

## THE POLITICS OF LAW: HOW COMPETING POLITICS INFLUENCE THE DEVELOPMENT OF INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW

SARIKA SINHA

*In an increasingly interconnected world, there is a growing need for a universal standard of behavior that is secured in the authority of law. But efforts towards realizing the establishment of an ideal model of international law are impeded by their manifestation in a reality defined by struggles over power. Thus, while law aims to be unbiased, it is inherently imbued with political competition. This paper discusses how the construction of international law is informed by the influence of powerful states and examines the dialectic of law and politics.*

The struggle to establish an international standard of behavior is rooted in differing visions of the function, applicability, and validity of international law. It is entrenched in the butting of heads between ideals of international law and practices of international law. Consequently, there is a dichotomy between popular conceptions of international law and how it is actually used—a dichotomy defined by the perception of how the law is constructed and how its use is envisioned based on this construction. These variegated visions of international law have enabled a competition between individual constructions of international law; there are some ideals of how laws are supposed to be applied, but the way they are actually applied depends on the interests of powerful states, revealing how the construction of international laws has been guided by hegemony, power, and politics. In this way, international law can be seen as politicized because it is manipulable and constructible. International human rights law and international humanitarian law offer two lenses through which to analyze this phenomenon.

Though they are often thought to have a directly oppositional relationship, law and politics have a symbiotic relationship. As Paul Kahn, Director of the Orville H. Schell, Jr. Center for International Human

Rights at Yale Law School, warns, “we would be wrong to think that because law follows politics, law always has the last word.”<sup>1</sup> Juxtaposing constitutional law with international law highlights this by revealing how the concept of popular sovereignty poses a threat to human rights. Popular sovereignty is a political agenda that characterizes American government. For Americans, “[t]he rule of law...is not simply a matter of getting the content of rights correct” but an “expression of our sense of ourselves as a single, historical community engaging in self-government through law.”<sup>2</sup> That is to say, adhering to the law is an engagement with popular sovereignty. However, this works against the basic construction of human rights. Because human rights law envisions the protection of individuals’ rights regardless of status or citizenship, it necessarily entails ceding state sovereignty to international institutions that safeguard human rights. Moreover, Kahn asserts, “international law has little to do with popular sovereignty and gains its legitimacy from the defense of rights.”<sup>3</sup> As such, this vision of how international law is meant to function competes with the American vision of protecting first and foremost a political (nationalist) identity over a legal (individual) identity.

Kahn further illuminates the ideal function of international law as balancing “the reality of power against the normative aspiration of law.”<sup>4</sup> In this view, human rights law envisions state legitimacy as contingent on and limited to protecting the rights of individuals. But the United States’ understanding of law, as illustrated by the reification of popular sovereignty, is bound up in political meaning. This understanding sees the state rather than the individual as the possessor of rights, as exemplified by the “fundamental right of the nation-state...to draft its citizens, the right to require sacrifice of its citizens for the sake of maintenance of the state.”<sup>5</sup> Thus, politics define the state’s rights and thereby supercedes its citizens’ rights in this view, which demonstrates how interests manipulate and construct conceptions of law’s function that undercut the ideal constructions of international human rights law.

Indeed, Lisa Hajjar, an expert on international human rights and humanitarian law, concurs that the hope of human rights is to “put humans’ interests above states’ interests [but has been] eclipsed as state actors commandeered the idea.”<sup>6</sup> Further, the vision of universal human rights is

1 Paul Kahn, “American Hegemony and International Law—Speaking Law to Power: Popular Sovereignty, Human Rights and the New International Order.” *Chicago Journal of International Law* no. 1 (2000): 1-18

2 Ibid.

3 Ibid.

4 Ibid.

5 Ibid.

6 Lisa Hajjar, “Chaos as Utopia: International Criminal Prosecution as a Challenge to State Power,” *Studies in Law, Politics and Society* 31 (2004): 3-23.

undermined by the fact that it is inevitably subject to state subjects' discretion: human rights are universal because people are subjects of states, which are subjects of international law. This conception of human rights envisions it as recourse for the weak, an idealist construction of international law that stands opposed to the political realist character of exercising power. But this oppositional framework is misleading because, according to Hajjar, it misses the point that "human rights are constructs of international laws, which are made and modified by representatives of states and thus are themselves manifestations of power."<sup>7</sup> In this way, human rights are inherently confronted by states' political agendas. As such, Hajjar shares with Kahn the claim that state sovereignty in large part accounts for the manipulation and control of how human rights are granted and protected, which is in direct contradiction to the international law ideal that individuals possess human rights regardless of state citizenship.

