

**IMPROVING COMPLIANCE WITH THE LAW PROHIBITING GENOCIDE,  
WAR CRIMES AND CRIMES AGAINST HUMANITY:  
RECALLING THE HUMAN FACTOR**

BY

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# ABSTRACT

International humanitarian law, international criminal law and international human rights law all share the common goal of seeking to regulate the behavior of international actors in relation to the three most serious offences under international law – genocide, war crimes and crimes against humanity. International legal rules, processes and institutions within these three areas of law represent the international community's ongoing quest to address and prevent the commission of these crimes – to create “a more humane world under law.” International law has therefore been relied upon as the primary – arguably exclusive - mechanism for prescribing rules of conduct and for enforcing prescribed rules.

It is clear, however, that the legal framework alone has not been able to bridge the gap between internationally agreed standards and substantive practice on the part of international actors. That international law comprises only a partial solution to the problem of human rights atrocities is well recognized. It is argued here that the international community's preoccupation with international law as the means for regulating State and individual behavior in this area has in fact contributed to continuing problems of non-compliance as much as it has assisted in engendering compliance with the law. In other words, law is as much a part of the problem as it is a part of the solution.

It is argued that the international community must look beyond the law, to non-traditional, informal influences operating alongside the law, in order to move towards the goal of effective enforcement of the law prohibiting genocide, war crimes and crimes against humanity. Based on Constructivist thinking, four key strategies – departures from traditional Positivist-Realist conceptions of the international legal system – are suggested as focal points for enhancing compliance with the laws in this area, these being: active differentiation between the target subjects of the law; utilization of the dual power of international humanitarian law; employing social norms and ethical values as motivations for compliance with the law; and embracing the informal compliance-inducing activities and powers of non-state actors. Applying these strategies to the humanitarian law enforcement project, a reversal of traditional perceptions of the influence of ethics and law in relation to individual and State target subjects respectively, is proposed as a future direction for enhancing compliance and furthering the prevention project in relation to genocide, war crimes and crimes against humanity.

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# INTRODUCTION

The silent voices of 'We the Peoples' – who are the true sovereigns of today – cry out for enforceable law to protect the universal human interest . . . Human rights must prevail over human wrongs. International law must prevail over international crime.<sup>1</sup>

The Twentieth Century is both marked and marred by milestones of violent conflict in which serious violations of fundamental human rights have shocked the international community by their scale and severity. Genocide, war crimes and crimes against humanity, once associated only with the horrors of World War II, after which the catch-phrase 'never again' revealed the universal moral condemnation of such conduct, are today a recurring feature of violent conflicts around the world.<sup>2</sup> This represents the current state of affairs despite the existence of a substantial, and growing, body of international humanitarian and criminal law protecting the fundamental human rights to life, liberty and personal security, in situations of armed conflict and during peacetime.

Alongside these events, there appears a continuing determination to put an end to these crimes and to prevent them from occurring again. The goal of universal respect for human dignity remains elusive, but support for its achievement and protection, in the context of preventing human rights atrocities, has gained momentum in the last decade with the international community seriously directing attention to the question of how to do this effectively. To this end, the Twentieth Century has witnessed a continuous and concerted *legal* effort to address grave violations of human rights in the form of genocide, war crimes and crimes against humanity. This is evidenced in the increased codification of these prohibited acts in numerous conventions,<sup>3</sup> progressive developments in customary international law,<sup>4</sup> and most explicitly, in

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<sup>1</sup> B. B. Ferencz, "Address to the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court" (1999) 11 Pace Int'l L. Rev. 301 at 302.

<sup>2</sup> Afghanistan, Rwanda, Bosnia, Cambodia, Guatemala, Indonesia, Russia, Sierra Leone, and Yugoslavia, to name a few. In recent times, armed conflict has predominantly taken the form of internal, non-international confrontations stemming from nationalist, ethnic, religious or ideological differences and divisions. Furthermore, the vast majority of war casualties in violent conflicts taking place today, are civilian rather than military.

<sup>3</sup> For example: *Convention on the Prevention and Punishment of Genocide*, 78 U.N.T.S. 277 (entry into force January 12, 1952); *Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*, 39 UN GAOR Supp (No. 51) UN Doc A/39/51(1984) (entry into force June 26, 1987); *Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Aug 12, 1949, 75 U.N.T.S. 31,32 [hereinafter Geneva Convention I] (entry into force 21 October 1950); *Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea*, Aug 12, 1949, 75 U.N.T.S. 85, 86 [hereinafter Geneva Convention II] (entry into force 21 October 1950); *Convention Relative to the Treatment of Prisoners of War*, Aug 12, 1949, 75 U.N.T.S. 135, 136 [hereinafter Geneva Convention III] (entry into force 21 October 1950); *Convention Relative to the Protection of Civilian Persons in Time of War*, Aug 12, 1949, 75 U.N.T.S. 287, 288 [hereinafter Geneva Convention IV] (entry into force 21 October 1950).

<sup>4</sup> According to customary international law, genocide, war crimes and crimes against humanity constitute international crimes.

the 1998 adoption of the Rome Statute for the Establishment of an International Criminal Court.<sup>5</sup> Thus, the international community has turned to the law – agreed international legal rules, processes and institutions – for solutions. Notably, however, a number of problems frustrate the attempts of international law<sup>6</sup> to actually prohibit and prevent the perpetration of these crimes. Key among these problems are objections to the law based on arguments of cultural relativism in relation to the *content* of the law, and arguments of State sovereignty in relation to the *reach* of the law. Arguably, the root of these problems lies in the fact that the law itself is relied upon as the principle mechanism both for setting standards *and* effecting or justifying compliance thereto. An exclusive focus on formal international legal rules and processes as the way forward in the compliance project and the means for achieving the end goal of preventing genocide, war crimes and crimes against humanity, is arguably insufficient and out-of-sync with contemporary international affairs.

The international community's focus on, and faith in, international law arguably emerges from conceptions of international law operating in its traditional form – as a framework for pact-making *between nations* to regulate inter-state issues such as trade or cross-border conflict. It must be recognized, however, that international law in the Twenty-First century serves broader purposes, and operates in a wider, more complex context, than that which existed at its Seventeenth Century inception. Key features of today's international system which impact upon the nature of international law include: changing conceptions of national sovereignty; the creation of standing international institutions and decision-making bodies; the appearance of non-state actors as organized, recognizable and influential forces in international affairs; and “a growing sensitivity to and desire to achieve respect for human dignity.”<sup>7</sup> As noted by Wilfred Jenks, the object of international law has “increasingly shift[ed] from the formal structure of the relationship between States and the delimitation of their jurisdiction to the development of substantive rules on matters of common concern vital to the growth of an international community and to the individual well-being of the citizens of its member States.”<sup>8</sup>

A clear example of such a shift is the development of a universally applicable body of law relating to the maintenance of fundamental humanitarian standards. Here, international law has assumed a role beyond simply governing relations between States, to regulating actions and decisions affecting transnational and sub-state entities and affairs. Essentially, international law today seeks to regulate human interaction as part of, and in addition to, State interaction. Phillip Jessup offers support for this contemporary expanded function of international law in noting, “some of the problems that we have considered essentially international...are after all, merely human problems which might arise at any level of human society...”<sup>9</sup> It appears, however, that despite this evolution in the role and context of international law, the law itself – formal legal rules, processes and institutions – remain the center of international attention in efforts to regulate the behavior of international actors. It is the formal legal process that has captured the

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<sup>5</sup> *Rome Statute of the International Criminal Court*, A/Conf.183/9, 1998 (hereinafter Rome Statute or Rome Treaty).

<sup>6</sup> International Human Rights Law, International Humanitarian Law, and International Criminal Law

<sup>7</sup> H. K. Jacobson, “Conceptual Methodological and Substantive Issues Entwined in Studying Compliance,” Afterword. (1998) 19 *Mich. J. Int'l L.* 569 at 578. See also: H. H. Koh, “Why Do Nations Obey International Law?” (1997) 106 *Yale L. J.* 2599 at 2604.

<sup>8</sup> W. Jenks in *The Common Law of Mankind* cited in W. Friedman, “Human Welfare and International Law – A Re-ordering of Priorities” in W. Friedman, L. Henkin, O. Lissitzyn, eds. *Transnational Law in Changing Society – Essays in Honor of Phillip C Jessup* (New York: Columbia University Press, 1972) 113 at 113.

<sup>9</sup> P. Jessup in *Transnational Law* (1956 at 15) referred to in W. Friedman, “Human Welfare and International Law” *supra* note 8 at 113.

attention, and held the confidence, of the international community in its ongoing effort to address and redress human rights atrocities. The legal regime prohibiting genocide, war crimes and crimes against humanity has been the focal point, rather than the context within which these legal proscriptions operate to impact upon actors prone to committing such crimes. Deficiencies in the international legal system, allowing the continued perpetration of genocide, war crimes and crimes against humanity, are viewed as 'gaps' in the legal regime to be 'solved' by the creation of new legal processes and institutions or the strengthening of existing ones.

Thus, it is asserted that while changes in the structure of international society and the role of international law in regulating this society, have been recognized and embraced by the formal legal process, through continued expansion of the body of international law, and continued extension of its application, such adaptation to the contemporary international environment remains confined to the formal law-creation process. In other words, while contemporary developments in international society are recognized in the theoretical context of formulating legal rules, they have not been so recognized in the actual practice of regulating the behavior of international actors in relation to genocide, war crimes and crimes against humanity. Key attributes of contemporary international society are not being employed to maximum effect in the international legal endeavor to prevent the occurrence and recurrence of these atrocities. Rather, the traditional international legal framework, and traditional processes of international law creation, implementation and enforcement remain the principal means of effecting change in the conduct of international actors.

It is the thesis of this paper that the international community's preoccupation with international *law* as the means for conquering international crime is hindering the compliance project as much as helping it. Within the realm of legal responses to human rights atrocities, the international community has been, and continues to be, attracted to traditional formal legal rules and institutions as the means of attaining actual compliance with fundamental human rights and humanitarian standards. Even when established legal rules have failed to secure compliance, loyalty to traditional, Positivist, legal process has remained steadfast, as evidenced in the campaign to create an international humanitarian law enforcement body in the form of a permanent independent International Criminal Court (ICC). Thus, the international community has concentrated on creating formal legal enforcement processes and institutions – effectively creating more law – as the primary means for enforcing existing legal rules prohibiting the commission of genocide, war crimes and crimes against humanity. A focus on creating law necessarily involves a focus on States as the key actors in the formulation of international law and traditionally perceived as the key subjects of its implementation. A focus on States inevitably directs attention to the issue of State sovereignty and the potential of international legal rules and mechanisms to impinge upon well-protected notions of territorial integrity and non-intervention. Thus, the State-based process of creating international law shifts attention away from the ultimate subjects of international humanitarian law – the base-level *human* constituents of international society. Furthermore, the State-centered, formal legal process relies upon State consent, thereby ensuring that State concerns and interests remain a priority and that States maintain control over the entire process.

It is submitted that this strict faith in the Positivist/Realist legal framework has led to a preoccupation with the *formulation* of legal rules and institutions over and above the need to develop genuine political commitment to, and support for, these initiatives. This is the case despite the reality that State agreement to legal rules – whether establishing standards of conduct or setting up a mechanism for enforcing prescribed standards – is often hollow. It is suggested

that, in relation to the crimes of genocide, war crimes and crimes against humanity, the international community has been preoccupied with the *tangible, visible* goal of establishing legal mechanisms defining and proscribing such conduct and punishing perpetrators – while overlooking or neglecting the ‘intangible’ internal commitment necessary to give substance to these goals and to the wider, ultimate goal of preventing the future commission of these crimes.<sup>10</sup>

This preoccupation with formal, visible legal processes as the means for enforcing the law prohibiting genocide, war crimes and crimes against humanity, in turn, overlooks the potential influence of non-legal, informal processes in creating norms of compliance with the law. Arguably, in seeking to enforce international humanitarian law, the very substance of the law – the common concern for human dignity and the moral desire to alleviate human suffering that comprises the essence of the prohibitions against genocide, war crimes and crimes against humanity – has been under-prioritized. And it is such non-traditional, informal, invisible factors, working in conjunction with established legal rules and processes, that are integral to developing the internal will or commitment on the part of international actors, necessary for ongoing and sustained compliance with the law.

In sum, this thesis contends that the current law-focused, State-centered approach to preventing human rights atrocities, based largely on Positivist-Realist assumptions, mutually and perpetually serves to curtail effective implementation and enforcement of international humanitarian and criminal law in several ways. First, attention is firmly focused on the creation of legal rules and processes with little consideration given to the fundamental task of establishing or inculcating a sound commitment to the ultimate goal of prevention. Second, a focus on law-based enforcement may negatively impact upon the enforcement of international humanitarian law through the construction of a State-controlled, State-serving framework for action. Finally, a law-limited approach fails to recognize that effective implementation and enforcement of international humanitarian norms, based upon an ongoing commitment to compliance with the law, cannot be achieved through formal legal processes alone. In order to strengthen the normative influence of the law prohibiting grave violations of human rights and to progress from a “culture of reaction”<sup>11</sup> to human rights atrocities, “towards a culture of prevention,”<sup>12</sup> a re-orientation in thinking is necessary – a real recognition and active employment of the very elements which have effected the general transformation in the international legal system over the last century.

This thesis argues that, in the quest to improve compliance with the law prohibiting grave violations of human rights, a few fundamental shifts in perspective and direction are necessary. Broadly stated, these changes involve a focus on the power of ‘meta-legal’<sup>13</sup> motivations for

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<sup>10</sup> That punitive action is a necessary element of prevention is not disputed. However, a narrow focus on punishment and the formal legal process as the sole or key method of enforcing the law prohibiting genocide, war crimes and crimes against humanity, overlooks the more fundamental aspect of prevention – that of *inculcating the personal commitment or genuine will to rid the world of these crimes* – an aspect essential to effective punishment as well as effective overall prevention.

<sup>11</sup> K. Annan, *Towards a Culture of Prevention: Statements by the Secretary-General of the United Nations* (USA: Carnegie Commission on Preventing Deadly Conflict, December 1999) at 15.

<sup>12</sup> *Ibid.*

<sup>13</sup> I use this term to refer to mechanisms working in tandem with the law in order to induce compliance. Attention is generally directed to the creation or application of formal legal rules when in fact, other less visible forces (in addition to political, economic and strategic interests emphasized by proponents of *realpolitik*) may work alongside the law to push States and other actors in the direction of compliance with the law. In the case of international

adherence to the law, in addition to current legal justifications; and a reconceptualization of the international order as one which supports transnational inclusivity and commonality at the level of human participants in international society as well as exclusive national identifications at the level of States.<sup>14</sup> More specifically, it is suggested that in order for the humanitarian law enforcement project to move forward, measures directed toward altering the behavior of *States* must entail a focus on *moral*, rather than simply legal, justifications for compliance with the norms in question, while at the ground level of individual human interaction within international society, initiatives aimed at affecting individual conduct must focus on the power of international *legal* authority as an inducement to comply.<sup>15</sup> Thus, the compliance project as a whole requires acknowledgement of state and non-state actors as contributors to the international system. Furthermore, informal processes involved in the development of a global common interest in human dignity, such as the promotion of ethical values and social norms, must be recognized and pursued as powerful and important instruments of change. In arguing for this change in orientation, this paper does not seek to dispute the value and continuing necessity of formal *legal* enforcement mechanisms and State-based initiatives. Rather, this paper seeks to highlight the need to expand the traditional standard legal framework for regulating international conduct, to account for the particular nature of international humanitarian law, as well as new developments in the international system, and to use these inherent and accessible factors to enhance the compliance inducing power of the law.

Before proceeding with this analysis, I will briefly review the literature in this area, identify the issues arising for investigation and the methodology employed to address them, and establish the premises and parameters of my discussion.

#### **METHODOLOGY - THE NEED FOR AN INTERDISCIPLINARY APPROACH TO THE INTERNATIONAL HUMANITARIAN LAW ENFORCEMENT PROJECT**

The issue of large-scale, serious violations of human rights has occupied the attention of legal scholars for some time. Much of the legal writing in this area focuses on what the law *is*, and its application in particular circumstances, or what the law *should be* – that is, explanation and recommendation in relation to the content and/or expansion of customary or conventional legal rules – as a means of enforcing humanitarian norms. Specifically, much attention has been directed towards technical legal definitional issues and applicability thresholds, addressing questions such as: what laws are applicable to particular instances of international or internal armed conflict?<sup>16</sup>

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humanitarian law, I emphasize the ethical nature of the law as a powerful and under-utilized force in motivating compliance. Reference to the term 'meta-legal' is made by Colonel G.I.A.D Draper cited in M. Veuthey, "Implementation and Enforcement of Humanitarian Law: the Role of the International Committee of the Red Cross" (1983) 33 Am. Univ. L. Rev. 83 at 89.

<sup>14</sup> A. C. Arend, *Legal Rules and International Society* (New York: Oxford University Press, 1999) at 190-191. Refers to ideas of Hedley Bull, *The Anarchical Society* (1977), notion of international system of sovereign states compared to international society when a group of states share common interests and values.

<sup>15</sup> That is to say, the content and applicability of international humanitarian and criminal law, previously espoused at the supranational level and rarely reaching beyond the concern of State decision-making elites, must be widely disseminated throughout the general population. While most human rights treaties include provisions obliging States to implement international legal norms into national law and to disseminate international law within their jurisdictions, it is clear that States can, and do, neglect or postpone their responsibilities in this regard.

<sup>16</sup>See K. W. Abbott, "International Relations Theory, International Law and the Regime Governing Atrocities in Internal Conflicts" (1999) 93 Am. J. Int'l L. 361.

A further focal point for legal writing in the area of international humanitarian and criminal law has been the need to establish supranational legal enforcement institutions. Much of the legal literature from the 1950s to the present day, considers the need for ad-hoc or permanent tribunals to fill the enforcement 'gap' in the human rights regime and respond to "the popular demand for increased accountability."<sup>17</sup> This continuing pursuit of "a more humane world under law"<sup>18</sup> is illustrated most clearly in the drive to establish the Nuremberg Tribunal at the end of World War II, the ad hoc International Criminal Tribunal for the Former Yugoslavia (ICTY) in 1993, the International Criminal Tribunal for Rwanda (ICTR) in 1994, and most recently, the agreement to establish a permanent International Criminal Court to bring perpetrators of genocide, war crimes and crimes against humanity, to justice.

Thus, in both historical and current legal scholarship, a *legal* regime – legal rules, processes and institutions – forms the basic premise for discussion of effective international regulation in relation to the maintenance of fundamental humanitarian standards. Discussion is therefore generally confined to the subject of creating legal rules and creating legal mechanisms for promoting adherence to established rules. Thus, much legal writing in the area of international humanitarian law has been theoretical or doctrinal in nature, with a focus on the form and definition of the law or legal institution itself, rather than on the actors or the behaviors it seeks to regulate. The dearth of interdisciplinary, contextual analysis of the enforcement of international humanitarian law is clear.

The conceptual framework or methodology employed in this thesis is a combination of international law, international relations and social science theories.<sup>19</sup> Using analytic approaches from disciplines outside the law, in pursuing the goal of individual and collective compliance with the law, recognizes that international law is fundamentally a social and political phenomenon in formation and operation. Clearly, consideration of the various influences guiding State and individual decision-making and behavior is necessary in order to propose future directions and to establish mechanisms capable of effecting compliance with international humanitarian law among all international actors. Kenneth Abbott emphasizes the importance of such an interdisciplinary approach in noting that the process of situating existing legal rules and institutions in a political and social context enables us to "channel normative idealism in effective directions."<sup>20</sup> Thus, this thesis seeks to integrate social science, international relations and international legal perspectives to offer a more complete contextual analysis of compliance in the international system. While the conclusions drawn may not be new in the eyes of each of these separate disciplines, acknowledging that each discipline, individually and independently offers consistent and complementary support for the concluding recommendations adds

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<sup>17</sup> Ibid.

<sup>18</sup> *Supra* note 1 at 302.

<sup>19</sup> In assessing the effectiveness of current legal rules, processes and institutions for addressing violations of international humanitarian and criminal law, international relations/social science models and ideas are fundamentally important, involving consideration of the "interests, powers and governance structures of States and other actors; the information, ideas and understandings on which they operate; [and] the institutions within which they interact" *Supra* note 16 at 362.

<sup>20</sup> *Ibid.* at 361. See also J. G. Ruggie, "Peace in Our Time? Causality, Social Facts and Narrative Knowing" (1995) 89 *Am. Soc. Int'l L.* 93 at 93 – notes, "Aspects of social facticity are relevant to understanding the role of ideas, norms and institutions in international politics."

considerable weight to the arguments invoked here, and highlights the need for continued interdisciplinary analysis in the future.<sup>21</sup>

The development of international legal and political theories from traditionally dominant Positivist-Realist paradigms to contemporary, integrated process-based models explaining the Constructivist operation of international society indicates that, from a sociological standpoint, the traditional inclination to separate law and politics in the international arena becomes blurred. Within a social context, these two forces of international regulation assume a complementary, if not indistinguishable, face.<sup>22</sup>

Considering various theories within the disciplines of international law and international relations serves to demonstrate not only the complementarity between the two spheres of international regulation, but the mutual reflection of one set of theories within the other when viewed within the common context of social interaction. This enhances our understanding of the operation of international society. Thus, the aim here is not to debate the explanatory or instructive value of international relations theories over international law, or vice versa, but to draw elements from individual theories, regardless of their discipline, that offer insight into the as yet unsolved problem of effective enforcement – compliance – with fundamental human rights and humanitarian legal standards.<sup>23</sup>

Theorists such as Martha Finnemore, Kathryn Sikkink and Margaret Keck draw on Constructivist scholarship to posit the influential role of “moral entrepreneurs”<sup>24</sup> and

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<sup>21</sup> See H. H. Koh, “Transnational Legal Process” (1996) 75 Neb. L. Rev. 181 at 191: “As the Cold War set in and reality intruded, the fields of international law and international relations became oddly estranged. Although the two disciplines covered much of the same territory, they evolved independently of one another, pursuing different analytic missions ...”

<sup>22</sup> A-M. Burley, “Law and the Liberal Paradigm in International Relations Theory” (Panel – International Law and International Relations Theory: Building Bridges) (1992) 86 Am. Soc. Int’l L. Proc. 180 at 182. Writers engaging in, and promoting, such integrated interdisciplinary analysis include Kenneth Abbott, Anne-Marie Slaughter-Burley, Benedict Kingsbury, Michael Reisman.

<sup>23</sup> J. G. Ruggie, *Constructing the World Polity: Essays on International Institutionalization* (London and New York: Routledge, 1998) at 36. The fact that the merits of one theoretical approach above another are so regularly debated in international relations and international law field “offers proof positive that no approach can rightfully claim a monopoly on truth – or even on useful insights.” See also A. F. Perez, “Who Killed Sovereignty? Or: Changing Norms Concerning Sovereignty in International Law” (1996) 14 Wis Int’l L. J. 463 at 464: “Political scientists, ordinarily concerned with “systems” and their “management” because they focus on problems ...of collective governance, reach for “legal” rhetoric that defines the relation of the individual state to the system of states. International lawyers, whose traditional ken is defining in “legal” terms the scope of freedom...individuals may exercise, look to “management” of the overall system as a way to reconcile collective state needs with individual state freedom.” As noted by Perez, “each discipline intuitively borrows from insights that appear to fill the theoretical gaps of its own methodology.”

<sup>24</sup> M. Finnemore, *National Interests in International Society* (New York: Cornell University Press, 1996) at 71. Transnational moral entrepreneurs - prominent individual and groups, such as Henri Dunant and the founding members of the International Committee of the Red Cross, actively involved in the construction and implementation of international norms. See also E. A. Nadelmann “Global Prohibition Regimes: The Evolution of Norms in International Society” 44 Int’l Org (1990) 479 at 482: lists the characteristics of transnational moral entrepreneurs as NGOs who “mobilize popular opinion and political support both within their host country and abroad”; “stimulate and assist in the creation of like-minded organisations in other countries”; “play a significant role in elevating their objective beyond its identification with the national interests of their government”; and often direct their efforts “toward persuading foreign audiences, especially foreign elites, that a particular prohibition regime reflects a widely shared or even universal moral sense, rather than the peculiar moral code of one society.”

“transnational advocacy networks”<sup>25</sup> as key generators and distributors of ethical ideas in the international system and, as such, an important mechanism for effecting change in the thinking and behavior of international actors.<sup>26</sup> Such political and social science approaches support the need for a re-orientation in international legal thinking, highlighting the role and impact of entities and agencies other than States, and systems of normative regulation other than the law, in the international arena.

#### **DEFINITIONS: GENOCIDE, WAR CRIMES, CRIMES AGAINST HUMANITY**

At this juncture, it is necessary to briefly define the particular legal rules comprising the focus of this discussion – that is, the international crimes in question and the corpus of law relating to them.

In defining the crimes that form the subject of this study, it must be noted that the detailed content of these legal rules is not the subject of review or analysis in this paper. Rather, the legal system itself, as the mechanism relied upon for addressing gross human rights violations, is critically considered. However, in the interests of conveying the nature of grave breaches of humanitarian law, I will briefly outline the legal definitions of genocide, war crimes and crimes against humanity.

