World Summit Outcome (2005) and with the two main Security Council resolutions, 1674 (2005) and 1894 (2009). And thirdly, as I have argued in this chapter, R2P is not and cannot be a norm per se. It does not create new obligations for states, lack of compliance does not lead to significant consequences, and insofar as it requires the Security Council's authorisation, it is not even possible to establish independently whether a given country is complying with it or not.

Unlike the prohibition of torture or the idea of justiciability of ESCR, states have kept tight control over the meaning of R2P. Human rights norms start from a conventional and limited reach and grow over time when states lose control over their meaning. However, this has not happened in the case of R2P. The idea of R2P endorsed by the General Assembly and the Security Council watered down the ambitions of early proponents, like the ICISS. And debates at the United Nations have leaned heavily towards its first pillar (responsibility of the state) rather than the third one (responsibility of the international community), thereby shadowing even more the burden imposed beyond borders.

With its systemic approach, Order-over-Justice disregards differences between Western European countries, treating these differences as more or less irrelevant in the broad scheme of things. However, the empirical analysis of the practice of Spain and the UK shows that differences between countries, even within Western Europe, are significant. The UK has much more proactively promoted R2P than Spain, reaching the point of arguing that

humanitarian interventions are accepted in international law even without a Security Council resolution. The Foreign and Commonwealth Office made such an argument in relation to Kosovo in 1998 and to Syria in 2013. Spain, on the other hand, has been much quieter in relation to R2P and (with the exception of Prime Minister Aznar, who actively supported the war in Iraq in 2003) Spanish senior officials have not ventured to go beyond the UN Charter. Official records of Security Council meetings suggest that France has a policy similar to the one of the UK, and Germany would be more like Spain in this regard.⁸¹⁸ Both the UK and France are permanent members of the Security Council and have a far wider reach in the international political arena, while a military dictator ruled Spain until forty years ago, and Germany still holds the darkest recollections of military expansionism. These factors may partly explain this difference between Western European states, which in any case exists and is greater than for the other human rights norms studied in this thesis.

Promoting R2P is relatively easy for Western European states. R2P does not alter the features of international society. Since 2005, it has repeatedly been formulated in line with the existing procedural requirements of the UN Charter. R2P is primarily focused on state responsibility in relation to gross violations of human rights that are unlikely to occur in Western Europe. And speaking of R2P and raising humanitarian concerns in public is a bit easier when there are good reasons to believe that Russia and/or China might veto the resolution.

R2P does not have much normative power of its own, but it may have contributed to the emergence of some initiatives since 2013 calling the five permanent states not to veto or threaten to use the veto in crises in which mass atrocities are being committed.⁸¹⁹ Whatever the future of normative

⁸¹⁸ See also Brockmeier, Kurtz and Junk, Emerging norm and rhetorical tool.

⁸¹⁹ Security Council Report, "The Veto" (New York: Security Council Report, 2015). Amnesty International, an organisation that, unlike Human Rights Watch and other groups, does not endorse R2P, has urged the five permanent countries not to use veto power in cases of genocide, war crimes or crimes against humanity (Amnesty International, *Report 2014/2015: The State of the World's Human Rights*, London: AI, 2015).

development may bring, the idea of the ‘Responsibility not to veto’ is articulated better than R2P because it is built upon the recognition of one important characteristic of the international society: that some countries are more powerful than others, and that some among them are entitled to veto power at the Security Council.

Wheeler is right to stress that humanitarian interventions pose “the conflict between order and justice in international relations in its starkest form”.⁸²⁰ I would extend this clash to R2P as well. However, as argued in this chapter, Western Europeans’ programmatic promotion of R2P does not suggest that a justice-based conception of human rights shapes Western foreign policy, or that the world is any less order-based or any more justice-oriented than it was decades ago. Western European states do not endorse R2P as a matter of global justice, they do so as a matter of international order, in line with existing rules of international law, in application of Chapter VII of the UN Charter (on threats to international peace and stability), and in relation to the type of gross human rights violations that not many expect to see in Western Europe again.

Dunne recently asked a very pertinent question: “Did the invention of R2P mark a shift from a pluralist conception of international society to a solidarist one that put the security of peoples ahead of the procedural concerns that protected the rights of sovereign governments?”⁸²¹ As a consequence of all of the above, my answer to Dunne’s question is that it did not.

⁸²⁰ Wheeler, *Pluralist or Solidarist Conceptions of International Society*, 463. Similar language is used by Reus-Smit: “The degree to which legitimate force may be used internationally to constrain illegitimate force domestically lies at the heart of the problematic relationship between order and justice in world politics.” (Christian Reus-Smit, *Liberal hierarchy and the licence to use force*, *Review of International Studies*, 31.S-1, 2005, 71).

