SOVEREIGNTY AND HUMAN RIGHTS: A THEORY OF INTERNATIONAL JUSTICE

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# TABLE OF CONTENTS

## CHAPTER 1

- Framing the Debate .......................................................... 4
- Sovereignty—a paradigmatic shift ....................................... 7
- Research question and methodology ................................... 8

## CHAPTER 2

- Fundamentals of a justice based approach to international law .......................................................... 11
- The philosophy of human rights .......................................... 11
- Notion of human rights—a minimalist approach ................... 15
- Moral minimalism ............................................................. 15
- The basic rights of man ...................................................... 17
- Moral equality principle .................................................... 21
- The challenge of cultural relativism .................................... 23
- Implications of a minimalist approach to human rights ...... 31
- Crimes against humanity .................................................. 32
- Justice over peace paradigm .............................................. 33
- Defining sovereignty ........................................................ 35
- Hobbes and Locke on the social contract ............................ 38
- A new paradigm: “sovereignty as responsibility” ............... 40
- The instrumentalist approach .......................................... 41

## CHAPTER 3

- War crimes as an assault on human dignity ........................... 44
- Judgment at nuremberg ..................................................... 45
- Cold war & permanent mechanism for criminal justice ....... 49
- The post-cold war era—advent of ad hoc tribunals .......... 50
- The 1998 Rome conference and the creation of the ICC ..... 55
CHAPTER 4

CASE STUDY OF LORDS RESISTANCE ARMY........................................58
BACKGROUND..................................................................................59
ISSUES.............................................................................................62
CASE ANALYSIS..................................................................................63
THE COST OF THE UGANDAN CONFLICT.........................................64
THE INSTITUTIONALIST PERSPECTIVE AND CULTURAL RELATIVISM...66
JUSTICE OVER PEACE AND SOVEREIGNTY AS RESPONSIBILITY........74
CONCLUDING REMARKS.....................................................................80
BIBLIOGRAPHY..................................................................................81
HUMAN RIGHTS AND STATE SOVEREIGNTY—FRAMING THE DEBATE:

Pray tell, my brother,
Why do dictators kill
and make war?
for beliefs, for hatred,
Is it for glory; for things,
for power?
Yes, but more,
because they can.

(RJ Rummel)

“Democide” derives from the Greek and Latin words *d’Tmos* (people) and *caedere* (to kill), respectively. It refers to acts of intentional killing of unarmed people by the government or, in other words, state-sponsored acts of cold-blooded mass murder. While armed conflicts during the twentieth century have claimed approximately 35 million human lives, the number of people killed by their own governments in acts of democide, however, is estimated at 150-170 million.

“Government is not reason; it is not eloquent,” as George Washington once cautioned, “it is force. Like fire, it is a dangerous servant and a fearful master.”

This begs the question of what recourse do the people have when the institution of the state, responsible for protecting them against both internal and external threats, itself becomes the greatest threat to their self-preservation?

The question touches upon the notion of international justice which, at least on the broader theoretical front, is the focus of this thesis. More specifically, this thesis is concerned with the inherent tension between two values that profoundly shape the current state-centric framework of the international system: human rights and state sovereignty.

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2 Democide includes “genocide, politicide, massacres, extrajudicial executions, and other forms of mass murder by the state and quasi-state regimes, and non-state groups.” R.J. Rummel, *Death By Government*, pp. 35
4 In Forsythe, *Human Rights in International Relations*, Cambridge: Cambridge University Press, 2000: “...150-170 million persons were killed by their own governments through political murder or mass misery that could have been ameliorated.” pp. 5
4 George Washington quotes (American commander in chief of the colonial armies in the American Revolution (1775-83) and subsequently 1st US President (1789-97), 1732-1799).
At the San Francisco Conference held on June 25, 1945, the victorious powers of World War II convened to adopt the United Nations Charter—a document establishing the origins of the United Nations and elaborating the values that would govern the post-World War II international system. The UN Charter enshrined two major ideals that would govern future inter-state relations: \(^5\) (1) respect for state sovereignty and, (2) respect for human rights. Ever since, the two ideas have maintained a troubled, in fact problematic, coexistence.

Insofar as the subject of human rights is concerned, the last century has been responsible for the birth, and subsequent development, of the idea of international human rights in the form of numerous international treaties and institutions of international justice. However, as evinced by the phenomenon of democide, the irony is that the last century has also been the bloodiest and most destructive in human history. The ideological origins, and eventual consolidation, of human rights as a critical value of the international system, therefore, stems from the history of human wrongs perpetrated by the state on its own citizens—from the Armenian genocide to the Soviet Gulag state, from the Jewish Holocaust to the Rwandan genocide. Government is force—indeed!

On the other hand, since the 1648 Peace of Westphalia, the concept of state sovereignty has constituted the bedrock of the international system. However, for an idea that has for centuries served as the bulwark against a pre-1648 Hobbesian-like international order of constant religious strife and external interferences in the domestic affairs of states, the Westphalian notion of the inviolability of state sovereignty has, over the years, resulted in a different predicament—in

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\(^5\) The Charter of the United Nations. Article 1(3) states: “To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.” At http://www.un.org/aboutun/charter/

Similarly, Article 2(4) states: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” At http://www.un.org/aboutun/charter/
simultaneously being the chief guarantor of, and the chief obstacle to, protecting human rights.

The nexus of human rights and state sovereignty, therefore, sits at the heart of international justice. The doctrine of respect for human rights necessitates a shift away from the traditional, absolutist notion of sovereignty toward a more flexible model that allows for statesmen to be held accountable for committing human rights atrocities. While the founding purpose of the United Nations was to prevent conflicts among states, experience has shown that the major threat to human rights stems not as much from inter-state violence, but from intra-state, or domestic, violence. According to report released by the United Nations on Human Rights and Conflicts:

“In 1996, there were 19 ongoing situations of internal violence around the world in which 1,000 people or more were killed. These so-called “high-intensity conflicts" cumulatively led to between 6.5 million and 8.5 million deaths. In the same year, there were also 40 "low-intensity conflicts", each causing between 100 and 1,000 deaths. Another 2 million deaths can be added to these figures if one includes situations of internal violence that had de-escalated in 1996.”

Cognizant of the role of the state as the major violator of human rights values, the ‘felt necessity of our time’ calls for re-examining the notion of state sovereignty vis-à-vis the human rights regime.

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6 The preamble of the United Nations Charter states its purpose in the following manner: “To unite our strength to maintain international peace and security” (emphasis added). Moreover, in Chapter VII of the UNC, dealing with issues of peace, threats to peace and aggression, Article 43 states: “All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security” (emphasis added). The word “international” qualifies “peace and security” to the international realm alone, indicating that the founding purpose of the UN was to prevent cases of inter-state violence. http://www.un.org/aboutun/charter/

SOVEREIGNTY AS RESPONSIBILITY—A PRADIGMATC SHIFT:

A recent United Nations report titled “A More Secure World: Our Shared Responsibility” underscores a “new security consensus” that constitutes a paradigmatic shift away from the Westphalian model of state sovereignty. The impetus behind this change in weltanschauung is best captured by one scholar’s observation that, “Governments increasingly understand that they cannot afford to look the other way; that fundamental threats to their own security, whether from refugees, terrorists, the potential destabilization of an entire region, or a miasma of disease and crime, may well have their origins in conditions once thought to be within a state’s exclusive jurisdiction.” The report, in essence, clearly recognizes that the sanctity of human rights cannot prevail unless the rulers responsible for violating those rights are held accountable under international law. The political effect of human rights, in this context, requires a shift from ‘sovereignty as right’ toward a system where “the state’s claim to territory ultimately depends upon its protection of human rights”—sovereignty as responsibility.

Yet, even today there persists a glaring chasm between human rights—the plethora of international human rights treaties indicating a commitment to protecting fundamental human rights—and human wrongs, a fact suggesting a failure of commitment on the part of states that have the resources to further the cause of international justice. Consider, for example, the international community’s dithering response to the breakup of Yugoslavia, or the general indifference toward the continuing genocide in Darfur, and even the current conflict in Uganda. How does one reconcile the recognition accorded human rights as one of the basic

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values of the international system with the failure to prevent or stop human rights atrocities? As a result, the issue around which most scholarship has centered itself is, quite simply: how can international law reconcile considerations of state sovereignty with the protection of fundamental human rights or, to state it differently, how can international law promote the cause of international justice viewed as the protection of basic human rights?

**RESEARCH QUESTION AND METHOLDOLOGY:**

The works of Jack Donnelly, Allen Buchanan, Simon Caney, John Rawls and David Forsythe have greatly contributed to this author’s ability to answer the question, and have also heavily informed the theoretical basis of this thesis.

The basic problem concerns the priority accorded to human rights considerations in the hierarchy of the international system. States have often allowed the notion of sovereignty to take priority over human rights matters, as a result of which statesmen have often been able to carry out atrocities with impunity. This thesis, therefore, articulates a moral philosophy of international law that takes human rights, not state sovereignty, as the fundamental value in international relations. *This argument advocates a justice based system under international law that accords human rights considerations the highest priority under international law, that is, an international system that actively promotes and protects human rights to achieve a reasonable approximation of the ideal of international justice.*

The qualifier “ideal” with respect to international justice is important. The concept of justice is a human construction that represents a certain ideal for society. As such, it must be admitted that there is no perfect justice that society can achieve to every persons satisfaction. What society can achieve, however, is the closest approximation to that ideal.

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The theoretical dimensions of this debate are shaped by an analysis of the following issues. Implicit in any discussion of human rights is the notion that certain rights are so basic and so integral to living a decent standard of life that the exercise of arbitrary government power aimed at depriving those rights warrants a decrease in the degree of sovereignty. Further, it begs the larger questions regarding the nature of these rights, the source they derive from and the tension between moral universality and cultural relativism. This philosophical debate is critical for the purposes of this thesis, as the attempt to construct a model of international justice is predicated on the assumption that all nations subscribe to similar notions of human rights standards. However, critics often contend that promoting universal moral values effectively suppress culturally conditioned moral norms and values. Hence, are human rights culture-specific or do they enjoy universal acceptance? The moral dimension of this theory will address these issues.

Moreover, any examination of the relationship between international justice and human rights must rest on a particular conception of justice. How does one define justice with respect to human rights and what should the primary goal of a justice based international order be?

In addition, one must consider the implications of a justice based international order on state sovereignty. What does it mean for a state to be “sovereign” in the legal and political sense and, more importantly, how does the notion of sovereignty militate against strengthening the global human rights regime. This dimension will also address the issue of why it is necessary to shape an international system that actively promotes and protects human rights and why must perpetrators of human rights abuses be held accountable under international law.
These issues, on the general level, constitute the theoretical foundation of a justice based international system anchored in the protection of human rights standards.

An analysis of these issues will be followed by a brief primer on the historical development of international human rights law, beginning with the Nuremberg trials in 1945 to the establishment of the International Criminal Court (ICC) at the Rome Conference in 1998. This brief historical background is essential in order to contextualize the case analysis of the current conflict in Northern Uganda. This will be followed, in the final section of this paper, by the conclusion and suggestions for further research.

Before elaborating on the theoretical framework of this thesis, a caveat is called for. The approach toward a justice based system under international law viewed as the protection of basic human rights advocated in this thesis is not a description of the values that shape international law at present, but an argument for the values that the current system should promote. This thesis, therefore, is an attempt to advocate moral improvement of the status quo.
CHAPTER 2: FUNDAMENTALS OF A JUSTICE BASED APPROACH TO INTERNATIONAL LAW

THE PHILOSOPHY OF HUMAN RIGHTS:

The encyclopedia Britannica defines human rights as “rights that belong to an individual or group of individuals as a consequence of being human.”\(^\text{12}\) The source of these rights, as often argued, does not derive from a supernatural force or from social constructions, but from our inherent human nature. As one scholar contends, they represent rights of the “highest moral order” that we enjoy solely because of our nature as human beings—droits de l’homme, Menschenrechte (the Rights of Man).\(^\text{13}\) According to this intellectual construct, human rights are essentially natural or fundamental rights in the sense that they are universally applicable to every human being. However, the notion of such a “universal ethical community”\(^\text{14}\) does not mesh with the striking contradiction between the asserted universalism of human rights one on hand, and the actual universalism of human wrongs on the other.

The dissonance between theory and practice is ontological in nature, concerning both the disputed philosophical origins and the substantive nature of these rights. “Virtually everything encompassed by the notion of ‘human rights’, writes one scholar, “is the subject of controversy.”\(^\text{15}\) The absence of unity on the substantive and philosophical fronts is not solely about the clash of Western and Eastern ethical traditions, as the coherence of western civilization on this question...
is greatly overstated. Consider, for instance, the divisions in Western societies on issues such as the death penalty, euthanasia, or even gay marriage.

The aim of this thesis, therefore, is to find a convergence of values or *moral congruence*—the degree to which certain human rights be supported by a wide range of moral, secular and religious perspectives—that might contribute to a moral consensus at the transnational level. Solving this problem is critical for creating a global ethic of responsibility in protecting human rights, as the contested philosophical foundations of human rights not only prevent the emergence, and eventual fusion, of international moral standards but also serve as a pretext for nonconformance. Human rights standards cannot be enforced *sans* any consensus of what those standards are, and such disputed principles might also provide the pretext for external interferences in the domestic affairs of other states. So, what are these supposedly universal, natural and inviolable basic human rights and, fundamentally, according to whom?

Most of the existing literature on human rights based theories of international justice subscribe to a broad array of human rights that encompass not only natural and civil rights, but social, political and economic rights as well. The problems with espousing such an expansive list of human rights are twofold. First, liberal interpretations of basic human rights that include a variety of civil, political, social and economic rights inevitably lend themselves to subjective value judgments and, ipso facto, engender controversy. Consequentially, liberal constructs of the notion of basic human rights are extremely hard, if not impossible, to justify in terms of moral universality. Consider, for example, the case of Saudi Arabia as a signatory to the 1979 Convention on General

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17 Buchanan, pp. 434-39. 
Also see, David Forsythe. *Human Rights in International Relations*, pp. 30, 191-201. 
Also, see Jack Donnelly, *Universal Human Rights in Theory and Practice*, pp. 24-27.
Discrimination against Women. Article 7(a) of the convention requires states to ensure gender equality with respect to political life—"To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies." Yet, when Saudi Prince Nayef bin Sultan was asked in 2005 about voting rights for women, he replied "I don't think that women's participation is possible." While the convention explicitly bars gender based discrimination of any kind, the convention’s standard of gender equality is not in harmony with conservative principles of Islamic Sharia Law.