The 1948 Genocide Convention (Article II) provides that certain identified acts, when committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group, constitute genocide, these acts being: killing or causing serious bodily or mental harm to members of the group; deliberately inflicting conditions of life calculated to bring about the group’s physical destruction in whole or in part; imposing measures intended to prevent births within the group; and forcibly transferring children of the group to another group.<sup>27</sup>

The term ‘crimes against humanity,’ originally defined in the Nuremberg Charter<sup>28</sup> and now modified by the Rome Statute of the International Criminal Court,<sup>29</sup> refers to any one of a range of acts “committed as part of a widespread or systematic attack directed against any civilian population,” such attack being “pursuant to, or in furtherance of, a State or organizational policy to commit such an attack.”<sup>30</sup> These acts include murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty, torture, rape, forced pregnancy and sexual slavery, enforced sterilization or any other form of sexual violence of comparable gravity, persecution against any identifiable group

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<sup>25</sup> M. E. Keck, & K. Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (New York: Cornell University Press, 1998). Transnational Advocacy Networks (TANS) – networks of activists distinguishable by the centrality of principled ideas or values motivating their formation.

<sup>26</sup> K. Sikkink, “Nongovernmental Organizations and Transnational Issue Networks in International Politics” (Panel: The Growing Role of Nongovernmental Organizations) (1995) 89 *Am. Soc. Int’l L.* 413 at 413-414.

<sup>27</sup> *Convention on the Prevention and Punishment of Genocide* *supra* note 3.

<sup>28</sup> Charter of the International Military Tribunal annexed to the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis. Note that while no Convention currently exists dealing specifically with crimes against humanity as an international crime, it is widely accepted that the illegal nature of crimes against humanity, along with genocide and war crimes, has a basis in customary international law. See: M. Scharf, “The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes” (1996) 59 *L. & Contemp. Probs.* 41 at 52.

<sup>29</sup> *Supra* note 5

<sup>30</sup> Article 7, Rome Statute *supra* note 5.

or collectivity, enforced disappearance, apartheid and other inhumane acts of similar character intentionally causing great suffering or serious injury.<sup>31</sup>

The term 'war crimes,' as referred to in the Hague Conventions<sup>32</sup> and Geneva Conventions, and also defined in detail in the Rome Statute, broadly refers to violations of the laws and customs of war, including: murder, ill-treatment or deportation of civilian population, murder or ill-treatment of prisoners of war, killing of hostages, wanton destruction of cities, towns, villages, and devastation not justified by military necessity.<sup>33</sup>

As stated in the 1998 Rome Statute of the International Criminal Court, these crimes comprise "the most serious crimes of concern to the international community as a whole."<sup>34</sup> And it is in this referential capacity that these terms are employed throughout this thesis, rather than in reference to their technical legal definitions.

### **WHAT IS THE LAW APPLICABLE TO THESE CRIMES?**

The issue of human rights atrocities traverses a number of international law subject areas, specifically, International Human Rights Law, International Humanitarian Law and International Criminal Law. It is important at the outset to define each of these legal areas and explain how they relate to each other on this issue.

International Human Rights Law refers to the entire corpus of laws protecting the civil, political, economic, social and cultural rights of humankind. The foundational sources of international human rights law are generally regarded as the Universal Declaration of Human Rights,<sup>35</sup> the International Covenant on Civil and Political Rights,<sup>36</sup> and the International Covenant on Economic, Social and Cultural Rights.<sup>37</sup> These agreements combine to encompass a comprehensive prescription of human rights, the full realization of which ensures every human being the opportunity to live a life of dignity. The most basic or fundamental of these rights are the inherent, inalienable and inviolable rights to life, liberty and personal security. Genocide, war crimes and crimes against humanity arguably represent the most blatant illustrations of the human capacity to violate these fundamental rights which form the very essence of the notion of *human rights*.

International Humanitarian Law, in today's usage, refers to the entire law of armed conflict, encompassing the Hague Conventions,<sup>38</sup> Geneva Conventions<sup>39</sup> and Additional Protocols,<sup>40</sup> and

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<sup>31</sup> Article 7, Rome Statute *supra* note 5. See also: T. Meron, "The Continuing Role of Custom in the Formation of International Humanitarian Law" (1996) 90 Am. J. Int'l L. 238 at 242 – on crimes against humanity, the ICTY [in *Tadic*] accepted that "it is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed, as the Prosecutor points out, customary international law may not require a connection between crimes against humanity and any conflict at all."

<sup>32</sup> Hague Conventions adopted by the Hague Peace Conferences of 1899 and 1907.

<sup>33</sup> *Supra* note 3.

<sup>34</sup> Rome Statute *supra* note 5.

<sup>35</sup> *Universal Declaration of Human Rights* adopted 10 December 1948, GA Res.217(III), UN Doc. A/810 (1948).

<sup>36</sup> *International Covenant on Civil and Political Rights*, GA Res. 2200 (XXI), UN Doc. A/6316 (1966) (entered into force 3 January 1976).

<sup>37</sup> *International Covenant on Economic, Social and Cultural Rights*, GA Res. 2200 (XXI), UN Doc. A/6316 (1966) (entered into force 3 January 1976).

<sup>38</sup> *Supra* note 32

<sup>39</sup> *Geneva Conventions*, *supra* note 3.

various codes of military conduct.<sup>41</sup> Traditionally, however, the laws and customs of war referred only to the technical and professional rules regulating the conduct of armed conflict as originally codified in the Lieber Code of 1863.<sup>42</sup> With the emergence of the International Committee of the Red Cross (ICRC), a new stream of laws governing conflict developed, emphasizing basic humanitarian principles. Today, the term 'international humanitarian law' merges the law initiated by the ICRC and codified in the Geneva Conventions, with traditional military rules and customs or warfare, in a single body of law.<sup>43</sup> This law includes limitations on the use of violence, and the observation of basic humanitarian principles for the protection of civilians and non-combatants, allowing the sick and wounded to be cared for, and prohibiting methods of warfare that cause unnecessary losses or excessive suffering.<sup>44</sup>

Thus, drawing on the humanitarian vein of the law of war, international human rights law and international humanitarian law may be regarded as one and the same, in respect of the essential commonality between the two – the principal endeavor to prevent human suffering. However, as Meron points out, in strict legal terms, the two forms of law are distinctly different. The law of armed conflict allows the killing and wounding of human beings – participants and non-participants in the conflict provided certain legal rules are observed in the process.<sup>45</sup> International humanitarian law has also traditionally drawn legal distinctions between conflicts of an international nature and non-international conflicts, along with breaches committed during armed conflict and those committed in peacetime, in its application of various provisions of the Geneva Conventions.<sup>46</sup> In contrast, human rights law unconditionally protects the fundamental

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<sup>40</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, opened for signature December 12, 1977, 1125 U.N.T.S. 3, 7 [hereinafter Geneva Additional Protocol I] (entry into force 7 December 1978); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, opened for signature December 12, 1977, 1125 U.N.T.S. 609 [hereinafter Geneva Additional Protocol II] (entry into force 7 December 1978).

<sup>41</sup> See T. Meron, "The Humanization of Humanitarian Law" (2000) 94 Am. J. Int'l L. 239 at 239.

<sup>42</sup> Lieber Code 1863 Code (General Order No. 100, issued on 24 April 1863 by President Abraham Lincoln) – first attempt to codify laws of war, cited in Address by C. Sommaruga, President, International Committee of the Red Cross, "Effective Implementation of International Humanitarian Law in Changing Circumstances" (April 9-12, 1997) (1997) 91 Am. Soc. Int'l L. Proc 519 at 519.

<sup>43</sup> Address by C. Sommaruga, President, International Committee of the Red Cross, "Effective Implementation of International Humanitarian Law in Changing Circumstances" (April 9-12, 1997) (1997) 91 Am. Soc. Int'l L. Proc 519 at 519. See also T. Meron *supra* note 41.

<sup>44</sup> A. Roberts, "The Laws of War: Problems of Implementation in Contemporary Conflicts" (1995) 6 Duke J. Comp. & Int'l L. 11 at 14. Roberts argues that the term 'international humanitarian law' as it is used today "has the defect that it seems to suggest that humanitarianism, rather than professional standards, is the main foundation on which the law is built..." [I focus on humanitarianism as ultimately the basis of the professional standards, and undoubtedly the basis of the prohibitions against genocide, war crimes and crimes against humanity. This sentiment is encapsulated in the Marten's Clause contained in the Geneva Conventions and Additional Protocols – Article 63 Geneva Convention I, Article 62 Geneva Convention II, Article 142 Geneva Convention III, Article 158 Geneva Convention IV, Article 1(2) Additional Protocol I, Preamble Additional Protocol II.]

<sup>45</sup> *Supra* note 41 at 240 – "common to conflate human rights and the international humanitarian law – growing convergence of protective trends. Nevertheless, significant differences remain. The law of war allows the killing and wounding of innocent human beings not directly participating in an armed conflict (eg. civilian victims of collateral damage). This is a narrow technical vision of legality – as long as the rules of the game are observed, it is permissible to cause suffering, death and deprive freedom. Human Rights Law protects physical integrity and human dignity in all circumstances."

<sup>46</sup> Increasingly, however, this distinction is losing relevance, in light of the type of conflicts occurring today. In the Rome Statute, both genocide and crimes against humanity can be committed in peace time or during armed conflict, whether international or non-international, and can be committed by State or non-State actors. See also *Tadic*

human rights to life, liberty and security of the person. Both the legal distinction and principled similarity between these two areas of the law will be further discussed at the end of Chapter Three in the context of the need to move beyond the traditional narrow focus on technical legality towards a broader ethical emphasis on respect and concern for the *human* subject of the law in seeking to enforce the international prohibitions against genocide, war crimes and crimes against humanity.

It is important to note, both with respect to international human rights law and international humanitarian law, that legal obligation attaches not only to the observation of the prohibitions themselves but also to the undertaking to “ensure respect” for the said laws. As noted in the Preamble of the Universal Declaration of Human Rights, “every individual and every organ of society...shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance...”<sup>47</sup>

The final category of international law applicable to genocide, war crimes and crimes against humanity is that of International Criminal Law – the law addressing, among other things, grave breaches of international humanitarian law, through criminal prosecution. These grave breaches are codified in the Geneva Conventions,<sup>48</sup> the Genocide Convention,<sup>49</sup> and most recently in the Rome Statute of the ICC.<sup>50</sup> Here too, there is an overlap between international humanitarian law, international human rights law and international criminal law. While Meron notes that “the ICC Statute does not criminalize violations of human rights, but only violations of international humanitarian law,”<sup>51</sup> it is clear that the offences falling within the jurisdiction of the ICC also constitute violations of the most fundamental human rights.<sup>52</sup>

In addition to the conventional sources and definitions of these crimes, it must be noted that these crimes are recognized as international crimes on the basis of custom or evidence of general State practice accepted as law.<sup>53</sup> Furthermore, the prohibitions against genocide, war crimes and crimes against humanity are widely recognized within the international community of States (and among legal scholars) as having attained the status of *jus cogens* – peremptory norms of general international law, “accepted and recognized [as such] by the international community of States as a whole.”<sup>54</sup> In addition to its *jus cogens* status, the law prohibiting genocide, war crimes and crimes against humanity, is characterized as *erga omnes*, whereby the obligation to

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decision cited in T. Meron, “The Continuing Role of Custom in the Formation of International Humanitarian Law” (1996) 90 Am. J. Int’l L. 238 at 238 – affirmed that serious violations of international humanitarian law committed in internal wars are international crimes under customary law.

<sup>47</sup> *Universal Declaration of Human Rights*, *supra* note 35. The Geneva Conventions also require states, “to respect and to ensure respect” for the law. The UDHR and Geneva Conventions are so widely ratified and recognised within the international community that they are considered customary international law such that all states whether or not party to the Conventions, are bound to comply.

<sup>48</sup> Geneva Conventions, *supra* note 3

<sup>49</sup> Genocide Conventions, *supra* note 3

<sup>50</sup> *Supra* note 5

<sup>51</sup> *Supra* note 41.

<sup>52</sup> *Celebici* case – the provisions of international humanitarian law “seek to guarantee the basic human rights to life, dignity and humane treatment...and their enforcement by criminal prosecution is an integral part of their effectiveness.” cited in T. Meron, *supra* note 41 at 267.

<sup>53</sup> *Supra* note 41. Note also that the international customary nature of these crimes has recently been affirmed through their codification under the terms of the Rome Statute.

<sup>54</sup> Article 53, *Convention on the Law of Treaties*, Vienna, opened for signature 23 May 1969, 1155 U.N.T.S. 331.

observe the fundamental human rights protected by the law, is an obligation owed to “the international community as a whole.”<sup>55</sup> That is to say that the law prohibiting these crimes “has risen to a level above that stemming from specific treaty obligations”<sup>56</sup> such that “all States have a legal interest in its observance.”<sup>57</sup>

Thus, in considering future directions for effective prevention of human rights atrocities in the form of genocide, war crimes and crimes against humanity, there is substantial cross-over in the operation of the above-mentioned areas of law. This overlap in the law both illustrates and supports a key premise of this thesis that the legal prohibitions against genocide, war crimes and crimes against humanity reflect universal values derived from the notion of common humanity.

In this thesis, the terms ‘international humanitarian law,’ ‘international human rights law’ and ‘international criminal law’ may be used interchangeably or in concert, to refer specifically to the point at which these three areas of law converge in the context of this study – that being the laws prohibiting gross violation of fundamental human rights through the commission of genocide, war crimes and crimes against humanity – as opposed to the general body of law encompassed within each of these legal areas.<sup>58</sup>

#### **PREMISES – UNIVERSALITY OF FUNDAMENTAL HUMAN RIGHTS/HUMANITARIAN STANDARDS**

As the universal applicability of the prohibitions against genocide, war crimes and crimes against humanity comprises a central premise of this thesis, I will briefly outline the justifications for this premise with reference to the debate regarding the universality of human rights standards.

The universality versus cultural relativism debate comprises one of the overarching and underlying challenges to the implementation and enforcement of international human rights norms. Much of the debate focuses on whether an objective basis can be found for a universal ethic or notion of human rights in order to justify their acceptance at the global level.<sup>59</sup> It is not within the scope of this thesis to enter into a philosophical analysis of the foundation, content or validity of international human rights. However, it is necessary to recognize this debate in the context of this paper’s support for the goal of universal compliance with the laws prohibiting genocide, war crimes and crimes against humanity. Genocide, war crimes and crimes against humanity constitute violations of the most basic and fundamental rights associated with human existence – the rights to life, liberty and personal security. This thesis contends that the values underlying criminalization of these acts are common to all cultures and societies – to all *human* entities. Furthermore, this thesis seeks to draw on legal and ethical motivations to encourage transnational compliance with the legal norms prohibiting these acts. As such, it is necessary to offer some theoretical foundation for these assertions, recognizing the potential critique of

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<sup>55</sup> *East Timor (Portugal v. Australia)* ICJ Reports 1995, Dissenting opinion of Judge Weeramantry at 127.

<sup>56</sup> M. C. Bassiouni, “International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*” (1996) 59 L. & Contemp. Probs. 63 at 68

<sup>57</sup> *Barcelona Traction, Light and Power Co, Ltd. (Belgium v. Spain)* Judgement 1970 ICJ Reports at p32, at para 35. Note at para 34: “Such obligations derive...from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person...Some of the corresponding rights of protection have entered into the body of general international law; others are conferred by international instruments of a universal or quasi-universal character.”

<sup>58</sup> Unless otherwise specified

<sup>59</sup> At a philosophical level, Freeman notes that “[u]nfortunately, there are no uncontested philosophical foundations of human rights.” M. Freeman, “The Philosophical Foundations of Human Rights” (1994) 16 HRQ 491 at 511.

'moral imperialism.'<sup>60</sup> As O'Manique notes, in the effort to support claims of universality of fundamental human rights, we are not searching for proof of their existence, but instead are involved in a process of identifying common values and beliefs to which the original notion of human rights can be traced.<sup>61</sup>

The tension between the claim to universality of human rights standards, and the notion of cultural relativity with regard to human rights has spawned a wealth of literature and debate in relation to the full range of civil, political, economic, social and cultural rights.<sup>62</sup> For the purposes of this paper, however, the universality of the gamut of human rights will not be considered. Only the most elemental human rights – those rights and standards protected by the prohibitions against genocide, war crimes and crimes against humanity – are asserted as universal on the basis of their widespread transnational moral and legal appeal, evidenced by their recognition in some form within the great majority of cultures. It is clear, however, that the universal nature of even these basic rights is contested on various levels of analysis.

The Universal Declaration of Human Rights, refers to the concept of an 'inherent human dignity,'<sup>63</sup> common to all human beings by virtue of their existence, as the source of all human rights. Human dignity is therefore seen as belonging to every person – the fundamental notion of being human – to be respected and protected by all people at all times. Objections to this justification for the universal applicability and validity of fundamental human rights standards are generally two-fold. First, critics of universality argue that human rights instruments and standards are Western conceptions reflecting Western ideals.<sup>64</sup> Second, these Western rights and standards fail to recognize differing cultural interpretations and conceptualizations of being human. Cultural relativists contend that there are no trans-cultural practices, values or standards against which human conduct may be viewed as proper or improper. According to the relativist argument, it is "local cultural traditions [that]...properly determine the existence and scope of...rights enjoyed by individuals in a given society."<sup>65</sup> Human rights and human dignity attain meaning only in relation to particular social and cultural contexts. Thus, "[w]hat may be regarded as a human rights violation in one society may properly be considered lawful in another."<sup>66</sup>

Both proponents and opponents of the universality of human rights resort to theoretical, abstract arguments of 'ultimate' justification, or alternatively, pragmatic, political justifications based on

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<sup>60</sup> Moral imperialism – a strand of the relativist argument referring to the idea that if no objective universal foundation can be found for human rights, then appealing to ethics is no answer as ethical values are culturally specific too. For example, many criticise the UDHR as a Western construction based on Western values, but masked in universal language. See M. Mutua, "The Ideology of Human Rights" (1996) 36 Virginia J. Int'l L. 589.

<sup>61</sup> J. O'Manique, "Universal and Inalienable Rights: A Search for Foundations" (1990) 12 HRQ 465 at 466.

<sup>62</sup> See generally K. Mickelson, "How Universal is the Universal Declaration?" (1998) 47 UNB L. J. 19; F. Teson, "International Human Rights and Cultural Relativism" (1985) 25 Va. J. Int'l L. 869.

<sup>63</sup> Preamble and Article 1 Universal Declaration of Human Rights, *supra* note 35.

<sup>64</sup> M. Mutua, "The Ideology of Human Rights" (1996) 36 Virginia J. Int'l L. 589. Contrast with B. G. Ramcharan, "The Universality of Human Rights" (1997) 58-59 Int'l Comm. Jur. Rev. 105. Notes that the UDHR drew upon truly international input and has subsequently been endorsed in international and regional treaties. "It is a misunderstanding of history to say that the Universal Declaration of Human Rights is a Western product...The universality of the Declaration is unassailable."

<sup>65</sup> F. Teson, "International Human Rights and Cultural Relativism" (1985) 25 Va. J. Int'l L. 869. at 870.

<sup>66</sup> *Ibid.* at 871

agreed rules and actual international consensus.”<sup>67</sup> I contend that it is difficult to apply the relativist argument to justify, on the basis of legal, religious or cultural tradition, the perpetration of genocide, war crimes or crimes against humanity. While philosophical arguments seeking ultimate justification are split on the issue of these grave human rights violations,<sup>68</sup> it is my contention that the acts falling within the definition of these crimes are universally abhorrent. As stated by Perry, “...human beings are all alike in at least some respects, such that some things good for some human beings are good for every human being and some things bad for some human beings are bad for every human being.”<sup>69</sup> Support for this idea can be found in the work of the InterAction Council,<sup>70</sup> the World Parliament of Religions,<sup>71</sup> and the UNESCO Universal Ethics Project,<sup>72</sup> whose various research and conference activities point to the concurrence of the central tenets of all major world religions. These groups submit that the notion of treating all others with respect and the desire to alleviate human suffering is common to all people of all faith and belief systems. Clearly, definitions or thresholds of ‘respect,’ and ‘human suffering’ may differ from culture to culture and therefore be contentious in relation to the broad corpus of human rights. However, it is contended here that the limited and specific acts contained within the crimes of genocide, war crimes and crimes against humanity universally offend these notions.

Furthermore, in support of the universal applicability of the prohibitions against genocide, war crimes and crimes against humanity, a pragmatic approach is employed by this writer, recognizing that, regardless of the origin of these rights or the existence of an objective foundation for these values, it is clear that *legal* universality in relation to the prohibition of these acts exists. The legal proscriptions, conventional and customary, endorsed by the international community have arguably served to render these values - that is, the principles of humanity

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<sup>67</sup> Mickelson provides a useful overview of the key positions along the spectrum from extreme relativism to universality, identifying four basic categories of opinion. The first category, argued by Mutua, among others, is that human rights is fundamentally a Western notion and seeks to diffuse a Western ideology under the guise of universal norms. Thus, these norms are particular to a specific cultural context and cannot fairly be imposed on all other cultures and societies. The second school of thought, propounded by writers such as Jack Donnelly and Rhoda Howard acknowledges that human rights originate in the Western Liberal tradition, and their conceptualization as individual rights held as limitations upon the powers of the State, is a Western creation. However, they contend that, regardless of their origin, the rights and standards themselves are universally relevant and applicable based on their foundation in the notion of human existence. A third category of opinion sees the notion of human dignity as a universal foundation for human rights, tracing the emergence of these rights to the “reality of human suffering and the struggle against it,” rather than to an abstract theoretical source. The final category of thinkers recognizes that human rights may not be universal, however, they argue that a core set of common, cross-culturally valid principles can be identified and protected through human rights. K. Mickelson, *supra* note 62.

<sup>68</sup> See J. Gorecki, *Justifying Ethics: Human Rights and Human Nature* (New Jersey: Transaction Publishers, 1996) – argues that there is no objective justification for human rights. Contrast with M. J. Perry, “Are Human Rights Universal? The Relativist Challenge and Related Matters” (1997) 19 HRQ 461.

<sup>69</sup> M. J. Perry, “Are Human Rights Universal? The Relativist Challenge and Related Matters” (1997) 19 HRQ 461 at 472: “This is true intraculturally as well as interculturality. A conception of human good can and should be universalist as well as pluralist; it can acknowledge sameness as well as difference; commonality as well as variety.”

<sup>70</sup> *A Universal Declaration of Human Responsibilities* adopted by InterAction Council, 1 September 1997 in H. Kung, and H. Schmidt, *A Global Ethic and Global Responsibilities – Two Declarations* (London: SCM Press Ltd., 1998) at 2.

<sup>71</sup> *Declaration Toward A Global Ethic* adopted by the Parliament of the World’s Religions, 1993 in *ibid*.

<sup>72</sup> *The Universal Declaration of Human Duties and Responsibilities* adopted by the Third Millennium Project of the City of Valencia and presented to UNESCO April 1999, in Y. Kim, “A Common Framework for the Ethics of the 21st Century” (Paris: UNESCO, 1999). See also The UNESCO Universal Ethics Project, Preliminary Report: Part II – Archive of Participant Contributions, online: <<http://www.unesco.org>> (visited 4 April 2000).

contained within the law - universal in nature and in application. The Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in 1993, demonstrates contemporary support for this view: “[t]he World Conference on Human Rights reaffirms the solemn commitment of all States to fulfil their obligations to promote universal respect for, and observance and protection of, all human rights and fundamental freedoms... The universal nature of these rights and freedoms is beyond question...”<sup>73</sup>

Beyond the conventional and customary criminalization of these acts, universal condemnation is most clearly expressed in the recognition that the prohibitions against genocide, war crimes and crimes against humanity have attained the status of *jus cogens* – peremptory norms of general international law, attracting *erga omnes* obligations.<sup>74</sup>

### THE NATURE OF THE PROBLEM – IMPROVING COMPLIANCE WITH THE LAW

“It seems to many that the problem is not to discover what the law is, or how to apply it to the particular case, or even whether the existing rule is ‘satisfactory’ or not, but rather how to secure or compel compliance with the law at all.”<sup>75</sup>

As outlined above, an extensive body of customary and conventional international human rights, humanitarian and criminal law exists, prohibiting the commission of grave human rights violations in the form of genocide, war crimes and crimes against humanity. However, human rights atrocities continue to be committed. Existing formal international legal rules, processes and institutions have not been successful in preventing the perpetration of these crimes. Compliance with the law in this area, is neither permanent nor universal.

In response to this appraisal, it may be argued that the legal rules prescribed by international law generally, and the various instruments of international humanitarian and human rights law specifically, operate in a different manner to legal regulation in the domestic sphere. That is to say, international legal rules are often aspirational in form and function, recognizing the fundamental diversity of values existing within the international community as well as the diversity of economic, social and political circumstances impacting upon State members of the community. Thus, the system of international legal regulation itself allows a degree of flexibility with regard to the level of compliance and commitment practiced by States in respect of the norms prescribed. As Falk asserts, in the international system, “legal norms are understood to support the realization of values rather than the restraint of behavior.”<sup>76</sup> In other words, international legal norms seek to “define the boundaries of acceptable action”<sup>77</sup> and establish agreed standards to strive towards.

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<sup>73</sup> Vienna Declaration and Programme of Action, UNGA Doc. A/CONF.157/23 (June 1993)

<sup>74</sup> See *Barcelona Traction Case*, supra note 57.

<sup>75</sup> Sir Frank Berman, Preface to *British Institute of International & Comparative Law, Armed Conflict, and the New Law* at xii (Hazel Fox and Michael Meyer eds., 1993) cited in supra note 44 at 15.

<sup>76</sup> R. Falk in A. Slaughter-Burley, “International Law and International Relations Theory: A Dual Agenda” (1993) 87 *Am. J. Int’l L.* 205 at 211.