⁸²¹ Timothy Dunne, “The English School and Humanitarian Intervention”, in Robert W. Murray (ed.), *System, Society and the World Exploring the English School of International Relations* (Bristol: E-International Relations, 2015), 63.

8. CONCLUSIONS

“It is simply in my nature, I prefer to commit an injustice than to endure disorder.”

Goethe, 1793.⁸²²

Human rights have been part of international law for nearly seven decades. The international recognition of human rights raised the profile of the individual in global politics, created mechanisms to monitor and promote human rights worldwide, and provided a discourse and a platform for international, national and local advocacy. These changes are positive, and they would not have happened if states had not agreed in the first place. History shows that Western European countries played a significant role in promoting international human rights law. But this does not mean that they did so because they *believed* it was the right thing to do for global justice.

In essence, that is the argument defended in this thesis. The contemporary international legal system stems from the expansion of a Eurocentric international society that emerged in the 19th century. Considering the features and the constraints of international law, I have argued that IHRL has evolved as a result of a political fight between two poles: On the one hand, a state-centric and order-based European notion of international society with a minimalist conception of human rights; on the other hand, a broader conception of human rights, inspired by global justice and advocated by civil society and independent bodies under the umbrella of the UN and other international organisations. While all actors spoke the same language, they contested the meaning of each other’s words.

Human rights are the fruit of tension, not the fruit of passion, tension in the political space of legitimacy, not between those who *believe* in human rights

⁸²² Johan Wolfgang von Goethe, *From My Life: Campaign in France 1792-Siege of Mains* (Princeton: Princeton University Press, 1994[1793]), 770.

and those who do not, but between those who *believe* in human rights as a matter of order and those who *believe* in them as a matter of justice.

In the remainder of this thesis, I will summarise the lessons and the limitations of the application of the six propositions derived from the argument of Order-over-Justice to our four human rights norms (8.1). The overall thesis and the empirical analysis will give way to some final reflections of theoretical nature (8.2), as well as a few ideas about what Order-over-Justice may mean for the future of human rights in world politics, and for human rights advocacy in particular (8.3).

8.1. Comparative exercise: The six propositions and the four human rights norms

Chapters 4-7 have given us the chance to explore the six propositions made by Order-over-Justice in relation to four norms at different stages of development: The prohibition of torture, Ecocide, Justiciability of economic, social and cultural rights, and Responsibility to Protect.

The prohibition of torture is a globally settled norm that human rights bodies and human rights defenders see as a peremptory norm of the international human rights legal system. Ecocide is the international crime that never reached the point of international recognition. In spite of efforts between the early 1970s and mid 1990s, ecocide evaporated from the international legal stage; hence, in our categorisation, ecocide would be a failed norm. Recognised in international law from the beginning, in the last two decades economic, social and cultural rights have received growing support as judicially enforceable rights. As an implementation mechanism, their justiciability has reached an advanced level of development. Finally, the global responsibility to protect civilians from gross violations of human rights emerged with remarkable strength in the early 21st century, but both the internal features and recent experiences in countries like Libya and Syria

suggest that it is too early to assert that R2P is anything more than a norm still at an early stage of development.

Order-over-Justice foresees that Western European states would make use of the strongest normative tools in the early years of the norm (P1), and would be less likely to challenge a norm the longer it has been part of the human rights regime (P2).

The two time-dependent propositions (P1 and P2) are confirmed in the case of torture. Western European states were crucial players in the initial decision that torture should be outlawed internationally. The principle was established in the 1950 European Convention on Human Rights, and Western European countries were also proactive in the negotiation of the Convention Against Torture in the late 1970s and early 1980s. Doing this was easier in the beginning, in spite of relatively poor domestic human rights records, when countries retained more control over the meaning of the norm. Some states, the UK among them, initially harboured doubts about the strength with which torture ought to be defined in international law, but their opposition would smooth out as time went by, as observed in the drafting process and ulterior ratification of both the Convention Against Torture in the 1980s and its Optional Protocol in the 1990s and early 2000s. This was particularly visible with the Optional Protocol, since this treaty elevated to the global level a compliance mechanism of prevention of torture that had been in place in Europe since the early 1990s. All this confirms P2, which expects less resistance from states the longer the norm has been part of the international system.

Ecocide, the international duty to criminalise the deliberate destruction of the environment either in peacetime or at war, only convinced a handful of relatively weak norm entrepreneurs between the 1970s and 1990s, and no country, in Western Europe or beyond, ever championed the cause of ecocide as a distinct international crime. Some were even clearly against it, including the UK. The soft version of ecocide, the one that intends to protect the natural environment in international armed conflicts, was much more successful. The

evidence does not suggest that Western European countries were any more proactive than others in this regard, but despite some possible doubts at earlier stages, Western European states did not resist this normative development and. By the 1990s, by and large, they seemed ready to accept that the deliberate destruction of the natural environment, at least in international conflicts, is a form of war crime. This confirms the expectations of the time-dependent propositions of Order-over-Justice.