A second problem in this respect is that an inclusive approach to human rights necessitates addressing complex issues of international distributive justice like foreign aid, international labor standards and environmental standards that, once again, lead to the kind of value laden judgments that engender controversy in the first instance. Such issues, moreover, are the subject of enormous controversy in part because addressing them satisfactorily requires, among other things, an evaluation of the current capacities of international institutions such as the World Bank, WHO and IMF in adequately fulfilling the criteria of international distributive justice. For example, in the case of climate change, one scholar notes that if "China burns its vast coal reserves and Brazil cuts its expansive rain forests, greenhouse gas levels will increase beyond the potential control of the industrialized countries. While the developed countries must do much more to reduce their own emissions of greenhouse gases, the developing countries must be persuaded that they should

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19 Ibid.
21 United Nations Country Reports: Saudi Arabia: "Many Islamic countries view the convention as culturally biased, and have consequently placed reservations on the elements that they see as in fundamental contradiction with Islamic Sharia law." http://www.un.org/womenwatch/daw/cedaw/reports.htm#s
forgo the energy-intensive industrialization enjoyed by the developed countries.”

Thus, finding a satisfactory conclusion to such issues is extremely challenging, if not impossible.

Cognizant of this problem, some scholars eschew issues of distributive justice in the international sphere, and similarly, any discussion on issues related to distributive justice is mostly beyond the scope of this project.

This thesis focuses on a narrower range of human rights—rights that this author believes are value neutral, garnering a greater degree of cross cultural acceptance, and thereby easier to justify in terms of moral universality. One could possibly object to this line of reasoning by pointing out that out of the approximately 190 states in existence, the fact that about 140 states are parties to major International Covenants on civil, political, economic, social and cultural rights indicates the moral universality of such values.

The argument, however, fails to distinguish de jure acceptance from actual compliance with treaty obligations. There is indeed a “yawning chasm between statements of noble principle and the reality of political action,” as one scholar notes, a fact suggesting that states often wish to present themselves as standing for noble human rights principles for wholly self-interested reasons. This fact suggests that numeric considerations are not a reliable indicator in gauging the widespread acceptance of human rights. Moreover, almost all of these international covenants succumb to a similar fallacy—a point this paper discussed earlier—of liberally enumerating basic human rights.

This thesis, therefore, adopts a relatively uncontroversial formula of beginning with a narrower conception of basic human rights, which is based on the

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23 Allen Buchanan, pp. 193
24 David Forsythe, pp. 41
25 David Forsythe, pp. 46
core ideals of respect for personal rights and the moral equality of every individual. This sets the initial foundation of the theoretical framework.

**NOTION OF HUMAN RIGHTS—A MINIMALIST APPROACH:**

This thesis collates specific ideas from the works of Allen Buchanan, Immanuel Kant, and Martha Nussbaum to establish the three foundational pillars of the theoretical approach employed toward human rights: Buchanan’s Moral Minimalism, Kant’s Moral Equality Principle, and Nussbaum’s Central Human Capabilities Approach.

Before explaining this approach, however, a caveat is in order. This work is not an attempt to make a case for western ethical supremacy. The point is important as critics often tend to attack any formulation of international justice emphasizing the primacy of human rights by branding it a sinister form of western moral imperialism—an attempt at imposing subjective western values on others. While advocating a notion of justice that utilizes international law as an instrument for protecting certain basic human rights necessitates a more flexible concept of national sovereignty, it does not follow that such an argument serves to justify the supremacy of western ethical standards, or its more controversial formulation, western moral imperialism. International justice need not necessarily require human rights to be de-contextualized from the unique standards of different societies.

**MORAL MINIMALISM:**

Buchanan’s theory of moral minimalism is based on the idea that there are some basic, core rights which constitute the minimum standard of human rights that must be protected and promoted to ensure a decent human life—basic rights which, moreover, cultures across the globe both accept and agree to uphold by virtue of our common humanity. In essence, the idea of protecting and promoting some basic human rights constitute a moral minimum threshold necessary to
maintain, ensure and promote the continued survival and progress of human civilization. As Buchanan states: “There are some interests common to all persons that are of such great moral concern that the very character...these interests are shared by all persons because they are constitutive of a decent life; they are necessary conditions for human flourishing.”26 This supplies the foundation for a human rights approach to international justice.

This view allows for a more pragmatic approach to a human rights orientation of international law, while eschewing the sort of moral hubris attendant to justifying a more expansive category of human rights in the international arena. Such a minimalist view of human rights, furthermore, allows one to prioritize the most widely accepted basic human rights while recognizing the diversity of cultures across the globe. Although few statesmen have challenged the nature of core human rights, there is general agreement among most scholars that claims of cultural relativism do not apply to these core rights. One writer observes:

“I think we should begin with that assumption, which is absolutely true, that there is no society in which there is not some repression or some deprivation of human rights; but also that at this time perhaps as never in the past, man can agree that there is a scale, there is some kind of line, and certain things are absolutely beyond the pale...there are instances where certain limitations on freedom may be acceptable within a given society. In the People’s Republic of China, for example, there are tings which people do and places...there are forced to go. Yet the people themselves may not perceive that as...an unwanted intrusion upon their rights. They consider it as something that fits into their concept of who they are within their society. On the other hand, there is no person in a tiger cage who believes that is an appropriate cultural form for him to be in.”27

Hence, this thesis starts with the assumption that certain core rights are not culturally relative, and are universal and inviolable in nature. One cannot think of any country where torture, murder, slavery or genocide is institutionalized, and

26 Ibid., pp. 127
27 Thomas Quigley, in International Protection of Human Rights: Hearings before the subcommittee on International Organizations and Movements of the Committee on Foreign Affairs, House of Representatives, 93rd Cong., 1st Session. pp. 215-16
even if it is, once cannot conceive of any government overtly defending such a policy. This fact indicates an underlying common denominator of core values that are universally recognized as inalienable, global universal rights that form the basis of a minimalist approach toward a justice based system under international law.

THE BASIC RIGHTS OF MAN:

Following is a list of the core human rights that ought to form the basis of the human rights approach; basic rights which, moreover, the state must protect and promote to guarantee non-interference in its domestic affairs. To phrase the claim in Rawlsian terms, the nature of these basic rights can be discerned by posing the following question: “What conditions must a society meet if we are to recognize it as a legitimate member of the society of peoples, entitled to non-interference in its domestic affairs?”

Although Buchanan’s list of basic human rights is much shorter compared to the International Bill of Human Rights, the list of basic rights listed here goes even further by condensing Buchanan’s version.

1. Right to life
2. Rights against slavery and involuntary servitude
3. Rights to physical security, including the right not to be tortured or to be subjected to arbitrary arrest, detention and/or imprisonment, the right to bodily integrity
4. Right to subsistence
5. Right to be free from persecution on the basis of race, sex, political affiliation and/or religious orientation
6. Rights of the most fundamental guarantees of due process and equality before the law
7. Freedom of expression and association

Also see Allen Buchanan, pp. 114
29 Allen Buchanan, pp. 71-78.
In *Women and Human Development*, Martha Nussbaum’s capabilities and capacities approach serves to buttress the fundamental nature of the aforementioned basic rights. Nussbaum provides a list of ten “central human functional capabilities” which international law ought to protect and promote as part of its human rights approach. “The intuitive idea behind this approach,” the author observes, “is two-fold: first, that certain functions are central in human life, in the sense that their presence or absence is typically understood to be a mark of the presence or absence of human life; and second—this is what Marx found in Aristotle—that there is something that it is to do these functions in a truly human way, not merely animal way.” In Nussbaum’s view these central human functional capabilities are necessary aspects for guaranteeing a decent standard human life. While it is true that the criteria of what constitutes a “decent standard of human life” is undoubtedly a value judgment, this author believes that the rights listed above serve as the bare minimum basic rights for living a decent standard. Nussbaum’s list includes:

1. Being able to live to the end of a human life or normal length
2. Being able to have bodily health and bodily integrity, including reproductive health
3. Being able to move freely
4. Being able to use the senses, to imagine, to think and reason
5. Being able to exercise emotions, to have attachments to things and people outside ourselves
6. Being able to exercise practical reason, the ability to form a conception of the good and to engage in critical reflection about the planning of one’s life

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31 Ibid., pp. 71-72
32 “Life... Bodily Health... Bodily Integrity... Senses... Imagination... Thought... Emotions... Practical Reason... Affiliation... Other Species... Play... [and] Control Over One’s Environment,” in *Women and Human Development*, pp. 76-77
7- Being able to have ‘affiliation,’ that is live with and toward others, to recognize and show concern for other human beings
8- To engage in various forms of social interaction
9- Being able to have the capacity for ‘play’
10-Being able to have ‘control over ones environment’

From the pragmatic standpoint, a pertinent point regarding the notion of basic rights is that they impose a reduced demand on international justice in safeguarding human rights—a goal that is, in other words, more viable and practical. Allen Buchanan makes an important observation concerning the “best,” or ideal, and the “sufficient” standard of human life in this respect:

“Notice that this is not an exorbitant demand. Human rights discourse does not require a specification of what the best sort human life is. It only requires that we have a good grasp of what the necessary conditions for a minimally good or decent human life are. There may be considerable controversy as to what is sufficient for a decent human life and there certainly is disagreement about what is the best life for human beings. It is much less controversial to say that certain severe deprivations generally undermine the possibility for a decent life. When human rights are violated, people suffer those severe deprivations.”

33 To simplify Buchanan’s and Nussbaum’s arguments, one can present them in the form of a simple syllogism in order to better understand their necessity for living a minimally decent standard of life:34

Premise 1: I ought to survive and live a sufficiently decent standard of life
Premise 2: X rights are necessary for this to be true
Premise 3: Therefore, I ought to have X rights

Another qualification is warranted concerning the protection of, and respect for, these basic rights. Most of these rights should not be construed as absolute in nature, as there are always certain extreme exceptions to the standard that nevertheless may justify infringement on some of these rights. No theory can

33 Allen Buchanan, pp. 128
perfectly account for the variability of real life circumstances, and there always exist exceptions to the general rule that must be acknowledged.

Consider the example of the “no-derogation” clause under Article 4 of the International Covenant on Civil and Political Rights, which states:

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, color, sex, language, religion or social origin.\(^{35}\)

Some rights that can be derogated from include, \textit{inter alia}, gender rights and property rights. But even though the covenant allows for derogation in times of public emergency, certain fundamental protections are not subject to exceptions of any sort. These include the right to life, not to be tortured or forced into involuntary servitude, and restrictions against genocide among other things.\(^{36}\) This indicates recognition of the core-inviolability and universality of these rights. To quote Allen Buchanan on the subject of derogation of certain rights in times of emergencies:

“This is not to say that rights are absolute constraints that invariably trump all other considerations. Rather, the point is that the existence of a right makes a difference as to which considerations are sufficient reasons for a course of action...This is perfectly compatible, of course, with acknowledging that it may be justifiable to infringe a right under certain extraordinary circumstances, as when respecting the right would be almost certain to produce an enormous amount of suffering for many innocent people. To assume that one cannot hold that there are human rights without regarding them as carrying absolute, exception less obligations that always ‘trump’ every other consideration is to indulge in caricature.”\(^{37}\)


\(^{36}\) No derogation from Articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

\(^{37}\) Allen Buchanan, pp. 26
Having established the notion of basic human rights, this paper will now place these rights within a certain moral framework.

**MORAL EQUALITY PRINCIPLE:**

In *Groundworks on the Metaphysics of Morals* Immanuel Kant sets forth his notion of the Moral Equality Principle which fits the purpose of this thesis. The essence of this principle is grounded in two moral tenets: 38

1- Every individual is entitled to equal respect and concern or, to phrase it in Kantian terminology, each person is to be treated as an end
2- Since every individual is entitled to be treated with equal respect and concern, it requires that one help ensure the just treatment of every individual by making sure that their basic human rights are not violated

According to Kant, treating every individual with equal respect and concern constitutes the crux of any practical concept of morality. An important point in this regard is that Kant’s moral principle does not merely entail equal treatment of all— for such a principle is also consistent with treating everyone badly—but requires treating them well by manifesting a great degree of respect for their basic rights. 39

Further, this principle strengthens the moral priority of actions that protect basic human rights by embedding the idea of treating every person as an end which, moreover, is an idea that in many ways is fundamental to peaceful existence. Another significance of this principle is that it is virtually impossible to argue against the equality of every individual, for to contend otherwise would, in effect, be tantamount to moral hubris.

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38 Immanuel Kant. *Groundworks on the Metaphysics of Morals (Grundlegung zur Metaphysik der Sitten)*, Yale University Press, 2002. (1) We are all, as human beings, ends in ourselves, and not to be used as mere means by others; (2) Respect for one’s own humanity involves respect for others, pp. 112
Before stating the implications of this principle, one needs to elaborate the concept of positive and negative duties correlative to human rights. A negative duty is one of "strict factual inaction...a duty of omission, of forbearance, of non-interference, of refraining from doing something." For example, person A does nothing to violate person B’s basic rights out of equal respect and concern for B. But lets suppose that someone else, person C, intends to violate person B’s basic rights and A has the power to prevent it with a “readily absorbable cost to himself,” then A’s refusal to prevent this abuse is logically inconsistent with the principle of treating every person with equal respect and concern. Conversely, a positive duty requires a “factual inaction...demanding performance, commission, assistance, providing something or otherwise doing something beneficial for the right holder.”

The implication of the moral equality principle establishes two correlative duties: first, a negative duty not to deprive the right holder of his right (not to kill etc). Second, a positive duty, that is, a limited moral obligation to help ensure that individuals and institutions protect the right holder’s basic rights, provided that the action can be performed with a readily absorbable cost. This formulation entails a limited moral obligation toward protecting basic human rights, with the qualification that cost of doing so is bearable and not excessive in nature. This marks the minimalist notion of human rights and the attendant moral obligations subscribed to in this thesis which a justice based international order ought to protect and promote. In the next section, this paper counters the major arguments of cultural relativism in making its case for the moral universalism of basic human rights values.

40 See pp. 96, 139, 141 in Human Rights: Concepts and Context, and Allen Buchanan, pp. 89
41 Ibid., pp. 139
42 Human Rights: Concepts and Contexts, pp. 96
43 Ibid., pp. 96
44 Ibid., pp. 97
THE CHALLENGE OF CULTURAL RELATIVISM:

“"I am human and nothing human is alien to me."”
   (Terence)
“"My own group aside, everything human is alien to me."”
   (Renato Rosaldo)

The universal nature of basic human rights is rejected by some who point to the historical and cultural circumstances shaping these values, arguing that promoting universal moral values effectively suppress culturally conditioned moral norms and values. The argument is rooted in claims of cultural diversity, which militates against the internalization of human rights values that is a necessary condition for their observance. The search for such a universal model of international justice is predicated on the controversial assumption that all nations subscribe to similar notions of justice and law. This section deals with the issue of whether there are any universal moral values that apply to every individual or is morality culturally relative?