<sup>77</sup> R. Falk in *ibid.* at 212. See also A. Chayes, & A. H. Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Massachusetts and London: Harvard University Press, 1995) at 17. Arguably, formal

Furthermore, it may be asserted that legal rules in the domestic sphere too do not succeed in universally and permanently preventing prohibited or criminal acts. However, the existence of a formal institutional legal order in the domestic setting, supported by the threat of certain sanction, provides a powerful inducement towards general compliance. Arguably, the same level of general compliance and respect for the law can be found at the international level in that "almost all nations observe almost all principles of international law and all of their obligations almost all of the time."<sup>78</sup>

These observations about the aspirational nature of international law and "the general propensity of States to comply with their treaty obligations"<sup>79</sup> are not contested insofar as they relate to the general body of international legal regulation. However, it is submitted that with respect to the fundamental obligations of international humanitarian law prohibiting genocide, war crimes and crimes against humanity, there is no place for aspirational observation and little value in a general inclination towards compliance based on factors that may coincidentally result in compliant behavior rather than emerging from a meaningful commitment to the goals of the law.<sup>80</sup>

While the existing legal regime may support a natural tendency to comply, its power does not currently extend to building a commitment to humanitarian norms that goes beyond this arguably neutral inclination towards compliance acceptable in other areas of international regulation. With respect to international humanitarian legal obligations proscribing genocide, war crimes and crimes against humanity, the single goal must be universal and permanent compliance. There are no levels of compliance with respect to these fundamental obligations of international humanitarian law. The very nature of these elementary humanitarian obligations demands full compliance in all circumstances. Anything less than total compliance renders irrelevant and meaningless the exercise of setting minimum humanitarian standards. It is the argument of this thesis that, in relation to genocide, war crimes and crimes against humanity, it is imperative that the standards embodied in the legal norms be realized, and that these norms serve to effectively constrain both State and individual behavior. Attention must be directed towards inculcating a real and proactive commitment to compliance. It is suggested that formal international humanitarian and criminal law regimes alone do not have the power to achieve this degree of

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international agreements are necessarily aspirational "embody[ing] ideals of the international system, but...they were designed to initiate a process that over time would bring behavior into greater congruence with those ideals."

<sup>78</sup> L. Henkin, "Law and Politics in International Relations: State and Human Values" (1990) 44 J. Int'l Aff. 183 at 200. See also A. Chayes, & A. H. Chayes, *The New Sovereignty* at 3: In considering the compliance problem, not denying the general propensity of states to comply with international obligations. Clearly, "given the time and energy spent preparing, drafting, negotiating and monitoring treaty obligations, it is not conceivable that they could do so, except on the assumption that entering into a treaty agreement ought to and does limit their own freedom of action, and in the expectation that the other parties to the agreement will feel similarly constrained."

<sup>79</sup> A. Chayes, & A. H. Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Massachusetts and London: Harvard University Press, 1995) at 4: The Chayes' identify three sorts of considerations that lend plausibility to the assumption of a propensity to comply: efficiency, interests and norms. "Of course, these factors, singly or in combination will not lead to compliance in every case or even in any particular case. But they support the assumption of a general propensity for states to comply with their treaty obligations and lead to a better understanding of the real problems of non-compliance and how they can be addressed."

<sup>80</sup> *Ibid.*

internalized compliance. Thus, the question becomes: with strict compliance as the goal, how can the behavior of international actors be influenced towards this?<sup>81</sup>

The challenge therefore appears to lie not in the process of creating specific and relevant legal rules, but in the enforcement of these rules – that is, generating norms of compliance with the law created. Given this, where should the international community be directing its attention in order to enhance compliance with the law – in order to build a steadfast commitment, among the various actors participating in international society, to prevent the occurrence of these crimes? Is the creation of more law in the form of formal legal processes and institutions such as the International Criminal Court, the most productive and constructive means of improving enforcement?

From an international law perspective, formal legal institutions providing accountability and punishment are fundamentally important in the compliance endeavor. Indeed, the absence of a central enforcement mechanism in the international arena has been pinpointed as a key weakness in the human rights system, viewed by many as the reason for continuing violation. However, international relations scholarship emphasizes that State actors are the primary creators and subjects of legal regulation in the international arena and, as such, both possess, and exercise, the freedom and flexibility to control the creation, application, and effectiveness of international legal processes and institutions, and furthermore, to choose between compliance and non-compliance with the laws created.

Before beginning to consider possible solutions to the compliance problem in the remainder of this thesis, it is necessary to clarify the goal that is compliance.

#### **ENFORCEMENT AND COMPLIANCE: DUAL PROCESS – SINGLE GOAL**

In considering effective strategies for improving compliance with the law, it is important to note the elements comprising effective enforcement and ongoing compliance in the context of grave human rights violations.

Enforcement is the “power to compel obedience.”<sup>82</sup> As such, enforcement clearly refers to tangible, visible formal accountability processes involving the “identification of perpetrators of violations, confirmation of the norms that apply, and the imposition of penalties.”<sup>83</sup> It must not be forgotten, however, that enforcement also includes the future prevention of these crimes, providing the assurance of ‘never again’ to victims and to society at large.<sup>84</sup> Thus, enforcement of the law encompasses not only the rendering of formal sanction in instances of breach, but also the ongoing process by which subjects comply with the law, based on a perception of its binding nature.

The goal of ensuring strict compliance with international legal prohibitions against genocide, war crimes and crimes against humanity is, in essence, the goal of effective enforcement. That is

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<sup>81</sup> *Ibid.* at 9-10. “...continuing instances of non-compliance ...warrant analysis of the methods by which international systems can bring deviant behavior into conformity with treaty norms.”

<sup>82</sup> J. B. Scott, “The Legal Nature of International Law” in *Essays on International Law from the Columbia Law Review*, (New York, 1965)19 at 30.

<sup>83</sup> W. M. Reisman, “Legal Responses to Genocide and Other Massive Violations of Human Rights” (1996) 59 *L. & Contemp. Probs.* 75 at 77.

<sup>84</sup> R. Goldstone, “Assessing the Work of the UN War Crimes Tribunals” (1997) 33 *Stan. J. Int’l L.* 1 at 5.

to say that the goal of effective enforcement is the ideal of universal and permanent compliance with the laws relating to genocide, war crimes and crimes against humanity, the ultimate effect of which is the 'invisible' goal of prevention. Thus, compliance and enforcement are effectively two sides of the same coin; ongoing compliance being the outcome of effective enforcement. This may seem a simplistic statement, however it is a common perception that enforcement of the law is separate and distinct from compliance – enforcement being a punitive process initiated at the point of violation while compliance denotes ongoing conformity.<sup>85</sup>

Certainly, the international community's conception of enforcement in relation to the prohibitions against genocide, war crimes and crimes against humanity has entailed a focus on formal institutional sanctions administered after violation. However, it is clear from the above, that enforcement may occur as a result of formal or informal sanction, administered in particular instances of breach as well as operating continuously to induce compliance.

Enforcement therefore is a complex problem contrary to the popular focus on responding to the violation of legal norms through punishment. This is particularly so in the case of genocide, war crimes and crimes against humanity. The punitive response to these offences comprises only one component of a much broader compliance process. Effective enforcement of international humanitarian law encompasses more than mere implementation of the law in the formal judicial or legislative sense, though it is this form of implementation that has been the focus of the international community's attention to date.<sup>86</sup> As Roberts aptly notes, "[m]ost of the literature on implementation...has been narrowly legal or prescriptive in character. There has too often been a formalistic assumption that the main modes of implementation are, or ought to be, those laid down in the Conventions."<sup>87</sup>

Harold Jacobson and Edith Brown-Weiss clarify the compliance/enforcement objective and its distinction from the limited process of formal implementation in concluding that "[c]ompliance may occur without implementing legislation. On the other hand, a state may not be in compliance with international law even with implementing legislation in place."<sup>88</sup> In other words implementation refers to the formal process whereby international legal rules and institutions are adopted within national and international systems, while compliance and effective enforcement embody actual and substantive behavioral obedience to the law. Compliance therefore encompasses some form of internalized commitment to the legal norms. This thesis uses the development of the ICC to contend that the international community remains

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<sup>85</sup> See G. W. Downs, "Enforcement and the Evolution of Cooperation" (1998) 19 Mich. J. Int'l L. 319 at 320. "Enforcement is a deterrent strategy designed to maintain cooperation by preventing non-compliance from ever taking place." See also B. Kingsbury, "The Concept of Compliance as a Function of Competing Conceptions of International Law" (1998) 19 Mich. J. Int'l L. 345 at 345: Compliance is "the conformity of behavior with legal rules." See also O. R. Young, *Compliance and Public Authority* (London: John Hopkins University Press, 1979): "It is not always possible to separate compliance from enforcement."

<sup>86</sup> *Supra* note 44 at 16. "Unfortunately the question of how the laws of war are, or are not, implemented has not been the subject of a vigorous tradition of thought. Lawyers tend to think in terms of enforcement through legal processes after a violation, though implementation may take many other forms."

<sup>87</sup> *Ibid.*

<sup>88</sup> Cited in J. E. Alvarez, "Foreword: Why Nations Behave" (1998) 19 Mich. J. Int'l L. 303 at 305. See also E. Brown-Weiss, "National Compliance with International Environmental Agreements" (Theme Plenary Session: Implementation, Compliance and Effectiveness). (1997) 91 Am. Soc. Int'l L. Proc. 56 at 59 "implementation refers to measures taken to carry out the agreement. Compliance addresses whether the targeted actors have changed their behavior. Need to distinguish between compliance with procedural obligations and compliance with substantive obligations and with the spirit of the agreement."

focused on visible implementation of international legal obligations rather than, or perhaps as a step towards, compliance with international humanitarian law. Effective compliance, however, can only be achieved if we move beyond this focus, and look outside the traditional legal framework of formal law-based enforcement in order to enhance enforcement of the law.

Effective enforcement - compliance - is therefore the key problem to be addressed in the area of international humanitarian and criminal law. It is contended that the processes of formal implementation and actual compliance have been, and continue to be, conflated such that the publicly visible goals of punishment and accountability have overtaken the goals of compliance and prevention in the progressive development of international humanitarian and criminal law. In the ongoing effort to establish an international criminal court, the goal of accountability has arguably been *equated* with the goal of effective enforcement. In other words, the goal of maintaining active and enduring obedience to the law and hence eradicating human rights atrocities from the world stage through ongoing compliance with the law, has been subsumed within the goal of combating impunity for these crimes. Arguably, this preferential focus on punishment/accountability<sup>89</sup> over compliance/prevention reflects a prioritization of the creation of visible, formal, legal processes over less tangible, less visible, substantive processes such as developing the meaningful commitment of States to the substance of the legal provisions. This assertion will be discussed in detail in Chapter Two.

#### PARAMETERS OF ANALYSIS

As a final introductory note, there are several core parameters to this analysis that must be stated at the outset in the interests of clarity.

First, it must be noted that, in critically considering the impact of legal rules, institutions and processes, particularly the establishment of a permanent ICC, on the behavior of international actors, such formal law is not viewed as a panacea or a comprehensive solution to the problem of human rights atrocities. Clearly, conflicts resulting in the commission of genocide, war crimes and crimes against humanity are a result of complex social, economic, political, historical and cultural factors. Consequently, a complex array of social, political and economic initiatives are necessary to effectively prevent the occurrence of these crimes. Legal mechanisms for standard-setting and enforcement constitute one important and necessary element contributing to this goal. This thesis focuses specifically on enhancing international law-based efforts to regulate State and individual conduct and improve compliance with the law prohibiting genocide, war crimes and crimes against humanity. Thus, any recommended strategies and actions – formal or informal – are made in reference to improving current *legal* responses to genocide, war crimes and crimes against humanity, and not in reference to any other necessary social, political or economic initiatives and developments.

Related to this issue is the fact that realization of the full range of civil, political, economic, social and cultural rights is an imperative component of the process of social construction necessary to remove the conditions likely to give rise to grave human rights violations.

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<sup>89</sup> Kratochwil and Ruggie, 1986 “the common practice of treating norms as ‘variables’...should be severely curtailed. So too should be the preoccupation with the ‘violation’ of norms as the beginning, middle, and end of the compliance story” quoted in B. Kingsbury, “The Concept of Compliance as a Function of Competing Conceptions of International Law” (1998) 19 Mich. J. Int’l L. 345 at 372.

However, the various ways and means of achieving compliance with the complete 'catalogue' of human rights will not be covered within the scope of this paper.

Similarly, in critically considering the development of the ICC in Chapter Three, this discussion recognizes that the ICC itself does not constitute a comprehensive means for achieving the aims and objectives identified as falling within the goal of effective enforcement. Certainly no advocate of such an institution expects that it alone can fully ensure accountability, deterrence, punishment, record-keeping and development of the law.<sup>90</sup> However, a judicial enforcement institution is clearly a necessary and integral element in the process of attaining these goals.<sup>91</sup> Within the confines of being a necessary contributory component to these goals, the ICC's prospects are critically considered.

In undertaking this analysis, it is recognized that retributive justice through prosecution and punishment is only one mechanism of accountability. The complexity and variety of environments and situations that give rise to the crimes falling within the ICC's jurisdiction, clearly call for equally complex and varied, national and international methods of accountability, an analysis of which falls outside the scope of this paper.<sup>92</sup>

In critically reviewing and evaluating the international regime governing human rights atrocities and the imminent creation of a permanent ICC, this thesis seeks to shift the current enforcement focus from punitive redress *after* the perpetration of atrocities, to the wider goal of preventing the commission of genocide, war crimes and crimes against humanity through ongoing compliance with existing legal prohibitions.<sup>93</sup> In pursuing this line of argument, it is recognized that punitive redress, through law-based enforcement mechanisms such as the International Criminal Court, plays a significant role in prevention, with the punishment of past conduct acting as a deterrent against future violation. The constant threat of punishment in the event of violation further serves to publicly affirm the sanctity of humanitarian norms. As such, these *ex post facto* enforcement mechanisms, although operating after commission of the crime, arguably constitute the starting point for an effective compliance regime, in contrast with the 'end point' that they occupy in the sequence of events surrounding violation. While such processes are undoubtedly

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<sup>90</sup> M. C. Bassiouni, "Historical Survey: 1919-1998" in M. C. Bassiouni, *The Statute of the International Criminal Court: A Documentary History* (New York: Transnational Publishers, 1998) at 1; P. Kirsch, "Keynote Address" (1999) 32 Cornell Int'l L. J. 437 at 441: "Doubts that the ICC, as with the ICTY and ICTR, will not be able to deter the commission of crimes. It must be understood that no-one expects the ICC, on its own, to deter all crimes. The ICC must be part of a framework of measures to sustain a culture of accountability. The establishment and affirmation of a culture of accountability will take time."

<sup>91</sup> Bassiouni, *ibid.*

<sup>92</sup> See W. M. Reisman, "Institutions and Practices for Restoring and Maintaining Public Order" (1995) 6 Duke J. Comp. & Int'l L. 175 at 185. "There is no general institution that can be applied as a paradigm for all circumstances. In each context, an institution appropriate to the protection and re-establishment of public order in the unique circumstances that prevail must be fashioned such that it provides the greatest return on all the relevant goals of public order."

<sup>93</sup> It is important to note that the subject of this thesis is not conflict prevention but prevention of these particularly heinous crimes associated with situations of conflict. I am not looking at broader issues of stopping wars or creating peace, but at the limited issue of preventing violation of the humanitarian legal proscriptions against genocide, war crimes and crimes against humanity. Having said that, it is also worth noting that this thesis does not comprise a study into the prevention of genocide, war crimes and crimes against humanity generally, as such a project would entail comprehensive interdisciplinary analysis of the specific factors and circumstances applicable in each case in order to determine their causes. Rather it is a study confined to the issue of how to enhance law-based efforts to prohibit these crimes – a consideration of ways to improve compliance with the law and legal regime governing these crimes – the ultimate effect and goal of which, is prevention.

an integral component of enforcement, this thesis seeks to shift focus from the formal punishment and accountability paradigm to broader strategies for effectively enforcing humanitarian law.

It must be noted that, in concentrating on the prevention rather than the punishment component of enforcement,<sup>94</sup> this thesis does not enter into the ethics, legality, politics or effectiveness of aggressive (unilateral or collective) military intervention as a means of preventing or suspending the occurrence of genocide, war crimes and crimes against humanity. This writer contends that effective prevention or timely intervention cannot be achieved, by military or other means, in the context of political realities and international relations as they exist today, without first ensuring a steadfast commitment, in the political and legal cultures of all members of international society, to upholding the obligations of humanitarian law. Thus, the question asked is: where should the international community be directing its attention in order to build a firm and unchanging commitment to the legal norms created - a sense of obligation or responsibility among the various actors participating in international society to comply with the law prohibiting these crimes? What additional mechanisms - formal or informal - should the international community consider, in conjunction with the law, to achieve effective internalization of humanitarian legal norms?

In sum, this thesis seeks to critically consider "where we stand now and where we are going"<sup>95</sup> in the compliance project, in light of the historic agreement to establish an International Criminal Court, and in relation to the continuing challenge of improving compliance with the laws protecting the most fundamental human rights. Chapter Two seeks to identify reasons for the international community's preoccupation with the creation of formal legal rules, processes and institutions in the effort to improve compliance with the laws prohibiting the commission of genocide, war crimes and crimes against humanity - why has this strategy been so attractive to the international community for so long? The assertion that the formal legal approach may actually contribute to the problem it seeks to solve, is also explained. Chapter Three considers the development of the Rome Statute for the Establishment of an International Criminal Court as an illustration of the strengths and prevailing inadequacies or weaknesses in the current formal law-based approach to the enforcement of international humanitarian law. The current level of international support for a supranational criminal law enforcement institution is assessed, by critically considering a few general features of the Rome Statute negotiating process and resulting Treaty, and a few key practical implications or functional challenges to be faced by the Court, once established. Chapter Four discusses the Constructivist theoretical approach and its application to the subject of humanitarian law enforcement, offering insight into the complex, multi-dimensional nature of compliance in the international arena. Essentially, the Constructivist perspective provides a broader framework, underlying and overarching the formal legal framework, to take account of the social context within which international law operates. Flowing from this, Chapter Five, proposes key focal points for attention in future efforts to ensure the effective operation of formal enforcement mechanisms such as the ICC and to enhance compliance with the fundamental obligations of international humanitarian and criminal law protecting against the perpetration of genocide, war crimes and crimes against humanity.

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<sup>94</sup> ie. preventing proscribed behavior.

<sup>95</sup> B. B. Ferencz, "An International Criminal Code and Court: Where They Stand and Where They're Going" (1992) 30 Colum. J. Transnat'l L. 375.

## CHAPTER 2

It is a truism, but one that is nevertheless often misunderstood that effective enforcement depends less on what institutions do than on what the members of those institutions have the *will* to do. And what states have the will to do will depend on what it is in their *interests* to do.<sup>96</sup>

Anthony Arend defines international law as “a set of legal rules that seek to regulate the behavior of international actors.”<sup>97</sup> This thesis adopts this definition in the Positivist sense such that the term ‘international law’ refers to posited legal rules, formally created on the basis of state consent in order to govern the behavior of participants in international society. In referring to legal rules, therefore, the term ‘international law’ includes reference to international legal processes and institutions as they are, in essence, sets of agreed legal rules. In addition to regulatory legal rules, processes and institutions, it is worth noting that even fundamental foundational principles of the international system (such as the sovereign equality of states) are essentially consent-based legal rules, be they conventional or customary. Thus, legal rules constitute both the structure as well as the content of the international legal system.<sup>98</sup> As noted by Barry Buzan, “in the most basic and essential form, international society is a legal construction.”<sup>99</sup>

### INTERNATIONAL LAW – A PROBABLE ‘SOLUTION’ TO THE COMMISSION OF GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY

It is fair to say that the creation and application of legal rules has, to date, been the orthodox response to human rights atrocities. In fact, key developments in international humanitarian law can be traced according to their emergence as a result of, and in response to, violent conflicts. As Meron notes, the Lieber Code grew out of the American Civil War, and gave birth to the stream of international humanitarian law regulating the conduct of hostilities - the Hague Conventions.<sup>100</sup> In turn, the Geneva Conventions and the International Committee of the Red Cross - the strand of international humanitarian law emphasizing the protection of civilians and victims of war - emerged from the Battle of Solferino.<sup>101</sup> Following this trend of law creation in the aftermath of war, the drafting of the Nuremberg Charter, the Geneva Conventions, and the Genocide Convention comprised the international community’s response to atrocities committed in World War II. Finally, the perpetration of genocide, war crimes and crimes against humanity

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<sup>96</sup> M. K. Albright, “Enforcing International Law” (1995) 89 Am. Soc. Int’l L. 574 at 575.

<sup>97</sup> *Supra* note 14 at 26.

<sup>98</sup> *Supra* note 14 at 147.

<sup>99</sup> B. Buzan, “From International System to International Society: Structural Realism and Regime Theory Meet the English School” (1993) 47 Int’l Org. 327 at 346. See also A. C. Arend, *supra* note 14 at 147 - Arend expands on this observation, noting that, “[t]he parameters of the system in which states and other actors find themselves are determined at least in part by international law. The playing field is defined to a large degree by international legal rules.”

<sup>100</sup> *Supra* note 41 at 243.

<sup>101</sup> The story of Henry Dunant in *supra* note 41.

in Rwanda and the former Yugoslavia, provoking world outrage, resulted in the establishment of the ad hoc International Criminal Tribunals for Rwanda and the former Yugoslavia.<sup>102</sup> Thus, it is through international humanitarian and criminal law that the international community has attempted to address and contain the use of force and violence among international actors.

In considering why the international community has constantly resorted to international law to combat violence and maintain order, the foundational structure of the international system arguably provides an answer. The formal recognition of the nation-state as the key unit of international society, emerging from the 1648 Treaty of Westphalia, gave birth to the fundamental, inviolable, operational elements governing international relations from the Seventeenth Century through to today. That nation states are sovereign comprises the keystone of all interaction within international society, the concept of sovereignty encapsulating the idea that all states are equal, autonomous and independent in the international community recognizing no higher supranational authority beyond the will and consent of each individual State.<sup>103</sup> In this context, the formal, consent-based rules, processes and institutions of international law provide a framework for inter-nation relations and comprise a workable solution to the issue of regulating the conduct of States. The formal legal framework offers a system whereby the rules are created by States to govern State behavior and regulate relations between States. Essentially, it is the concept of the nation-state that arguably holds the reason for the international community's continued attraction to the law. As Koskenniemi notes, the system of sovereign states is "conceptually linked with [that of] an international Rule of Law."<sup>104</sup>

International law constitutes an attractive framework for the operations of the inter-state system for several reasons. First, international law provides the international community with an ostensibly objective, and therefore viable, means of regulating international action because its creation is based on State consent - as is its implementation, modification and enforcement.<sup>105</sup> Without a hierarchy or central body empowered with the legislative authority and enforcement capacity to regulate state interactions, international society relies upon State consent to produce objectively valid rules.<sup>106</sup> As noted by Watson, "state consent...is the method whereby states identify and acknowledge the rules they consider binding upon themselves and other states."<sup>107</sup> Consent-based international law therefore provides a means for recognizing the valid and applicable rules of the system, with detailed discussion on the part of states consenting to the norm, operating to give clear expression to the content of the obligations. In a society founded on the basis of respect for the equality, autonomy and territorial integrity of its constituent parts, any form of regulation must depend upon obtaining the consent of those constituents. As Buzan explains, "by accepting each other as sovereign equals, the centrality of international law to

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<sup>102</sup> *Supra* note 41.

<sup>103</sup> See Article 2(1) *Charter of the United Nations*, 1945 - codifies sovereign equality.

<sup>104</sup> M. Koskenniemi, "The Politics of International Law" (1990) 1 *Eur. J. Int'l L.* 4 at 4.

<sup>105</sup> The necessity for State consent applies both to the plethora of regulatory laws governing international conduct as well as the laws establishing the international legal structure (eg. laws preserving respect for sovereignty, equality and the primacy of state consent).

<sup>106</sup> J. S. Watson, "State Consent and the Sources of International Obligation" (Panel - The Jurisprudence of International Law: Classic and Modern Views) (1992) 86 *Am. Soc. Int'l L. Proc.* 108 at 110. See also Koskenniemi, *supra* note 104 at 7: "Organising society through legal rules is premised on the assumption that these rules are objective in some sense that political ideas, views or preferences are not."