In her elaboration of the purpose of universal jurisdiction, Hajjar further explains how the ideal construction of human rights law competes with state sovereignty, which threatens to impede the enforceability of human rights law. She states that universal jurisdiction is meant to shatter any hope of sovereign immunity by conferring upon national courts the right to prosecute public officials for gross violations of human rights. To illustrate, repeated attempts by European nations to summon Henry Kissinger for questioning concerning his role in Operation Condor, a state terror campaign in Latin America, reveal how the no-escape ideal of human rights is intended to function. International law is supposed to make states vulnerable to prosecution. Revealing a turn on Kahn's understanding of the symbiotic relationship between law and politics in favor of law, prosecution is a form of legal violence that attacks impunity, reducing political power and thereby demonstrating an ironic "political productivity"<sup>8</sup> of the law. In addition, universal jurisdiction as envisaged by human rights discourse stands opposed to political manipulation of international law because it makes "prosecution a viable option [that] would 'depoliticize' law enforcement by depriving political authorities of choice to preserve impunity."<sup>9</sup> It is important to note, however, that even international adjudicatory mechanisms can manifest as agents of state power through which states can manipulate, construct, and assert their own visions of international law. International courts "reinforce the state-centrism of the international order and prevailing imbalances of global power."<sup>10</sup> A centralized international court, such as the International Criminal Court, requires compromise and consensus on its establishment,

---

7 Ibid.

8 Ibid.

9 Ibid.

10 Ibid.

which inevitably privileges dominant states' interests and thus becomes a medium through which they can exert their influence. Since consensus is grounded on dominant parties' interests, prosecution through these types of courts invariably becomes a power-play enabling hegemonic powers to set the tone of global order; furthermore, it politicizes the institution, which, according to its envisioning in human rights discourse, is supposed to be depoliticized. A more ideal system—a universal system—would be constituted by multilateral enforcement mechanisms. Such a system is an ideal construction of the function of international law because it would be “more democratic by empowering countries of varying strengths to contribute to the interpretation and application of international criminal law,”<sup>11</sup> gradually deconstructing the apparatuses of sovereignty and power idealized by the state. In this way, Hajjar and Kahn show how competition of idealist (utopian) and realist (political) constructions of international law is sustained by its inherently political nature.

Michael Ignatieff, who has held positions at the Carr Center for Human Rights Policy and Harvard University's Kennedy School of Government, expands the ideal construction of human rights law to a “precommitment”<sup>12</sup>—the unconditional non-derogation of human rights. However, ensuring this ideal raises the dilemma of responding to terrorism as a consequence of the belief that the derogation of rights for those who commit violence is legal and necessary. Similar to Paul Kahn's explanation of the rationale behind prioritizing the rights of the state over the rights of the individual, Ignatieff recalls the rationalization for suspending human rights that is invoked in times of emergency: “*salus populi primus lex*—the safety of the people is the ultimate law”<sup>13</sup>. This rationalization unfolds as a particular construction of law that enables fearful majorities responding to threat to deploy their power to oppress minorities because “they can do so with little direct cost to their own liberties and rights”<sup>14</sup>—a distinctly politicized construction of how the law can be used or wielded. Moreover, this vision of rights stands as a direct contradiction of what rights were designed to protect.

However, Ignatieff argues, international human rights law does not envision “absolute non-derogation of rights, but rather [the] limitation of derogation through an obligation to provide justification to accountable public bodies.”<sup>15</sup> Thus, in this view, international human rights law is envisioned as necessarily having a political element—the body of human rights law

11 Ibid.

12 Michael Ignatieff, “Human Rights, the Laws of War and Terrorism.” *Social Research* 69 no.4 (2002): 1137-1158.

13 Ibid.

14 Ibid.

15 Ibid.

requires a political system through which to evaluate and adjudicate the validity of a suspension of rights. As such, this construction of human rights law contains provisions for limitation and justification, which envisions a space for derogability. Ignatieff advocates this lesser evil position, “one that countenances democratically authorized abridgements of the liberties of some to preserve the liberties of all.”<sup>16</sup> Kahn, on the other hand, sees this as a red flag signaling an unacceptable assertion of sovereignty and as the politicization of that which is to be depoliticized. Yet Ignatieff recognizes the potential of a state to justify a suspension of rights to leverage a power-play: “The rule of law is not compromised by emergencies per se, but by politicized construal of risk to justify emergency measures that are not actually necessary to meet the threat at hand.”<sup>17</sup> Thus, human rights can still be an adequate guide to respond to terrorism in this view because it is fundamentally pacifist, but it also would essentially resign a society to danger.