Since the Universal Declaration of 1948, Western European states have promoted ESCR in IHRL. However, they tried to control the meaning of these rights in the 1960s and 70s by avoiding the establishment of strong accountability and monitoring mechanisms. By the 1990s and 2000s, several, while not all, Western European states came to accept that ESCR might be justiciable, and some of them even ratified international treaties that are based explicitly on this premise, namely the 1996 Revised European Social Charter and the 2008 Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.

At a programmatic level, Western European states have promoted the idea of R2P in the international system. However, there does not seem to be enough evidence to conclude that Western European states were any more willing to promote R2P while it was framed in abstract and general terms, and less willing to resist it when it was referred to in relation to specific conflict situations. Unlike for the other three norms, it would be heedless to assert that the time-dependent propositions confirm our expectations in relation to R2P.

Order-over-Justice expects that Western European states would not be prone to support human rights norms whose meaning is too clear (P3) or whose implications are too burdensome (P4).

From the perspective of these two propositions, the prohibition of torture would not be a likely candidate to be supported by Western European countries, because it is formulated in clear and absolute terms in international law. However, as said above, Western European countries have

supported the international prohibition of torture at a programmatic level.

On the other hand, the analysis specifically of Spain and the UK shows that both countries maintained an attitude of frontal opposition against independent human rights bodies in relation to most sensitive issues: specifically, the fight against terrorism, compliance with the principle of *non-refoulement* (non devolution of foreigners to countries where their human rights may be at risk), and, in the case of Spain, accountability for crimes committed during Franco's regime. In addition, as with most other human rights treaties, the UK has not accepted the jurisdiction of the UN Committee Against Torture on individual complaints.

Based on the analysis of the global prohibition of torture, it would seem that clarity and burden are less important than other factors considered in Order-over-Justice, but may still help to explain marginal behaviour, that is, resistance to clear and burdensome human rights norms when they affect sensitive areas, like national security.

The expectations of P3 and P4 seem tricky in the case of ecocide. On the one hand, the analysis showed that ecocide lacked clarity from the very beginning, and in fact the same term has been used at least with two different meanings: an international crime on its own, and the attempt to protect the environment in international armed conflicts. Both of these interpretations, nonetheless, would impose potentially burdensome obligations on states, but the first one failed to be recognised in international law, precisely because no country seemed ready to endorse it, and the second one has not yet been enforced in national or international courts.

In a non-binary system, one must polish the ascertainment of the level of clarity and burden of ESCR justiciability. The chapter devoted to the justiciability of ESCR showed that there are several degrees of separation between those rights and the civil and political ones. The different treatment of IHRL is observable in the terms used in key legal provisions (Articles 22 UDHR and 2(1) ICESCR, particularly), as well as the fact that international mechanisms on ESCR are generally weaker and were set up years after those

for civil and political rights. On the other hand, these rights are now seen by many as justiciable, and the meaning of the justiciability of ESCR is relatively clear and operational, at least not less so than for civil and political rights.

Compared to the mere proclamation of rights, justiciability intensifies the burden of ESCR, but as argued in the chapter, as a policy to implement ESCR, justiciability would demand less from states than the adoption of certain tax regimes, social policies or budget decisions that may constitute more radical forms of fulfilment of ESCR. Hence, by themselves, the propositions on clarity and burden (P3 and P4) do not help us understand whether the justiciability of ESCR is a likely candidate to be endorsed by Western European states.

From the perspective of clarity and burden, out of the four norms, R2P is the most likely candidate to be endorsed by Western European countries. Its level of obscurity is only comparable to that of ecocide. As shown in chapters 5 and 7, the confusion about meaning was such that both ecocide and R2P have been interpreted in two different ways, ecocide and ecocide-lite, and R2P and R2P-lite.

At least within the confines of Chapter VII of the UN Charter (so-called R2P-lite), promoting R2P is also relatively easy for Western European states, considering that at least in some cases they can safely assume there will be a veto from Russia or China. This R2P is primarily focused on state responsibility in relation to the worst kinds of human rights abuse, the type of violations that one does not expect to see in Western Europe again in the conceivable future. Furthermore, apart from being a weak implementation mechanism, R2P does not add substance to the rights recognised and crimes prohibited in international law.

Order-over-Justice also anticipates that norms that resonate better with liberal principles, such as individual freedoms, rule of law and free market, would have more chances to be promoted by Western European states (P5), particularly when strong and resourceful norm entrepreneurs are pushing behind them (P6).