<sup>107</sup> *Ibid.* at 111.

international society is confirmed.”<sup>108</sup> It appears therefore that one of the keys to international law’s reign and continuing appeal as the principal means for regulating international affairs is its reliance upon, and commitment to, state consent. This is summed up in the traditional Positivist conception that, “international law is the sum of the rules by which states have consented to be bound and [that] nothing can be law to which they have not consented.”<sup>109</sup>

International law therefore offers a means of regulation in an anarchic system of states where “state selfishness is the hallmark of the international system.”<sup>110</sup> As Realists assert, States are engaged in open competition for the power to pursue national interests. And it is national interest that plays a governing role in state decision-making and constitutes a key motivation for State action. Thus, a viable framework for regulating international interaction must account for, or at least allow expression of, the interests of States while embodying the ideal of “a set of rules applied even handedly between weak and strong on all occasions.”<sup>111</sup> As noted by Kelsen, “that is the function of the law in general, and treaties in particular, to stabilize the legal relations between states in the stream of changing circumstances.”<sup>112</sup>

Furthermore, an international legal system based on state consent not only provides a means of creating valid rules but also provides mechanisms for generating compliance with the rules created. The participation of sovereign states in the rule-negotiation and creation process in itself produces a motivation on the part of consenting states to comply with the emergent rules. As noted by Chayes and Chayes, “the rules themselves focus and crystallize expectations of compliance.”<sup>113</sup> The simple fact that state assent is required and obtained at every stage of the rule-creation process serves as an internal and external pressure upon states to comply.<sup>114</sup> Thus, agreed legal rules may be enforced against non-compliant states by drawing on the reason and power of the violating state’s original consent.<sup>115</sup> Thomas Franck affirms this assertion with reference to the compliance-inducing notion of rule “legitimacy,” that is, “a property of a rule or rule-making institution which itself exerts a pull toward compliance because those addressed believe that the rule or institution has come into being and operates in accordance with generally

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<sup>108</sup> *Supra* note 99 at 346. See also: H. H. Koh, “Why Do Nations Obey International Law?” (1997) 106 Yale L. J. 2599 at 2608 – “In 1789, Jeremy Bentham coined the phrase ‘inter-national law.’ The very term rejected the monistic vision of a single integrated transnational legal system in favour of a notion that the public law of nation as equates to a separate horizontal plane for states only.”

<sup>109</sup> J. L. Brierly, *The Law of Nations* 31 (6<sup>th</sup> Waldock ed., 1963) in A. C. Arend, *supra* note 14 at 61. International law, whether customary or conventional, is created through state consent. See also J. S. Watson, *supra* note 106: “custom is as dependent on state consent as are treaties. In the latter, the consent is expressed openly, while in the former it is tacit.” See also *S. S. Lotus* (France v. Turkey), 1927 P.C.I.J. Ser. A, No. 10. See also L. Henkin, *supra* note 78 at 188 – refers to John Locke’s social contract theory which uses the concept of an inter-state social contract to describe the consent-based role and operation of international law.

<sup>110</sup> *Supra* note 78 at 188 at 189, notes that the national interest may sometimes “bow to competing national interests but is not subordinated to the common good.” “There is little sympathy for notions of interstate utilitarianism - the greatest good for the greatest number - or maximum happiness for mankind.”

<sup>111</sup> S. V. Scott, “International Law as Ideology: Theorizing the Relationship between International Law and International Politics” (1994) 5 Eur. J. Int’l L. 313. at 320.

<sup>112</sup> H. Kelsen in A. C. Arend, *supra* note 14 at 71.

<sup>113</sup> *Supra* note 79 at 150.

<sup>114</sup> As Chayes and Chayes argue, legal norms, particularly those formally codified in treaties, “provide the leverage for a series of measures and activities that...press toward compliance.” *Ibid.* at 110 and 112.

<sup>115</sup> A state’s participation in this process and its consent to the outcome makes it difficult for the state to subsequently violate the norm.

accepted principles of right process.”<sup>116</sup> The consent of states to the rules binding upon them arguably imbues the law creation process with such legitimacy.<sup>117</sup>

Importantly and additionally, legal rules provide a basic and central foundation for the interactions, norms and practices of international society. In the words of Chayes and Chayes, formal legal norms comprise the “basic architecture”<sup>118</sup> of international regulatory regimes. Positive legal rules, as codified in treaty texts and recognized in custom, both specify rules of behavior and provide a reference point for authoritative statements of relevant norms. In this way, formal, visible, posited law brings an otherwise elusive degree of certainty, objectivity and predictability to the national-interest oriented, competitive international arena - a further reason for the international community’s continued attraction to legal rules, processes and institutions for governing state behavior. With specific reference to the regime governing human rights atrocities, Prosper Weil highlights the international community’s preference for the certainty and specificity of Positive legal regulation over less formal, less concrete, normative forces in asserting: “one can scarcely over-emphasize the uncertainties inflicted on the international normative system by the fragmentation of normativity that the theories of *jus cogens* and international crimes have brought in their wake.”<sup>119</sup> This statement arguably demonstrates the international community’s aversion to normative processes less tangible than posited law and derived from sources outside State control.

Perhaps most fundamentally, the normative framework provided by formal international law creates a general sense of binding *legal* obligation upon all actors in the system. Kenneth Abbott points to the value of positive legal norms in the international arena in observing that, “...the formality of treaties and their approval and ratification procedures allows states to clearly signal commitment; legally binding commitments raise the political costs of violation.”<sup>120</sup>

International law therefore provides “a language for diplomacy,”<sup>121</sup> making “communication about legality between states both possible and meaningful.”<sup>122</sup> In other words, the existence of formally agreed international rules governing behavior, places an obligation upon States to explain or justify their actions in terms of compliance or non-compliance with the law. As Scott submits, “the notion that there is indeed an autonomous set of rules about the conduct of international relations which international actors must obey, underpins all legal discourse.”<sup>123</sup> Thus, the language of international law serves to promote order, with States referring to the law to discuss, negotiate and resolve cross-border issues. As Arend notes, “when international actors speak, they use the idiom of international law ...they make legal claims...it is rare indeed for a state to justify its actions based solely on political, practical or even moral factors.”<sup>124</sup>

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<sup>116</sup> T. Franck cited in H. H. Koh, “Why Do Nations Obey International Law?” (1997) 106 Yale L. J. 2599 at 2628.

<sup>117</sup> Franck suggests four indicators of a norm’s legitimacy: rule determinacy or clarity; its symbolic validation by rituals and other formalities; its conceptual coherence; and its adherence to “right process” cited in H. H. Koh, *ibid.* See also T. Franck, *The Power of Legitimacy Among Nations*; and T. Franck, *Fairness in International Law Institutions*.

<sup>118</sup> *Supra* note 79 at 1.

<sup>119</sup> P. Weil in A. C. Arend, *supra* note 14 at 72.

<sup>120</sup> *Supra* note 16.

<sup>121</sup> *Supra* note 14 at 139.

<sup>122</sup> *Supra* note 106 at 111.

<sup>123</sup> *Supra* note 111 at 320.

<sup>124</sup> *Supra* note 14 at 139.

In sum, international law provides a prescriptive framework for conduct, a language for interstate interaction, and through the consent-based law-creation process, provides some assurance of commitment, bringing a degree of clarity and certainty to international affairs – all the while maintaining respect for the overriding principle of state sovereignty. As summarized by Henkin, international law “serve[s] the purpose and advance[s] the values of...the interstate political system...”<sup>125</sup>

It is no surprise therefore, that international law comprises the first resort as a solution to the problem of enforcing agreed legal standards, recognizing that the existence of legal prescriptions alone is not sufficient to deter violation.<sup>126</sup> As asserted by Blewitt, with specific reference to grave violations of international humanitarian law, “without the rule of law and appropriate measures to enforce the rule of law, there is nothing to stop criminal behavior at any level, including States committing crimes against their own citizens.”<sup>127</sup> To this end, the international community has faithfully turned to formal positive law to establish mechanisms such as court-based punitive processes and institutions to deal with violations of international law and enforce agreed legal rules.

Historically, such formal law enforcement mechanisms have been the primary response to breaches of humanitarian law in the international sphere, embodying and perpetuating the idea that effective enforcement of the law lies in formal, law-based accountability and punishment in the event of violation. Formal accountability for grave human rights violations - at the State and individual level – has increasingly occupied the attention of the international community since the Post World War II Nuremberg and Tokyo Tribunals. International support for this formal, law-based enforcement process of identifying and punishing perpetrators of international crimes is illustrated in the United Nations 1947 affirmation of the Nuremberg Principles, which implied, as Benjamin Ferencz states, “the promise that ‘never again’ would aggression, war crimes and crimes against humanity go unpunished.”<sup>128</sup> Recent examples of this enduring attraction to court-based punitive processes for the enforcement of international humanitarian and criminal law, include the creation of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda and the ongoing campaign to establish a standing permanent ICC.

Formal, positive, consent-based law comprises arguably the most feasible and attractive system for regulating the conduct of international actors. The sovereign state system has given rise to the state-centric, Positive law framework and has been the pillar supporting the international community’s continued faith in international law as a medium for ordering the affairs and activities of international actors. As Koskenniemi asserts, “[i]n a system whose units are assumed to serve no higher purpose than their own interest and which assumes the perfect equality of those interests, the Rule of Law seems indeed the sole thinkable principle of

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<sup>125</sup> *Supra* note 78 at 184. See also L. Henkin, “Theoretical Perspectives on the Transformation of Sovereignty” (1994) 88 *Am. Soc. Int’l L. Proc.* 1 at 15 – notes that State sovereignty protects the rights of all states “to liberty, international autonomy, and territorial integrity...”

<sup>126</sup> As asserted by Joyner, “compliance with legal norms depends on the adequate enforcement of those norms.” C. Joyner, “Strengthening Enforcement of Humanitarian Law: Reflections on the International Criminal Tribunal for the Former Yugoslavia (1995) 6 *Duke J. Comp. & Int’l L.* 79 at 93.

<sup>127</sup> G. T. Blewitt, “The Necessity for Enforcement of International Humanitarian Law” (1995) 89 *Am. Soc. Int’l L.* 298 at 298.

<sup>128</sup> *Supra* note 1 at 301.

organization.”<sup>129</sup> In sum, the international legal framework for interstate relations, in its regulatory and enforcement capacity, is tangible, visible and state-centric – attributes which maintain the international community’s attraction to formal international law as a mechanism for addressing genocide, war crimes and crimes against humanity.

#### **INTERNATIONAL LAW – A PERPETUAL PROBLEM IN THE EFFORT TO PREVENT THE COMMISSION OF GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY**

As with the above discussion considering the merits of formal legal norms in regulating international affairs, the ensuing discussion of the drawbacks or limitations inherent in the international legal process considers factors which may relate to all issue areas regulated by international law, but for our purposes, refer specifically to the context of international legal regulation of genocide, war crimes and crimes against humanity.

As described above, international practice has reflected traditional Positivist-Realist theories and such theories in turn have directed international practice in a cyclic manner, perpetually reinforcing the centrality of State consent to international law and the centrality of international law to the international community’s efforts to regulate the behavior of international actors. State consent is an integral component of the international law-making process and the single component which arguably sustains the historically and currently dominant, formal legal approach to international law enforcement.

While international actors do not always abide by international legal rules, and it is this problem that forms the basis of this thesis, it is clear nonetheless that international law has been the key mechanism – the solution – to which States and other actors have referred in order to guide their conduct. It is contended that the international community as a whole “perceive[s] legal rules to be of a different nature from other types of international rules.”<sup>130</sup> As Arend asserts, “[t]hey perceive them to be *law* and thus to carry added weight as grounds for action,”<sup>131</sup> whether or not compliant action actually results.

In recent times, the consistent failure of international actors to comply with the legal regulatory regime in the area of international humanitarian law has become the focus of attention. With all that the international humanitarian and criminal law regime has to offer in terms of prescribed standards and agreed mechanisms for accountability and punishment in instances of violation, enduring compliance with the laws prohibiting genocide, war crimes and crimes against humanity, remains an elusive goal. The UN Secretary-General highlights this particular disjunction between legal prescription and actual practice in noting: “[d]espite the adoption of the various Conventions on international humanitarian and human rights law over the past 50 years, hardly a day goes by where we are not presented with evidence of the intimidation, brutalization, torture and killing of helpless civilians in situations of armed conflict. Whether it is mutilations in Sierra Leone, genocide in Rwanda, ethnic cleansing in the Balkans...the parties to conflicts have acted with deliberate indifference to those Conventions.”<sup>132</sup>

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<sup>129</sup> *Supra* note 104 at 4.

<sup>130</sup> *Supra* note 14 at 34.

<sup>131</sup> *Ibid.*

<sup>132</sup> Report of UN Secretary-General cited in T. Meron, *supra* note 41 at 277.

In light of this reality, it is argued that the law itself may contribute to the problem of non-compliance with fundamental humanitarian standards. It is contended here that the nature of international norm creation and implementation, through traditional, consent-based legal rules and processes, may in fact serve to limit the international community's ability to move forward in the direction of effectively enforcing the law prohibiting genocide, war crimes and crimes against humanity. In short, as much as international law in this issue-area assists in constraining the behavior of international actors, it may equally and simultaneously hinder the process - as much as law is part of the solution to combating genocide war crimes and crimes against humanity, it is also part of the problem in the ongoing quest to improve compliance with these laws.

The international community's continued, and arguably exclusive, focus on formal law as the key to regulating the behavior of international actors in this area, may contribute to the problem on non-compliance with humanitarian law in several ways.

First, a key problem inherent in the use of law to both prescribe and enforce fundamental human rights standards is the very same factor which attracts the international community to the law as a solution - that is, state consent. Employing international law to achieve and maintain fundamental humanitarian standards of conduct among international actors relies upon the consent of sovereign States. States therefore remain all-powerful, as State consent is required in relation to the content of the legal rules and also in relation to their formal implementation and enforcement. In such a system, the creation of legal norms is necessarily focused upon obtaining the requisite consent. Invariably, state negotiations over appropriate definitions and enforcement procedures are conducted with state sovereignty and national interests as factors governing state consent. Consequently, the formal written text - the formulation of the legal norms - occupies center stage for States engaged in the process. The legal norm creation process thus becomes an exercise in crafting formal distinctions and definitions aimed at acquiring state consent. As noted by Meron, the objective in creating new international law is "to fashion generally acceptable texts."<sup>133</sup> The extent to which progressive legal norms can be pursued is therefore limited as "a few recalcitrant governments may prevent the adoption of more enlightened provisions."<sup>134</sup> It is further asserted that applying the traditional formal law-creation process to the area of grave human rights violations inappropriately situates fundamental human rights protections - inalienable rights to personal liberty, security and integrity - in the context of contractual obligations determined by state consent. If, and when, consent is ultimately granted, the obligation to comply with the agreed legal rules arguably rests upon a purely legal justification - the fact that consent binds a State to its commitments - rather than the substantive and inviolable human rights underlying the creation of the legal rule.

Thus, any effort to create new law in this area - whether it be new standards or new mechanisms for the enforcement of existing standards - is limited to the extent that the law-making process is subject to state participation and ultimately state agreement. State consent is at once the key to international regulation and the hurdle that obstructs its progressive development.<sup>135</sup>

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<sup>133</sup> T. Meron, "International Criminalization of Internal Atrocities" (1995) 89 Am. J. Int'l L. 554 at 555.

<sup>134</sup> *Ibid.*

<sup>135</sup> While the temptation exists to do away with consent-based law-making, to do so would surely deprive the law of its regulatory power. As noted by Watson, such a scheme would be "...equivalent to a physicist disregarding the law of gravity because he prefers the results that can thus be obtained." *supra* note 106 at 110.

Related to this problem is the international legal system's inherent deference to the sovereignty of States. Paramount respect for State sovereignty operates to contain the extent and power of the law in accordance with State interests. State sovereignty becomes the central focal point in the process of creating formal international legal rules and institutions governing humanitarian conduct, rather than the substance and purpose of the law being created. The state-centric system of international law, therefore, supports, protects and perpetuates "state values,"<sup>136</sup> directing attention toward issues of state independence and the pursuit of national interests, and away from the common, transnational 'human' values of humanitarian law.<sup>137</sup> A formal legal system based on respect for State sovereignty is therefore inherently individualistic.<sup>138</sup> This individualism is arguably intensified in the context of creating international law, as international regulation poses a potential threat in the form of restricting State autonomy. Thus, the legal prohibitions against acts defined as genocide, war crimes and crimes against humanity and the processes for enforcing these prohibitions are seen by states as potential constraints upon national sovereignty no different from any other form of international legal regulation. It is submitted therefore that the creation of formal international legal rules, processes and institutions governing humanitarian conduct inevitably "makes concessions to traditional conceptions of sovereignty"<sup>139</sup> and is therefore weaker in impact than a regulatory regime not bound by "the straitjacket of sovereignty."<sup>140</sup>

Furthermore, the nature of the formal international legal approach and its central concern for State sovereignty concentrates attention on State aggregations and the placement of individuals in a national context, sharing a commonality of values with other individuals within those territorial and cultural boundaries. In the area of international humanitarian law, a focus on individual national interests and exclusive State identifications is particularly detrimental, given that international humanitarian standards concerning the protection of fundamental human rights are all-inclusive, relating to *all* human beings in obligation and effect. Thus, the formal legal approach to encouraging universal compliance with prohibitions against genocide, war crimes and crimes against humanity, fails to highlight the very basic, cross-border commonalities that comprise the essence of this field of law.<sup>141</sup> This assertion is supported by McDougal when he claims that current international normative processes and practices demonstrate "increasingly fragmented identifications with no rational relation to basic humanity or to potential contributions to the common interest."<sup>142</sup>

In this sense, the law is as much a part of the problem as it is a part of the solution.

A further problem with the creation of an extensive body of law and legal institutions governing serious human rights violations is that it serves to direct, and arguably confine, attention to the law and legal mechanisms for enhancing its power. Thus, if a legal regime is not functioning effectively, attention is directed towards creating stronger laws or establishing stronger law-

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<sup>136</sup> *Supra* note 78 at 185.

<sup>137</sup> *Ibid.*

<sup>138</sup> *Ibid.*

<sup>139</sup> M. Mutua, "Looking Past the Human Rights Committee: An Argument for De-Marginalizing Enforcement" (1998) 4 *Buff. Hum. Rts. L. Rev.* 211 at 213.

<sup>140</sup> A-M. Burley, "Law among Liberal States: Liberal Internationalism and the Act of State Doctrine" (1992) 92 *Colum. L. Rev.* 1907 at 1923.

<sup>141</sup> Commonalities associated with human existence. See Martens Clause, *supra* note 44.

<sup>142</sup> M. S. McDougal, H. D. Lasswell & L. Chen, "Human Rights and World Public Order: Human Rights in Comprehensive Context" (1977) 72 *Nw. Univ. L. Rev.* 227 at 265.

based enforcement mechanisms.<sup>143</sup> Continued non-compliance with the law proscribing genocide, war crimes and crimes against humanity, is therefore viewed by the international community not as a defect within the law or the law creation process, but rather as a function of a lack of appropriate laws in the form of formal enforcement mechanisms. This is illustrated in the comments of Blewitt noting that human rights atrocities continue to occur “due to the lack of an effective deterrent for gross criminal behavior...This pattern of violence and criminal behavior will continue until there is a strong deterrence in place to prevent or limit the commission of such crimes.”<sup>144</sup> In the law-oriented, state-centered, international setting, such a deterrent refers to punitive sanctions applied by a formal enforcement institution.

To this end, and in pursuit of the goal of comprehensive compliance with the law prohibiting genocide, war crimes and crimes against humanity, the international community has set about the task of establishing a standing judicial institution for the prosecution and punishment of those violating the law. In so doing, the international community has continued to demonstrate its faith in the law as a means of regulating the conduct of international actors, focusing on formal law-based mechanisms for enforcing existing legal rules. The idea that “international law without [formal] enforcement will fail”<sup>145</sup> has dominated thinking such that the absence of a permanent supra-national enforcement institution has been pinpointed as the key weakness in the current regulatory system. In other words, continued violation of the law proscribing genocide, war crimes and crimes against humanity, has been attributed to a structural or institutional deficiency in the legal regime, rather than the absence of genuine sentiment in support of strong and effective regulation. International humanitarian law enforcement is therefore conceived primarily in terms of formal legal processes and institutions. Effective enforcement of humanitarian legal obligations – the process of ensuring compliance with agreed legal rules prohibiting genocide, war crimes and crimes against humanity – is seen as a matter falling squarely within the legal framework. As noted by the Chayes,<sup>146</sup> such an approach to law enforcement “excludes all kinds of more diffuse pressures”<sup>146</sup> capable of influencing state behavior.

Thus, the enforcement of international humanitarian law, as with the establishment of the law itself, remains focused on Positive, formal, legal processes, with State consent constituting the lynchpin for progressive developments in the enforcement project, and State interests remaining paramount. The State-controlled international law-making process therefore extends beyond the creation of legal standards of conduct to the creation of formal legal processes and institutions for the enforcement of those standards. Just as States are perceived as the key law-creating agents in the contemporary international system, they are also perceived to be the key enforcers of the law in terms of formal international enforcement measures.

Enforcement, in the formal legal sense, therefore involves creating stronger laws or specialized legal institutions carrying the threat of formal accountability and punishment for violation of the law. Leaving aside the argument that harsher laws may not necessarily deter the commission of

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<sup>143</sup> For example punishment, investigatory and prosecutorial mechanisms.

<sup>144</sup> *Supra* note 127 at 298.

<sup>145</sup> M. M. Penrose, “Lest We Fail: The Importance of Enforcement in International Criminal Law” (1999) 15 *Am. U. Int’l L. Rev.* 321 at 393.

<sup>146</sup> *Supra* note 79. “But they are not what international lawyers or international relations scholars or politicians mean when they call for “sanctions” or “teeth” in international agreements.”

crimes such as genocide, war crimes and crimes against humanity<sup>147</sup> and the assertion by some that “international and national criminal tribunals have thus far engendered little demonstrable deterrence,”<sup>148</sup> stronger laws for enforcement may in fact compound the initial compliance problem by generating the problem of non-compliance with agreed enforcement processes, in addition to non-compliance with the laws sought to be enforced. The formal, Positive law enforcement process relies upon State agreement to the creation of formal sanctions or supra-national enforcement institutions, and furthermore, State participation in the implementation of agreed enforcement measures. Thus the responsibility for, and control over, the effectiveness of formal enforcement mechanisms lies with States. It is inevitable therefore that national interest will play a role in the decision-making of States consenting to the establishment of enforcement institutions, such as the International Criminal Court, and also the decision-making of States choosing between compliance and non-compliance with agreed enforcement procedures.<sup>149</sup> In this context, a State’s active participation in enforcement will likely be ad-hoc and selective, “responding not to the need for reliable enforcement of treaty obligations, but to political exigencies in the sanctioning States.”<sup>150</sup> For these reasons, the creation of formal legal enforcement processes to support existing international legal rules is problematic, perpetuating the problems plaguing compliance in the first place. As summarized by Chayes and Chayes, “sanctioning authority is rarely granted by treaty, rarely used when granted and likely to be ineffective when used.”<sup>151</sup>

A further problem with this formal enforcement psychology<sup>152</sup> is its focus on establishing stronger legal mechanisms rather than recognizing the fundamental need to cultivate a stronger commitment on the part of international actors, to the existing legal regime. The attraction to formal legal process overlooks the fact that, for enforcement to be effective, an enduring willingness to comply with the law must be present – the same willingness found lacking in relation to the legal prescriptions sought to be enforced. The issue of building genuine sentiment in support of effective legal regulation is arguably sidelined by an international community preoccupied with the visible activity of creating formal legal rules and institutions for the tangible process of enforcement.

Essentially, the international community’s preoccupation with formal legal process (and the concomitant focus on issues of sovereignty and State consent in the process of developing legal norms and establishing formal law enforcement mechanisms) serves to mask the fundamental responsibility of States and individuals in regard to the substance of humanitarian law, and furthermore, to hide any lack of meaningful commitment on the part of these actors, to the legal norms. This state of affairs essentially leads to a façade of legality – a false sense of effective

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<sup>147</sup> See J. I. Charney, “Progress in International Criminal Law” (1999) 93 Am J. Int’l L. 452. See also Chayes & Chayes, *supra* note 79 at 32: The essential difference between the international and domestic frameworks that prevent the viable and effective transposition of the traditional law enforcement model is the absence of a supranational sovereign authority with the power to compel its constituents “to act in accordance with the norms and rules of the system.”

<sup>148</sup> *Supra* note 41 at 276.

<sup>149</sup> *Supra* note 79 at 20: “the choice of whether to intensify or slacken the international enforcement effort is a political decision. It implicates all the same interests, pro and con, that were involved in the initial formulation of the treaty norm.”

<sup>150</sup> *Ibid.* at 2.

<sup>151</sup> *Ibid.* at 33. [Referring to economic and military sanctions but equally applicable to court-based punitive sanctioning processes.]

<sup>152</sup> *Supra* note 126 at 93.

legality with respect to the conduct of international actors and the operation of the international legal regime.

In practice, states who have agreed to the content and capacity of the rules and institutions comprising the international humanitarian law regime may lack the internal political commitment to permanently abide by the rules created, viewing the legal rules as malleable depending upon national interests at any given time, and losing sight of the inviolable human protection and purpose of the law. Thus, those who are subject to the legal regime may take decisions and actions according to alternative behavioral norms, regardless of whether such decisions and actions are at odds with established legal norms.<sup>153</sup> Kenneth Abbott highlights the disjunction between word and deed evident in state behavior in asserting that, “the widespread ratification of human rights treaties masks widely varying normative views – a form of ‘organized hypocrisy’ inconsistent with legal universality.”<sup>154</sup> While states may agree to the legal text of norms prescribing or prohibiting certain conduct, in reality, the presence of their consent and the existence of a written text does not necessarily represent a commitment to compliance with the rules contained therein. Some states may give their consent without any intention of abiding by the rules to which they have agreed, while others may lodge their agreement to legal rules and processes with varying levels of compliance in mind. This builds into the legal regulatory system an informal expectation among international actors that violation of strict humanitarian norms remains a possible option. As noted by Chayes and Chayes, “the formal pronouncements are enshrouded in a maze of informal and tacit customs and practices that orient behavior and flesh out the scope of the obligations.”<sup>155</sup> Such informal understandings may be at odds with, or fall short of, strict compliance with the law. This in turn leads to a common perception of humanitarian legal norms as mere aspirations rather than binding legal obligations. In this way, the formal legal process may actually contribute to diminishing the perception of international humanitarian law as *law*.<sup>156</sup> In Reisman’s words, formal legal behavioral prescriptions become “mythic” as opposed to effective operational norms.<sup>157</sup>

As such, the international community’s preoccupation with formal law as the instrument for achieving and maintaining compliance with the laws against genocide, war crimes and crimes against humanity, becomes detrimental to the compliance project, with the legal façade ultimately serving to undermine the purpose and goals of the legal regime itself. The idea of law as neutral, objective and compulsory,<sup>158</sup> loses its strength if the practice of international actors treats legal rules relating to basic human rights standards as flexible and derogable, establishing

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<sup>153</sup> This is not to say that all states engaging in the treaty ratification process lack commitment to the rules contained therein. Indeed, as noted in Chapter One, most States do act in compliance with legal norms most of the time. See *supra* note 78 and 79. However, in relation to international humanitarian and human rights law, it is clear that some States do choose to violate legal norms to which they have consented, and in doing so, serve to undermine the system as a whole.