Critics often point to the status accorded to women in Islamic societies, or Confucian traditions that hold duties to be more important than rights, or the philosophy of some African communities where community rights trump individual rights, to criticize advocacy for the moral universalism of human rights. Many political theorists and philosophers argue, for a variety of reasons, that universal morality is not achievable or, if achievable, highly undesirable.45 Their approach is one of relativism, requiring tolerance and respect to the values of one’s own

community, eschewing any positions on an underlying commonality of basic moral values. Hence, cultural relativism defines correct moral principals as those conforming to a community’s own commonly shared values. As one scholar states:

"Moral relativism denies that there are basic moral demands and says different people are subject to different basic moral demands depending on the social customs, practices, conventions, values, and principles that they accept."\(^{46}\)

The approach is exemplified by Michael Walzer’s view that “a society is just if its substantive life is lived in a certain way—that is, in a way faithful to the shared understandings of the members.”\(^{47}\) Hence, exponents of this school view moral norms as the product of historical, social, cultural and economic circumstances of a community, shaped over the passage of time.

Moral universalism, on the other hand, contends that there exist certain core moral values that hold constant across cultures. In the strict sense of the word, human rights are a special class of rights which one has solely by virtue of being a human being—*droits de l’homme, Menschenrechte, "the rights of man."*\(^{48}\) rights that flow from the recognition of our dignity as human beings, and are not bestowed upon us by either god or society. To phrase it in Rawlsian terminology, these basic rights represent an international “overlapping consensus” on some moral values, meaning that people of different faiths and values converge on some “comprehensive doctrines.”\(^{48}\) In the following section this paper will explore the tension between the two approaches to basic human rights and attempt to come to grips with these seemingly antagonistic positions.

**THE ELEMENTS OF UNIVERSALISM:**

Beneath the veneer of the cultural relativism defense exist two implicit, and often overlooked, assumptions: (1) every person has a right to live in accordance with his own cultural values and, (2) this right is absolute and inalienable—the obvious inference being that culture provides one with a license to ‘do what he pleases, as he pleases.’ Consider for a moment the idiom that ‘my freedom to swing my arms stops where the other persons nose begins.’ Granted that every person has a right to enjoy his own cultural identity and live in accordance with his own moral values, but this right is not unlimited. When culture becomes an excuse to infringe upon, or to deny, another person his right, then the defense of relativism is no longer tenable.

This is the essence of the universalist claim of basic human rights. It does not deny the sanctity of diversity by imposing values decontextualized from the particulars of a culture, nor does it arrogate to a particular faction—in this case, Western civilization—the right to decide which norms are universal; rather, the argument asserts that certain basic, minimum, rights are so fundamental to human existence that their validity cannot be, as political philosopher Richard Scanlon argues, “reasonably rejected.” 49 The criterion of the soundness of a moral norm, in this respect, is based on resonableness. In light of this standard, one cannot imagine a reasonable defense of, for instance, the practice of slavery, female infanticide, religious sacrifice or, for that matter, killing innocent people based on cultural grounds. Cultural relativism is not an excuse for barbarism and inhumanity.

In considering the tension prevalent between universalism and relativism of basic moral values, Simon Caney’s work provides two crucial features marking the view of universalism endorsed in this thesis. 50 The nuanced conception of moral universalism subscribed to in this thesis draws its validity from two concepts: (1)
universalism of scope, (2) universalism of justification. The former is defined as the “values that apply to everyone in the world,” and the latter “refers to values that can be justified to everyone in terms that they would accept.” It claims that there are “values that can be justified to everyone in the sense that everyone would accept this justification.” 51

By combining the standard of moral soundness—which, in turn, furnishes the universalism of scope—with the universalism of justification, the hybrid model affirms certain universal moral values, and also safeguards moral diversity in the sense that no one can reasonably reject them. It maintains the universality of some values on one hand, while simultaneously recognizing the diversity of cultural norms by giving the particular culture the right to choose how to practice those universal values.

One must emphasize, however, that universality of human rights does not imply uniformity. It does not presume the supremacy of western philosophical or ethical values, nor does it seek to subsume the plurality of cultural values under a single unified worldview. Instead, the idea seeks to accomplish a system of inalienable human rights that reflects our common humanity; an idea which, moreover, not only safeguards human dignity against the forces of repression but also does not contradict the moral principles of almost any human society. The idea is best stated by a statesman who observes:

“Both Asians and Westerners are human beings. They can agree on minimal standards of civilized behavior that both would like to live under. For example, there should be no torture, no slavery, no arbitrary killings, no disappearances in the middle of the night, no shooting down of innocent demonstrators, no imprisonment without careful review. These rights should be upheld not only for moral reasons. There are sound functional reasons. Any society which is at odds with its best and brightest and shoots them down when they demonstrate peacefully...is headed for trouble.” 52

51 Ibid., pp. 27
Having conducted this analysis, the thesis evaluates two major arguments commonly advanced against moral universalism:

**UNIVERSALISM AS A REJECTION OF CULTURAL DIVERSITY:**

This view equates moral universalism with repression, or imperialism, contending that it subsumes diversity in the form of manufactured uniformity. Moral universalism, as one scholar avers, amounts to “the subsuming of particular cases under a general rule” thereby negating cultural plurality. The flaw with this argument is threefold: first, it fails to make a distinction between proscriptive and prescriptive principles. Moral universalism of basic human rights, as Caney points out, “prohibit some specific activities but do not prescribe any specific ones that everyone must follow,” and hence are proscriptive principles. In light of this argument, prescriptive moral universalism does not impose values that cultures must follow. It simply bars certain activities and permits considerable variation on how a culture chooses to honor those principles; that is, the substance of these values is universal, how a society chooses to implement them is their prerogative. Thus the claim that moral universalism imposes uniformity does not hold.

Second, the relativist view is based on the implicit assumption that universal values must always defer to cultural diversity. While it is certainly true that cultural values of different societies represent their consensus on what constitutes a valid way of life, it does not follow that relativism justifies tolerance for oppressive practices such as cannibalism, slavery, female infanticide, or anti-Semitism. In emphasizing the stability and continuity of traditional practices, relativism effectively trivializes, or ignores, the inevitability of change in every

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53 Simon Caney, pp. 50, quoting Emmanuel Levinas in “Otherwise than Being” (pp. 159).
54 Simon Caney, pp. 51
society. The view of culture in this regard is purely as a static phenomenon. A society’s notions about the religion, law, government, and rights of the individual constantly evolve to meet the challenges of a particular era; evolved perspectives which, moreover, have enabled cultures to survive over time. The practice of slavery, for instance, while widely accepted and practiced till the beginning of the nineteenth century, cannot be justified as a valid way of life today. The same goes for the practice of segregation against African Americans in the U.S. before the 1960s, or for religions practicing human sacrifices, irrespective of how ancient they may be. As Kofi Annan eloquently stated, “When have you heard a free voice demand an end to freedom? Where have you heard a slave argue for slavery? When have you heard a victim of torture endorse the ways of the torturer? Where have you heard the tolerant cry out for intolerance?”

From the logical standpoint, relativism as used against the universality of human rights results in a logical contradiction. While asserting that universal values cannot exist among the plurality of world cultures, relativism concurrently appeals to the principle of tolerance as a universal precept in precluding criticism of cultural practices inimical to the idea of human rights. In effect, relativism holds that one must be tolerant of other traditions by turning the idea of tolerance into a “defacto universal principle.” The point is aptly conveyed by one scholar who observes:

“The proponents of this argument are opposed to projects that thrust a set of uniform values on everyone else. As such, however, they are themselves articulating a universal principle—namely ‘show respect to other persons, allow them the space to practice their way of life.’ their critique can thus be best understood as a critique of some kinds of universalism drawing on an affirmation of another more culturally

58 Zechenter, Elizabeth, at pp. 332
sensitive universalism. As such, although the argument officially opposes universal rules it is itself inspired by a universal ethic."  

**UNIVERSALISM AS PRETEXT FOR POWER POLITICS:**

This view holds that moral universalism is often used to cloak the ulterior motives of selfish, politically driven aims. Thus, moral universalism serves to legitimate imperialism, repression and exploitation in the name of morality, in essence, “weapons framed for the furtherance of interests,” or as Walzer puts it, that “since justice cannot be objectively defined, the temptation of a powerful nation is to claim that the solution it seeks to impose is a just one.”  

The argument, however, that moral universalism is often manipulated to justify nefarious designs of power politics does not constitute a denial of moral universality. Rather, it provides a strong reason to be suspicious of the “humanitarian” claims often invoked by political actors to carry out such actions.

Another noticeable feature in this regard is that authoritarian rulers often voice objections to the universality of human rights standards to either rationalize violation of the human rights of their own citizens to further their self-interests.

“Arguments of cultural relativism regularly involve urban elites eloquently praising the glories of village life—a life that they or their parents or grandparents struggled hard to escape and to which they have not the slightest intention of returning. Government officials denounce the corrosive individualism of western values—while they line their pockets with the proceeds of massive corruption, drive imported luxury automobiles and plan European or American vacations. Leaders sing the praises of traditional communities—while they wield arbitrary power antithetical to traditional values, pursue development policies that systematically undermine traditional communities, and replace traditional communities with corrupt cronies and party hacks.”

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59 Simon Caney, pp. 52  
60 Ibid., pp. 52  
61 Michael Walzer. *Spheres of Justice.* pp. 213  
63 Jack Donnelly. pp. 120
Similar to how the devil can conveniently quote the scripture for his purpose, the argument of human rights as “western” values has often served as a loyal servant for tyrants cloaking their repression under the rubric of protecting traditional values and practices. Denying any diversity of moral values across cultures is one thing; using cultural relativism as a defense to tolerate and accept any and every unjustifiable practice, quite another.

If we do not unequivocally assert and uphold the universality of the rights that governments’ often tend to abuse, and if we admit that these rights fluctuate by cultural dispositions, ultimately we risk furnishing oppressive governments with an intellectual justification for the morally indefensible. The underlying dynamics of this Orwellian idea are obvious to the more perceptive minds: just like sovereignty was previously invoked as a defense against domestic tyranny, just like security has often served as the statesman’s weapon to erode constitutionally cherished freedoms, the language of cultural diversity has been a loyal servant for the self-interest of power elites. Crushing the sanctity of fundamental human freedoms with the ugly fist of “cultural diversity,” using the language of humanity to cloak the repression of basic rights, is an old and malicious strategy.

There is a solution in gauging the validity of the defense of a particular cultural practice in this respect: when adherence to a practice involves coercion of any sort, the practice is not defensible on grounds of reasonableness. As I argued earlier, culture cannot be used as a bogey to violate the rights of another person. Hence, coercion, not culture, provides the proper substantive test in gauging the defensibility of a norm. The problem with the culture argument is that it subsumes all members of a society under a cultural framework that may in fact be inimical to their own interests. It is one thing to advocate cultural defense with a “coercion
test, that is, one that does not seek to coerce dissenters but permits individuals to not follow and assert their individual rights. Those who freely choose to live by and to be treated according to their traditional cultures are justified in doing so. However, this is only if others who do not wish to follow those traditions are not oppressed in the name of culture.

**INTERNATIONAL JUSTICE—IMPLICATIONS OF A MINIMALIST APPROACH:**

“To observe without protest a government that engages in systematic violations of human rights is, in effect, to be an accomplice to injustice.”

Before evaluating the implications of a minimalist approach of human rights on state sovereignty, it is necessary to begin with a consideration of what is meant by justice and, more importantly, justice for whom? As this section will clarify, it is also important to link the concept of justice with the idea of crimes against humanity which, under international law, represents the odious offense against human dignity.

John Rawls *A Theory of Justice* sets forth a notion of “justice as fairness” that is appropriate for the purposes of this paper. Rawls state of nature is one in which a community of equal individuals coalesces to establish disinterested rules meant to govern their future conduct. Hence, Rawls principle of justice is manifested when “free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association. These principles are to regulate all further agreements.” Moreover, the enterprise is undertaken by the community behind a

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64 Evan Charney. Cultural Interpretation and Universal Human Rights: A Response to Daniel A. Bell *Journal of Political Theory* Vol. 27, No. 6 (Dec., 1999), pp. 840-848


66 Ibid., pp. 327

67 Allen Buchanan, pp. 3

“veil of ignorance,” with the intent of establishing principles of justice that confer basic rights and duties. The situation is akin to the state signing a contract with its citizens, delineating rights and duties to both parties, with specifications of what remedies to seek in the event that one party violates the terms of the agreement.

Rawls theory of justice is an extension of the Lockean conception based on the social contract, which formulates a regime of rights and duties that all parties to the contract must abide by. The Rawlsian model of the social contract theory represents an improvement over Locke’s in that the notion of “justice as fairness” combines the legal equality of community members as the fundamental starting point, with a neutral determination of how future violations of the contract are to be dealt with. Rawls states:

“Men decide in advance how they are to regulate their claims against one another and what is to be the foundation charter of their society. Just as each person must decide by rational reflection what constitutes his good, that is, the system of ends which is rational for him to pursue, so a group of persons must decide once and for all what is to count among them as just and unjust.”

With respect to the relationship between human rights and state sovereignty, the purpose of the law is firstly to protect the pre-determined rights of individuals, and secondly, to provide redress if their rights are infringed upon. Hence, this marks the notion of justice which this paper advocates with respect to human rights and state sovereignty—that is, individuals begin with certain clearly established basic rights and duties that they must abide by. Moreover, the institution of the state is obligated in protecting these rights to the best of its ability, failing which, the contract is nullified.

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68 Ibid., pp. 363  
69 Ibid., pp. 362
CRIMES AGAINST HUMANITY: 70

Crimes against humanity describe the gravest violations of “the international law of mankind” that not only constitute the most odious offense against mankind in the sense of a universal community but also carry the status of crimes jus cogens (Latin for “compelling law”)—a peremptory norm of international law against which there can be no derogation under any circumstances. These crimes are defined as:

The inhumane acts and persecutions which, in the name of a State practicing a hegemonic political ideology, have been committed in a systematic fashion, not only against persons because they belong to a racial or religious group, but also against the adversaries of this [State] policy, whatever the form of their opposition. 71

The absolute prohibition against crimes against humanity stems from historical experience as the most prevalent human wrong. The 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid declares that crimes against humanity constitute a threat not only to the state in which they

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70 Commentary on the Rome Statue of the ICC: [Crimes against humanity] are particularly odious offences in that they constitute a serious attack on human dignity or grave humiliation or a degradation of one or more human beings. They are not isolated or sporadic events, but are part either of a government policy (although the perpetrators need not identify themselves with this policy) or of a wide practice of atrocities tolerated or condoned by a government or a de facto authority. However, murder, extermination, torture, rape, political, racial, or religious persecution and other inhumane acts reach the threshold of crimes against humanity only if they are part of a widespread or systematic practice. Isolated inhumane acts of this nature may constitute grave infringements of human rights, or depending on the circumstances, war crimes, but may fall short of meriting the stigma attaching to the category of crimes under discussion. On the other hand, an individual may be guilty of crimes against humanity even if he perpetrates one or two of the offences mentioned above, or engages in one such offence against only a few civilians, provided those offences are part of a consistent pattern of misbehavior by a number of persons linked to that offender (for example, because they engage in armed action on the same side or because they parties to a common plan or for any similar reason.) Consequently when one or more individuals are not accused of planning or carrying out a policy of inhumanity, but simply of perpetrating specific atrocities or vicious acts, in order to determine whether the necessary threshold is met one should use the following test: one ought to look at these atrocities or acts in their context and verify whether they may be regarded as part of an overall policy or a consistent pattern of an inhumanity, or whether they instead constitute isolated or sporadic acts of cruelty and wickedness. As quoted by Guy Horton in Dying Alive - A Legal Assessment of Human Rights Violations in Burma April 2005, co-Funded by The Netherlands Ministry for Development Co-Operation. See section “12.52 Crimes against humanity,” page 201. He references RSICC/C, Vol. 1 p. 360

are committed but also to international peace and security. The idea is best captured in the words of Sir Hartley Shawcross during the Nuremberg trials:

The Charter of this Tribunal, . . . gives warning for the future--I say, and repeat again, gives warning for the future, to dictators and tyrants masquerading as a State that if, in order to strengthen or further their crimes against the community of nations they debase the sanctity of man in their own countries, they act at their peril, for they affront the International Law of mankind.\(^2\)

The reason behind highlighting the significance of crimes against humanity is that on the moral, legal and philosophical levels, the rationale for prosecuting perpetrators of such crimes goes beyond the perspectives of deterrence, legitimacy, legality, retribution or peace and reconciliation. As the US Circuit Court of Appeals ruled in *Demjanjuk v. Petrovski*, *these "crimes are offences against the law of nations and against humanity and the prosecuting nation is acting for all nations."*\(^3\) This constitutes a clear and unmistakable recognition of moral congruence vis-à-vis crimes against humanity.