These two propositions are clearly confirmed in the case of torture. The prohibition of torture is rooted in liberal Enlightenment, and significant entrepreneurs were in the forefront of the prohibition of torture worldwide. Apart from large international NGOs established in the Global North, independent human rights bodies set up in the UN, the Council of Europe, and other regional human rights systems progressively expanded the meaning of the prohibition of torture to encompass areas initially not foreseen to be under its remit, such as abortion rights or the rights of persons with disabilities. Guided by order, norms tend to be minimalist at first but, once established in international law, they evolve and their scope expands. Because states are less likely to oppose a human right norm the longer this norm has been part of the international system (P2), countries by and large did not challenge this expansionist view, unless, as said earlier, it clashed with sensitive areas related to terrorism or the use of military force abroad.

As a separate international crime, it would be difficult to match ecocide with the primary institution of national sovereignty and territorial jurisdiction, or with the liberal principle of the individual rights-holder. On top of that, ecocide never enjoyed the support of strong and resourceful norm entrepreneurs.

Ecocide meets one of the four non-temporal propositions, the one that expects Western European countries to shy away from clearly defined norms (P3), but certainly did not meet two other, the liberal fitness (P5) and the role of norm entrepreneurs (P6), and was ambiguous in relation to the last one, favouring non-burdensome norms (P4). It cannot surprise anyone that ecocide never enjoyed the support of Western European states. And with no European support, at least until now, human rights norms have not settled in international law.

As time went by, resourceful civil society groups, both internationally and nationally, judges and lawyers, and international human rights bodies, including the UN Committee on Economic, Social and Cultural Rights, advocated the judicial enforceability of ESCR relatively successfully. Because

Western European states are more inclined to support norms advocated by strong norm entrepreneurs (P6), this would suggest that Western European states could promote the judicial enforceability of ESCR internationally.

On the other hand, just as with clarity and burden, there are reasons to believe that the justiciability of ESCR fits well in the liberal European human rights legal mentality, but only to some extent. While framed in the language of the rule of law, a cornerstone of liberalism, if taken too expansively, making ESCR justiciable could potentially give judges the power to decide over the allocation of resources spent on social policies, and some see this as an undue interference with the separation of powers between judiciary, legislative and executive. In all, fitness with liberalism (P5) and the role of norm entrepreneurs (P6) help explain the partial support given by Western European states to the justiciability of ESCR.

As in the case of ecocide, the degree of R2P's fitness with liberalism depends on the type of R2P one has in mind: The one advocated by the ICISS in 2001, ready to bypass the Security Council when necessary, or the one endorsed by the UN General Assembly in 2005, which did not ignore the limits of the UN Charter. The 2005 version is largely respectful of national sovereignty and more so with the existing legal rules of the international society. Relatively powerful norm entrepreneurs, including influential former government officials, actors within the UN Secretariat and a large number of academics, have pushed for the recognition of R2P in the international system. This is a reason to believe that Western European states would jump on the bandwagon. Overall, fitness with liberalism (P5) and the role of norm entrepreneurs (P6) provide valid insight to explain both Western European states' programmatic promotion of the 2005 R2P (R2P-lite), and lack thereof in relation to the 2001 initial proposal of the ICISS.

Table 2: Does reality meet the expectations of Order-over-Justice?

	TORTURE	ECOCIDE	JUST-ESCR	R2P
P1 (promotion)* P2 (resistance)*	Yes	Yes	Yes	No
P3 (clarity) P4 (burden)	Marginally	Partly	Partly	Yes
P5 (liberalism) P6 (norm entrepreneurs)	Yes	Yes	Yes	Yes

* In relation to the examples of Spain and the UK

The comparative exercise shows that, from a systemic analysis of the IHRL in the existing international society, the six propositions of Order-over-Justice in general help us understand better what norms are more likely to be promoted by Western European states.

Four partial exceptions, clarifications or qualifications are required, though. The level of clarity and burden of the prohibition of torture (P3 and P4) would suggest that Western European states would be wary of it. However, the prohibition of torture is globally settled in the IHRL system, and it has enjoyed support from Western European states. The other four propositions seem to be accurate in their predictions. That said, we could also see that both Spain and the UK have opposed not only factual assessments but also normative interpretations by international human rights bodies when they touched on most delicate issues, particularly, terrorism, the military and crimes of the past. This might correspond to the initially mentioned propositions, but whether this is at all connected to the level of clarity and burden of the norm would require more careful scrutiny.

Based on a systemic level of analysis, for the sake of parsimony, Order-over-Justice soft pedals differences between countries. However, the justiciability of ESCR showed that at least sometimes these differences are significant.