<sup>154</sup> *Supra* note 16 at 373.

<sup>155</sup> *Supra* note 79 at 2.

<sup>156</sup> See *supra* note 44 at 77: “The many failures to find effective means of implementation in respect of violations of the laws of war in the past 20yrs, coupled with a high level of rhetoric on the subject, have had deeply damaging effects. They have contributed to a view, quite widespread today, that the laws of war are virtually a dead letter, and can be ignored with impunity. Serious violations in one conflict, publicized but not checked by international reaction, have lowered international standards, making such violations more probable in subsequent conflicts.”

<sup>157</sup> In W. M Reisman, Book Review of *Compliance and Public Authority* by O. R. Young (1982) 76 Am. J. Int’l L. 868 at 869 - “prospective ineffectiveness often shifts norms that were created to be effective from operationality to mythic status.”

<sup>158</sup> *Supra* note 111 at 325

a norm of condoned deviation from strict compliance. *Mutua* captures the effect of this situation in noting that, "supervision or enforcement mechanisms that are ineffectual...reduce the potency of the idea of human rights and undermine the urgency of protecting basic freedoms."<sup>159</sup>

It is contended here that the international community continues to pursue the avenue of formal law-based enforcement mechanisms to enforce fundamental obligations of humanitarian law because they represent visible actions with symbolic value (in addition to any real value) which appeals to the public eye.<sup>160</sup> In other words, the international community is preoccupied with being *seen* to be taking action in response to violations of international humanitarian law which "shock the conscience of humanity."<sup>161</sup> Public attention is therefore diverted to the visible process of law creation as an active response on the part of the international community to the occurrence of serious international crimes. To their credit however, stronger laws and institutions for administering punishment in response to violation undoubtedly offer a clear affirmation of the importance and value of agreed humanitarian standards. And in doing so, these legal processes symbolize the ultimate goal of eradicating these crimes from the world stage. This symbolic value granted, an exclusive focus on formal legal mechanisms for addressing these crimes remains problematic in that a façade of effective legal regulation is created, invoking public confidence in the rule of international law and disguising the fact that human rights atrocities remain largely uncontained and unaddressed. As noted by Reisman, public perception "becomes and remains reality as long as reality does not intrude...a studied diversion of the public gaze to novel issues can keep an ugly reality out of sight."<sup>162</sup>

#### **INTERNATIONAL HUMANITARIAN LAW – ADDRESSING THE PROBLEMS INHERENT IN THE FORMAL LEGAL SOLUTION**

The fundamental tenets of the international legal system – the sovereign equality of states, the idea that States can be bound by no higher law without their consent, and the public visibility of formally agreed legal rules – underpin international law as a solution to the problem of grave human rights violations. So too, these aspects comprise the key problems with international law as the primary means for engendering compliance with international humanitarian standards. Thus, the inclination of the international community to refer to legal rules to govern the behavior of international actors, and to resort to legal processes for the enforcement of established legal rules, must be critically considered in the effort to improve compliance with humanitarian norms.

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<sup>159</sup> *Supra* note 139 at 213.

<sup>160</sup> However, as Reisman notes, while symbols may be a necessary part of an effective enforcement process, "[w]hen used alone, [however] they are a counterfeit for action." W. M. Reisman, "Stopping Wars and Making Peace: Reflections on the Ideology of Conflict Termination in Contemporary World Politics" (1998) 6 *Tulane J. Int'l L. & Comp. L.* 5 at 35. [Note that an alternative, but equally problematic explanation for the attraction of the international community to the idea of "treaties with teeth" or "coercive enforcement measures" as the means for assuring that international actors comply with their legal obligations, may stem from "an easy but incorrect analogy to domestic legal systems." In the domestic setting "formal sanctions imposed by the coercive power of the state" arguably play a critical role in engendering compliance with legal norms. In the international arena, however, attempts to transpose the domestic law "enforcement model" of implementation faces many problems. As the Chayes' assert: "The effort to devise and incorporate such sanctions in treaties is largely a waste of time." *Supra* note 79 at 2 and 31.]

<sup>161</sup> M. C. Bassiouni, "International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*" (1996) 59 *L. & Contemp. Probs.* 63 at 69

<sup>162</sup> W. M. Reisman, "Stopping Wars and Making Peace: Reflections on the Ideology of Conflict Termination in Contemporary World Politics" (1998) 6 *Tulane J. Int'l L. & Comp. L.* 5 at 51.

As long as the solution is state-initiated and state-dependent, the focal point of progressive development in the area of preventing human rights atrocities will remain trained on the issue of national sovereignty and the extent to which such sovereignty will be curtailed by international legal rules and institutions. This limits the focus to technical legal formulations in establishing the standards to be achieved and the means for enforcing agreed standards. Throughout this process, little attention is given to building an internal commitment to the law based upon the humanitarian substance of the law.

It appears therefore, that in the international arena, the formal legal regulatory process is fraught with problems in its attempt to enforce the legal prohibitions against genocide, war crimes and crimes against humanity. In fact, as outlined above, the international community's continuing preoccupation may actually contribute to the problem of non-compliance with fundamental humanitarian standards. This is not to say that the legal process is in any way dispensable. The formal positive law framework is a necessary and integral part of the solution. Clearly the prevention of genocide, war crimes and crimes against humanity cannot be attained without law. Equally, it cannot be attained by law alone. The compliance-inducing power of the law can and must be enhanced by focusing on the invisible, but conspicuously absent, factor of internal commitment to the law – a factor which may be attained by means alternative and additional to the legal system. A shift in thinking is necessary – from a purely legal basis for regulating the conduct of international actors to take account of other less formal normative forces operating in the international context.

This chapter has sought to map out the current state of affairs with respect to international humanitarian law – the international community's attraction to international law as the initial step towards preventing genocide, war crimes and crimes against humanity, and the international community's continued preoccupation with legal rules and processes in the effort to enforce established humanitarian norms. It highlights the advantages of international law and its role as a solution to the problem of serious human rights violations, while also pointing out the limitations of, and problems with, the international legal framework as the sole or primary mechanism for enhancing compliance with international humanitarian law. That the international community continues to focus on traditional formal legal rules and institutions as the key to improving respect for international humanitarian law and has, to date, largely failed to recognize, and hence address, the limitations inherent in the law, is aptly illustrated in the development of a permanent ICC as described in Chapter Three.

## CHAPTER 3

“The administration of justice in the community of States will not be complete until a criminal jurisdiction is established to cope with international crimes. The necessity for such a jurisdiction seems to be a fact established beyond reasonable doubt.”<sup>163</sup>

### **THE DEVELOPMENT OF THE INTERNATIONAL CRIMINAL COURT – AN ILLUSTRATION OF THE WEAKNESSES IN THE FORMAL LEGAL APPROACH TO IMPROVING COMPLIANCE WITH THE LAW PROHIBITING GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY**

The recent agreement to establish an international criminal court under the Rome Statute, arguably a “breakthrough in the achievement of rights protected by international criminal law,”<sup>164</sup> will be considered in this chapter in order to illustrate the international community’s attraction to formal, visible legal processes as well as the weaknesses in such law-focused, state-based approaches to achieving compliance with the prohibitions against genocide, war crimes and crimes against humanity.

Clearly, there are many reasons for the “open repudiation of basic principles of human rights and humanitarian law”<sup>165</sup> reflected in the commission of genocide, war crimes and crimes against humanity. The most obvious reasons include a demonstrated deference to national political, economic, cultural or social demands, along with the absence of a central enforcement mechanism in the international arena, the former arguably giving rise to the latter. The common theme underlying these international realities and the central objection to the creation of strong and effective international enforcement institutions is the well-entrenched principle of state sovereignty, recognizing that all States are equal and independent, possessing the sovereign legal right to govern matters within their territorial jurisdiction without interference from outside. As described in Chapter Two, in relation to the progressive development and formal enforcement of international law, the principle of state sovereignty is inevitably crippling in ensuring that States “can be bound by no higher law without their consent.”<sup>166</sup> The influence and power of this principle can be seen in the history and negotiations leading to the 1998 adoption of the Rome Statute for the Establishment of an International Criminal Court, as well as in the practical implications of the agreed provisions and consequent prospects for success.

The development of the ICC clearly illustrates the international community’s long-standing attraction to the creation of formal law – in this case, formal accountability and punishment processes – in the quest for compliance with the law against genocide, war crimes and crimes against humanity. The narrow priorities of sovereignty and national interest in this traditional

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<sup>163</sup> R. Alfaro, Special Rapporteur of the International Law Commission, 3<sup>rd</sup> March 1950 in B. B. Ferencz, *An International Criminal Court: A Step Toward World Peace - A Documentary History and Analysis* Vol I & II (1980) at 1.

<sup>164</sup> *Supra* note 147 at 452

<sup>165</sup> M. Robinson, “Genocide, War Crimes and Crimes Against Humanity” (1999) 23 *Fordham Int’l L. J.* 275 at 277.

<sup>166</sup> *Supra* note 14 at 138.

approach to enforcement are also illustrated. Finally, the contention that the critical aspect of political will or meaningful commitment to comply with the law proscribing genocide, war crimes and crimes against humanity, has either been neglected or assumed in the process of establishing a formal legal institution embodying tangible, visible law enforcement, is demonstrated in this chapter. The historical precursors to the ICC, the process of negotiating the Treaty establishing an ICC, and the projected practical implications of the Treaty provisions, all provide support for this assertion and illustrate the limitations of a strategy which fails to devote adequate attention to this factor.

It is also important to note that this analysis is not conducted for the purpose of suggesting that the ICC is doomed to failure or that the Rome Statute contains serious flaws requiring amendment.<sup>167</sup> Rather, the ICC is discussed as a timely example of the formal law enforcement approach, the limitations of which, if not recognized and addressed through a future shift in thinking, have the potential to be borne out as significant practical impediments to the functioning of such an enforcement institution. The ICC constitutes a useful example for several reasons.<sup>168</sup> First, the ICC was established with the specific purpose of enforcing the laws that are the subject of this thesis – the prohibitions against genocide, war crimes and crimes against humanity. Furthermore, the establishment of the ICC illustrates the law-creation and negotiation process while also exemplifying the inclination to enforce existing international laws through the creation of further international law – formal legal rules establishing an international legal institution. Clearly the rationale behind the establishment of an ICC is that the effective operation of the ICC will constitute an important and necessary contribution to the enforcement project. However, it is asserted that, in order for this institution to fulfil its intended enforcement role, the same lack of commitment that exists in relation to the laws prohibiting these crimes, must be overcome in relation to the legal mechanism created to enforce the law prohibiting these crimes! Critical analysis of the history and development of this institution is conducted with the aim of understanding the origins of, and demonstrating fundamental weaknesses in, the formal legal approach to the enforcement of international humanitarian and criminal law.

It must be noted that, in pointing to the weaknesses of the ICC as a formal legal mechanism, this institution alone is not viewed as a comprehensive means of achieving the goals of punishment and prevention. However, its contributory role towards these goals is arguably limited by the international community's continuing perception of the law itself as the key motivation for compliance.

In looking critically at the development of the ICC, the concept of punishment is submitted as a possible rationale for the international community's focus on creating formal, positive law. Punishment exemplifies visible enforcement. Clearly punishment is an important component of prevention. This discussion does not seek to dispute or comment on the value of punishment as a deterrent for these crimes. The process of criminal punishment administered by formal judicial

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<sup>167</sup> Editors in Chief, "Foreword" (1999) 93 Am. J. Int'l L. at 1. "The debates about whether such a court is a "good idea" are no longer relevant. The issues now on the table are how to make the court an effective instrument that will contribute to the maintenance and improvement of world order."

<sup>168</sup> In using the Rome Statute and the imminent creation of a permanent ICC to illustrate the limitations of the law-centred approach, I am not criticizing the ICC per se or questioning the utility of an ICC as opposed to other mechanisms of accountability. I am simply using it to demonstrate the international community's preoccupation with the law and legal process over and above other less formal, less concrete processes of normativity and behavioral regulation.

institutions is discussed simply because it is the formal legal function to be carried out by the ICC. The argument made is that a sound commitment to this enforcement institution – an ongoing commitment that extends beyond formal agreement to its establishment – is necessary for effective punishment as well as effective compliance to occur. Without such commitment, emanating from some constant and voluntary motivation for compliance (in addition to coercive legal obligation), effective enforcement of the law prohibiting genocide, war crimes and crimes against humanity, will remain reactionary and selective.

Thus, this chapter considers the ICC as an illustration of the limited concentration on formal law and the formal law enforcement process to the exclusion of less visible, less tangible normative processes such as building an internal will to commit to agreed legal rules and procedures.

### **HISTORICAL OVERVIEW**

As mentioned above, the current focus on formal, visible legal solutions to the problem of human rights atrocities at the expense of, or with the presumption of, gaining State commitment to the law, can be traced through the various stages of development of a permanent international criminal court. A brief survey of historical precedents to a permanent ICC is undertaken here<sup>169</sup> in order to highlight the context of calls for its establishment and the various perceived purposes of such an institution. The international community's overriding concern with the tangible goals of punishment and accountability – with *seeing* justice done – is clearly illustrated.

The Rome agreement to establish an International Criminal Court was by no means a novel or recent idea. International law, despite its traditional application to relations between States, has long recognized the concept of individual responsibility for the commission of acts which “shock the conscience of humanity,”<sup>170</sup> and the need for personal accountability in this regard.

The 1474 Breisach trial and conviction of Peter von Hagenbach by a multi-nation court for “crimes against God and man”<sup>171</sup> represents the earliest recognized instance of an international criminal court. Some time later the Hague Conventions of 1899 and 1907 contemplated the creation of an international criminal code and court in the Convention for the Pacific Settlement of Disputes.<sup>172</sup> The next recognized call for the establishment of an international criminal tribunal emerged from the 1919 Paris Peace Conference following World War I. The Treaty of Versailles provided for the creation of ad hoc tribunals to prosecute Kaiser Wilhelm II for

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<sup>169</sup> In the interests of brevity, I provide only a cursory overview of key historical references to, and instances of, international criminal tribunals as a means of revealing the value placed by the international community on the institution of a Court and its practical, visible functions of punishment and public accountability. Detailed historical accounts of precedents to the ICC envisioned in the Rome Statute, can be found in numerous sources: eg., M. C. Bassiouni, *supra* note 90; M. C. Bassiouni, “From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court (1997) 10 Harvard H.R.J. 11.; B. B. Ferencz, *An International Criminal Court: a step toward world peace - a documentary history and analysis* Vol I & II (1980).

<sup>170</sup> *Supra* note 161 at 69.

<sup>171</sup> D. D. Ntanda Nsereko, “The International Criminal Court: Jurisdictional and Related Issues” (1999) *Crim. L. Forum* 87 at 87.

<sup>172</sup> S. L. Jamison, “A Permanent International Criminal Court: A Proposal that Overcomes Past Objections” (1995) 23 *Den. J. Int'l L. & Pol'y* 419 at 421.

offenses against the peace, and for the prosecution of German military officials responsible for committing war crimes.<sup>173</sup> For various reasons, these tribunals did not eventuate.<sup>174</sup>

During the inter-war period, the international community again entertained the idea of an international criminal court, this time in response to a perceived increase in the threat of international terrorist activities. In 1937, the Convention for the Prevention and Punishment of Terrorism along with a Convention for Creation of an International Criminal Court with jurisdiction over offenses contained in the Terrorism Convention, was adopted.<sup>175</sup> These Conventions were signed, but not ratified, indicating, as Jamison asserts, that “nations were not yet willing to give up their national sovereignty to a body with compulsory jurisdiction.”<sup>176</sup>

Following World War II, international outrage over the atrocities committed by the Nazi regime led to the 1942 Inter-Allied Declaration of St. James stating that “the sense of justice of the civilized world” requires “punishment through the channel of organized justice, of those guilty or responsible for these crimes.”<sup>177</sup> In pursuit of this “sense of justice,” the London Agreement of 1945 established the International Military Tribunal at Nuremberg,<sup>178</sup> followed later by the International Military Tribunal for the Far East (the Tokyo Tribunal). The Nuremberg and Tokyo Tribunals represented the international community’s acknowledgement that “certain crimes are of universal concern and become the world’s responsibility.”<sup>179</sup> Furthermore, these tribunals formally recognized the responsibility of individuals in violating the international prohibitions against genocide, war crimes and crimes against humanity. As articulated in the Nuremberg judgement, “crimes against international law are committed by men and not by abstract entities and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”<sup>180</sup>

Also a notable development in the aftermath of WWII, was the adoption of the Genocide Convention,<sup>181</sup> which included a proposal for the establishment of a standing international court to enforce the provisions contained within the Convention.

Thus, the international community’s attraction to the concept of public, formal accountability for serious violations of international law in the form of genocide, war crimes and crimes against

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<sup>173</sup> Article 227-229 Versailles Treaty - Treaty of Peace between Allied and Associated Powers and Germany, 1919 T.S. 4, entered into force 28 June 1919.

<sup>174</sup> The Kaiser sought refuge in the Netherlands, thereby avoiding prosecution. Germany refused to submit German military officials to an international tribunal and agreed instead to prosecute those accused of war crimes, in national courts. These trials, known as the Leipzig Trials are regarded by many as tokenistic and biased. See Penrose *Supra* note 145 at 333.

<sup>175</sup> 1937 Convention outlawing Terrorism and Convention for the Creation of an ICC, League of Nations O.J. Spec. No. 156 (1936), L.N. Doc. C.547(I) M.384(I). 1937 (1938). These Conventions were signed but never ratified, and consequently did not enter into force.

<sup>176</sup> *Supra* note 172 at 422.

<sup>177</sup> Inter-Allied Declaration (signed at St James Palace, London, 13 January 1942) *Punishment for War Criminals* (United Nations Information Office ed., 1944) cited in B. E. Macpherson, “Building an International Criminal Court for the 21<sup>st</sup> Century” (1998) 13 Conn. J. Int’l L. 1 at 8.

<sup>178</sup> Article 1 of Charter of IMT proposed a tribunal “for the just and prompt trial and punishment of the major war criminals of the European Axis”.

<sup>179</sup> *Supra* note 145 at 335.

<sup>180</sup> France et al. v Goering et al., (1946) 23 I.M.T. 1, [1946] Ann. Dig. 202; 22 Trial of the Major War Criminals Before the International Military Tribunal 466 (1948) cited in B. E. Macpherson, “Building an International Criminal Court for the 21<sup>st</sup> Century” (1998) 13 Conn. J. Int’l L. 1 at 9.

<sup>181</sup> *Convention on the Prevention and Punishment of Genocide*, *supra* note 3.

humanity, has been constant. However, until 1950, it appears that actual support for the same was selective and reactionary. The tribunals that were successfully established were ex post facto and arguably driven by the public demand for accountability and the need to *see* justice done. International condemnation of these crimes, through visible punishment of the perpetrators, was the primary goal. In contrast, in those instances where an international criminal tribunal was envisaged in conventional prescriptions as a standing institution for the purpose of proactive prevention of proscribed criminal acts, rather than in reaction to specific incidents of egregious violation, sufficient international support was not forthcoming. This disjunction starkly illustrates the fact that States were unwilling to cede sufficient sovereignty to an external judicial body so as to “replace selective reaction with consistent and systematic pro-action.”<sup>182</sup>

From the 1950s onwards, progressive developments towards the establishment of an international criminal court displayed a slightly different orientation: the idea of proactive prevention, through the creation of a *permanent* court, gained currency, however it is questionable whether the political willingness of States to actively support an international court, matured at all during this time.

During the Cold War years, little progress towards the goal of an ICC was made. However, throughout the late 1980s and early 1990s, a number of events and circumstances combined to create widespread public demand for an ICC and a renewed determination on the part of international negotiators to meet this challenge. Many writers contend that “the time was ripe”<sup>183</sup> for the dream of a permanent ICC to become a reality. A range of international legal and political developments combined to create an arguably unprecedented environment conducive to State agreement to an international enforcement mechanism with jurisdiction over serious crimes of international concern.

First, the progressive “internationalization of human rights”<sup>184</sup> is highlighted as an important force behind the drive to establish a permanent ICC. Indeed, the period since Nuremberg had seen a growth in international treaties seeking to protect fundamental human rights, representing the progressive elevation of human rights from a purely domestic issue to a matter of international concern.<sup>185</sup> This development arguably emerged from an increase in the occurrence and severity of large-scale human rights violations and a concomitant increase in the international visibility of these atrocities through the global media.

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<sup>182</sup> T. L. H. McCormack, “Selective Reaction to Atrocity: War Crimes and the Development of International Criminal Law” (1997) 60 Alb. L. Rev. 681 at 732

<sup>183</sup> Professor Stephen C McCaffrey, International Law Commission Member, reported in 1990 that “The international climate now appears particularly favorable for the establishment of such a court...and it would be unfortunate if such an opportunity were lost.” in “The Forty Second Session of the International Law Commission” (1990) 84 Am. J. Int’l L. 930 at 933. See also J. Cavicchia, “The Prospects for an International Criminal Court in the 1990s” (1992) 10 Dick. J. Int’l L. 223.

<sup>184</sup> K. K. Pease & D. P. Forsythe, “Human Rights, Humanitarian Intervention, and World Politics” (1993) 15 HRQ 290 at 294.

<sup>185</sup> For example: *Universal Declaration of Human Rights*, *supra* note 35; *International Covenant on Civil and Political Rights*, *supra* note 36; *International Covenant on Economic, Social and Cultural Rights*, *supra* note 37.

From a practical standpoint, an increase in the conventional codification of international crimes and the emergence of competing claims for jurisdiction arising out of these treaties,<sup>186</sup> lent further support to the creation of a standing international criminal court. As stated by Crawford, the international community witnessed extensive normative development in the area of human rights protection, however, "the capacity of the international system to generate norms" was countered by its simultaneous "incapacity to directly do anything about their enforcement."<sup>187</sup> Coupled with these developments was a perceived increase in the perpetration of international crime and the realization of its transnational impact, particularly in the case of drug-trafficking and international terrorism.<sup>188</sup>

On the political front, the end of the Cold War provided new opportunity for effective multilateral cooperation in the establishment of an international human rights enforcement body. Wexler contends that, in the early 1990s, the creation of the International Criminal Tribunal for the Former Yugoslavia<sup>189</sup> and the International Criminal Tribunal for Rwanda<sup>190</sup> demonstrated the existence of a political consensus regarding the establishment of an ICC that was previously not evident.<sup>191</sup>

Finally, global public opinion in reaction to the continuation of grave violations of international humanitarian law demanded certain accountability and retribution. A new and open recognition that peace cannot be attained without justice in situations where genocide, war crimes and crimes against humanity have been committed, led to an emerging international perception that institutions of justice and accountability are indispensable elements in the resolution of violent conflict.<sup>192</sup> As noted by Justice Goldstone, "reconciliation can be achieved only if accountable justice is established and if the survivors of [such crimes] are assured that what has happened will never happen again."<sup>193</sup>

Thus, in the latter half of the Twentieth Century, the idea of an ICC became much more than a possible measure to assist in the enforcement of international humanitarian and criminal law. Political and academic discourse in the 1990s emphasized the clear *need* for such an institution

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<sup>186</sup> Eg., competing claims of United States, United Kingdom and Libya to prosecute persons responsible for the bombing of a Pan American aircraft over Lockerbie, Scotland; competing claims of Spain, Belgium, United Kingdom to prosecute former Chilean dictator, Augusto Pinochet.

<sup>187</sup> J. Crawford, "An International Criminal Court?" (1997) 12 Conn. J. Int'l L. 255 at 256.

<sup>188</sup> J. Cavicchia, "The Prospect for an International Criminal Court in the 1990s" (1992) 10 Dick. J. Int'l L. 223. Cavicchia notes that increased receptiveness to an ICC was apparent on many fronts - In 1987, former General Secretary of the Communist Party of the Soviet Union, Mikhail S Gorbachev, submitted a letter to the UN General Assembly proposing a tribunal to investigate acts of international terrorism; In 1989 Prime Minister A.N.R Robinson of Trinidad & Tobago called for an international court to deal with drug trafficking and other international crimes (UN GAOR 6<sup>th</sup> Comm. 44<sup>th</sup> Sess., UN Doc. A/C.6/44/SR.38-41 1989); In 1990, Eduard Shevarnadze, Minister for Foreign Affairs of the USSR stated at the UN General Assembly that the time had come to create a legal environment "in which anyone guilty of grave crimes against humanity, or participating in atrocities...could not escape punishment." (Address to 45<sup>th</sup> Session of UNGA, reprinted in NY Times, 26 September 1990 at A10).