The next best guide to respond to terrorism, then, is International Humanitarian Law (IHL), which preserves the “ethical restraints” of human rights.<sup>18</sup> Yet this also requires public accountability and raises the question, to whom are we accountable? The U.S. government, in response to the 9/11 terrorist attacks, has asserted that it is only accountable to U.S. courts but it is applying the Geneva Conventions’ principles on the detainment of prisoners at its own discretion. This reflects a dominantly constructed vision of how the U.S. is to be governed by the laws of war, on one hand, acknowledging that it adheres to international law, and on the other, denying the applicability of international law to the unconventional war on terror.

Ignatieff also offers an alternate view through which to understand the inherently political character of rights and law. He elucidates how different visions of rights and law are constructed in his explanation of how terrorists justify their actions through the discourse of accessing the law and possessing fundamental human rights. Citing the right to self-determination as a basic human right, Ignatieff argues that “[h]uman rights do not motivate terror...but this does not prevent them from serving as an important justification for acts of terror.”<sup>19</sup> Simultaneously, human rights offer only nonviolent guidelines on achieving rights, which would seem “only to disarm the weak and entrench the injustice of the strong.”<sup>20</sup> Therefore, Ignatieff argues, the weak should turn to the lesser evil argument of suspending rights temporarily using the justification that, “if one side can make use of a lesser evil argument, why can’t the other?”<sup>21</sup>

---

16 Ibid.

17 Ibid.

18 Ibid.

19 Ibid.

20 Ibid.

21 Ibid.

As such, the weak and the strong alike construct visions of human rights that require access to a political logic. The difference, however, is that the strong use this logic to justify the oppression—supposedly temporary—of the weak while the weak use it to justify their violent struggle against subjugation by the strong. This idea demonstrates that one construction of human rights can be understood essentially the same way by different parties, though rhetorically manipulated and politically justified to serve each party's own interests. In this view, violence alone is not the problem with terror; it is the denial of political access—in other words, the ability to justify one's actions—that causes ultimate harm.

In “Who Owns the Rules of War,” Kenneth Anderson also addresses the questions of who is justified in declaring war, when it is justified, and what is acceptable in war. He argues, “there is profound disagreement over who has the authority to declare, interpret, and enforce” the rules of conduct in war<sup>22</sup> and that the Nuremberg trials were a highly strategic, politicized, and hegemonically manipulated gambit in establishing the modern body of IHL. The duty of determining aggression was given to the permanent members of the Security Council, conferring upon these states not only the power and authority to create new categories of crimes, such as “crimes against humanity” under which to prosecute their enemies, but also the impunity of being held accountable to these laws. Thus, the Security Council was given the ability to mold international humanitarian law as it saw fit, a vision influenced by maintaining its interests and ensuring that these laws could and would evolve in its favor. Like Ignatieff, Anderson posits that what matters in responding to violence is “the quality of justice served” rather than who serves it.

In this way, Anderson and Ignatieff envision a construction of IHL in which justice is a political interpretation and necessarily so. However, Anderson would say that justice is a political interpretation by nature of the parties involved, and these are the only parties that need be involved, whereas Ignatieff would argue that political interpretation is necessary to ensure equal access to the law by strong and weak states. Like Hajjar, Anderson understands universal jurisdiction as a depoliticized construction of international humanitarian law. But, unlike Hajjar, he believes its depoliticized character tarnishes the idealist vision of international humanitarian law, criticizing the fact that it “leaves open widely different interpretations,”<sup>23</sup> which illustrates the difficulty of determining who owns the laws of war. This, however, is exactly what Hajjar understands as the benefit that universal jurisdiction offers international law—differing interpretations and expressions of authority serving to broaden and enhance the rule of law.

---

22 Kenneth Anderson, “Who Owns the Rules of War?”

*New York Times Magazine*, April 2003, 39.

23 *Ibid.*, 41.