Spain followed a rather ambivalent and confusing policy towards the justiciability of ESCR. On the one hand, it was one of the first countries to ratify the Optional Protocol to the ICESCR, but on the other hand, it has not shown the same commitment with the Revised European Social Charter, and ESCR remain largely non-justiciable in the national legislation. As for the other case, the UK has not supported this implementation mechanism either internationally or nationally, although over time it came to let others subscribe to it, as shown in the negotiation of the Optional Protocol in the 2000s. Considering its vocal opposition to ESCR in general, and to their justiciability in particular, the UK may be an outlier. This point encourages further research on this particular case study.

Another caveat is necessary in relation to this norm, at least in its international form. Spain has been internationalist and accepts the jurisdiction of a number of international bodies in relation to individual complaints. The UK, on the other hand, has been reluctant to do so, not only in relation to ESCR, but other rights as well. As we saw in chapter 4, the UK has not accepted the jurisdiction of the UN Committee Against Torture. Unlike 116 countries, it has not accepted the jurisdiction of the Human Rights Committee either, which deals only with civil and political rights. Other factors must therefore be considered in this respect, such as the degree of national pride and the suspicion towards external interference with domestic affairs.

Finally, R2P also shows important differences between our two countries, but a superficial look at their neighbours suggests that the plurality of approaches to R2P goes wider than that. I offered four possible explanations in the preliminary conclusions of section 7.4. Firstly, created in 2001 and elevated to the UN level in 2005, R2P is the youngest norm out of the four examined in this thesis. Not enough time has passed for an accurate assessment, while recent and on-going experiences in Libya and Syria are likely to have a decisive impact on the future of R2P. Secondly, the programmatic proclamation of R2P (ICISS in 2001, General Assembly in 2005,

Security Council in 2006 and 2009) and its alleged application in concrete cases (Darfur in 2006, Sri Lanka in 2008-2009) happened more or less at the same time, which alters the evaluation of the importance of the passing of time on states' understanding of the norm. Thirdly, compared with the other three norms, R2P does not meet the necessary requirements of a norm in its own right. It does not create new obligations for states, lack of compliance does not lead to legal or significant political consequences, and due to the way in which it is formulated in the UN lexicon, it is not even possible to establish independently whether a country is complying with the norm or not. In my opinion, the fourth explanation is the essential one: Order-over-Justice is based on the idea that countries progressively lose control over the meaning of human rights norms once they get incorporated into the international human rights regime. As seen in the other chapters, the evolution of the meaning of the prohibition of torture and the justiciability of ESCR, and also ecocide while it lasted, depended on the hermeneutics of independent bodies. This is not the case with R2P, whose application is entrusted to the most political body of the UN structure, the Security Council, where two Western European countries, France and the UK, have seats since the UN opened its doors. Unlike other norms, R2P largely remains what states make of it.

8.2. Limitations and theoretical lessons from Order-over-Justice

This thesis has offered a critical reinterpretation of the features of four human rights norms and the discourse and action of Western European states, particularly Spain and the UK. In opposition to both normative cosmopolitanism and realist disbelief (see literature in section 2.1), the hermeneutical exercise gives us reasons to conclude that order trumps justice when it comes to explaining why Western European countries promote international human rights norms. This, however, does not mean that IHRL represents Western Europeans' interests or even a Western

European idea of international order. Other actors advocate the same norms for different reasons. Borrowing from the literature of the English School of International Relations, IHRL would be the result of the politics of contention between two forces, international order and global justice, that pull normative standards of adequate behaviour in different directions.

We should recall that the argument is built on certain assumptions that were acknowledged in chapters 2 and 3. This interpretive exercise of the politics of international law is based on a systemic analysis of the international society and the human rights regime within it. Order-over-Justice also assumes that it is possible to infer motivation from behaviour expressed in state action and discourse. Causal relationships are treated as complex phenomena that require a great deal of critical interpretation from the researcher. Part of this interpretive exercise is whether states' behaviour fits within the normative standard established in IHRL. Admittedly, I expect a great deal from governments before concluding that they meet international requirements in the field of human rights, but my decision to set the bar at a certain height is no more aprioristic than any other. Finally, the research is based on legal analysis, mostly international law and diplomatic statements and other positions that may constitute *opinio juris*.