**“INTERNATIONAL PEACE & SECURITY”: THE ‘JUSTICE, OVER PEACE’ PARADIGM:**

Article 1(1) of the UN charter states:

To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace

Until recently, the dominant view among international legal scholars has been that the only legitimate goal of the system is maintaining *international* peace,

\(^2\) For more information on the Nuremberg Trials, see The Avalon Project at Yale Law School at http://www.yale.edu/lawweb/avalon/imt/proc/07-26-46.htm
\(^3\) *Demjanjuk v. Petrovski*. 776 F.2d 571. US Court of Appeals, Sixth Circuit.
that is, peace among nations. As it stands, the qualifier “international” in this respect is an important one, for it limits the scope of “peace” to inter-state and not *intra-state* relations. Such a standard, however, undermines the effectiveness of international justice on two fronts: first, this version of “peace” is also compatible with gross human rights violations such as the Armenian Genocide, the Holocaust, the Rwandan Genocide, and even the current genocide in Darfur, and does not encompass crimes of state insofar as they do not significantly endanger international peace and stability.

Second, Article 1(1) of the UN Charter reflects the goals of a bygone era, when inter-state conflict constituted the dominant threat to peace and security. In contemporary times, the most serious threats to international peace and security arise not from inter-state violence, but from violence within states—violence which, although internal in nature, often transcend borders through humanitarian crises, terrorism, nuclear proliferation etc, and thereby endanger international security. This requires that “peace” should not just mean peace among states, but within states as well.

The current approach to peace and security presents one of the most formidable obstacles to international justice, an approach which carries the implicit assumption that “justice is only a legitimate aim to the extent that pursuing it promotes peace.” International justice grounded in the protection of human rights

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Also see, Allen Buchanan, pp. 60
76 “In 1996, there were 19 ongoing situations of internal violence around the world in which 1,000 people or more were killed. These so-called “high-intensity conflicts” cumulatively led to between 6.5 million and 8.5 million deaths. In the same year, there were also 40 "low-intensity conflicts", each causing between 100 and 1,000 deaths. Another 2 million deaths can be added to these figures if one includes situations of internal violence that had de-escalated in 1996.” The United Nations Organization. Human Rights and Conflicts: A United Nations Priority. May, 1997. At [http://www.un.org/rights/HRToday/hrconf.htm](http://www.un.org/rights/HRToday/hrconf.htm)
77 Allen Buchanan, pp. 30
seeks the inverse: justice, and not peace, as its primary goal. This does not imply that peace is not an important end, but that justice ought not to be sacrificed for measures targeted at peace.

This recognition of the importance of human rights provides the impetus for reformulating the Westphalian notion of absolute state sovereignty toward a more flexible version of sovereignty that better protects and promotes human rights. A defensible account of state sovereignty must be founded on a conception of justice, since the justification of the powers a state exercises lies in its ability in providing the fundamentals of justice within its territorial jurisdiction.

**DEFINING SOVEREIGNTY:**

Prior to discussing the problem with the Westphalian notion of sovereignty, which has for centuries constituted the bedrock of the contemporary international system of nation states, and presenting an alternative approach to it, this paper defines what state sovereignty means. Traditionally, sovereignty as it applies to the state is defined as the “supreme authority within a territory.”

In the Island of Palmers case Judge Huber states: “Sovereignty in the relations between states signifies independence, independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other state, the functions of a state.” Furthermore, under international law the idea of “sovereignty” has three dimensions: (1) *External sovereignty* is the authority exercised by states in dealing with other subjects of international law without prior authorization or control by another state. (2) *Internal sovereignty* refers to the states exclusive right or competence to determine the character of its own institutions, to ensure and provide for their operation, to enact laws of its own choice, and to ensure their

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Territorial sovereignty is the exclusive authority of the state over all persons and objects existing on, under or above its territory. The theoretical contours of this work will deal with the problems associated with the Westphalian view of sovereignty vis-à-vis its internal dimension, or to state it another way, *the problematic relation between internal state sovereignty and human rights*.

On the theoretical level, the two predominant views of sovereignty prevalent among legal scholars are:  

1. The traditional Westphalian notion of sovereignty and, 
2. the modern, flexible view of sovereignty premised on a justice based approach to international law. 

The first view is attributed to Jean Bodin and Thomas Hobbes—two of the earliest and most important theorists of sovereignty—in which the concept of sovereignty is absolute, unconditional and inviolable under international law. Both theorists were profoundly influenced by the religious wars that destroyed France and Britain and were driven by a desire to provide a rationale for a legitimate and absolute authority within the state. On the other hand, the second view of sovereignty is a comparatively modern and flexible one that has gradually evolved since World War II.

Until recently, the Westphalian notion has been the norm of international relations. However, a recent report by the International Commission on Intervention and State Sovereignty states that “sovereignty has come to signify, in the Westphalian concept, the legal identity of a state in international law....generally, however, the authority of the state is not regarded as absolute, but constrained and regulated internally by constitutional power sharing arrangements.”

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of any external mechanism for accountability. But what if the state transgresses its power, violating the social contract? How can the sovereign be held accountable if the citizens of the state are unable to do so? The Westphalian paradigm, which regards “sovereignty as control,” does not provide a feasible mechanism for accountability as the annals of history abundantly demonstrate.

The problem with placing an exceptionally high premium on state sovereignty provides political leaders endorsing the inviolability of sovereignty as a carte blanche to carry out all sorts of atrocities against its own people with impunity. The best illustration of this shortcoming is provided in a quote by Adolf Hitler who, when announcing his genocidal plan to exterminate the Jews of Europe, stated, “Who now remembers the Armenians?” Hitler was referring to the failed attempts to bring to justice the Turks responsible for the Armenian Genocide between 1915 and 1918. As one scholar writes in this respect: “the overweening nation-state all too readily begat the horrors of nationalism. The jurisprudence of sovereignty, in turn, all too easily lent a spurious legitimacy to these horrors.”

The predominant Westphalian view of sovereignty, in other words, prevents any feasible mechanism for enabling state officials to be held accountable for crimes committed against their own citizens. As C. A. Macartney wrote before the Nuremberg trials: "the doctrine of state sovereignty does not admit that the domestic policy of any state—the policy which it follows toward its own citizens—can be any concern of any other state." The problem with the Westphalian notion of state sovereignty, therefore, lies in its paradoxical role in simultaneously being the chief guarantor of and the chief obstacle to peace.

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It was nevertheless this scenario of absolute state sovereignty that led to the emergence of human rights law that denied the state a monopoly over its internal affairs. “The fundamental point about human rights law,” observes Forsythe, “is that it establishes a set of rules for all states and people...the international law of human rights is revolutionary because it contradicts the notion of national sovereignty—that is, that a state can do as it pleases in its own jurisdiction.”

**HOBBES AND LOCKE ON THE SOCIAL CONTRACT:**

From the perspective of the social contract theory, Westphalian sovereignty also reflects the remnants of Hobbessian philosophy where absolute sovereignty was a primarily viewed as a means to protect against a “solitary, poore, nasty, brutish, and short” state of nature (Leviathan,186)—that is, the major threat was believed as external in nature, which mandated a rationale for an absolute political authority.

Hobbes’ social contract theory, however, failed to realize that absolute sovereignty in this case could also be used to perpetrate those very problems that necessitated the need for an absolute sovereign in the first place. According to Hobbes’ Leviathan, even an oppressive government is preferable to the state of nature, as implied by his assertion that once people who willingly obligate themselves to the terms of the contract entered into with the state, they “must either submit to their decrees, or be left in the condition of warre he was in before” (Leviathan,232,186). Important to note in this regard that Hobbes considers the sovereign, who although, like any other human, is a product of his desires and passions, and susceptible to neglect the public interest to “procure the private good of himself” is still above the law. Moreover, the sovereign has a carte blanche to

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87 David Forsythe. Human Rights in International Relations, pp. 201
subject the people to a range of arbitrary powers—even execution—without any accountability.

The restraining force compelling such an absolute authority against tyrannizing his own people, according to Hobbes, lies in the sovereign’s own self-interest, in not aggrieving the populace “in whose vigor consisteth their own strength and glory” (Leviathan, 238). The rationale behind this argument being that by oppressing his own people the sovereign dissolves the contractual agreement between the state and the people, thereby empowering the masses to revolt against the ruler. The claim, however, falsely assumes that the sovereign, who exercises a monopoly on means of force, cannot use the power of the “publique sword” to suppress dissent against his rule.

A better formulation of the social contract theory is presented by John Locke’s view of the social contract, which links the sovereign’s duty with the protection of “life liberty and the pursuit of happiness,” that is, by insisting on promoting justice, and not merely protecting against the vagaries of the state of nature. The government, according to Locke, is only a discretionary authority, a fiduciary power elected by the majority that acts “pursuant to their trust” (Locke, 70). Further, this authority is governed by the following rules: (1) laws directed at the public good of society, (2) settled, standing laws and no arbitrary decrees, (3) laws cannot deprive any person of his property without his consent (Locke, 75). Any exercise of power beyond these limits amounted to tyranny—“exercise of power beyond right” (Locke, 101)—that nullifies the social contract. The people, according to Locke, have a right to rebel against illegitimate rule either when the legislature is changed or usurped by a tyrannical executive, or when the legislature or executive acts contrary to the trust of the people in preserving the property of...

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the people, or when the executive ignores its own enforcement duties thereby rendering the law meaningless (Locke 108, 111).

While Locke’s version of the social contract theory represents a marked progress compared to Hobbes, it is nevertheless subject to a similar problem given Locke’s concept of prerogative: “power to act according to discretion, for the public good, without the prescription of the law, and sometimes even against it” (Locke, 84) under certain circumstances. While Locke argues that revolution against the government is justified upon a “long train of abuses, prevarications and artifices” (Locke, 113), his idea appears problematic when juxtaposed next to his claim that undoubted prerogative which, “whilst employed for the benefit of the community...never is questioned,” given that “people are very seldom or never scrupulous” (Locke, 84). With the state wielding a monopoly over use of means of force, undoubted prerogative can be used as a justification to suppress dissent and violate the rights of its citizens.

**A NEW PARADIGM: “SOVEREIGNTY AS RESPONSIBILITY”:**

The Nuremberg trials initiated the paradigmatic shift from “sovereignty as control” to the contemporary notion of “sovereignty as responsibility.” An international order seeking to protect human rights against the abuses of state power can only be achieved by re-characterizing state sovereignty to a juridical concept that necessitates responsibility and accountability toward its citizens. This view was recognized in the report by the International Commission on Intervention and State Sovereignty which observes:90

“Thinking of sovereignty as responsibility, in a way that is being increasingly recognized in state practice, has a threefold significance. First, it implies that

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90 Ibid., pp. 11
the state authorities are responsible for the functions of protecting the safety and lives of citizens and promotion of their welfare. Secondly, it suggests that the national political authorities are responsible to the citizens internally and to the international community through the UN. And thirdly, it means that the agents of state are responsible for their actions; that is to say, they are accountable for their acts of commission and omission. The case for thinking of sovereignty in these terms is strengthened by the ever-increasing impact of international human rights norms, and the increasing impact in international discourse of the concept of human security."

Thus, when the state exercises power beyond its rights to perpetrate basic human rights violations against its own people, it not only violates the notion of moral minimalism but also relinquishes its sovereignty.

On the institutional level, the minimalist approach to human rights provides the underpinning for empowering supra-national authorities “standing over and above states,” that is, not abolition of states but the creation of a system that limits their power by empowering supra-national authorities such as the UN and the ICC with the requisite means for protecting human rights.91

INTERNATIONAL INSTITUTIONS—THE INSTRUMENTALIST APPROACH

What sort of global political institutions does such a system require if human rights are to be the primary objective of international justice? The essence of an instrumentalist approach regarding international institutions is that it seeks to enact those institutions that best further the goals of the moral minimalist perspective. The evaluative criterion here is “what political system best advances the rights of individual mean and women throughout the world.”92 Since it is apparent from historical experience that states cannot be trusted in respecting human rights, there is a need for an arrangement where international institutions, not nation states, must harbor the supreme authority and enforcement power regarding the application and enforcement of human rights norms within

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91 Simon Caney, pp. 161
92 Ibid., 153
states.\textsuperscript{93} The rationale for this principle is that “liberty is best protected when power is not monopolized by one institution or group of people” and “a system which divides power between global authorities and states protects peoples liberty better than a purely statist framework in which states can persecute their citizens at will.”\textsuperscript{94}

While Hobbes’ Leviathan argues for an institution wielding overwhelming, even tyrannical, coercive power to enforce the social contract, Locke’s view emphasizes a legitimately elected authority to enforce rules in the sphere of public interaction to resolve the problem of partial enforcement. The state, according to both theorists, is a necessary entity in order to prevent the problems inherent in private enforcement of rules. To the extent that international institutions are concerned, this logic can be extended to the international system by creating a system of legal accountability beyond those of individual states in order to ensure the protection of basic human rights. However, this should not be construed as an argument for an international state, or the eradication of the concept of sovereignty per se, but as a means for instituting an international legal regime whose jurisdiction extends only to cases of international justice related to protection of basic human rights both among and within states. Hence, this is an instrumentalist approach to global institutions, the basic tenets of which are:\textsuperscript{95}

1. Appropriate political institutions are those that best further the ideals of international justice defined in this respect as the protection of basic human rights.
2. Such institutions must operate by principles that specify clear provisions and processes that best serve the ideals of international justice.