<sup>189</sup> UN Security Council Resolution 808, U.N. SCOR, 48<sup>th</sup> Sess., U.N. Doc. S/25274 (1993)

<sup>190</sup> UN Security Council Resolution 955, U.N. SCOR, 49<sup>th</sup> Sess., U.N. Doc. S/RES/955 (1994)

<sup>191</sup> L. S. Wexler, "The Proposed International Criminal Court: An Appraisal" (1996) 29 Cornell Int'l L. J. 665 at 666.

<sup>192</sup> K. Annan, "Advocating for an International Criminal Court" (1997) 21 Fordham Int'l L. J. 363 at 365: "Peace and justice are indivisible...in all post-conflict situations where the dawn of peace must begin with the light of justice. The ICC is the symbol of our highest hopes for this unity of peace and justice."

<sup>193</sup> *Supra* note 84 at 5.

in the effort to prevent human rights atrocities. As Cavicchia asserts, the pervading belief was that a more effective world order could be achieved through a permanent ICC.<sup>194</sup>

### AIMS AND OBJECTIVES

The perceived objectives of an ICC, as discerned from reviewing the historical calls for the establishment of a permanent court, are manifold. An assessment of these articulated aims and purposes reveals that, throughout history, an ICC has attracted support primarily on the basis of its *tangible, practical* contribution to enforcement of the law. As outlined below, the most oft-cited justifications for such an institution have been largely pragmatic, with the focus firmly fixed on creating a formal enforcement institution with the legal authority to administer punishment.

Undoubtedly, the need to prevent the occurrence of genocide, war crimes and crimes against humanity, constitutes the overarching goal and ultimate aim of punitive accountability measures for the enforcement of international humanitarian law. As Bassiouni submits, "by working toward the elimination of impunity, it is believed that prevention and deterrence will be enhanced."<sup>195</sup> Within this broader goal of prevention, a number of other important aims, constituting key justifications for the creation of a mechanism capable of providing swift and sure accountability for these crimes, are identified. These objectives include retributive justice and punishment for violation of the law; deterrence through the threat of punitive redress; record-keeping or establishing a true and accurate account of events for educational purposes "so that the mistakes of the past will not recur in the future;"<sup>196</sup> and finally, the setting and affirmation of universal humanitarian standards through progressive interpretation and development of the law.<sup>197</sup> Of these multiple purposes theoretically served by an international criminal tribunal, Janis articulates the dominant perception that "the most significant role of [an] international criminal court[s] is the trying of the accused, dispensing justice and meting out punishment."<sup>198</sup> Certainly, this perception has pervaded both sides of the debate regarding the establishment of a permanent ICC.

The regulation of international crime through some form of institutional enforcement mechanism is highlighted throughout the discourse advocating the establishment of an international court. The lack of an international enforcement system for protecting against grave violation of human rights was pinpointed as a major deficiency in the human rights regime. Arguably, the existing possibility and probability of impunity in the international arena served to remove all regulatory power from the legal prohibitions against genocide, war crimes and crimes against humanity. While the body of international instruments codifying and prohibiting international crime had

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<sup>194</sup> *Supra* note 188.

<sup>195</sup> M. C. Bassiouni, "Introduction: Accountability for International Crime and Serious Violations of Fundamental Human Rights" (1996) 59 L. & Contemp. Probs. at 5.

<sup>196</sup> M. C. Bassiouni, paraphrasing George Santyana, "From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court" (1997) 10 Harvard H.R.J. 11 at 62.

<sup>197</sup> See M. Morris, "Foreword: Accountability for International Crime and Serious Violations of Fundamental Human Rights" (1996) 59 L. & Contemp. Probs. at 1.; M. Janis, "The Utility of International Criminal Courts" (1997) 12 Conn. J. Int'l L. 161.

<sup>198</sup> M. Janis, "The Utility of International Criminal Courts" (1997) 12 Conn. J. Int'l L. 161 at 165 and 170.

increased, the lack of an enforcement mechanism highlighted the “gap between principle and practice in international criminal law.”<sup>199</sup>

Proponents of an ICC argued that existing international law criminalizing genocide, war crimes and crimes against humanity would continue to have little deterrent effect without certain and credible means of prosecution and punishment in instances of violation of the law. Proponents asserted that existing domestic processes could not be relied upon as the sole protectors and enforcers of international law in relation to genocide, war crimes and crimes against humanity. A permanent international criminal court offered the certainty of an independent trial and significantly increased the probability that those committing these crimes would be punished.

A further point of debate, again focusing on the ICC’s practical and visible role of prosecution and punishment, concerned the advantages and disadvantages of a permanent body, over ad hoc tribunals. While those reluctant to support an ICC argued that ad hoc tribunals, established when necessary, adequately filled the enforcement gap, a number of counter-arguments were made. Advocates of a permanent ICC noted that ad hoc tribunals such as Nuremberg were criticized as rendering ‘victor’s justice’ – the defeated were subject to prosecution and punishment, while the victorious escaped judgement. A permanent international court therefore fulfilled the need to “deliver justice not only for the victims, but also for the victimizers.”<sup>200</sup> Other ad hoc tribunals such as those recently created by Security Council resolution to address war crimes, genocide and crimes against humanity committed in the Former Yugoslavia and Rwanda, were contingent upon Security Council determination that a threat to international peace and security exists, and further, Security Council agreement to create an international tribunal in response to such situations. Ad hoc tribunals conceived in this way were viewed as politically motivated creations rather than independent judicial institutions. Furthermore, it was contended that ad hoc tribunals created in reaction to atrocities – that is, after the fact - do not maximize the potential for deterrence through the permanently visible threat of prosecution.

Proponents argued that a permanent tribunal, established by the international community, would overcome these problems, as a standing legal institution created in the interests of justice, with the potential to deter future criminal behavior through the constant threat of punishment. Finally, a standing ICC would ensure the consistent development and application of international criminal law over time and across cases, which could not be guaranteed by ad hoc measures.

Thus, supporters of a permanent ICC emphasized its practical utility in overcoming the problems inherent in ad hoc or domestic enforcement procedures. Most arguments in favor of an ICC focused on the prosecution of crimes of international concern more than on their prevention. The prioritization of this goal was captured by UN Secretary-General Kofi Annan, when he asserted, “in the prospect of an ICC lies the promise of universal justice – the assurance that those who violate human rights will be punished.”<sup>201</sup> Clearly, the goal of universal justice came to mean the goal of universal accountability and punishment for grave human rights violations, illustrating the international community’s preoccupation with filling the tangible enforcement ‘gap’ with the tangible structure of an ICC, over and above the need to inculcate a willingness on the part of States to prevent these crimes from occurring. The imperative of bringing perpetrators of human rights atrocities to justice fuelled the determination to establish an ICC. In

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<sup>199</sup> *Supra* note 182 at 682.

<sup>200</sup> *Supra* note 145 at 333

<sup>201</sup> *Supra* note 192 at 366.

light of this, it is contended that the creation of an enforcement institution itself became the goal, overlooking the more fundamental objective of establishing a commitment to the institution created. As described below, this prioritization of formal punitive enforcement over preventive compliance pervaded the negotiations leading to the Rome Treaty, and is reflected in the drive to gain State agreement to the establishment of an ICC, over and above ensuring State commitment to effective enforcement of the law.

If discussion and activity regarding the establishment of an ICC in the years leading up to the Rome Conference had focused on building meaningful State support for an "international institution with the capacity for autonomous action"<sup>202</sup> as against the desire of States to retain sovereign control over their actions in relation to international humanitarian law, the Statute for the Establishment of an International Criminal Court emerging from the Rome Conference may have contained very different provisions. Instead, notions of State sovereignty and territorial jurisdiction remained key concerns and as such, governed the negotiations. Despite the perceived 'ripeness of time,' the Rome negotiations demonstrated that active support for an effective ICC was far from present, and even post-Rome, cannot be guaranteed.<sup>203</sup> A few key features of the Rome Statute and the basic principles guiding the negotiations are illustrative in this regard.

#### THE NEGOTIATING PROCESS

The Rome negotiation process, as noted by Phillippe Kirsch, Chair of the Rome Conference, pursued the dual goals of a strong constitutional Statute for the Court and widespread international support for the institution as constituted. In reality however, these goals represented conflicting priorities in the view of most States. The negotiation process was thus governed by a clear determination to "bridge gaps and accommodate concerns in such a way as to broaden support for the Court."<sup>204</sup> As with all international law initiatives, State consent directed every aspect of the negotiations. The degree of incursion on State sovereignty formed the focal point of every issue with respect to the Court's power, rather than the "sovereignty of the people"<sup>205</sup> or the universal human interest in preventing these crimes. As noted by Bruce Broomhall, the ICC deliberations were an exercise in "balancing opposing concerns of State vulnerability to jurisdiction and the ability of the ICC to administer justice in a fair and effective manner."<sup>206</sup>

While a detailed analysis of the provisions of the Statute and the deliberations leading to their agreement, falls outside the scope of this paper, it is sufficient for our purposes to briefly note a

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<sup>202</sup> *Supra* note 187 at 259

<sup>203</sup> When I argue that international support for the goals underlying the creation of this institution is not yet established, I am not contesting that significant numbers of States have signed or ratified the Rome Statute. I am stating that signature and ratification, no matter how widespread, does not in itself represent proactive support for, or sustained commitment to, the law and should not be interpreted as such. I draw on this fact to argue that the traditional approach to, and focus on, law-creation and law-enforcement overlooks the fundamental need to develop an internalized commitment to compliance with the law based upon the humanitarian substance of the law.

<sup>204</sup> P. Kirsch & J. T. Holmes, "The Rome Conference on the International Criminal Court: The Negotiating Process" (1999) 93 Am. J. Int'l L. 2 at 10.

<sup>205</sup> *Supra* note 95 at 392 - notes that "the correct notion of sovereignty, the power of the sovereign to better serve his people, is not diminished by treaties but rather is enhanced."

<sup>206</sup> B. Broomhall, "Looking Forward to the Establishment of an International Criminal Court: Between State Consent and the Rule of Law" (1997) 8 Crim. L. F. 317 at 319.

few of the concessions made in relation to the Court's constitution – concessions clearly based on State desire to protect and retain sovereignty.

The issue of the Court's jurisdiction – subject matter and personal – highlights State concerns over relinquishing sovereignty in the area of criminal prosecution and punishment. Negotiations over the selection and definition of crimes to be included in the Statute proved contentious, as did the issue of universal versus consent-based jurisdiction over persons accused of crimes within the jurisdiction of the court. Furthermore, the issue of extending war crimes to encompass internal as well as international conflict situations, proved divisive. Major States displayed rigid inflexibility in attempting to “preserve appropriate sovereign decision-making in connection with obligations to cooperate with the Court.”<sup>207</sup> Despite the lack of broad-based political will to support a strong and effective ICC, evidenced throughout the early weeks of negotiations, and the inability to resolve disputes over several key substantive provisions in the final week of the Conference, the drive towards achieving agreement to a Statute establishing an ICC continued. Clearly the goal of establishing an international criminal tribunal, above all else, dominated the Rome Conference.

With regard to subject matter, the ICC's jurisdiction was limited to four international crimes – genocide, war crimes, crimes against humanity and aggression.<sup>208</sup> Several compromises are noteworthy in this regard. Many States fought for the inclusion of a broader range of crimes within the jurisdiction of the Court, particularly the offences of terrorism and drug-trafficking. These two crimes were excluded from the final Statute with a compromise resolution requiring that these crimes be re-considered at a Review Conference for inclusion within the Court's jurisdiction.<sup>209</sup>

With respect to the narrow list of crimes finally agreed upon as falling within the Court's jurisdiction, establishing agreed definitions for these crimes proved difficult. In illustration, certain aspects of the definition of war crimes – those centering on the heinous nature of the crimes themselves – were compromised in the interests of attaining agreement to, and support for, the Statute. Specifically, many States expressed concern over extending the definition of war crimes to cover crimes committed during internal as well as international armed conflicts. While the definition itself was in fact expanded to include such coverage, this progressive development was stunted by the inclusion of an ‘opt out’ clause permitting States to exclude war crimes occurring in internal conflicts from the jurisdiction of the Court for an initial period of seven years.<sup>210</sup>

Another significant concession made in this area as a consequence of intractable divisions among negotiators, relates to the list of prohibited weapons, use of which would constitute a war crime. The inclusion of nuclear weapons in this list met with strong resistance from a number of

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<sup>207</sup> D. J. Scheffer, “The United States and the International Criminal Court” (1999) 93 Am. J. Int'l L. 12 at 15.

<sup>208</sup> Article 5 Rome Statute *supra* note 5 – the Court has jurisdiction with respect to the crimes of genocide, crimes against humanity, war crimes and aggression. [Note para (2) – Court shall not exercise jurisdiction over crime of aggression until agreement has been reached on its definition.]

<sup>209</sup> Caribbean States in particular supported inclusion of drug-trafficking. Inclusion of terrorism also received some support however agreement on an acceptable definition could not be reached within the time limits of the Rome Conference. See M. Arsanjani, “The Rome Statute of the International Criminal Court” (1999) 93 Am. J. Int'l L. 22 at 29-30.

<sup>210</sup> Rome Statute Article 8(2)(e) – definition of war crimes extended to armed conflicts not of an international character; Article 124 – transitional ‘opt-out’ provision.

States, so much so that not only were nuclear weapons excluded from the final list but also biological and chemical weapons.<sup>211</sup> Again, strong provisions responding to the nature of the crimes in question, gave way to overriding forces of national interest guided by notions of State sovereignty and non-intervention.

With respect to personal jurisdiction, a number of issues provoked debate,<sup>212</sup> most notably the circumstances under which the Court could actually exercise jurisdiction. Proposals ranged from broad-based, universal jurisdiction<sup>213</sup> to limited jurisdiction based on State consent.<sup>214</sup> State sovereignty arose as the principal concern. Many States were unwilling to grant the ICC the ability to exercise jurisdiction without their consent “leading to an insistence that they retain primary jurisdiction over international crimes and that they control the initiation of proceedings before the Court.”<sup>215</sup> Adoption of the principle of complementarity, along with the need for the consent of either the territorial state or the state of nationality of the accused, catered to this demand, effectively giving national courts jurisdictional priority over the ICC.<sup>216</sup>

Furthermore, hopes that the ICC Statute would formally codify the concept of universal jurisdiction to prosecute those accused of genocide, war crimes and crimes against humanity, were not fulfilled. Recognition that universal jurisdiction already exists in relation to these crimes as a matter of customary international law was widespread. As Ntanda notes, genocide, war crimes and crimes against humanity are offenses against the law of nations and the law of humanity such that any nation possesses the power to prosecute perpetrators on the basis that “no-one should go unpunished for want of jurisdiction.”<sup>217</sup> Orentlicher offers further support for the concept in noting that the granting of universal jurisdiction to the Court “was simply a matter of States clothing a multilateral court with their own jurisdictional authority”<sup>218</sup> in the effort to prosecute persons responsible for the most serious crimes of international concern. However, the prior and existing lack of political will to exercise such jurisdiction came to the fore in the Rome negotiations. As David Scheffer commented, on behalf of the United States, his delegation “would have to actively oppose this Court if the principle of universal jurisdiction or

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<sup>211</sup> Most developing countries supported inclusion of nuclear weapons within the list of prohibited weapons, while other States strongly resisted such provision. Exclusion of nuclear weapons from the war crimes provision meant that biological and chemical weapons also had to be excluded in order to ensure widespread support for the Court. Issue to be reconsidered at Review Conference. See Kirsch & Holmes, *supra* note 204 at 10.

<sup>212</sup> See *supra* note 204 at 4: The differences over jurisdictional issues included: “how the jurisdiction of the Court could be triggered; whether States should automatically accept the court’s jurisdiction over crimes as soon as ratification took place, or be protected by some form of case-by-case consent; and which States, if any, must accept the Court’s jurisdiction before the Court could actually exercise its jurisdiction.”

<sup>213</sup> Universal jurisdiction was advocated by Germany, while Korea argued for a similarly broad reach in proposing that the Court could exercise jurisdiction with the consent of any one of four States – the State of nationality of the accused or the victim, the territorial State and the custodial State. *Ibid.* at 9. Sixty-five States supported the Korean proposal approximating universal jurisdiction. However, a number of powerful States, including USA, China and Russia voiced strong opposition. See Ntanda Nsereko, *supra* note 171 at 102.

<sup>214</sup> Argued most forcefully by the United States delegation, proposing mandatory consent of the State of nationality of the accused.

<sup>215</sup> J. Dugard, “Obstacles in the Way of an International Criminal Court” (1997) 56 Cambridge L. J. 329 “Obstacles in the Way of an International Criminal Court” (1997) 56 Cambridge L. J. 329 at 335.

<sup>216</sup> Articles 1 & 17 –19, Rome Statute, *supra* note 5. A trial before the ICC is only admissible if a State which has jurisdiction is unwilling or unable to prosecute the person concerned. Article 1 – complementarity; Article 12 – preconditions to exercise of jurisdiction.

<sup>217</sup> Ntanda Nsereko, *supra* note 171 at 98

<sup>218</sup> D. Orentlicher, “Politics by Other Means: The Law of the International Criminal Court” (1999) 32 Cornell Int’l L. J. 489 at 491.

some variant of it were embodied in the jurisdiction of the Court...As theoretically attractive as the principle of universal jurisdiction may be for the cause of international justice, it is not a principle accepted in the practice of most governments of the world...<sup>219</sup> The substantial encroachment on State sovereignty represented by the possible endorsement of universal jurisdiction and the unwillingness to let this happen, was patently clear. Consequently, while a number of proposals were tabled envisaging a broad jurisdiction for the court, a restrictive, consent-based regime was finally adopted, requiring the consent of either the territorial State or the State of nationality of the accused before the Court can exercise jurisdiction.<sup>220</sup>

The ICC negotiations thus illustrate the constant tension between national sovereignty and effective enforcement of international humanitarian standards, with State consent determining the content and capacity of the emergent institution. States entering these negotiations brought individual political, economic and social considerations to the decision-making process, along with widely varying historical and cultural backgrounds. It is contended that this combination of factors inevitably leads to the prioritization of national over international interests, both at the rule-creation stage and at the stage of choosing between adherence to, or violation of, agreed legal rules. Essentially, the full commitment of States to the law falls victim to notions of State sovereignty and non-intervention.

Thus, the spirit of compromise so much a part of the Rome negotiations and indeed credited with making agreement to the Statute possible, must be considered critically. The necessity for such compromise must not be overlooked. The concessions in the final text clearly reflect a lack of the requisite political will to create an enforcement institution capable of administering universal and independent justice. They represent weaknesses built into the Statute in order to limit the effectiveness of the enforcement institution it envisions. McCormack submits that such compromises reflect "a significant amount of maneuvering [on the part of States] to ensure that the Court will only operate at an 'acceptable' level of efficacy."<sup>221</sup> Effectively the compromise was that of establishing the physical, formal legal structure of an International Criminal Court at the expense of garnering the internal will to make this institution an effective mechanism for enforcing the law. As Askin notes, "the final text of the Statute adopted in Rome, incorporated rigid triggering mechanisms for core crimes and introduced an elaborate scheme of extensive protective measures with many of the judicial safeguards added as concessions to States largely at the expense of ensuring justice."<sup>222</sup> Consideration of some practical implications of the Statute's provisions and projected difficulties to be overcome by the ICC, once established, bears out the significance of this fundamental compromise.

#### **PROJECTED PRACTICAL IMPLICATIONS FOR THE OPERATION OF AN INTERNATIONAL CRIMINAL COURT**

While certainly a landmark in many respects, entertaining the possibility of effective international accountability for individuals committing genocide, war crimes and crimes against humanity, many writers warn that the success of the ICC, once established, is far from

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<sup>219</sup> Ambassador David Scheffer, head of US delegation, Intervention on Bureau's Discussion Paper A/CONF.183/C.1/L.53, 9 July 1998, cited in Ntanda Nsereko, *supra* note 171 at 103.

<sup>220</sup> Article 12, Rome Statute— preconditions to the exercise of jurisdiction.

<sup>221</sup> McCormack, *supra* note 182 at 729

<sup>222</sup> K. D. Askin, "Crimes within the Jurisdiction of the International Criminal Court" (1999) 10 *Crim. L. Forum* 33 at 36.

guaranteed.<sup>223</sup> Based on weaknesses built into the provisions of the Rome Statute, and drawing on the experiences of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, a number of practical problems are envisaged.

In considering the practical implications of the Rome Treaty, one cannot ignore the fact that the ICC's ability to effectively prosecute and punish perpetrators of genocide, war crimes and crimes against humanity, is primarily contingent *not* upon the legal provisions contained in the Statute, but upon a range of external factors grounded in State cooperation and support. These factors include the provision of adequate human and financial resources to support the establishment and ongoing work of the Court. Most importantly, however, the success of the Court depends upon the meaningful participation of a majority of States including the major powers. All practical aspects associated with the Court's ability to carry out its central function of investigation and prosecution, including the arrest and detention of indicted persons, service of documents, preservation and production of necessary evidence, and access to witnesses and victims are wholly contingent upon State assistance, support and ongoing co-operation. Not only is the support and assistance of States critical to the initiation and conduct of ICC proceedings – at the stages of arrest, investigation and prosecution – but, as Wedgewood points out, the Cooperation of nations such as the United States, is fundamental to the enforcement of Court orders and judgements. Referring to the experience of the ICTY, Wedgewood notes that “the orders of an ICC are not self-executing, and are often disregarded unless the Court is supported by the economic, diplomatic and military assets of major powers. The Court must rely upon States to enforce its rules and judgements.”<sup>224</sup> As Cassese notes, “[t]he principal problem with the enforcement of international humanitarian law through the prosecution and punishment of individuals is that implementation...ultimately hinges on and depends upon, the goodwill of States.”<sup>225</sup>

According to Part 9 of the Rome Statute,<sup>226</sup> States are required to comply with Court requests for cooperation and assistance in the investigation and prosecution of crimes falling within the jurisdiction of the Court. However, the ICC has no capacity to force States to cooperate with the Court. Thus, the effective operation of the ICC relies upon the will of States to comply with their international obligations. As Penrose notes, the ICC “envisions a world where nation states will assist one another in the implementation and enforcement of international law.”<sup>227</sup> Drawing upon the precedents of International Criminal Tribunals for the former Yugoslavia and Rwanda, Penrose asserts that, within the current international system, such a vision is “premature and misguided.”<sup>228</sup> In illustration, a much publicized problem plaguing the work of the ICTY has been the difficulty in obtaining custody of accused war criminals and the necessary evidence for trial. Access to the accused remains entirely within the control of States. Political will therefore plays a crucial role in enforcing international criminal law. In reference to the experiences of the ICTY and ICTR as predictive of the future prospects for the ICC, Penrose submits that “although the political will existed to establish a criminal tribunal for the purpose of trying individuals

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<sup>223</sup> For example, see M. M. Penrose, *supra* note 145; and J. I. Charney, *supra* note 147.

<sup>224</sup> R. Wedgewood, “The United States and the International Criminal Court: Achieving a Wider Consensus through the ‘Ithaca Package’” (1999) 32 Cornell Int'l L. J. 535 at 535.

<sup>225</sup> A. Cassese, “On the Current Trend Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law” (1998) 9 Eur. J' Int'l L. 2.at 4

<sup>226</sup> Part 9 – International Cooperation and Judicial Assistance – Articles 86-102.

<sup>227</sup> Penrose, *supra* note 145 at 352.

<sup>228</sup> *Ibid.*

accused of war crimes and crimes against humanity, the political will apparently does not exist to arrest and detain such individuals to enable the tribunals to function as designed.”<sup>229</sup>

Thus, the operational success of the ICC remains threatened by the potential non-participation and non-cooperation of States based on principles of national sovereignty and self-interest. In commenting on the practical implications of an ICC built on such unstable foundations, Cassese warns that such a structure is similar to a volcano: “the tribunal must always contend with the violent eruptions of State sovereignty – the effect of States’ lack of cooperation is like lava burning away the foundations of the institution.”<sup>230</sup>

#### **WHERE DO WE STAND NOW – DOES THE ROME STATUTE FOR THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT REPRESENT THE KEY TO EFFECTIVE ENFORCEMENT?**

There is no doubt that the Rome Statute constitutes an historic milestone in the continuing quest for the enforcement of international humanitarian and criminal law. The Statute merges key elements of different criminal justice systems into a single international penal and procedural code. Furthermore, the institution it creates – “a permanent, multilateral, treaty-based, international criminal tribunal with global jurisdiction to prosecute individuals”<sup>231</sup> for violations of international humanitarian law in the form of genocide, war crimes and crimes against humanity – is unprecedented. Within this broad achievement, many specific provisions represent significant progress in the protection of fundamental human rights, such as the expansion of war crimes to include crimes committed in internal conflict, and the extension of crimes against humanity to include acts committed in peacetime as well as during violent conflict.<sup>232</sup> The creation of an international criminal law enforcement institution signifies clear international condemnation of these acts and symbolizes a permanent stand against impunity for perpetrators of these crimes.<sup>233</sup> That the ICC Statute is “worthy of admiration”<sup>234</sup> is beyond question. However, despite its landmark status, the successful operation of the ICC, as illustrated above, is not a given.<sup>235</sup> The Rome Statute, as it stands, entertains the possibility of effective international accountability for individuals committing genocide, war crimes and crimes against humanity – however, much work remains to be done before the ICC actually represents the attainment of this goal.