A different level of analysis, epistemology, method or selection of sources could take the researcher to different conclusions. I have treated the state as a unitary actor and I have examined sources that could carry legal weight in the ascertainment of *opinio juris*: national legislation, ratification of relevant treaties, positions expressed in treaty drafting processes, engagement with international independent bodies, and voting patterns at the UN. A large-N study of Western European states coding for their positions in relation to the four norms could deliver valuable information too,⁸²³ but this sort of study would require a different epistemological approach to the critical interpretivism adopted by this researcher (as explained in section 3.1). Even

⁸²³ Related to this, see the annual *Foreign Policy Scorecard* concerning the EU and its Members States of the European Council of Foreign Relations: <http://www.ecfr.eu/scorecard>

within critical realist epistemological parameters that acknowledge the inevitable subjectivism of the researcher, the study could have examined other sources, such as in-depth interviews (with UN or government officials, political parties and NGOs) or media discourse analysis. For the sake of research feasibility, and due to international law's assumption of the unitary character of the state, my choice was limited to the mentioned inputs, but the research would have benefited from wider sources, which could have enlightened the expectations that were not confirmed in the observations (see section 8.1).

More importantly, part of the analysis of the time-dependent expectations (P1 and P2) in the cases of ecocide and R2P (sections 5.3 and 7.3) was nourished by the UK with less content from Spain. The reason is that the available sources provided more insight about the evolving position of the UK and not so much about Spain. In the case of ecocide, this was due to the fact that the Spanish position was not made known or was not reported in the official *travaux préparatoires* of the 1977 Additional Protocol I, or in the reports of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities and of the International Law Commission. As regards R2P, the sources for the analysis of the country positions vis-à-vis specific conflict situations were official records of UN Security Council sessions, of which Spain was only a member in 2015-2016. Even though this different treatment can be explained with the given reasons, it does constitute a limitation of the research.

The English School has proven its richness as a theoretical framework to explain Western European states' reasons to promote international human rights legal standards. The tension between order and justice was never relieved by the literature, and of course the conundrum has not been solved with this thesis. That said, hopefully this project has provided grounds to believe that the fact that we now have internationally recognised human rights does not mean that order and justice are on equal footing in international society.

Hurrell wrote in 2008 that the “solidarist consciousness” had impregnated the English School, and that globalisation, global governance challenges in relation to the natural environment, and transnational action networks made the retreat to pluralism impossible.⁸²⁴ More recently, however, he conceded that concerns with national security, mistaken approaches in military conflicts and rising nationalism were likely to revive pluralism, which might even be “virtuous” after all.⁸²⁵ For Williams, the English School took for granted the “solidarist normative agenda”.⁸²⁶ Later on, he developed his views about the “ethical contribution” of pluralism, which in his opinion is more “progressive” and “liberal” than its solidarist alternative because it embraces diversity and fosters tolerance.⁸²⁷

Several authors have written that the Westphalian idea of a world of functionally equal nation-states with predetermined interests was never materialised in the real world.⁸²⁸ This notwithstanding, in line with the prognosis of the most recent Hurrell and with Williams, Hopgood has argued that we are entering into a new Westphalian era where nation-states plan to take back control from supranational institutions, and this will affect the future of human rights in international politics.⁸²⁹

As should be unsurprising at this point, this thesis is overall sympathetic to the arguments lately put forward by Hurrell, Williams and also Hopgood. However, while a retreat to order and pluralism may be happening in front of our eyes (in fact, I would say we never truly left order and pluralism), the sort of state-centric international society that Bull and his acolytes had in mind is gone. While there is no guarantee that human rights institutions and values will shape the future of international politics, technology and

⁸²⁴ Hurrell, *On Global Order*, 11-12 and 292.

⁸²⁵ Andrew Hurrell, Power Transitions, Global Justice, and the Virtues of Pluralism, *Ethics & International Affairs*, 27:2 (2013).

⁸²⁶ John Williams, Pluralism, Solidarism and the Emergence of World Society in English School Theory, *International Relations*, 19:1 (2005), 19.

⁸²⁷ John Williams, *Ethics, Diversity, and World Politics: Saving Pluralism from Itself?* (Oxford: Oxford University Press, 2015).

⁸²⁸ Krasner, *Sovereignty*; Keene, *Beyond the Anarchical Society*, ch. 5; Glanville, *Sovereignty and the Responsibility to Protect*, 2014.

⁸²⁹ Hopgood, *The Endtimes of Human Rights*.

communications have reduced the size of the world significantly. Identities are also increasingly fluid, and so are allegiances. From an international political perspective, individuals should no longer be seen as mere citizens of one country or another. That simplification would make us reach the wrong conclusions. Second-wave solidarist scholars rushed to conclude that pluralism was over, but they were right to step up from the international to the world society. States remain powerful, but they are not alone any more.

In a nutshell, we still need to return to Hedley Bull's thinking to explain international politics in the 21st century, but we no longer live in an international society but in a world society. We have IHRL first and foremost because states let us have it. But this does not mean that IHRL is necessarily a victory for justice. IHRL is what we see when order enters in conflict with justice. And this thesis has argued that Western European states are driven by order, while other actors favour justice in the international arena. Going back to the English School dichotomies, order and pluralism are compatible with world society.