So far, this paper has established the minimalist conception of human rights and the moral framework within which these rights must be placed. Further, the

\textsuperscript{93} Allen Buchanan, pp. 296
\textsuperscript{94} Simon Caney, pp. 160
\textsuperscript{95} Simon Caney, pp. 159. Also Allen Buchanan, pp. 67, 299
implications of the minimalist approach were delineated with regard to notions of justice, sovereignty and international institutions. The next section will, now, give a very brief overview of the historical development of the international human rights regime. While there are several historical precedents that are relevant to the case study of Uganda, this thesis will concern itself solely with the most pressing events and attempt to state them as succinctly as possible. The historical background is essential in order to understand the context in which the current conflict in Uganda is taking place, and will inform many of the points argued for later.
CHAPTER 3: WAR CRIMES AS AN ASSAULT ON HUMAN DIGNITY—

DISCERNING MORAL CONGRUENCE

BACKGROUND:

Before Nuremberg, state sovereignty still constituted the bedrock of the international system and attempts to prosecute crimes that amounted to breaches of international law did not lead to anything concrete. But even since 1920, attempts were made, albeit unsuccessful, to pierce the wall of state sovereignty.96

The Advisory Committee of Jurists proposed the creation of a “High Court of International Justice” in 1920 for the purposes of trying crimes “constituting a breach of international public order or against the universal law of nations” but the proposed draft statues were rejected by the erstwhile League of Nations as being “premature.”97 Moreover, while endeavors such as the Kellog-Briand Pact, the establishment of the International Labor Organization, and numerous other treaties entered into after the World War I did manifest an inclination toward protecting human rights, international law had for no practical mechanism, or historical precedent, for international criminal accountability.

It was nevertheless this very scenario—the inviolability of state sovereignty—that awakened the international community from its slumber and provided the impetus for the successful establishment of the Nuremberg and Tokyo Tribunals, thereby marking a turning point in international law. The Holocaust of almost six million Jews by the Third Reich, and Japanese atrocities in Manchuria served as a glaring reminder of the disastrous consequences of maintaining an

96 Attempts to prosecute soldiers in the German military before the “Imperial Court of Justice” at Leipzig after World War I resulted in only 12 indictments, of which six were acquitted. Similarly, efforts to bring the perpetrators of the Armenian genocide of 1915 were mostly failures, although the Turkish judiciary did prosecute some of the alleged violators to trial. Schick, F.B. “International Criminal Law: Facts and Illusions.” The Modern Law Review, Vol. 11, No. 3, pp 291
97 Ibid., pp. 293
absolutist interpretation of the doctrine of state sovereignty. Such crimes made an indelible impression on world opinion and the subsequent trials of the Nazi and Japanese leaders were an expression of the widespread conviction that ‘never again’ would human rights atrocities go unpunished. The interest of justice, therefore, demanded that these trials serve as a lesson for future generations.

**JUDGMENT AT NUREMBERG—“THIS TRIAL, WHICH IS NOW TO BEGIN, IS UNIQUE IN THE ANNALS OF JURISPRUDENCE”:**

These events constituted the historical backdrop leading to one of the most important trials in the history of international law. This paper elaborates upon the Nuremberg precedent in detail because it was important in many ways. First, Nuremberg shifted the hitherto absolute monopoly of states in the domestic sphere over crimes such as war crimes, crimes against humanity etc. to the international domain. For the first time in history, non-national entities were established to prosecute state leaders for egregious violations of human rights.

Second, these trials codified new definitions of criminal acts under international law—war crimes, crimes against humanity, war of aggression—that gradually acquired the status of crimes prohibited by customary international law. The statute of the International Military Tribunal, which was set up to try the Nazi leaders, initiated the development of new legal standards that contributed to the existing corpus of international law, thereby setting the foundations of international criminal law. This was a crucial development on purely moral grounds, as it started the momentum that eventually lead to important prosecutions of perpetrators of human rights violations in the form of independent tribunals such as the International Criminal Tribunal for ex-Yugoslavia (ICTY) and International Criminal

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99 “We must never forget that the record on which we judge these defendants is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well.” Justice Robert Jackson at Nuremberg. *International Conference on Military Trials*, p. 126
tribunal For Rwanda (ICTR), finally culminating with the birth of a permanent international organization for prosecuting such crimes—the International Criminal Court (ICC). While the legal controversies of Nuremberg are varied and many, this paper will concern itself only with the major substantive legal issues involved.

CRIMES AGAINST HUMANITY AND AGGRESSIVE WAR:

The Nuremberg charter established the statute of the International Military Tribunal (IMT) to prosecute individuals for “war crimes, crimes against peace, crimes against humanity, and conspiracy to wage aggressive war.”100 Prosecuting crimes against humanity was important because it “denotes a particular type of war crime, and is a kind of clausa generalis, the purpose of which is to make sure that inhumane acts violating general principles of the laws of all civilized nations” must be held accountable.101

Another aspect of the trial was the charge of waging “aggressive war,” a crime that never existed before in international law. Notably, aggressive war was termed the "supreme international crime"102 in recognition of the destructive effects of war on humanity, thereby making aggressive war an “international crime against the human species”103

Martin Nijhoff, in his book "Aggressive War an international Crime,” observes that “the tribunal recognizing this grave violation of the fundamental rule of international law as having all the essentials of criminality, was justified in

100 For further information, see “The Avalon Project at Yale Law School.”
http://www.yale.edu/lawweb/avalon/imt/proc/imtconst.htm#art6b
101 The Crimes against humanity were defined as: “murder, extermination, enslavement, deportation or other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.” Ibid.
102 Umberto, Leanza. The Historical Background, in the International Criminal Court and the Crime of Aggression. European Journal of international Law Vol. 17, No. 2. pp. 3-16
103 In this regard, a noted scholar observes that “while many features of Nuremberg...were innovative, none was as new as a trial for the crimes of aggressive war making.” Johnathan Bush. The Supreme...Crime’ and its Origins. The Lost Legislative history of the Crime of Aggressive War. Columbia Law Review, Vol. 102, No. 8. pp. 2326. UN War Crimes Commission. History of UN War Crimes Commission and the Development of the Laws of War. (Lord Wright, 1948).
punishing its authors in the name of the offended world community, thus establishing a law-making precedent in a field where no criminal law existed before."^{104} Nuremberg also showed how effective international justice could be when there is political will to support it.

This ruling by the IMT later laid the foundation of Article 2(4) of the UN Charter—the linchpin governing the prohibition against the use of force in international law.^{105}

**THE “ACT OF STATE” DOCTRINE:**

The defense of act of state—"acts performed by individuals in their capacity as organs of the state and therefore acts imputable to the state"—functions as a shield against individual responsibility by precluding accountability before an international tribunal, because the illegal act is attributed to the "state."^{106} The essence of this doctrine is grounded in the belief of the inviolability of sovereignty. Dr. Herman Jahrreiss’ attorney argued that the Nazi leaders could not be prosecuted because individual responsibility in such circumstances “cannot take place as long as the sovereignty of states is the organizational basic principle of interstate order.”^{107}

Although Article 7 of the IMT precluded the use of such a defense, the Tribunal ruled, and rightfully so, that "crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."^{108}

Chief Justice Jackson’s opening statement demonstrated an awareness of such abuse of power by arguing that “this trial represents mankind’s desperate
effort to apply the discipline of the law to statesmen who have used their powers of state to attack the foundations of the world’s peace...but the ultimate step in avoiding periodic wars is to make statesmen responsible to law.”

The upshot of the IMT’s rejection of this defense sent a clear message to future perpetrators of international crimes: statesmen are now responsible for any breaches of international law, for to hold otherwise would be tantamount to granting individual rulers carte blanche to commit both internal and external atrocities. As Chief Justice Robert Jackson eloquently stated during the trial:

“How a government treats its own inhabitants generally is thought to be no concern of other governments or of international society. Certainly few oppressions or cruelties would warrant the intervention of foreign powers. But the German mistreatment of Germans is now known to pass in magnitude and savagery any limits of what is tolerable by modern civilization. Other nations, by silence, would take a consenting part in such crimes. These Nazi persecutions, moreover, take character as international crimes because of the purpose for which they were undertaken.”

While crimes such as “crimes against humanity” and “crimes against peace” have been criticized for breaching the principle of *nullen crimen sine lege*, these crimes have since become a part of international customary law prohibitions. The development of such legal norms and standards of responsibility, which furthered the case for international justice, were a necessary step to ensure the primacy of the rule of law. To argue otherwise would have delivered a crushing defeat not only to justice but also human. The point is best stated by a scholar who observes:

“Legal rights and obligations are constantly being created. Justice must be done, *ruat caelum*. International law has been laboriously evolved to serve the ends of justice between peoples. It embraces not only the interests of states but of individuals. Because a man is *heimatlos* and without a champion to defend him does not imply that he is to be denied either international or means of redress.”

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110 Ibid.
While awaiting execution at Nuremberg, Herman Goering stated that “the victor will always be the judge and the vanquished the accused,” conveying, in a sense, a charge that has often been leveled at the “justice” imparted at Nuremberg—‘victors justice.’

THE COLD WAR AND EFFORTS TO ESTABLISH A PERMANENT MECHANISM FOR CRIMINAL JUSTICE:

One of the most important lessons of Nuremberg was the importance of creating a permanent mechanism for international justice which, moreover, was impartial in dispensing justice. However, the quest for such an international tribunal remained fruitless in the face of the highly charged and antagonistic political atmosphere between the east and west blocks during the cold war, although the UN did embark on some important, albeit abortive attempts in this regard.

In 1947, UNGA Resolution 177/II mandated the International Law Commission (ILC) to formulate the draft code for an international criminal court.112 The 1948 UN Genocide Convention, which imposed a legal obligation on states to “prevent and punish” the crime of genocide, envisaged in Article IV the future establishment of an “international penal tribunal.”113 Such efforts failed to gain any momentum due to the fact that the world was sharply divided into the east-west blocks and the risks of another war that could plunge the entire international system into yet another destructive conflict were high. Hence, due to the tense geopolitical environment of the international system, states were averse to the idea

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113 Umberto Leanza. The Historical Background, in the International Criminal Court and the Crime of Aggression. European Journal of International Law Vol. 17, No. 2. pp. 3-16
of accepting legally binding legislation and were willing to pay only lip-service to international human rights.\textsuperscript{114}

**Since 1948, some 60 human rights treaties and declarations have been negotiated at the United Nations. Some examples are:}\textsuperscript{115}

<table>
<thead>
<tr>
<th>Year</th>
<th>Treaty or Declaration</th>
</tr>
</thead>
<tbody>
<tr>
<td>1948</td>
<td>Convention on the Prevention and Punishment of the Crime of Genocide</td>
</tr>
<tr>
<td>1961</td>
<td>Convention Relating to the Status of Refugees</td>
</tr>
<tr>
<td>1965</td>
<td>International Convention on the Elimination of All Forms of Racial Discrimination</td>
</tr>
<tr>
<td>1979</td>
<td>Convention on the Elimination of All Forms of Discrimination Against Women</td>
</tr>
<tr>
<td>1984</td>
<td>Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</td>
</tr>
<tr>
<td>1989</td>
<td>Convention on the Rights of the Child</td>
</tr>
<tr>
<td>1990</td>
<td>International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families</td>
</tr>
</tbody>
</table>

Despite many human rights violations committed during the cold war, the bi-polar system had managed to maintain some degree of international stability and order, with each superpower acting like a sheriff in his own sphere of influence. The focus of the UN and nation states during this period was primarily to prevent *inter-state conflicts*, a notion that was compatible with egregious human rights violations perpetrated by the state against its own people.

**THE POST-COLD WAR ERA—ADVENT OF AD HOC TRIBUNALS:**

The disintegration of the Soviet Union in 1989 marked the end of the bi-polar system that resulted in a fragmented international order in which previously quiescent multi-ethnic states, now spurred by the forces of rising nationalism and fundamentalism, engaged in devastating internal armed conflicts that resulted in


some of the worst human rights atrocities since the Second World War. On the other hand, there were several positive consequences resulting from the end of the cold war. The disintegration of east-west block rivalry thawed relations in the UNSC and initiated an atmosphere of greater cooperation and compromise. The genocide of almost 800,000 people in Rwanda and the systematic ethnic-cleansing of minorities in Yugoslavia rekindled the sense of outrage felt by the international community after the Second World War.

The crimes of the state in both countries were of such magnitude that the UNSC was compelled to act by establishing two ad-hoc tribunals—the International Criminal Tribunal for ex-Yugoslavia in 1993 and the International Criminal Tribunal for Rwanda 1994—to prosecute those responsible for such assaults upon human dignity.

An emerging consensus began to emerge for the need to prosecute violators of human rights. One scholar notes in this regard that “not to prosecute the criminals would amount to condoning their crimes. In extreme situations, speaking out is a moral obligation.” The United States Secretary of State to George Bush, Lawrence Eagleburger, opined in 1996 that “the United States could no longer remain silent on the issue of war crimes...acts against humanity could not and would not be ignored.”116 A brief analysis of the ICTY and ICTR is called for as they speak to the moral and legal aspects of human rights.

A) INTERNATIONAL CRIMINAL TRIBUNAL FOR EX-YUGOSLAVIA:

To the extent that the legal dimension of this tribunal is concerned, this resolution marks a seismic shift in international law.117 For the first time, the

117Expressing concerns about the reported “mass killings, massive, organized and systematic detention and rape of women, and the continuance of the practice of "ethnic cleansing", including for the acquisition and the holding of territory,” the UNSC established the ICTY in its resolution 827 in 1993. Available at http://www.un.org/icty/legaldoc-e/index.htm
human rights atrocities carried out inside Yugoslavia were subsumed under Chapter VII of the UNC, which deals with actions required for the “maintenance of international peace and security.”\(^{118}\) In other words, internal state conflicts, which were previously considered to be a matter of a state’s internal sovereignty and beyond the jurisdiction of the UN, were now determined as conflicts within the meaning of “international peace and security.”\(^ {119}\)

This expanded notion of “international peace and security” was a pivotal evolution in international law, which the ICTY states in the following manner: “It has expanded upon the legal elements of the crime of grave breaches of the Geneva Conventions of 1949 by further defining the test of overall control, identifying the existence of an international armed conflict…”\(^ {120}\)

On the matter of moral congruence, the tribunal’s statute and legislative history clearly indicate a consensus at the international level that torture, war crimes and crimes against humanity\(^ {121}\) constituted violations of the “peremptory norms of general international law” (jus cogens)\(^ {122}\), that is, basic principles that are fundamental to the international legal system.