Moreover, Anderson's examination of the United States' problems with Additional Protocol I of the Geneva Conventions illuminates his argument that international laws act against democracies. Protocol I grew out of the need to balance the supposed ineffectiveness of nonviolence against the seeming inevitability of killing civilians. At the heart of the United States' problem with Protocol I are three issues: it grants combatants rights, including the right to be a Prisoner of War (POW), which Anderson deems "unacceptably political in nature;"<sup>24</sup> it restricts warfare that the U.S. believes is legitimate; and it accommodates guerrillas that the U.S. views as a threat to civilians. These issues are problematic for the U.S. because they limit the authority it could have over the international rules of war and are a response to its global power. In addition, Anderson criticizes Protocol I for making less mention of "the obligations of *defenders*" and "practically [inviting] such neglect." Thus, Anderson views the laws of war as constructed in favor of the "defenders," an affront to democracy, and an internationalist agenda to "constrain American sovereignty." He argues that the laws of war are politicized and constructed deliberately to weigh against "the side that in fact tries to obey the law." Further, Anderson states that "every war is a petri dish for the next round of the laws of war," a claim that belies a belief that the rules of war have not been dictated by the global hegemon.

The memorandum written by James Bybee for Alberto Gonzalez considering whether U.S. agents had used torture during interrogations reveals that the U.S. government has interpreted parts of IHL in a way that would deem its actions—which would otherwise be illegal—as legal. Defining the limits of mental and physical pain in terms devoid of substance and measurability, the memo offers degrees up to which suffering is legal and beyond which it becomes illegal. In addition, it cites international conventions, such as the Convention Against Torture (CAT), implying that it has adhered to established principles of international law, and compares its actions against models of other states to underscore the supposed lawfulness of the methods it has implemented. According to the memo, the Torture Convention "prohibits only the most extreme by reserving criminal penalties solely for torture and declining to require such penalties for 'cruel, inhuman, or degrading treatment or punishment.'"<sup>25</sup> This leads Bybee to conclude that U.S. interrogation tactics would not be unlawful under the Convention because they only constitute "cruel, inhuman, or degrading treatment."<sup>26</sup> Moreover, the text of the memo concludes, based off of the Israeli Supreme Court ruling, that certain

24 Ibid, 42.

25 James S. Bybee, "Memorandum for Alberto R. Gonzales, RE: Standards of Conduct for Interrogation under 18 U.S.C. 2340-2340A." *U.S. Department of Justice, Office of Legal Counsel*, August 1, 2002.

26 Ibid.

circumstances may warrant a necessity defense. However, the memo states that, had the “court been of the view that the General Secret Service methods constituted torture, the Court could not permit this affirmative defense under CAT. Accordingly, the court’s decision is best read as concluding that these methods amounted to cruel and inhuman treatment, but not torture.”<sup>227</sup> This means the court purposefully asserted that these methods amount to less than torture according to the United States’ own definition, and thus they could only be legal. In this way, the U.S. government created its own interpretation of IHL to allow its illegal actions to continue, revealing how a global power can use its influence to construct a view of law that suits its interests.

As elaborated, ideal conceptions of international law envisioned in texts and institutions are susceptible to a variety of interpretations of how the law is constructed, how it can be accessed, and who and what influences it. Political power often serves as the realist opposition to idealist conventions of international human rights law and international humanitarian law. Hegemony can manipulate and guide the course of law and policy development, and political clout in the global arena can reform constructions of law that are popularly envisioned as depoliticized or inherently non-political. Yet, although it can prevent a weak group’s access to the law, it also has the potential to offset a powerful group’s influence over the law. Certainly, law confers power and is confirmed by power.

## WORKS CITED

- Anderson, K. "Who Owns the Rules of War?" *New York Times Magazine*, April 2003, 38-43.
- Bybee, James S. "Memorandum for Alberto R. Gonzales, RE: Standards of Conduct for Interrogation under 18 U.S.C. 2340-2340A." *U.S. Department of Justice, Office of Legal Counsel*, August 1, 2002.
- Hajjar, Lisa. "Chaos as Utopia: International Criminal Prosecution as a Challenge to State Power." *Studies in Law, Politics and Society* 31, (2004): 3-23.
- Ignatieff, Michael. "Human Rights, the Laws of War and Terrorism." *Social Research* 69 no. 4 (2002): 1137-1158.
- Kahn, Paul. "American Hegemony and International Law—Speaking Law to Power: Popular Sovereignty, Human Rights and the New International Order." *Chicago Journal of International Law* no. 1 (2000): 1-18.