The second theoretical lesson of this thesis is that there is room for mutual enhancement between Critical Theory and the English School. A critical approach to IHRL is in fact necessary in order to make sense of the conflict between order and justice. Others have seen this connection before,⁸³⁰ and I agree with Dunne when he observes that:

“Cox and Bull are closer than many contemporary IR scholars would admit. Putting it crudely, Cox saw world order as the meeting point of social forces, interstate relations and the hegemony of global capitalism; Bull saw world order in terms of a hierarchy in which institutions and regimes were in part constituted by world order values – the degree of convergence between the levels required detailed empirical and institutional research. What is not in doubt is that both Cox and Bull believed that world order could not be bracketed from normative evaluation – the claim that it is a neutral concept would be an anathema to both theorists. This is well understood as a feature of Cox's work in light of his association with critical theory; yet it is an under-appreciated dimension of Bull's

⁸³⁰ Linklater, *The Problem of Harm in World Politics*; Linklater and Suganami, *The English School of International Relations*; Clark, *Hegemony in International Society*.

work.”⁸³¹

Critique and self-critique are particularly necessary to understand the emergence and evolution of the international human rights legal regime. As reviewed in chapters 1 and 2.1, a sizeable sector of the literature has taken for granted the authenticity of the humanitarian project expressed in human rights treaties and other documents. However, this thesis has shown how IHRL began as a conservative project intended to preserve an international society of states and delimited by Western European instrumental and ideological preferences, favouring civil and political rights over economic and social rights. Critique must also make us aware of the Eurocentric nature of IHRL, at least of its origins.⁸³² The mere fact that human rights were embedded in an international regime set up by states constrains the potential of human rights as an emancipatory project: “By establishing and consenting to human rights limitations on their own sovereignty, states actually define, delimit and contain those rights, thereby domesticating their use and affirming the authority of the state as the source from which rights spring”.⁸³³

In this thesis I have followed the tale of IHRL as narrated with great talent by Samuel Moyn in *The Last Utopia*. The plot of the story is that human rights became an international political idea two or three decades after they entered the realm of international law. Human rights started to resonate in global affairs with the emergence of new social movements in the 1970s and after the progressive decline of left-leaning ideological projects in the 1980s and 1990s. By the end of the century, human rights reached a point in political discourse and legal architecture that hardly anyone could have envisioned in the 1940s.

IHRL as we know it is therefore not the linear consequence of a project that began six to seven decades ago. It is rather the result of a political turn that

⁸³¹ Timothy Dunne, “The Responsibility to Protect and World Order”, in Ramesh Thakur and William Maley (eds.), *Theorising the Responsibility to Protect* (Cambridge: Cambridge University Press, 2015), 86.

⁸³² Mutua, “Politics and Human Rights”; *Human Rights*.

⁸³³ Martti Koskenniemi, The Future of Statehood, *Harvard International Law Journal*, 32:2 (1991), 406.

gave birth to the so-called international human rights community. Since then, IHRL is a matter of political contention within certain institutional confines. This takes us to the uncomfortable dilemma posed by Hopgood.⁸³⁴ The labour movement was united by common interests against the capitalists, and nationalist movements were glued together by a shared identity from a constructed idea of the nation. What are the common interests or the shared identities for human rights advocates? And if we cannot identify any, what should the human rights community do? This thesis will conclude with a tentative answer to this question.

8.3. Practical lessons: What does Order-over-Justice mean for human rights advocacy in the outside world?

Western Europe was instrumental in the recognition and promotion of international human rights norms. IHRL emerged and evolved in an era of Western hegemony in which Western European states remained economically prosperous and ideologically influential. The global human rights community spread out in this historical time and geographical context.

However, for more than one decade, we are witnessing the progressive decline of the North and the West, with stagnant economies and scapegoating nationalism, and the rise of some of the South and East, with growing populations and gross domestic products.

Rising powers from the Global South have not yet articulated a cohesive and homogenous alternative to the Western liberal international society. In fact, there are no significant indications that they will risk some of their leverage and reputation in killing off the global human rights regime. For example, both the 2015 Ufa and 2016 Goa Declarations of BRICS countries make

⁸³⁴ Stephen Hopgood, Moral Authority, Modernity and the Politics of the Sacred, *European Journal of International Relations*, 15:2 (2009), 229-240.

references to human rights within the UN framework.⁸³⁵

Having said that, human rights law and practice have seen better times. A series of African countries recently announced their desire to withdraw from the ICC, the UK Government has threatened to denounce the ECHR, several countries are trying to restrict NGO participation in international human rights forums,⁸³⁶ and local civil society groups and human rights defenders are being targeted by governments all over the world.⁸³⁷

This thesis would not be palatable to realists. To state the obvious, firstly because realists tend to be sceptical about international law in general and about human rights in particular. Secondly, because institutions matter dearly, not only the international ones but also the domestic ones that enhance the democratic fabric and allow civil society to flourish and advocate human rights as a matter of justice. And thirdly, because the idea of order adopted in this thesis is not synonymous with security and balance of power, as realists would have it, but with stability and predictability, where *pacta sunt servanda* is a core principle.