Despite the important advances on the legal and moral levels, the Yugoslav conflict is a glaring reminder of the exorbitant costs to human life due to political inaction. The Milosevic regime was responsible for killing more than 200,000 Bosnians and rendering more than 800,000 homeless, people who became internal refugees.\(^ {123}\) From the very beginning, the international community was unwilling to intervene militarily to stop the campaign of violence against innocent civilians. “We don’t have a dog in this fight,” President George Bush, Sr. stated in

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\(^{118}\) Legal Standards in the Kosovo Conflict. Human Rights Watch. Available at http://www.hrw.org/reports/2001/kosovo/undword2e.html


\(^{121}\) See ICTY website at http://www.un.org/icty/legaldoc-e/index.htm


the early stages of the conflict. Moreover, when asked about the US response to the Yugoslav conflict, U.S. National Security Advisor Brent Scowcroft stated: “Tell me again what this is all about.” Efforts by the European Union too did not go beyond mere rhetoric and issuing declarations for the Yugoslavian government to cease its human rights violations. It was only after when the conflict led to an international refugee crisis, threatening the regional stability of the Balkans, did the international community take meaningful action against the Milosevic regime.

B. INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA:

It is usually individuals in power or authority that can, in practice, commit genocide and crimes against humanity. This is the first time high-ranking individuals have been called to account before an international court of law for massive violations of human rights in Africa. The Tribunal’s work sends a strong message to Africa’s leaders and warlords. By delivering the first-ever verdicts in relation to genocide by an international court, the ICTR is providing an example to be followed in other parts of the world where these kinds of crimes have also been committed. (ICTR on Evolution of Political and Legal Accountability)

The saying that ‘the only thing needed for evil to succeed is for good men to do nothing’ is certainly applicable to Rwanda’s case. The genocide of approximately 800,000 Rwandans within 100 days is not only a blot on the world’s conscience but also an indictment of the international community’s lack of political will in preventing the genocide. As Kofi Annan stated: “Looking back now, we see the signs which then were not recognized. Now we know that what we did was not nearly enough--not enough to save Rwanda from itself, not enough to honor the


126 Website of the ICTR: http://69.94.11.53/default.htm
ideals for which the United Nations exists. We will not deny that, in their greatest hour of need, the world failed the people of Rwanda.”

As a measure to assuage its conscience, the Security Council finally created the International Criminal Tribunal for Rwanda (ICTR) by resolution 955 of 8 November 1994, with the jurisdiction to prosecute the crimes of genocide, crimes against humanity and other violations of the Geneva Conventions.

During the time when the Rwandan Genocide was in progress, it is noteworthy that no nation was willing to use the word “genocide” in describing the events in Rwanda, despite clear evidence that genocide was taking place. When State Department spokeswoman Christine Shelley was asked in April, 1994, whether what was happening in Rwanda is a genocide, she responded: "...the use of the term 'genocide' has a very precise legal meaning, although it's not strictly a legal determination. There are other factors in there as well." The US government, however, was clearly aware that genocide was indeed taking place as manifested by a secret intelligence report released by the State Department in the end of April which termed the killings "genocide." Similarly, a secret Discussion Paper sent to the Office of the Deputy Assistant Secretary of Defense for Middle East/Africa Region, Department of Defense, on May 1, 1994, cautions: "Be Careful. Legal at State was worried about this yesterday—Genocide finding could commit USG to 'do something'". The U.N. Security Council, moreover, passed Resolution 997 on April 27, 1994, condemning the killing, but refrained from using the word "genocide."

128 Website for the ICTR: http://69.94.11.53/default.htm
The avoidance stems from the language employed in the UN Genocide Convention of 1948 which imposes a legal duty on states to “prevent and punish” those responsible for committing genocide. Hence, as the document sent to the Secretary of Defense’s Office clearly demonstrates, the international community was not willing to use the word Genocide because that would have imposed a legal duty to intervene in Rwanda.¹³²

In addition to the ICTY and ICTR, the UNSC also considered the situations in Sierra Leone, Cambodia, and East Timor as being suitable for the creation of ad hoc international tribunals.¹³³ The sheer amount of time and resources spent with the ICTY and ICTR, however, had strained the capabilities of the UN. This motivated the UN to establish a permanent and independent International Criminal Court for trying certain “core” crimes under international law.

**THE 1998 ROME CONFERENCE AND THE CREATION OF THE ICC:**

The two ad-hoc tribunals were limited in territorial jurisdiction, and established by the UNSC for situations falling under Chapter VII of the charter. These tribunals provided the impetus to form a legal organ of global jurisdictional reach, potentially capable to respond to violence anywhere. In 1995, the GA formed a Preparatory Committee composed of member states, NGO’s, and other International Organizations to prepare a statue for a permanent ICC that would be politically independent.¹³⁴ After several meetings and political compromises between 1995 and 1998, the Committee finally presented a final Draft Statue consisting of 116 Articles to the Diplomatic Conference in Rome on July 15,

¹³² National Security Advisor Anthony Lake aptly captured the issue of lack of national and international institutional resources in matters related to preventing human rights violations "When I wake up every morning and look at the headlines and the stories and the images on television of these conflicts, I want to work to end every conflict. I want to work to save every child out there. And I know the president does, and I know the American people do. But neither we nor the international community have the resources nor the mandate to do so. So we have to make distinctions. We have to ask the hard questions about where and when we can intervene. And the reality is that we cannot often solve other people's problems; we can never build their nations for them.”


1998.\textsuperscript{135} This Rome Conference resulted in the formation of the ICC, which formally came into force in 2002.\textsuperscript{136} The Statue was adopted by 120 votes to 7 with 20 abstentions. Countries that voted against the statue include USA, Libya, Israel, Iraq, China, Syria, and Sudan). At this point, 104 countries are parties to the Rome Statute of the International Criminal Court.\textsuperscript{137}

Before analyzing the conflict in Uganda, this paper will recapitulate the essential points argued for the creation of a justice based system under international law. First, experience shows that the greater threat to fundamental human rights stems from the apparatus of the state itself. Hence, preventing such a scenario requires that the absolutist notion of sovereignty, which has hindered any efforts by international institutions in either preventing such human rights atrocities or holding statesmen accountable, be re-characterized to a more flexible version in which state sovereignty is synonymous with the idea of the ‘responsibility’ to protect the basic rights of citizens. The human rights doctrine is premised on the moral equality of all people, with every person holding certain basic and minimum rights in order to live a minimally decent standard of life. These basic rights are not culturally relative but enjoy almost universal acceptance.

Thus, when the state infringes upon these rights, it violates the paradigm of sovereignty as responsibility and justice as fairness and, therefore, dissolves the social contract and surrenders its sovereignty. This necessitates empowering international institutions to hold statesmen accountable for violating the basic rights of its citizens so as to plant the seeds for a justice based system under international law that serves as the closest approximation to the ideal of justice. More importantly, consistent with the “justice, over peace” paradigm, it is crucial

\textsuperscript{135} Ibid.
\textsuperscript{136} The International Criminal Court at a Glance, at the ICC Website at http://www.icc-cpi.int/about/ataglance/establishment.html
\textsuperscript{137} State Parties to the ICC Statue, available at http://www.icc-cpi.int/statesparties.html Out of them 29 are African States, 12 are Asian States, 16 are from Eastern Europe, 22 are from Latin America and the Caribbean, and 25 are from Western Europe and other States.
that justice must not defer to measures targeted at securing peace; that justice should be an end in itself. Now, this paper will analyze the case of the LRA in Uganda on the levels of analysis indicated in the first chapter.
THE LORDS RESISTANCE ARMY:

UGANDA AND HUMAN RIGHTS
1. BACKGROUND—ORIGINS OF THE CONFLICT AND THE LORDS RESISTANCE ARMY:

This section is an analysis of the issues surrounding the human rights atrocities in Northern Uganda. In analyzing the case, this paper will apply the theoretical points argued for in the second chapter.

The Lords Resistance Army (LRA) began in 1986 as the Holy Spirit Movement (HSM) under Alice Lakwena, a self-proclaimed prophet who claimed to have powers to perform miracles. Lakwena was succeeded by Joseph Kony in 1998, a rebel leader who declares himself her spiritual heir with similar supernatural powers. Kony’s declared mission is to overthrow the Ugandan Government and to “install the Ten Commandments.”

In 1986, the National Resistance Movement (NRM) led by Yoweri Museveni’s overthrew the dictatorship of General Tito Okello, who had ruled for a brief interim period after the removal of Milton Obote’s dictatorship. The Tito regime had previously been involved in massive human rights violations that murdered civilians and ravaged the countryside in order to destroy the NRA’s support.

After seizing power in early 1986, Museveni’s NRA forces in mid-1986 began to commit human rights abuses throughout the Acholi region in the name of crushing an emerging rebellion. The removal of the Okello regime led to an alliance between the remnants of Okello’s and Obote’s armed forces, which had perpetrated egregious human rights atrocities during their rule, to retreat to the north of Uganda and seek refuge in the area of southern Sudan.

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139 UN Commissioner for Human Rights Report, pursuant to Commission Resolution 2000/60 (UNHCR Report on Uganda) at www.ohchr.org
This operational base in Southern Sudan was maintained under active Sudanese support. From here, these forces consolidated and reorganized themselves as antigovernment insurgents who found useful allies in factions of Idi Amin’s armed forces who had fled to Sudan after the Amin’s overthrow in 1979.

The Sudanese government, governed by the predominantly Arab National Islamic Front (NIF), viewed the NRM’s victory as a major threat to its control over the non-islamic and non-arabic population in the south of Sudan that borders Uganda. Therefore, the Sudanese government began identifying the NRM with the Sudan Peoples’ Liberation Army (SPLA), which largely consists of Christian Dinka and Neur ethnicities.

This web of disaffected former soldiers and suspicious government officials resulted in an unlikely alliance between the Islamist government of Sudan and the predominantly Christian insurgents, the Lord’s Resistance Army (LRA), against the NRM in Uganda. The LRA’s aim to “install the Ten Commandments” in Uganda has resulted in a continuing campaign of terror against innocent civilians in northern Uganda, primarily the regions of Acholi, Gulu and Kitgum.

In March 2002, the Ugandan army (Ugandan People’s Defense Force or UPDF) launched Operation Iron Fist (OIF), a military offensive against the LRA, by sending troops into southern Sudan with the permission of Sudan’s government. Although the goal of the offensive was to eliminate the LRA, the conflict inside northern Uganda instead intensified and spread to the eastern district of Teso.

In January 2004, Ugandan President Yoweri Museveni became the first head of state to refer the LRA’s case to the International Criminal Court (ICC) under Articles 13(a) and 14 of the Rome Statute, which trigger the jurisdiction of the ICC.
the court in this matter.\textsuperscript{146} In response, the ICC Prosecutor informed the Ugandan government that he would analyze all crimes committed in Northern Uganda, \textit{not only those allegedly committed by the LRA}.

After thorough analysis of available information, on 28 July 2004 Prosecutor Ocampo opened the investigation into the situation of Uganda. The Office of the Prosecutor then made over fifty missions to investigate in Uganda and also to listen to the concerns of local community leaders, including religious and traditional leaders, government officials and NGOs.\textsuperscript{147} Based on the evidence obtained, the ICC issued arrest warrants for five senior LRA commanders indicted for \textit{war crimes and crimes against humanity}: Joseph Kony, leader of the LRA, Vincent Otti, second in command, Raska Lukwiya, Okot Odhiambo and Dominic Ongwen.\textsuperscript{148}

The crimes for which the LRA commanders have been indicted are:\textsuperscript{149}

- At least 2,200 killings and 3,200 abductions recorded
- Attacking and pillaging communities in Uganda and Southern Sudan.
- Killing without reason thousands of men, women, boys and girls from different communities.
- Destroying villages and camps, burning entire families.
- Abducting thousands of persons, (especially children), forcing boys to be killers and girls to be sexual slaves.

\textsuperscript{146} Ibid.
\textsuperscript{147} Case Studies on Uganda, DRC and Sudan. \textit{Advancing Justice and Reconciliation in Relation to the ICC}. Available at http://www.wcrp.org/files/chapter%206%20Case%20Studies%20on%20Uganda%20DRC%20and%20Sudan.pdf
\textsuperscript{149} Ibid., see List of "Charges" against LRA Leaders.
ISSUES:

International and national efforts to end the civil conflict in northern Uganda have led to several challenges that cut across issues of human rights, law and politics. Consistent with the theoretical arguments put forth in the second chapter, the issues surrounding the conflict in Northern Uganda are as follows:

What is the nature of the crimes committed by the LRA and do these crimes violate the notion of moral minimalism and the tenets of the moral equality principle? Attempts to prosecute the LRA commanders under international justice procedures, have not received unanimous support in Uganda or even internationally for that matter. Some prefer to have justice applied according to Uganda’s own traditional tribal laws, and Museveni reportedly has indicated that if Kony asks for forgiveness the Ugandan government would not pursue with the ICC arrest warrants. This issue is also intertwined with the criteria of “justice as fairness” and “sovereignty as responsibility.” Are the arguments related to allowing the LRA to be tried nationally or internationally a case of cultural relativism? Is the national prosecution of LRA commanders reconcilable with the Institutionalist perspective? Moreover, is the prosecution of the LRA commanders under Ugandan law consistent with the ‘justice, not peace’ paradigm.

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CASE ANALYSIS:

Where else in the world have there been 20,000 kidnapped children? Where else in the world have 90 per cent of the population in large districts been displaced? Where else in the world do children make up 80 per cent of the terrorist insurgency movement?... For me, the situation is a moral outrage... A much bigger international investment [is needed] — in money, in political engagement, in diplomacy and also more concerted efforts to tell the parties there is no military solution... there is a solution through reconciliation, an end to the killing and the reintegration and demobilization of the child combatants.151

Twenty three year old David was abducted by the LRA from his village in February, 2003. The events that followed serve as a gruesome reminder of the atrocities carried out by a rebel group whose name is synonymous with torture, fear and indiscriminate killing of innocent civilians. David’s testimony provides a gut-wrenching tale of unimaginable horror:

"They tied me and laid me down. They told me not to cry. Not to make any noise. Then one man sat on my chest, men held my arms, legs, and one held my neck. Another picked up an axe. First he chopped my left hand, then my right. Then he chopped my nose, my ears and my mouth with a knife."152

The victim pleaded the LRA rebels to kill him, but they wrapped up David’s ears in a letter to warn others against joining or cooperating with the Ugandan government. The incident reveals only the tip of the proverbial iceberg regarding the enormities of the LRA. The following statistics highlight the magnitude of the death and destruction the conflict in Northern Uganda has resulted in within the last twenty years.

## INDEX A: Northern Uganda Key Facts

### Internal displacement
- Between 1.8 and 2 million people are internally displaced and living in camps (about 8 per cent of the national population).
- Approximately 1.2 million of these people are internally displaced in the northern districts of Gulu, Kitgum, and Pader (representing 94 per cent of the local population).
- In Gulu, Kitgum, and Pader an area the size of Belgium is now depopulated.
- There are 202 IDP camps in northern Uganda, some with populations of over 60,000.
- Population density in some camps is as high as 1,700 people per hectare.
- 50 per cent of IDPs are under the age of 15.

### Mortality
- Rates of violent death are three times higher than those reported in Iraq following the Allied invasion in 2003.
- Crude mortality rates are more than three times higher than those recorded in Darfur in October 2005.
- There are 901 excess deaths every week. This means 129 people die every day as a result of violence and conditions in camps.
- Each day, 58 children under the age of five die as a result of violence and preventable diseases.