Clearly, the agreement to establish an International Criminal Court could not have come about without some accommodation of State interests. As noted by Phillippe Kirsch, the Statute represents “a balanced effort to create a strong ICC, deriving its strength both from the provisions and from the support of States. Uncompromising insistence on the strongest

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<sup>229</sup> *Ibid.* at 361. Pejic too submits that the lack of State cooperation with the ICTY on this issue indicates the likelihood that the ICC will suffer from a similar affliction. See J. Pejic, “The Tribunal and the ICC: Do Precedents Matter?” (1997) 60 *Alb L. Rev.* 841

<sup>230</sup> *Supra* note 225 at 12.

<sup>231</sup> R. B. Phillips, “The International Criminal Court Statute: Jurisdiction and Admissibility”, (1999) 10 *Crim. L. Forum* 61 at 61.

<sup>232</sup> *Supra* note 224 at 535. “the ICC Statute is worthy of admiration in many respects.”

<sup>233</sup> In considering the international community’s preoccupation with the establishment of a permanent ICC as a key response to human rights atrocities, I do not seek to ignore or trivialise these positive aspects of the formal legal approach. Rather, the ICC as a formal legal institution and a humanitarian law enforcement mechanism provides illustration of significant limitations apparent and inherent in the formal law enforcement process.

<sup>234</sup> *Supra* note 231 at 535.

<sup>235</sup> See generally: M. M. Penrose, *supra* note 145; and J. I. Charney, *supra* note 147.

provisions could only be made at the expense of the support of a significant number of States such that the future of the ICC would be jeopardized...<sup>236</sup> The compromises and concessions outlined above were therefore a necessary, even recommended, element of the negotiation process.<sup>237</sup> To seek the political commitment of States to independent, comprehensive, uniform and proactive criminal enforcement, at the same time as seeking State consent to the establishment of an international institution empowered to carry out such enforcement, would have been an overly ambitious exercise. As Wexler asserts, "it is better to create a strong institution with narrow compulsory jurisdiction...than to try to be all things to all States and end up with a structure that cannot function at all."<sup>238</sup> Arguably, therefore, the narrow focus on establishing the institution itself as a mechanism for delivering punishment and combating impunity, as opposed to the less politically palatable, less visible task of developing a substantive commitment to compliance with the law and legal institution in question, was necessary. Cavicchia supports an initially limited approach to the establishment of an ICC in suggesting that the international community should "avoid the seduction of idealistic visions of a sweeping judicial order."<sup>239</sup> The force of State sovereignty had to be recognized and a modest Court established on this basis. According to Cavicchia, if such a Court is perceived as credible and effective in the administration of justice, "it will lay the groundwork for a broader ICC."<sup>240</sup> Thus, the negotiation process, compromises included, may be seen as wholly successful in achieving what it set out to achieve – the creation of an international criminal court that represents "a compromise between an idealized court and what is currently politically possible."<sup>241</sup>

It is further asserted that, through the agreement to establish an international criminal court, the international community has ensured that public attention is focused on the matter of prosecuting and punishing war criminals, and the need for legal rules and institutions to carry out this objective. In this way, the reality that the actual commitment of States to this cause falls short of ensuring permanent and universal enforcement, is masked. As noted by Reisman, "[I]nternational criminal courts [would] function to assuage the conscience of an international community that ha[s] retreated from responsibilities it had tried to assume in the past."<sup>242</sup> Arguably, this "retreat from responsibility" is an inherent feature of a regulatory system established, controlled and continually reliant upon the consent of actors to whom the protection of national sovereignty and national interest can, and does, take precedence over international demands.

Thus, in the formal law enforcement process, just as in the formal prescriptive standard-setting process, attention remains focused on the visible legal framework. This is the case even though visible agreement to establish an enforcement institution such as the ICC does not ensure international participation in, nor Cooperation with, the essential activities of the Court. In fact, the hard-fought battle to obtain formal agreement to the establishment of a permanent ICC indicates the nature and depth (or lack thereof) of state commitment to its effective operation.

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<sup>236</sup> P. Kirsch, "Keynote Address" (1999) 32 Cornell Int'l L. J. 437 at 439.

<sup>237</sup> See generally: B. E. Macpherson *supra* note 180; J. Cavicchia *supra* note 188- arguing for limited subject matter and personal jurisdiction; see also L. S. Wexler, *supra* note 191.

<sup>238</sup> *Supra* note 191 at 726.

<sup>239</sup> *Supra* note 188 at 258.

<sup>240</sup> *Ibid.*

<sup>241</sup> *Supra* note 180 at 60.

<sup>242</sup> *Supra* note 162 at 53.

While the battle to obtain formal international agreement to the establishment of a permanent ICC may have been fought and won, every component necessary for the court's effective operation constitutes a battle yet to be fought, and requires a depth of state commitment not apparent in the limited agreement to the establishment of an international court.<sup>243</sup>

It must be recognized therefore that, even that which appears politically possible according to the agreed provisions of the Statute, is not necessarily an indication of faithful commitment to the Statute and the goal of effective enforcement. The creation of an ICC is undoubtedly a starting point and an important step in the direction of combating impunity and condemning the commission of serious human rights violations. However, the international community must not become caught in the dangerous misperception that punishment equals prevention; that the existence of an enforcement institution equals support for the institution; and that the creation of an ICC embodies the achievement of effective enforcement or "an unequivocal stop to impunity for grave human rights violations."<sup>244</sup>

An enforcement institution such as the ICC is, at base, an international creature subject to the same dictates and limitations, expressed by its state creators, as the legal rules which it seeks to enforce. States mindful of protecting national sovereignty will act to limit the powers of such an enforcement institution,<sup>245</sup> if not in its constitutive treaty, then in establishing norms of non-compliance or lesser compliance with agreed terms. Crawford alludes to the core of this issue in noting that the absence of a permanent criminal court in the international arena to date is generally viewed "as a gap, a failure or a deficiency in our international arrangements"<sup>246</sup> instead of a deliberate and conscious decision on the part of state actors.<sup>247</sup> And, as demonstrated in this chapter, this unwillingness to actively and practically support the existence of an ICC may persist even in light of the international community's agreement to the Rome Statute.

Thus, it must be remembered that the milestone that is the Rome Statute is not the ultimate goal. It is simply a stepping stone on the way to achieving effective enforcement of international humanitarian and criminal law. As McCormack warns, "[w]e have yet to see whether the international community possesses the necessary political will and the commitment to principle to achieve an effective international criminal law regime. While there are some encouraging signs, they are tempered by the realities of national self-interest."<sup>248</sup> Penrose concurs with this analysis in noting that, "[a] judicial body cannot be effective if it is subservient to the vacillating interests of nation-states."<sup>249</sup>

The concessions made in the Rome Statute exemplify a continuing problem plaguing the development of international law in general – the reluctance of States to uphold the rule of law or to grant such power to a supranational authority. The numerous weaknesses contained in the Rome Statute which threaten the credibility and effectiveness of the Court, are not legal flaws

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<sup>243</sup> The process of collecting evidence, arresting suspects, locating and protecting witnesses, obtaining and maintaining adequate human and financial resources for carrying out investigations and prosecutions and overseeing punishment all depend upon unconditional state support and cooperation.

<sup>244</sup> K. Ambos, "General Principles of Criminal Law in the Rome Statute" (1999) 10 *Crim L. Forum* 1.

<sup>245</sup> *Supra* note 79 at 125.

<sup>246</sup> J. R. Crawford, (Panel: The Internationalization of Criminal Law) (1995) 89 *Am. Soc. Int'l L.* 301 at 301.

<sup>247</sup> *Ibid.* Crawford suggests that the strength, depth and pervasiveness of the concept of sovereignty has meant that "[i]t is a structural feature of the international system not to have an ICC."

<sup>248</sup> *Supra* note 182 at 728.

<sup>249</sup> Penrose, *supra* note 145 at 363.

emanating from the Statute itself, but deliberate limitations worked into the Statute by an international community lacking the political will and consensus for strong and effective enforcement of the prohibitions against genocide, war crimes and crimes against humanity, in *all* circumstances. It must be acknowledged that this problem is not a legal one to be addressed through the development or application of stronger legal rules and processes. Just as the legal rules prohibiting these crimes have failed to ensure compliance, the legal provisions establishing the ICC are equally vulnerable to breach. As Penrose asserts, “[l]eft to their own devices, nation states will continue to pursue their own self-interests at the cost of enforcing international law.”<sup>250</sup> We must recognize that obtaining State agreement to legal rules, processes and institutions is not the ultimate goal, and that such agreement may mask the contrary or lesser intentions of States. As noted by Askin, “even a perfect Statute would not ensure a perfect Court.”<sup>251</sup>

Aside from the limitations of the formal international legal approach, an exclusive focus on the criminal law enforcement paradigm as the means for inducing compliance with international humanitarian law may also be problematic. While the model of domestic criminal justice centered around institutions for the prosecution and punishment of those violating the law, is attractive as a vehicle for publicly visible law enforcement, its operational enforcement effect with respect to the prohibitions against genocide, war crimes and crimes against humanity in the international setting is less than analogous. In the domestic context, the existence of a sovereign authority, the relative certainty of prosecution combined with the reliable implementation of court-ordered sanction, and the public visibility of these procedures gives strength and credibility to the enforcement process. In the international arena, however, while criminal law enforcement processes in response to genocide, war crimes and crimes against humanity may adequately carry out the role of public condemnation, other aspects of the criminal justice model such as perceived certainty of prosecution and severity of punishment administered by a sovereign authority are lacking.<sup>252</sup> As noted by Meron, examples to date of national prosecutions of grave breaches of the Geneva Conventions are limited despite the clear and universal obligation to prosecute.<sup>253</sup> Even where some certainty of prosecution and punishment does exist, as in the establishment of a permanent ICC, the deterrent effect of such formal legal threats remains questionable when pitted against the sovereign will to commit genocide, war crimes and crimes against humanity. That is to say, it is unlikely that any formal sanction, regardless of its severity, will deter those determined to commit these crimes. As Meron asserts, “[i]t is far from certain [however], that under present-day circumstances, belligerents subjected to the pressure of persistent attacks on their civilians ... would agree that the prospects of future prosecution are compelling enough to cause the violating state to cease and desist.”<sup>254</sup>

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<sup>250</sup> Penrose, *supra* note 145 at 352

<sup>251</sup> Askin, *supra* note 222 at 58.

<sup>252</sup> See *supra* note 147. See also H. Kelsen, “The Essence of International Law” in K. W. Deutsch & S. Hoffman, (eds.), *The Relevance of International Law: Essays in Honor of Leo Gross* (Massachusetts: Schenkman Publishing Company, 1968) at 87: “International law as a coercive order, shows the same character as national law...but differs from it...in that international law does not establish special organs for the creation and application of its norms. It is still in a state of far-reaching decentralization...General norms are created by ...the members of the legal community themselves, not by a special legislative organ.”

<sup>253</sup> *Supra* note 133 at 555.

<sup>254</sup> *Supra* note 41 at 250. See also: Charney, *supra* note 147; Roberts, *supra* note 44 at 69 and 27 “a questionable part of the legacy of Nuremberg is the creation of expectations that in general, trials are an appropriate way to handle war crimes issues.”

Thus, even with the legal authority and formal mechanisms for supranational criminal justice to be administered in response to genocide, war crimes and crimes against humanity, effective enforcement cannot be assumed as a logical consequence. As noted by Chayes and Chayes, the choice of whether to participate in, and contribute to, the international enforcement effort or curb its effect through a lack of active support, is essentially a political decision attracting the very same weighting of pros against cons undertaken in the original negotiation of the formal treaty norms.<sup>255</sup>

Effective enforcement, encompassing the dual goals of accountability and prevention depends on more than the mere existence of an independent judicial enforcement institution. At base, the problem to be addressed is that of instilling the requisite political will to comply with the law and to actively participate in its continued enforcement. As Louis Henkin asserts, “[w]e will have a permanent ICC. The issues to be resolved are not issues of law but issues of politics, of political feasibility and acceptance. But while political forces have pushed the ICC into the realm of probability, international political forces, I fear, will also keep the Court from being all that some of us wish to see.”<sup>256</sup> The focus must therefore be shifted from developing stronger laws and legal institutions, to cultivating a deeper commitment among international actors to adhere to agreed legal norms. If future action proceeds on the basis of the single-focused, law-centered approach, the potential regulatory and preventive contribution of the ICC to the pursuit of justice and the enforcement of international criminal law will be severely limited. It is imperative that new directions be pursued at this time in order to ensure that the ICC, in practice, embodies “the world community’s commitment to forging a better world order based upon the rule of law.”<sup>257</sup>

Pointing out the limitations of this approach in no way seeks to imply that such efforts should not continue. Rather, formal international legal processes, in particular, criminal law enforcement institutions, should not be perceived “as the sole or even the principal means of implementation.”<sup>258</sup> While “the strong desire for vivid moral condemnation of wrongdoers and a reaffirmation of the moral values...render the notion of an international criminal court particularly appealing,”<sup>259</sup> it is clear that in the enforcement of international humanitarian and criminal law, the mere existence of courts neither creates, nor comprises, a means for ensuring their effective operation in enhancing compliance with the relevant legal norms. As Reisman warns “lest we fall victim to a judicial romanticism in which we imagine that by creating entities we call ‘courts,’ we have solved major problems.”<sup>260</sup>

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<sup>255</sup> *Supra* note 79 at 20.

<sup>256</sup> L. Henkin, “Keynote Address - Conceptualizing Violence: Present and Future Developments in International Law Symposium” (1997) 60 *Alb L. Rev.* 571 at 577.

<sup>257</sup> *Supra* note 180 at 28.

<sup>258</sup> *Supra* note 44 at 69.

<sup>259</sup> *Supra* note 162 at 46.

<sup>260</sup> *Supra* note 92 at 175. In other words, it must be recognized that an agreement among state creators of legal rules to establish legal processes and institutions for enforcement of international humanitarian law does not equal a genuine commitment to proactive enforcement on a permanent and universal basis. As noted by Henkin, “the rule of law...is not built with paper laws.” See L. Henkin, “International Organization and the Rule of Law” (1969) 23 *Int’l Org.* 656 at 664

## EFFECTIVE ENFORCEMENT OF INTERNATIONAL HUMANITARIAN LAW – THE WAY FORWARD

The development of an ICC clearly illustrates the way in which the continuing focus on formal law and legal process may contribute to the problem of non-compliance, as much as it comprises part of the solution. Undoubtedly, the traditional state-based process of creating legal rules has value in prompting international actors to explore, and perhaps redefine, their interests.<sup>261</sup> As noted by Chayes and Chayes, the formal treaty-making process “is at its best a learning process in which not only national priorities but also conceptions of national interest evolve and change.”<sup>262</sup> However, the development of the ICC also illustrates the problems inherent in the international formal law-enforcement process arising from the seemingly insurmountable stumbling block of state sovereignty. It further illustrates the fundamental need to look behind the legal framework and to focus on building a steadfast internal commitment on the part of international actors to compliance with the legal rules proscribing genocide, war crimes and crimes against humanity. While agreement to the ICC Statute was obtained, an active commitment to the goals and aims of the Statute is yet to be achieved. A willingness among relevant international actors to refrain from, and put a stop to, the commission of genocide, war crimes and crimes against humanity – the single component fundamentally important to the effective base-level operations of the Court and the very element necessary for the ultimate goal of prevention – must be developed.<sup>263</sup> It is imperative that this issue comprise the focus of international attention if we wish to move towards the effective enforcement of international humanitarian law.

Thus, it must be recognized that the traditional ‘top-down’ formal legal approach does not represent the beginning and end of the enforcement story. The necessity for compromise in deference to State sovereignty indicates a lack of willingness among parties to truly ensure effective prosecution and punishment, let alone comprehensive prevention, of genocide, war crimes and crimes against humanity.<sup>264</sup> While one may concede that the self-interested, protectionist concept of absolute national sovereignty is changing in contemporary international society, sovereignty nonetheless remains and commands respect as a “basic operating principle of international affairs.”<sup>265</sup> As noted by Arend, “it is ingrained in the minds of all international actors.”<sup>266</sup> This being so, the question arises as to how the concept of respect for human dignity in its most basic sense, embodied in the proscription of genocide, war crimes and crimes against humanity, can be similarly enshrined in principle as a ground rule applicable to all actors and all interactions in the global setting. How do we create a humanitarian obligation as strong, permanent and universal as the concept of sovereignty?<sup>267</sup>

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<sup>261</sup> *Supra* note 79 at 4.

<sup>262</sup> *Ibid.*

<sup>263</sup> Jonathon Charney alludes to this priority in noting that “one cannot be certain whether the creation of the ICC was a ‘feel-good’ agreement or a genuine commitment by States to support international prosecutions of such crimes in relative independence from the political context... While there is much apparent support for the ICC, as evidenced by the vote in Rome, its depth is unknown.” *supra* note 147 at 459.

<sup>264</sup> As Cassese notes in relation to the experience of the International Tribunal for the Former Yugoslavia, State sovereignty continually reappears to impede the everyday operations of the tribunal and its ability to fulfil its intended role. See Cassese, *supra* note 225.

<sup>265</sup> *Supra* note 14 at 138.

<sup>266</sup> *Supra* note 14 at 138.

<sup>267</sup> *Supra* note 92 at 176 - Reisman suggests it is necessary to recall the baseline goals that legal rules and institutions seek to achieve - preventing, deterring, suspending, restoring, correcting, rehabilitating, reconstructing - all of which, in relation to international humanitarian and criminal law, can be subsumed within the ultimate goal of

Since the signing of the Rome Statute, advocates of the Court have stressed the goals of ratification and implementation as the immediate priority. As Ferencz asserts, “[t]he primary and most urgent goal, of course, must be to obtain sixty ratifications without which the Rome Treaty cannot come into effect. This will require new legislation and even constitutional amendments in many countries.”<sup>268</sup> This statement arguably indicates the international community’s continued faith in formal legal rules as the means for achieving compliance with the law prohibiting genocide, war crimes and crimes against humanity. While obtaining the requisite number of ratifications and ensuring national implementation of the Statute are important measures necessary to bring the ICC to life, it is contended that a preoccupation with these technical, external, legal pursuits at the expense of cultivating an internal political and personal commitment to such actions will be detrimental to the cause. The target goal must become that of establishing and maintaining a willingness among all international actors to refrain from committing human rights atrocities and to assist in the effective prosecution and punishment of those who do. The uniform and ongoing commitment of those subject to, and participating in, effective enforcement of the law, must be attained. Without this foundational element, the power to prosecute, punish and prevent the perpetration of genocide, war crimes and crimes against humanity, even where these powers have been formally implemented into national legal systems, will remain open to selective, subjective invocation. Essentially, the notion that formal law-based implementation of accountability and punishment procedures are the key priority for effective enforcement, must be overcome.

Koh clarifies the goal of internalization of fundamental humanitarian principles and norms of compliance with them, by distinguishing between social, political and legal internalization.<sup>269</sup> Beyond, and arguably fundamental to, the adoption of international humanitarian norms as government policy and the legislative incorporation of these norms into domestic law (effective political and legal internalization), is the need for social internalization – building a general commitment among all actors to the common goal of respecting the prohibitions against genocide, war crimes and crimes against humanity.<sup>270</sup> Clearly it is the combined effect of all three forms of internalization that we are striving to achieve in the area of international humanitarian law – the formal incorporation of international humanitarian law by States into domestic legal and political systems as well as a voluntary interest in, and willingness to comply with, the legal norms among all actors.

With this level of internalization as the goal, a number of shifts in thinking and action are proposed as steps towards effective enforcement of international humanitarian law. As noted by Meron, the challenge is “to single out new strategies for law enforcement that can reconcile effective law enforcement with respect for state sovereignty and for human rights...”<sup>271</sup> In other

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effective enforcement and permanent compliance – essentially the prevention of grave human rights violations. At 182 and 186 - refers to the common denominator of all these goals being the protection or creation of public order through the prevention of violent disrespect for fundamental human rights.

<sup>268</sup> B. B. Ferencz, “Can Aggression Be Deterred By Law?” (1999) 11 Pace Int’l L. Rev. 304 at 312.

<sup>269</sup> H. H. Koh, “Why Do Nations Obey International Law?” (1997) 106 Yale L. J. 2599 at 2656. “Social internalization occurs when a norm acquires so much public legitimacy that there is widespread general obedience to it. Political internalization occurs when political elites accept an international norm and adopt it as a matter of government policy. Legal internalization occurs when an international norm is incorporated into the domestic legal system through executive action, judicial interpretation or legislative action.”

<sup>270</sup> *Ibid.*

<sup>271</sup> Meron, T., Remarks (Panel: The Internationalization of Criminal Law) (1995) 89 Am. Soc. Int’l L. 297 at 298.

words, the task is to develop strategies that either achieve state consent to law enforcement processes, or bypass the need for state consent in the law enforcement process.

First, in terms of attempting to achieve State consent and commitment to strong and effective humanitarian law enforcement, it is contended that the focus must be shifted from the legal content and character of international humanitarian law to the humanitarian content and character of the same. It is asserted that the intense focus on the formal international humanitarian law enforcement regime overlooks the substance of the rules being enforced, and that through a focus on the “unconditional and non-reciprocal character of the obligations,”<sup>272</sup> the prospects for compliance may be improved. In other words, in order to effectively enhance the humanitarian law enforcement project, attention must be directed towards the principles of humanity underlying the law as common denominators and common interests for all States – indeed all actors - involved in the law-making and law enforcement process.<sup>273</sup>

It is suggested that this re-direction of emphasis is particularly important in formal, State-based law-creation and law enforcement processes where the human subject and object of humanitarian law should comprise the focus of attention.<sup>274</sup> The proscriptions against genocide, war crimes and crimes against should be viewed as humanitarian principles based on social and moral regulatory norms,<sup>275</sup> as much as legal norms. This “humanization of humanitarian law”<sup>276</sup> involving a focal shift from ‘State’ to ‘human’ values, in turn promotes a focus on individual responsibility for action in relation to these crimes rather than the traditional international law focus on constraints upon States. A focus on the heinous nature of the proscribed acts, emphasizing “human right over human wrong”<sup>277</sup> as opposed to the de-personified focus on “international law over international crime”<sup>278</sup> promotes a universal, transnational interest in human protection. It becomes difficult, therefore, for States to deny application of the law, or contest the strength of proposed enforcement procedures, if the object of the law is centered on human interests rather than State interests and the universal, transnational nature of compliance is highlighted, as opposed to the contractual, reciprocal and conditional nature of other forms of international law.<sup>279</sup> It is asserted that these shifts in perspective assist in building an internal motivation to comply with humanitarian legal norms based upon a commitment to supporting common fundamental principles of humanity rather than a purely legal commitment. While it is acknowledged that it may be idealistic to strive for the *genuine* support and commitment of State

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<sup>272</sup> Meron, *supra* note 41 at 248.

<sup>273</sup> eg. The Declaration of Minimum Humanitarian Standards (“The Turku Declaration”) – a set of non-derogable standards drawn from human rights and humanitarian law drafted by a group of individual experts in humanitarian law – represents an attempt to move away from the law to essential humanitarian principles “that the international community would expect all parties to apply at a minimum, in all situations and especially in situations of endemic internal violence.” See Meron, *supra* note 41 at 274 -275 – “the Turku Declaration is gaining currency in the discourse of governments, non-governmental organisations and experts.”

<sup>274</sup> As noted by the ICTY in relation to the Geneva Conventions, “the Conventions have been drawn up first and foremost to protect individuals and not to serve State interests.” *Celebici* case cited in T. Meron, *supra* note 41 at 267.

<sup>275</sup> See Marten’s Clause, Geneva Conventions and Additional Protocols *supra* note 44, See also T. Meron, *supra* note 41; Prosecutor v. Furundzija, No. IT-95-17/1-T (10 Dec 1998) Judgement para 183 – notes that the general principle of respect for human dignity underlies international human rights and humanitarian law.

<sup>276</sup> Meron, *supra* note 41 at 273.

<sup>277</sup> *Supra* note 1.

<sup>278</sup> *Ibid.*

<sup>279</sup> See Meron, *supra* note 41 at 243 “The law of war was paradigmatically interstate law driven by reciprocity.”

and other actors to the humanitarian substance of international humanitarian law,<sup>280</sup> there is no reason why the humanitarian substance of the law can't be used as a lever or motivation for generating active compliance, whether or not such compliance is genuinely humanitarian in nature.<sup>281</sup> Just as stronger laws and enforcement mechanisms are established to promote compliance on the basis of the threat of punishment, it is contended that similar power lies within the ethical foundations of humanitarian law to promote voluntary compliance

Thus, formal humanitarian law enforcement efforts must direct attention away from interstate, national interest and sovereignty-oriented negotiations towards a focus on the human constituents of international society. Undoubtedly such a shift is gradually taking place in some areas of customary and conventional humanitarian law. Limited examples of this shift in perspective can be found within the ICC development process, these being the formal extension of the definition of crimes against humanity to include crimes committed during peacetime, and recognition that war crimes encompass those committed in international and non-international armed conflicts. This suggests a trend towards the breaking down of traditional legal distinctions, recognizing their decreasing relevance in the application of international humanitarian norms. This gradual movement within the law appears to acknowledge that, in the prevention project, legalistic distinctions related to the timing of the act or the geographical location, bear little relevance to the promotion, implementation and enforcement of humanitarian norms which proscribe genocide, war crimes and crimes against humanity in *all* circumstances. While illustrative of the broader shift in thinking necessary, these examples remain limited by the fact that their development is embedded within the formal legal state-based, consent-dependent process.