“Periods in which power relations are fluid and interests and strategies are unclear or lack consensus generate demands for new ideas”.⁸³⁸ Human rights are as necessary today as they ever were in the last six to seven decades. How can we ensure that human rights underpin law and policy in future global politics?

This has been a critique of the human rights regime from within. Those of us who believe in essentially universal values for all people must come up with intelligent strategies to make the most of the tools at our disposal. This requires, first and foremost, managing expectations about what human rights are capable of bringing about in real international politics. Carr put it nicely

⁸³⁵ Ufa Declaration of 9 July 2015: http://www.brics.utoronto.ca/docs/150709-ufa-declaration_en.html Goa Declaration of 16 October 2016: <http://www.mea.gov.in/bilateral-documents.htm?dtl/27491/Goa+Declaration+at+8th+BRICS+Summit>

⁸³⁶ See examples in International Service for Human Rights: <http://www.ishr.ch/>

⁸³⁷ Find out more in Civicus, the World Alliance for Citizen Participation: <http://www.civicus.org/>

⁸³⁸ Judith Goldstein and Robert Keohane, “Ideas and Foreign Policy: An Analytical Framework”, in Goldstein, Judith and Keohane, Robert O. (eds.), *Ideas and Foreign Policy: Beliefs, Institutions, and Political Change* (Ithaca: Cornell University Press, 1993), 26.

long before anybody cared about human rights in the then incipient International Relations literature: “Rationalism can create a utopia, but cannot make it real”.⁸³⁹

The meaning and power of human rights is limited by institutional settings but, without muscle, without mobilisation, international human rights risk perpetuating a conservative and Eurocentric idea of international order, neither accurately descriptive of the future to come, nor fit for the purpose of empowering people.

The defence of human rights can no longer be built exclusively or even principally on some immaterial, universal and superior principles. Human rights advocates must not fool themselves assuming that human rights are an idea whose time has come. Political opportunities only exist when mobilising structures exploit framing processes to generate the change they want to see.

In light of invigorated states, I will not say, as Schmitt did, and Proudhon before him, that “whoever invokes humanity wants to cheat”.⁸⁴⁰ But I will defend that we must bring politics back to the table. The human rights community, at least in the Global North, would benefit from greater interaction with other sectors. It could open up to others, even if this means lowering the pre-eminence of international law in the discourse. The human rights community could pay more attention to local identities and listen more to people’s values and fears, opening up to new ways of constructing the ideas of human rights. The future of advocacy could lie more on the issues (the human rights with lower-case) than with the NGO logos or with the institutionalised forms of rights (Human Rights with capital letters).⁸⁴¹ The human rights community could merge into other forces, other movements. In other words, human rights people could move from the realm of law to the realm of politics.

A more explicitly political approach to human rights means, perhaps

⁸³⁹ Carr, *The Twenty Years’ Crisis*, 29.

⁸⁴⁰ Carl Schmitt, *The Concept of the Political* (Chicago: The University of Chicago Press, 2007[1932]), 54.

⁸⁴¹ Using the categories by Hopgood, *The Endtimes of Human Rights*.

ironically, that we should take the *pacta sunt servanda* seriously again.⁸⁴² States matter because, without their consent, there would not be international human rights law in the first place. States are not alone in world society and broadly defined justice-driven activists are right to push order-driven states to ratify and promote human rights in international law. They must also fight to stop them from withdrawing from the human rights regime once states are part of it.

But there is another reason why states are critically important. States are crucial not only to get rights proclaimed in the international system, but also to get them respected, protected and fulfilled domestically. The protection of human rights is only as strong as the state that is meant to protect them. This is another reason why human rights advocates must master the game of politics. Human rights advocates should not bypass states. They ought to embrace them, campaign to change them and take control. The challenge for human rights does not lie in their ethical justification or in their international legalisation, but in the articulation of tools to protect them most effectively at the national and local levels.

In a nutshell, get real, get political and get local. The result, nonetheless, will not be satisfactory. After all, and I promise this will be my last quote from Koskenniemi, “human rights are like love, both necessary and impossible. We cannot live without them, but we cannot have them, either”.⁸⁴³

⁸⁴² Similarly, Çali, *The Authority of International Law*, 102.

⁸⁴³ Martti Koskenniemi, Human Rights, Politics, and Love, *Finnish Yearbook of International Law*, 13 (2002), 79.

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