### Abduction
- More than 25,000 children have been abducted during the course of the war
- At times of heightened insecurity up to 45,000 children ‘night commute’ each evening to avoid abduction by the LRA

### Education
- 737 schools in Northern Uganda (60 percent of the total) are non-functioning because of the war
- 250,000 children in Northern Uganda receive no education at all

### Humanitarian access

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- 80 per cent of the camps in Gulu, Kitgum, and Pader cannot be accessed without military escorts

**Economic costs:**
- 95 per cent of IDPs in Gulu, Kitgum and Pader live in absolute poverty
- Cost of the war to Uganda after 20 years: $1.7bn.
- Cost of the war to Uganda annually over 20 years: $85m
- The annual cost of the war is approximately equivalent Uganda's total annual income from coffee exports. The equivalent amount of money could provide clean, safe drinking water to 3.5 million people per year - or the total population of Liberia.15

**IDP demographics**
- There are 202 IDP camps in northern Uganda.
- Between 1.8 and 2 million people are displaced (approximately 8 per cent of the national population).
- In some camps population density exceeds 1,700 people per hectare.
- 50 per cent of IDPs are under the age of 15.
- 25 per cent of children over 10 years of age have lost one or both of their parents.
- There is a large absence of adult males aged 20-29, as a direct result of the war.
- 12 per cent of females aged 30-44 are widows – twice the national average.

As the statistics indicate, the two decade long conflict between the UDPF and the LRA has turned the region of Northern Uganda into the crucible in which the human rights of innocent civilians have suffered unimaginable horrors. The crimes committed by the LRA—mass murder, torture, rape, abductions, use of children as child soldiers and sex slaves—amount to crimes against humanity and, thus, stand as clear violations of the minimalist notion of human rights.154

As the horrifying case of David shows, the LRA has been using a campaign of terror and brutality against the very people it claims to represent, and fight for,

154 Further discussions on this point below.
as a means to pressure the Ugandan government into revoking the ICC arrest warrants and granting the LRA commanders blanket amnesty. Upon issuing the arrest warrants for the LRA commanders, ICC Prosecutor Ocampo poignantly stated that "the LRA has mainly attacked the Acholis they claim to represent. For nineteen years the people of Uganda have been killed, abducted, enslaved and raped."

Moreover, according to a former LRA soldier, the LRA’s heinous tactics are meant to "prove the world wrong, that they are not finished. Atrocities speak louder than what the Ugandan government claims." This nefarious strategy of using human beings as pawns to pursue a political agenda amounts to a clear violation of both tenets of Kant’s moral equality principles—that is, treating individuals as means rather than as ends in order to further a political agenda.

THE INSTITUTIONALIST PERSPECTIVE AND CULTURAL RELATIVISM:

Some argue that the ICC arrest warrants have only derailed the peace process in Uganda, and therefore, in the interests of peace, the arrest warrants be revoked and the Ugandan people themselves determine how to impart justice. LRA deputy commander Vincent Otti stated in reaction to the ICC’s involvement, "our delegation will sign an agreement but we shall stay where we are until the warrants are withdrawn". The argument of pursuing peace at the expense of justice was best articulated by a western diplomat in Kampala, who stated that, "In our hearts, we want the negotiations to work and finally everyone gets to go home.

But in our minds, we support the ICC. Does the ICC want to be seen as a last hurdle to peace, after all these years? No, but can they afford to compromise?"  

According to findings of the Ugandan Refugee Law Project (February 2005), “the ICC’s involvement is deeply unpopular because it jeopardizes the concept of amnesty and, therefore reduces hope for a peaceful resolution to the conflict”. A senior ex-LRA combatant supports this point: “There is amnesty under the Amnesty Act. Why is the ICC investigating?” On the other hand, the evidence of the Acholi Religious Leaders Peace Initiative (ARLPI) indicates the opposite view: “some people want the war to end and they see the ICC as the hand of the international intervention coming to end the prolonged war. They therefore support the ICC intervention and they wish the Chief Prosecutor to issue a warrant of arrest without any further delay.”

Is the issue of national versus international law simply an issue of cultural relativism versus moral universalism, of justice being in the eye of the beholder, or does it go beyond this consideration? First, this paper will engage in a comparative analysis of the processes used to impart justice under the ICC and under Uganda’s traditional tribal rituals. In doing so, this paper argues that the conflict between national and international law is not a case of cultural relativism, as the justice imparted through traditional Ugandan rituals amounts to a violation of “justice as fairness.”

As previously stated, the two basic principles of the institutionalist perspective espoused in this paper are:

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160 Ibid.
1. Appropriate political institutions are those that best further the ideals of international justice defined in this respect as the protection of basic human rights.

2. Such institutions must operate by principles that specify clear provisions and processes that best serve the ideals of international justice.

From this perspective, the ICC is an ideal fit. First, it is an institution founded purely for the purposes of advancing the cause of international justice in the form of prosecuting individuals for committing the “core” crimes—war crimes, crimes against humanity and genocide—under international law that encapsulate violations of basic human rights. The Preamble of the ICC statute reflects its purpose of ending “impunity for perpetrators and thus to contribute to the prevention of such crimes.” In addition, unlike the UNSC that previously dealt with issues of international justice through ad-hoc courts, the ICC is an independent political organization created to dispense impartial justice. The neutrality, independence and procedural clarity of the ICC as an institution is a crucial issue regarding the legitimacy of international criminal justice as it guarantees that the justice delivered by such an institution is not viewed as ineffective, or worse still, as a form of “victors justice.”

Moreover, its statute provides clearly codified procedural and substantive safeguards—institutional processes—essential for dispensing impartial justice; notably, the jurisdiction to try only persons above the age of 18 at the time the crime is committed,\(^{161}\) clearly codified definitions of crimes including the elements of the crime,\(^{162}\) prohibition against double jeopardy,\(^{163}\) the right to counsel, and the

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\(^{161}\) ICC Statue Articles 25(1) and 26.
\(^{162}\) ICC Statue Articles 5-8, 124, and 30
\(^{163}\) ICC Statue Article 20
presumption of innocence.\textsuperscript{164} Additionally, the establishment of guilt is in line with internationally accepted standard of “beyond a reasonable doubt.”\textsuperscript{165}

On the other hand, the Ugandan traditional model of justice is wanting in several aspects. The observations of Kathambi Kinoti from The Association for Women's Rights in Development (AWID) provide an intriguing insight into the nature of Ugandan justice: “Traditional African laws are for the most part unwritten,” she states, “this means that it is not always clear what the laws are as their interpretation can be ad hoc and modified to suit the occasion.”\textsuperscript{166} Tribal laws in Uganda are a reflection of the African tradition of communalism, based primarily on reconciliation and truth-telling.

As reported by foreign journalists who witnessed\textsuperscript{167} the trial—a traditional reconciliation ceremony called “mato oput”\textsuperscript{168}—of a former LRA member named Betty Atto, the process of reconciliation is initiated with a traditional community dance in front of the tribal chiefs sitting in judgment of the accused, followed by the accused stepping on an egg as a symbolic gesture suggesting a return to innocence. More importantly, the accused is never forced to confess his crimes, as many Ugandans believe that the spirits of departed ancestors will punish the accused if he does not confess. “If a string of misfortunes befall a person,” the assumption is that the accused is “covering up a misdeed.” Upon confession, the perpetrator repays the victim’s clan in the currency of cows or cash. According to the journalists present during the reconciliation ritual, Betty stated at the end of the ritual that “I feel cleansed. Some of the bad things in my heart: they are gone.”

\textsuperscript{164} ICC Statue Articles 55, 66(1), 67
\textsuperscript{165} Ibid.
Moreover, Ugandan justice privileges the interests of men over those of women. As Kathambi Kinoti points out, Ugandan women are “particularly adversely affected by the absence of written laws and it is believed that their rights and status has actually been eroded over time.” A similar sentiment is echoed by the UNIFEM regional director for East and Horn of Africa Nyaradzai Gumbondzvanda who states that ‘Women's roles are often undervalued or ignored, despite the fact that it is their right to participate on equal terms with men in all governance and decision-making processes.”

Given that a huge number of women in Uganda were either raped or forced into being sex-slaves, one would assume that the participation of women in the reconciliation process would be considered an essential element. This is not the case in Uganda, where male tribal elders are the sole authorities in charge of the institution of justice.

At this point, one must recall the elements of universalism of scope and universalism of justification elaborated upon earlier. Also recall that prescriptive moral universalism simply prohibits certain activities and permits considerable variation on how a culture chooses to honor those principles; that is, the substance of these values is universal, how a society chooses to implement them is their prerogative. How does Ugandan national justice, on the substantive and implementation fronts, meet the two-pronged test of universalism?

As previously established, the rights of the most fundamental guarantees of due process and equality before the law qualify as one of the basic, most integral,

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170 As stated earlier in the paper, the former is defined as the "values that apply to everyone in the world," and the latter "refers to values that can be justified to everyone in terms that they would accept. It claims that there are values that can be justified to everyone in the sense that everyone would accept this justification." Moreover, moral universalism of basic human rights, "prohibit some specific activities but do not prescribe any specific ones that everyone must follow" and hence are prescriptive principles.
rights of man. Such procedural and substantive legal safeguards are not only essential in protecting human rights but also inform the foundations of a society free from the tyrannical whim of the powerful. For example, Alexander Hamilton argued in *The Federalist Papers* that the state's authority to detain without cause could be considered as even more dangerous than the power to deprive someone of the right to life. Hamilton quotes William Blackstone, the most influential scholar of English common law:

> To bereave a man of life (says he), or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole nation; but confinement of the person, by secretly hurry him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government.\(^{171}\)

Hence, fundamental due process guarantees and equality before the law enjoy universalism of scope. That Uganda is a signatory to the ICC statue, moreover, constitutes a clear recognition on her part that the scope of such rights applies to the Ugandan people as well.

To the extent that the universalism of justification—specifically, prescriptive moral universalism—is concerned, let us begin by assuming that the ICC does withdraw its arrest warrants and the LRA members are tried under Ugandan law. Can the Ugandan government guarantee, as per its obligations under international law and as one of the 138 signatory nations of the ICC Rome Statue,\(^{172}\) that the justice imparted through such reconciliation rituals will provide fundamental due process guarantees of justice?

What if some of the women victims of the LRA's atrocities do not view the judgments of the tribal elders as just? What if some do not agree with the notion of exonerating LRA members after the *mato oput* ceremony? How does one know if

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171 Alexander Hamilton. Federalist No. 84
the LRA members do not fully disclose the nature of their crimes? What if the tribal elders insist upon trying, for example, a ten year old child who was forced into being a child soldier by the LRA? Who will guarantee that tribal elders will not discriminate between males and females and treat them equally as a matter of law? One could argue that it is highly unlikely, if not impossible, for Ugandan law to meet these fundamental requirements. Therefore, the claim that the LRA be tried under Ugandan law fails the test of prescriptive moral universalism.

Even when judged from the institutionalist perspective, justice of this sort does not further the ideals of international justice viewed as the protection of basic human rights, and nor does it operate by principles and processes that best serve the interests of that ideal. There is no guarantee in any of these instances that the victims’ interests would be met, which makes the case of international justice fickle.

Moreover, the argument speaks to the notion of “justice as fairness,” in ensuring that the aggrieved in Uganda are adequately recompensed for the violation of their pre-determined rights. As observed above, there is no guarantee of fairness, consistency, or equality in the sort of “justice” meted out under Ugandan law. One could also argue that since Uganda is a signatory to the Rome Statue and, more importantly, willingly chose to refer the LRA’s case to the ICC’s jurisdiction, the Ugandan government is obligated under international law to bring violators of human rights to justice through international means.

Article 17 of the Rome Statue embodies the principle of complementarity (also known as the “try-or-extradite” rule), which states:

“The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the
decision resulted from the unwillingness or inability of the State genuinely to prosecute.\textsuperscript{173}

Under this principle, a case will be inadmissible before the ICC if a state is investigating or prosecuting the case, or has declined to prosecute, unless the concerned state is “unwilling or unable” to genuinely carry out the task of prosecuting or investigating the guilty party. In this regard, a state cannot unilaterally renounce any of its obligations under the ICC treaty, or for that matter, resort to a \textit{sham prosecution} that does not adhere to criminal law procedures in order to protect the criminally liable parties. However, the ICC statute also states that the prosecutor of the Court may refuse to pursue a case if “taking into account the gravity of the crime and the interests of the victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.”\textsuperscript{174}

Such discretion provides for the prosecutor to take into account the legitimacy of the amnesty process in a state. On cannot legitimately argue that Ugandan national law adheres to internationally accepted criminal procedures, for to argue otherwise would be to engage in caricature. Consider for instance, President Yoweri Museveni’s statement offering Kony a renewed amnesty: "One thing we are offering for sure is no prosecution for Kony. That should be a big relief for him, because Kony should be hanged for what he has done."\textsuperscript{175} The fact that the President of Uganda offers Kony, an indicted war criminal on the run, blanket immunity if he surrenders and reconciles with his community, effectively amounts to a nullification of the basic human rights of the victims’ of the LRA’s atrocities. In essence, the offer implies that the victims had no rights in the first place which goes against the core assumption of justice as fairness.

\textsuperscript{173} Text of the ICC Rome Statue, at http://www.preventgenocide.org/law/icc/statute/part-a.htm\#1
\textsuperscript{174} Ibid.
Juxtapose Museveni’s claim next to one of the tenets enshrined in Uganda’s constitution, which states its commitment to “building a better future by establishing a socio-economic and political order...on the principles of unity, peace, equality, democracy, freedom, social justice and progress.” Moreover, XXVI(i) on State Accountability to the people states: (i) All public offices shall be held in trust for the people, (ii) All persons placed in positions of leadership and responsibility shall, in their work, be answerable to the people. So, how can a state initiate an amnesty which claims to exchange the legal rights of the victims of crimes against humanity, when it is legally obliged to prosecute the perpetrators of those crimes under both Ugandan and International law? It simply cannot. Moreover, how can a state build a stable democracy if that democracy is founded upon such an inconsistent application of the law? One could argue that such an amnesty stands void in light of the contractual obligations of the Ugandan government with not only its own people but also with the international community. Consequentially, the contention that such a form of “justice” violates Rawls ‘justice as fairness’ threshold would certainly qualify in this context.

Considering this reality, the argument must be made that the LRA members be tried under international law in order to strengthen the cause of international justice. A noted scholar of international law accentuates the nexus between human rights concerns and international justice by observing that, "Where these obligations [human rights] are breached, the individual may be punished for such international crimes as a matter of international law, even if his or her own state, or the state where the crime was committed, refuses to do so." Such an approach to human rights ensures that if the legitimacy of national laws of a state

is compromised for political purposes, the concurrent legitimacy of international law does not suffer.

Fundamentally, the issue in this case is not about deference to Ugandan culture but about the primary ideal of bringing those who commit jus cogens crimes—war crimes, crimes against humanity—to justice by means that are clear, impartial, and transparent. Recall the poignant words of Sir Hartley Shawcross during the Nuremberg trials regarding the atrocities of the Nazi regime:

> The Charter of this Tribunal, . . . gives warning for the future--I say...that if, in order to strengthen or further their crimes against the community of nations they debase the sanctity of man in their own countries, they act at their peril, for they affront the International Law of mankind. 

The rationale for prosecuting perpetrators of such crimes, in essence, goes beyond the perspectives of deterrence, legitimacy, legality, retribution or peace and reconciliation. In committing numerous atrocities against thousands of innocent civilians, the LRA has trampled upon the Law of Mankind and assaulted man's core dignity as a human species.

**JUSTICE OVER PEACE AND SOVEREIGNTY AS RESPONSIBILITY:**

First, the argument that the ICC’s involvement is an impediment to peace is not only unsubstantiated but also a negation of ‘justice, over peace.’ The former is given credence when evaluated in light of the numerous overtures for negotiations to the LRA by the Ugandan government. Since 1993, representatives of the Ugandan government have made several attempts at securing peace with the LRA, but Kony’s forces have failed to end their campaign of violence. If Amnesty for the LRA commanders were indeed the problem, then it would be reasonable to assume that the 2000 Amnesty Act—which grants LRA commanders’ blanket

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178 The Avalon Project, see Judgment at Nuremberg, at http://www.yale.edu/lawweb/avalon/imt/jack02.htm
amnesty for its human rights atrocities as long as they quit the LRA and reconcile with the community for their previous acts—would constitute sufficient incentive for Kony and his commanders to surrender and end the violence. This, however, has not been the case.

To strengthen the argument of ‘justice over peace,’ this paper will also argue that Kony is not inclined toward ending the conflict and is using the threat of violence as a stratagem to escape accountability under international law.

Since its inception in 1986 till present, the LRA has delineated no “coherent ideology, rational political agenda, or popular support,” except that it aims to overthrow the NRM and “install the Ten Commandments” in Uganda. One could argue that the reasons behind the LRA’s ideological incoherence stem from Kony’s own paranoia regarding the predicament he now finds himself in. In an interview with Crisis Group International, Kony stated that he envisaged three possible scenarios for himself: prison, exile or death. Kony’s concern stems from perceived threats emanating from four quarters: the Ugandan government, the ICC, the US terrorist organizations list, and retribution from the local community.

The statement suggests desperation, the paranoia of a person who finds himself with his back against the wall, a veritable cul-de-sac. The notion was aptly stated by a senior LRA commander: “Kony may not ultimately accept to talk peace. He can come to compromise but he can change his mind. He can make you feel very stupid. He is very difficult and very paranoid.” Moreover, evidence indicates that the LRA’s capabilities have been greatly reduced after Operation Iron Fist.

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182 128. pp. 3
184 Ibid.
185 Ibid.
(OIF), however, they still retain a destructive capacity. A senior LRA commander and Kony’s erstwhile colleague states: “The material condition of the LRA commanders has deteriorated 100 percent. They have lost a lot.” In light of these facts, one could argue that Kony’s attempts to negotiate with the Ugandan government are merely tactics to acquire breathing space and reorganize, and not serious attempts at securing peace in the region. The inference is strengthened by a former LRA commander who observes: “If Kony asks for a ceasefire, give it, but know that he will be reorganizing, so you have to plan to prevent that reorganization. The ceasefire should be only for dialogue, not for reorganization.”

When analyzed in their totality, these facts provide sufficient evidence to conclude that the LRA is neither genuinely interested in peace talks nor in making any substantial compromises. Instead, his strategy is one of using innocent men, women and children as a means to achieve Kony’s deranged dream of “installing the ten commandments” in Uganda.

As argued in chapter 2, justice must not defer to measures targeted at achieving peace. To the extent that privileging amnesty for the LRA over the ICC arrest warrants is concerned, one could argue that such an approach would send a resounding message to violators of human rights everywhere that the international community’s commitment to justice is merely limited to noble pronouncements, and not meaningful action. Additionally, it will not only defeat the founding purpose of the ICC—“to put an end to impunity for perpetrators and thus to contribute to the prevention of such crimes”—but also strengthen the culture of gross human

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187 Ibid., pp. 3
188 Ibid., pp. 7
189 Ibid., pp. 6
rights abuses that have over the centuries led to some of the worst human rights disasters. As one scholar aptly put it:

“History and experiences of other nations who have had to grapple with similar situations suggests that the past will simply not go away. Prolonging the search for equitable solutions to such issues will merely compound the problem...the accounting process must therefore be wide open and encompass all abuses and violations of human rights.”

In a letter submitted to the UNSC on Jan 16, 2006, the Ugandan Government argued that its military offensive against the LRA has made huge inroads into destroying the LRA fighting capacity, and that “Any call for the situation in northern Uganda to be put on the agenda of the Security Council is therefore unjustified.” The Ugandan government, however, has been trying in vain to eliminate the LRA for almost two decades. Contrary to the government’s claims, all available evidence suggests that Operation Iron Fist (OIF) has not only failed to crush the LRA but has instead resulted in an increase in violence.

The Civil Society Organizations for Peace in Northern Uganda (CSOPNU) notes that “instead of crushing the rebels, OIF stirred up a hornet’s nest, driving most of the LRA into Northern Uganda, where it began a brutal campaign of massacres, abductions and attacks on humanitarian organizations.” In this respect, the UN Office for the Coordination for Human Affairs reports:

The LRA has stepped up its attacks on northern Uganda in retaliation for the offensive against its bases in southern Sudan. In response to Operation Iron Fist, the LRA has divided into smaller units and spread across Acholi region’s three districts of Gulu, Kitgum and Pader. In addition, the group has begun to spread its activities to a wider geographical area beyond Acholiland. More recent attacks have been carried out westwards into Adjumani, southwards into Lira and Apac, and eastwards into the Karamoja district of Kotido.

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191 Letter dated 16 January 2006 from the Charge d’affaires a.i. of the Permanent Mission of Uganda to the United Nations addressed to the President of the Security Council
According to Fr. Rodriguez, a Catholic Priest in Gulu and member of the local Acholi Religious Leaders Peace Initiative, neither OIF nor the Ugandan Government’s recruitment of approximately 7,000-strong, pro-government militia has improved the security situation for the local population in the region. Rodriguez contends that the UPDF has failed in doing its job, always arriving at the scene of conflict long after the LRA rebels have wrecked their havoc.\(^{194}\)

In light of these facts, one might legitimately wonder why the Ugandan government is averse to any international involvement to end the conflict? Perhaps the observations of Mr. Olara A. Otunnu, former U.N under secretary-general and special representative for children and armed conflict, provide a glimpse of the Ugandan Government’s motives. In his article titled *The Secret Genocide*, he argues that "The truth is that reports of indisputable atrocities of the LRA are being employed to mask more serious crimes by the government itself. To keep the eyes of the world averted, the government has carefully scripted a narrative in which the catastrophe in northern Uganda begins with the LRA and will only end with its demise."\(^{195}\) The facts on the ground in Northern Uganda indicate that both parties to the conflict, the LRA and the UDPF, are involved in egregious human rights abuses.

Recall the three-pronged requirement of sovereignty as responsibility illustrated earlier in this paper:

"Thinking of sovereignty as responsibility, in a way that is being increasingly recognized in state practice, has a threefold significance. First, it implies that the state authorities are responsible for the functions of protecting the safety and lives of citizens and promotion of their welfare. Secondly, it suggests that the national political authorities are responsible to the citizens internally and to the international community through the UN. And thirdly, it means that

\(^{194}\) Ibid., pp. 12

"What puzzles me is that for so many months all you hear from the military is that they are winning the war, scoring many victories, making progress," he says. "But why is that progress not translating into the improvement of security of people on the ground?"

\(^{195}\) Olara Otunnu. The Secret Genocide. *Foreign Policy*, No 155 44-6 Jul/Aug 2006
the agents of state are responsible for their actions; that is to say, they are accountable for their acts of commission and omission. The case for thinking of sovereignty in these terms is strengthened by the ever-increasing impact of international human rights norms, and the increasing impact in international discourse of the concept of human security.”

Regarding the first criterion of protecting and safeguarding the welfare of its citizens, the Ugandan government has clearly failed. Otunnu notes that “for more than a decade, government forces have kept a population of almost 2 million (from the Acholi, Lango, and Teso regions) in some 200 concentration camps, where they face squalor, disease, starvation, and death...In March, a survey by a consortium of nongovernmental organizations (NGOs) reported that the death rates in the concentration camps are three times those of Darfur.” One could argue that the actions of the Ugandan government in this respect qualify as democide—if not war crimes, crimes against humanity, or genocide—and perhaps this illuminates Musseveni’s ulterior motives for stonewalling international intervention. The notion is implied in Otunnu’s claim that “the LRA is frightening, but northern Uganda's people have more to fear from their own government. It's time the world understood that.”

The second part of the Sovereignty as responsibility test requires that “national political authorities are responsible to the citizens internally and to the international community through the UN.” It was clearly proved earlier, with respect to the issue of Amnesty for Joseph Kony, that the Ugandan government is in violation of both prongs of this requirement.

The third part establishes that the Ugandan government is accountable for its acts of “commission or omission.” For almost a decade, the government's forces have confined a population of approximately 2 million in some 200 in UN managed IDP concentration camps, “where they face squalor, disease, starvation, and

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death.” The evidence in all three cases clearly establishes the Ugandan government’s failure to meet the threshold of ‘sovereignty as responsibility.’ Even in the face of numerous setbacks in negotiating a viable peace with the LRA and repeated failures to crush the LRA rebellion, the government continues to protest any international involvement other than material support in the form of humanitarian aid. Moreover, it has perpetrated the same sorts of human rights atrocities against its own people in the name of crushing the LRA. The basic human rights violations of the Ugandan people, therefore, cannot be allowed to continue by deferring to the demands of a government that has neither the capacity nor the will to ensure an expeditious end to the conflict.

In 2004, the U.N. Security Council made its first statement on the Ugandan crisis, condemning the LRA for “appalling atrocities.” So far, the UN’s rhetoric has not translated into any meaningful action. Even United States Senator James Inhofe recently exhorted the Bush Administration and the UN for more meaningful action in Uganda through Senate Resolution 366, which received broad bipartisan support. In introducing the resolution, the Senator stated:

“The words in this resolution are long overdue, and are only the beginning. Thus far, the action of the United Nations has been woefully inadequate. Words are not nearly enough. We need more action from the UN. If the United Nations is to be useful for the peoples of the world, this sort of problem is its highest and best use….I also strongly suggest to President Bush and our Administration that you examine every aspect of your Executive Authority to relieve this suffering, including the new authorities Congress provided under Section 1206 of Public Law 109-163, the train-and-equip legislation which I authored.”

197 Letter dated 16 January 2006 from the Charge d’affaires a.i. of the Permanent Mission of Uganda to the United Nations addressed to the President of the Security Council
In keeping with the ‘justice over peace’ paradigm, the UNSC ought to utilize the precedent of former Yugoslavia—where atrocities carried out inside Yugoslavia were subsumed under Chapter VII of the UNC which deals with actions required for the “maintenance of international peace and security”\(^{200}\)—and take military action in the form of armed humanitarian intervention. As a general rule in international relations, rhetoric alone does not have a substantial impact in situations like these unless backed up with the use of force, or a credible threat thereof. Uganda’s case, moreover, not only includes human rights violations occurring within the country but also bears international dimensions owing to the active aid and support provided to the LRA by the Sudanese Government. This presents the United States with a good opportunity to play a part in ending the human rights disaster in Uganda by pressuring Sudan to cease aiding and abetting the LRA. Previously, the Clinton Administration had declared Sudan a terrorist state for its attempted assassination of Egyptian President Hosni Mubarak and for providing refuge to Osama Bin Laden,\(^{201}\) and therefore American involvement in the issue can potentially yield positive results, if not bring an end to the devastating conflict in Northern Uganda.

However, until any meaningful action is taken by the international community to improve, if not end, the situation in Uganda, one is compelled to state that the slogan of “Never Again” always was, and still is, undoubtedly the most unfulfilled promise in the history of international relations.

**CONCLUDING REMARKS:**

This paper began with R.J. Rummel and the idea of democide, which, this author argued, represents not only the most significant but also the most prevalent


\(^{201}\) Restoring Relations between Uganda and Sudan. The Carter Center Process, 2002.
threat to our collective human dignity. This paper will end, now, with Thomas Hobbes, who writes: “And covenants, without the sword, are but words and of no strength to secure a man at all.” For international human rights to go beyond the level of an abstraction or a convenient catchphrase, proclaimed by many but in reality practiced by few, international institutions must be equipped with the adequate enforcement mechanisms to enforce its covenants. The inadequacies of existing institutions need not necessarily deter one from pursuing a path of reform, rather cognizance of such realities should provide the incentive to understand and reformulate global security institutions in order to meet the challenges of our era and realize the ideal of a justice based system under international law.

While there is no quick-fix formula for achieving this end, this thesis represents the first step in this direction. This author’s suggestions for further research in this area can be classified into two broad categories: structural and legal.

After the United States decision to invade Iraq absent any Security Council authorization, a dejected Kofi Annan stated that we “are living through a crisis of the international system,” and wondered “whether the institutions and methods we are accustomed to are really adequate to deal with all the stresses of the last couple of years.” Annan’s pronouncement touches upon the Achilles heel of the international system: the absence of an authoritative enforcement mechanism for resolving inter-state disputes and the inability, or ineffectiveness, of international institutions in constraining powerful states from overriding international legal rules.

The issue of structural progress of international institutions is, in my view, a challenging area to explore. Most scholars agree that the institutional framework of these institutions are largely defective and must be reformed to achieve a stronger system of international justice. For instance, the UN Security Council privileges

202 Thomas Hobbes. Leviathan, Chapter XVII.
stronger states over weaker ones through the privilege of veto power. How can such institutions be reformed in a way that the power symmetry between nations is not lopsided? The aim should be to propose guidelines for reform based on an evaluation of the structural and institutional inadequacies that have consistently hindered the effective protection of human rights. What moral framework must be considered just by all nations in order to be embodied in the institutional framework, with the assumption those principles will result in better protection of human rights?

Second, an area worth exploring is the legal issues surrounding the law of pre-emptive armed humanitarian intervention. The focus of this research should be directed at resolving the apparent contradiction between Articles 2(4) and 2(7) of the UN Charter204 that are responsible for the prohibitions against the use of force in international relations. This also concerns the fundamental tension between sovereignty and the pre-emptive violation of it for purposes of human rights protection. The issues that one could analyze are at what point does the international community have a legitimate right to override state sovereignty to protect human rights? What legal criteria must govern the just use of force by an external agent to intervene in the domestic affairs of a state to prevent human rights abuses?

These questions are extremely challenging, if not impossible, to answer. Perhaps, the most that can be done is to invest further research for the sake of empowering the idea of human rights.

204 Article 2(4): All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.
Article 2(7): 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.
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