A further strategy suggests that, rather than continuing to focus on formal legal state-based approaches to enforce the law relating to genocide, war crimes and crimes against humanity, it is necessary to expand our approach to the compliance problem to "areas in which the sovereignty of the nation-state may be bypassed rather than overcome by frontal attack."<sup>282</sup> In this regard, it is useful to distinguish between the international law-*creation* and law-*enforcement* process. That is to say, while a focus on the formal, consent-based, state-centered, Positive legal process may be necessary in terms of establishing humanitarian standards and international crimes, it is possible to look to *non-legal* processes for the efficient and effective enforcement of those legal rules. While it may be argued that removing the requirement of state consent may remove any regulatory power held by the law at the law-*creation* stage, it is a mistaken assumption that the same applies to the law *enforcement* stage. It may not be possible or desirable to do away with state consent in the making of international legal norms, however, it is possible to bypass state consent in the enforcement of agreed legal norms. Roberts concurs with this assertion in noting that "the formal provisions for ensuring compliance with the laws of war, [which] are not necessarily the same as the actual processes which induce compliance..."<sup>283</sup> While it is a ground rule of the contemporary international system that states are directly responsible for making the law, other actors may play a significant role in enforcement of the law.

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<sup>280</sup> Ironically, if this element existed in the field of international humanitarian law, theoretically there would be no practical need for stronger laws and enforcement mechanism.

<sup>281</sup> This will be explored further in Chapter Five – the use of "moral leverage" to generate compliance with international humanitarian norms.

<sup>282</sup> W. Friedman, "Human Welfare and International Law – A Re-ordering of Priorities" in *Transnational Law in Changing Society – Essays in Honor of Phillip C Jessup*, *supra* note 8 at 118.

<sup>283</sup> *Supra* note 44 at 72.

That enforcement of, or achieving compliance with, fundamental principles of international humanitarian law need not be limited to traditional consent-based legal processes must be recognized. Watson summarizes the constraints of such an approach in noting that, “the choice is between ignoring the inevitable importance of state consent as a pre-requisite for obligation, in which case one generates norms neither complied with nor enforced, or continuing to require consent whereby one is undeniably limited to fewer and less ambitious norms.”<sup>284</sup> These remain the two choices if the international community continues to focus on the traditional, Positive legal framework for enforcement of the law. However, numerous choices arise if the concept of enforcement is seen as encompassing more than simply formal legal sanction.<sup>285</sup> As noted by James Scott, actual enforcement or enforceability does not emerge from the creation of the rule itself but from something independent “predicated upon the existence of the law.”<sup>286</sup>

Furthermore, in focusing on law enforcement through informal, non-legal processes, the international community needs to look beyond tangible, sanction-based forms of enforcement to cultivating the ongoing commitment of international actors to the goals of the legal norms – an invisible but indispensable component of effective compliance. Arguably, these two distinct aspects of the law – the formal legal rules themselves, and the internal commitment to comply with agreed norms – are often treated as synonymous, the latter either completely neglected, or alternatively, presumed to exist, upon creation of the former. It must be recognized that the establishment of specialized enforcement rules and institutions dependent upon State consent and participation will suffer from the same unwillingness of relevant actors to comply with the enforcement process as that which affects compliance with existing legal standards, if the issue of building a wilful commitment to the law and its enforcement, is not addressed. As noted by Kingsbury, “an approach to compliance that focuses only on objectively observable patterns of behavior implicitly takes these patterns as proxies for internal attitudes...”<sup>287</sup> Attention must therefore be directed to the invisible mechanism of *voluntary* enforcement and to informal measures for building political and personal commitment to the preventive goal of compliance with the law.

In the international context, actual deterrence of human rights atrocities is ultimately dependent upon the co-operation and support of all international actors, particularly State actors, as potential perpetrators and potential enforcers of the law.<sup>288</sup> Furthermore, States carry the power and responsibility to disseminate knowledge of the law as a means of ensuring respect for

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<sup>284</sup> *Supra* note 106 at 112.

<sup>285</sup> See also J. B. Scott, “The Legal Nature of International Law” in *Essays on International Law from the Columbia Law Review*, (New York, 1965) at 33 – “any means which produces the end [of compliance with the law] has the force of a sanction.” In illustrating possible non-legal mechanisms of enforcement, Scott goes on to argue “if it be found that a moral sanction, so called, produces or enforces compliance with the command, for example, public opinion, why should not public opinion, in so far as it produces the desired result, namely obedience, be regarded as a legal sanction? Everyday experience shows the persuasive force of public opinion, and it is perhaps not too much to say, that public opinion is more compelling in its nature than a sanction be it never so legal. The evil threatened is not necessarily or immediately imprisonment or legal punishment, but social ostracism, which is as controlling, if indeed it be not more controlling. The threat of imprisonment does not do away with the jail, but the fear of public opinion or social ostracism keeps many a weak-minded or frail being on this side of the bars.”

<sup>286</sup> *Ibid.* at 29.

<sup>287</sup> B. Kingsbury, “The Concept of Compliance as a Function of Competing Conceptions of International Law” (1998) 19 *Mich. J. Int’l L.* 345 at 356.

<sup>288</sup> As noted by Sommaruga, “the establishment of international criminal courts, whether permanent or ad hoc, does not diminish the role of individual States in repressing violations of international humanitarian law.” Sommaruga, C., President, International Committee of the Red Cross, *supra* note 43 at 521.

fundamental human rights standards.<sup>289</sup> Clearly, state actors responsible for creating international law are demonstrably unwilling to expose themselves to demanding laws and strict law enforcement applied through international judgement of a state's behavior.<sup>290</sup> Thus, the active support of States for preventing and punishing these crimes must be developed and not assumed upon acquiring state consent to the legal framework. The task then becomes one of engendering this co-operation and support in relation to the substantive aims of the law rather than focusing on the formality of binding legal commitments. This entails a recognition that enforcement power, in terms of encouraging active compliance, may be achieved through voluntary as well as coercive means.<sup>291</sup> Thus, a move away from the "...wrong and self-defeating...arithmetical assumption that more of something good or bad will induce or deter in desired ways,"<sup>292</sup> is advocated in seeking to prevent the commission of genocide, war crimes and crimes against humanity. That is to say that the creation of more international law and harsher enforcement mechanisms is not necessarily the way forward in the humanitarian law enforcement project. While the focus of public attention is on tangible enforcement power, it is clear that "other kinds of pressures can be and are mobilized to change state behavior to bring it into compliance with treaty obligations."<sup>293</sup>

The means for effectively empowering the international enforcement effort therefore lies in building the invisible and internal commitment of international actors to compliance with established legal rules, processes and institutions for the protection of fundamental humanitarian standards, rather than continuing to focus on the largely superficial process of creating formal international law. This thesis argues that the use of informal, non-legal mechanisms and non-traditional international actors, in the international arena, is the key to addressing the limitations inherent in the formal legal approach and realizing the full potential of the law. Such a seemingly radical shift in focus is in fact quite logical given that it is social attitudinal and behavioral change – in line with legal advances – that we seek to evoke in the compliance project. As Roberts states, "[t]he means by which international norms are upheld are far more complex and wide-ranging than what is provided for in the conventions."<sup>294</sup> Franck affirms this assertion in promoting the "normative perspective"<sup>295</sup> rather than the "instrumental

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<sup>289</sup> *Ibid.*

<sup>290</sup> L. Henkin, "International Organization and the Rule of Law" (1969) 23 *Int'l Org.* 656 at 662.

<sup>291</sup> See H. H. Koh, *supra* note 269 at 2645 - advocates "voluntary obedience not coerced compliance." See also Discussion Panel, *Forty Years After the Nuremberg and Tokyo Tribunals: The Impact of the War Crimes Trials on International and National Law* 80 *Am. Soc. Int'l L. Proc.* 56 at 70 in A. Roberts, *supra* note 44 at 27 - The notion of building a voluntary willingness to comply with international humanitarian law is supported by Telford Taylor as he asserts: "[i]n terms of enforcement, whether the charge is war crimes or crimes against humanity, [I think] it is a mistake to expect that the device of a criminal trial is the major way in which the enforcement of those limitations and obligations is going to be achieved...most law enforcement is voluntary. Therefore...the idea that trials alone (or statutes and treaties) can bring about the reforms and remedies that we hope for is misplaced reliance."

<sup>292</sup> W. M. Reisman, "Looking, Staring and Glaring: Microlegal Systems of Public Order" (1983) 12 *Den. J. Int'l L. & Pol'y* 165 at 177.

<sup>293</sup> "but we do not regard such pressures as sanctions properly so called..." A. Chayes, & A. H. Chayes, *supra* note 79 at 29-30.

<sup>294</sup> *Supra* note 44 at 69. See also: H. H. Koh, *supra* note 269 at 2645 - "social psychologists who study why individuals obey the law conclude after extensive empirical study that people comply with the law not so much because they fear punishment as because they feel that legal authorities are legitimate." See also: Franck, *Fairness* at 4 urging authorities who seek to promote voluntary compliance with laws to apply a "normative perspective [which] leads to a focus on people's internalized norms of justice and obligation" rather than "an instrumental perspective [which] regards compliance as a form of behavior occurring in response to external factors."

<sup>295</sup> *Ibid.*

perspective<sup>296</sup> which sees compliance as a function of external factors prompting desired behavior.<sup>297</sup>

It cannot be denied that the State-based process of developing legal rules and institutions agreeable to all parties currently overtakes the process of developing a substantive commitment to the agreed rules. It may be that such commitment is presumed to exist upon creation of the legal rules; or alternatively, it may be that such commitment is deliberately neglected in the law-creation process, to be pursued at a later stage, as the two components (creation of the law and political commitment to the law) cannot be pursued simultaneously. Whatever the reason, the fact remains the same – that negotiation, agreement, signature and ratification do not, in themselves, necessarily reflect a steadfast commitment to pro-active, permanent compliance with the law.<sup>298</sup> Consequently, the need to inculcate a commitment to the effective operation of established legal rules in the area of international humanitarian law and build a “systematic culture of compliance”<sup>299</sup> must become the priority if effective enforcement is to become a reality.

This thesis contends that the formal, consent-based, legal approach is *part* of an effective enforcement strategy. To complete the strategy, attention must be directed away from the formal legal process with its tangible, institutional enforcement mechanisms toward informal, less visible means of inducing and motivating State and individual compliance with humanitarian law. The development of an internal and steadfast commitment to compliance requires equal attention, in addition to the construction of the legal framework. Thus, a fundamental shift in thinking and action is required if we are to realize the aspirations of international humanitarian and criminal law and maximize the contribution that the ICC can make towards the goals of justice and prevention.

What practical and theoretical framework can the international community employ in order to build a pervasive norm of compliance with the prohibitions against genocide, war crimes and crimes against humanity based on a voluntary will to comply? How do we overcome the obstacle of state sovereignty to develop a meaningful, permanent commitment within the international community to the goals of humanitarian law and foster internalization of the concept of common humanity, in the effort to improve compliance with the rule of international humanitarian and criminal law? The answer to this challenge lies in a move away from the Positivist/Realist framework of international affairs, in relation to the legal prohibitions against genocide, war crimes and crimes against humanity, towards a Constructivist conception of international relations. The Constructivist perspective challenges the Positivist emphasis on formal legality and state-based processes as a means for enforcing legal rules and opens up a dynamic process relying on, and combining, non-legal mechanisms, non-state actors and the development of a commonality of interest among all international actors, as a strategy for enforcing international humanitarian law.

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<sup>296</sup> T. Franck, *Fairness in International Law and Institutions* in H. H. Koh, *supra* note 269 at 2645.

<sup>297</sup> *Ibid.* See also A. Chayes, & A. H. Chayes, *supra* note 79 at 32: The Chayes’ support this process of normative development noting the limitations of the traditional and persisting academic and political focus on the importance of formal legal structures and the “threat or application of significant material sanctions.” The Chayes’ note that anthropologists, sociologists and increasingly lawyers, recognize that “all societies use informal or non-legal sanctions to secure compliance with legal as well as other social rules.”

<sup>298</sup> In stating this, I am not suggesting that the law-creating process is meaningless or insignificant. I am simply pointing to the limitations of this process.

<sup>299</sup> *Supra* note 78 at 200.

## CHAPTER 4

A system of law must look to the past and the values of continuity, predictability and stability, but it must also look to the future and the values of justice, progress and peace demanded by the public opinion of the community.<sup>300</sup>

The drive to establish a standing ICC illustrates the international community's prevailing preoccupation with the law as the beginning and end of the endeavor to prevent genocide, war crimes and crimes against humanity. The Positivist-Realist framework within which international humanitarian and criminal law has developed, perpetuates the idea that the behavior which we seek to regulate – the commission of genocide, war crimes and crimes against humanity – constitutes an “objective technical problem,”<sup>301</sup> and the legal regime devised to address these crimes, provides a technical and objectively valid “solution.” This conceptualization on the part of the international community leads to a focus on *legal* norms and their formal expression rather than their behavioral translations. And, as Benedict Kingsbury notes, “the exclusive focus on legal norms entail[s] heuristics that are too simple for complete understanding of much of the international behavior with which work on compliance is currently concerned.”<sup>302</sup>

### **BUILDING AN INTERNATIONAL COMMITMENT TO THE LAW PROHIBITING GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY**

In order to achieve the tangible goals of prosecution and punishment in instances where genocide, war crimes and crimes against humanity have been committed, and to move closer to the ultimate goal of prevention, attention must be directed to inculcating a commitment on the part of all international actors, to comply with the law prohibiting these crimes on a universal and permanent basis. If future priorities follow the current practice of focusing on Positive law-based forms of international enforcement in the area of human rights atrocities, the potential regulatory and preventive contribution of legal rules and institutions such as the ICC, to the pursuit of ongoing compliance with the obligations of international humanitarian law, will be severely limited. It is imperative that a broader perspective be adopted in order to ensure that the legal regime for establishing and enforcing fundamental humanitarian standards, in practice, embodies “the world community’s commitment to forging a better world order based upon the rule of law.”<sup>303</sup>

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<sup>300</sup> Q. Wright, *The Study of International Relations* (1955) at 233 cited in R. A. Falk, “The Relevance of Political Context to the Nature and Functioning of International Law: An Intermediate View” in K. W. Deutsch & S. Hoffman (Eds.) *The Relevance of International Law: Essays in Honor of Leo Gross* (Cambridge: Schenkman Publishing Company, 1968) at 151.

<sup>301</sup> *Supra* note 287 at 361.

<sup>302</sup> *Ibid.*

<sup>303</sup> *Supra* note 180 at 28.

The future directions for the enforcement of international humanitarian law advanced in this thesis draw on elements of international relations and international law theories which combine to form what may be viewed as a social theory for explaining, regulating and modifying the behavior of international actors with respect to fundamental humanitarian norms. In doing so, this thesis highlights the interconnectedness of formal international law with the social normative process, and the need to recognize this interplay as two faces or sides of the same endeavor rather than as distinctly separate structures, institutions and ideas.

This chapter seeks to demonstrate the overlap between international legal theoretical frameworks for explaining the behavior of international actors, and their international relations counterparts, by tracing the development of several international relations and international law theories and highlighting their convergence at the point of socially conditioning the behavior of international actors. The resultant integrated theoretical framework offers significant insight into future directions for improving compliance with international humanitarian law. Such future directions, outlined in Chapter Five, build upon the basic tenets of traditional Positivist-Realist theories to form a more contemporary approach which recognizes multiple, decentralized avenues for effectively enforcing fundamental norms of international humanitarian law.

#### **INTERNATIONAL LAW: A SOCIAL CONSTRUCT – TOWARDS EFFECTIVE ENFORCEMENT**

International legal theories which, when combined and placed in the context of contemporary international society, provide constructive tools and processes for tackling the compliance problem, include the foundational legal theory of Positivism,<sup>304</sup> the New Haven<sup>305</sup> approach and the Transnational Legal Process School.<sup>306</sup>

As outlined in Chapter Two, Positivism focuses on determining formal *legal* rules with little or no consideration of non-legal influences that may impact on the effective implementation and enforcement of agreed legal rules. As noted by Kingsbury, “[t]raditional Positivist theories of law are rule-based: the enterprise is to separate law from non-law.”<sup>307</sup> Moreover, as Scott asserts, “the ideology of international law presents legal norms as not only distinguishable from non-legal, political ones, but as somehow ‘more than’ or superior to them.”<sup>308</sup>

As discussed in Chapter Two, the formal process and status of Positive law is an integral component of effective enforcement of the prohibitions against genocide, war crimes and crimes against humanity. While this thesis argues that the Positivist paradigm should not be relied upon as the sole or dominant framework for regulating international behavior in terms of gaining and maintaining respect for the rules of international humanitarian law, nonetheless the tenets of Positivism remain important to the international regulatory and compliance project, and as discussed below, pervade contemporary theories of compliance. Furthermore, the concept of fairness, a key attribute underpinning the creation of Positive law, exerts an important pull towards compliance in the context of the minimum humanitarian standards which international

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<sup>304</sup> See generally H. L. A. Hart, “Positivism and the Separation of Law and Morals” (1955) 71 Harv. L. Rev. 593.

<sup>305</sup> See generally: S. Wiessner and A. R. Willard, “Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity” (1999) 93 Am. J. Int’l L. 316; M. S. McDougal, H. D. Lasswell, & L. Chen, *supra* note 142.

<sup>306</sup> See generally H. H. Koh *supra* note 269 at 2646.

<sup>307</sup> *Supra* note 287 at 348.

<sup>308</sup> *Supra* note 111 at 320.

humanitarian law seeks to uphold.<sup>309</sup> As Chayes and Chayes note, the notion of fairness in the creation, application and content of law is particularly important if, as more contemporary theories claim, “a discursive process of explanation, justification and persuasion”<sup>310</sup> plays a major role in the internalization, by international actors, of norms of compliance.

Contemporary, process-based legal theories which view the creation, implementation and enforcement of law as a continuous process of social interaction and behavioral modification are generally perceived as a challenge to the Positivist framework which separates law from behavior in using law to guide behavior. In fact, in relation to the compliance project, these theories build upon Positive theoretical foundations to take account of additional factors impacting upon the actual behavior of international actors. Such process-based theories which hold particular sway in regard to improving compliance with humanitarian law include the New Haven approach of McDougal, Lasswell and Reisman,<sup>311</sup> along with the International Legal Process school espoused by Chayes and Erlich<sup>312</sup> and the Transnational Legal Process stream of Koh.<sup>313</sup> This group of theories expands upon the Positivist focus on words and documents isolating legal rules from the context of their influence. Process-based legal approaches place international law in its social and political context, emphasizing the connection between legal rules and the behavior such rules seek to influence. These theories contend that compliance with international law occurs as a consequence of interaction between international actors in day-to-day societal relations, in effect recognizing that all actors play a part in enforcing legal norms. Importantly, human subjects are recognized as influential interactive participants in the international legal regulatory process.

Essentially, the focus is on communication about, and interaction around, the law as the key mechanism through which actors internalize agreed norms of behavior. Thus, according to these theories, effective enforcement and compliance depend upon social discussion and implementation as much as, if not more than, the existence and imposition of formal rules, procedures and institutions. It is the transition from text-based legal rules to their embodiment in State and individual behavior that comprises the focal point of these theories. As such, they provide new insight into generating norms of compliance with fundamental human rights and humanitarian standards. It is important to note, however, that Positive law remains an important foundational component of these theories as it is interactions occurring around, and in relation to, an established body of international legal rules that forms the skeleton or basic structure underlying the operation of these theories.<sup>314</sup>

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<sup>309</sup> See A. Chayes, & A. H. Chayes, *supra* note 79 at 127. Legitimacy of posited law “depends on the extent to which the norm (1) emanates from a fair and accepted procedure, (2) is applied equally without invidious discrimination, and (3) does not offend minimum substantive standards of fairness and equity.”

<sup>310</sup> *Ibid.*

<sup>311</sup> Also known as the Yale school or the Policy Science approach. See generally M. S. McDougal, H. D. Lasswell, & L. Chen, *supra* note 142; W. M. Reisman, *supra* note 83; S. Wiessner and A. R. Willard, *supra* note 305.

<sup>312</sup> See A. Chayes, T. Erlich, & A. F. Lowenfeld, *International Legal Process: Materials for an Introductory Course* (1968) cited in M. E. O’Connell, “New International Legal Process” (1999) 93 *Am. J. Int’l L.* 334.

<sup>313</sup> *Supra* note 269 at 2599.

<sup>314</sup> M. S. McDougal, W. M. Reisman, & A. R. Willard, “The World Process of Effective Power: The Global War System” in M. S. McDougal & W. M. Reisman, eds., *Power and Policy in Quest of Law: Essays in Honor of Eugene Victor Rostow* (Dordrecht: Martinus Nijhoff Publishers, 1985) 353 at 355: McDougal views international affairs and their regulation through law as a “world community process.” According to McDougal’s theory, several actors or participants in international society play a lead role in “the shaping and sharing of power” or the process of international relations.

In discussing contemporary process-based theories of international law, it is important to note that the term 'norms' refers to more than simply legal norms of the Positivist tradition, that is, customary or treaty-based rules "acknowledged in principle to be legally binding on States that ratify them."<sup>315</sup> In process-based legal theories, the term 'norm' embodies *any* "rule-like prescription which is both clearly perceptible to a community of actors and which makes behavioral claims upon those actors."<sup>316</sup> Thus, the process of creating, maintaining or changing norms of compliance with international humanitarian law according to these contextual theories involves a broad range of prescriptions from formal authoritative written rules, standards and principles to informal or tacit understandings "carrying a sense of obligation, a sense that they ought to be followed."<sup>317</sup>

The New Haven, Transnational Legal Process and International Legal Process approaches highlight the importance of community interactions in establishing international behavioral norms through the continuous development and communication of shared expectations. The participants in this process include nation states, international organizations, transnational political orders, transnational pressure groups and individuals.<sup>318</sup>

According to Koh, recognition of the transnational legal process provides a possible solution to the problem of under-implementation and under-enforcement of humanitarian law alternative, and additional to, the Positivist focus on stronger rules and procedures for improved compliance. As Koh explains, the interactions activated by transnational legal issues – the transnational legal process – carries the power to ensure compliance or improve obedience to international law. The theory of transnational legal process suggests that the interactive process which may affirm and enforce legal norms – or alternatively override and undermine legal rules – involves international actors engaging in an interaction or series of interactions relating to a transnational legal issue. This, in turn, gives rise to discursive *interpretation* of the meaning and application of the relevant international norm, which eventually leads the parties involved to internalize a particular interpretation of the international norm.<sup>319</sup> As Koh notes, the aim is to interpret a norm and influence parties to comply with the interpretation as part of their "internal normative system."<sup>320</sup>

Thus, the transnational legal process acts as a dynamic norm-generator with the power to influence international actors towards compliance, not through external instrumental forms of coercion, but through interpretation and internalization of a commitment to established legal norms. The influence of State and non-state actors in the interpretation and internalization of global norms is acknowledged. Furthermore, this approach recognizes the two-way process of international norm-creation – that actors interacting in international society not only possess and exercise the power to interpret existing rules of customary and conventional law and internalize or enforce specific interpretations of those norms, but also to influence the creation of such

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<sup>315</sup> *Supra* note 79 at 116.

<sup>316</sup> M. Finnemore, "International Organizations as Teachers of Norms: The UNESCO and Science Policy" (1993) 47 *Int'l Org.* 565 at 566.

<sup>317</sup> *Supra* note 79 at 113.

<sup>318</sup> *Supra* note 314.

<sup>319</sup> *Supra* note 269 at 2646.

<sup>320</sup> *Ibid.*

formal law through continuous interaction. As Koh asserts, "as transnational actors interact, they create patterns of behavior that ripen into institutions [and] regimes."<sup>321</sup>

The application of Transnational Legal Process theory to the disjunction between international humanitarian law on paper and in practice brings an important theoretical and practical element to the compliance project additional to the Positive law-making and formal enforcement process. Transnational Legal Process suggests a "transmission-belt"<sup>322</sup> or pathway through which multiple actors – States, international organizations, non-government organizations, multinational corporations and private individuals – participating in the international legal system can assist with the implementation and enforcement of international humanitarian norms and importantly, through constant interactions, can lead States to perceive new national interests based on domestic internalization of, and compliance with, those norms.<sup>323</sup> As Koh claims, the existing international legal framework promotes an "evolutionary process whereby repeated compliance gradually becomes habitual obedience."<sup>324</sup> In this context, if a State violates an international legal norm as interpreted and applied by the multiplicity of international actors, such violation undoubtedly affects that State's reputation and "hinder[s] its ongoing participation within the transnational legal process."<sup>325</sup>

In addition to these features of Transnational Legal Process, the New Haven approach, espoused by writers such as McDougal, Lasswell and Reisman, draws attention to a further aspect of the international legal environment relevant to enhancing compliance with fundamental principles of international humanitarian law. New Haven theory highlights the importance of the most basic level of social functioning underlying all international legal and political interactions, that being individual human actors and decision-makers.<sup>326</sup> International legal regulation is seen in the broader context of a "world social process"<sup>327</sup> as well as in its most elementary form as human beings "acting individually in their own behalf and in concert with others with whom they share symbols of common identity and ways of life of varying degrees of elaboration."<sup>328</sup>

The New Haven school asserts that human dignity is the overriding aspiration of all actors in the international community, as the notion of human dignity is universally recognized and valued. According to McDougal and Lasswell, human dignity refers to a societal context "in which values are widely not narrowly shared, and in which private choice, rather than coercion, is emphasized as the predominate modality of power."<sup>329</sup> In advocating this idea, an additional focal point in the effort to effectively enforce fundamental principles of international humanitarian law is identified. Combining the goal of human dignity with a recognition of

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<sup>321</sup> *Ibid.* at 2654.

<sup>322</sup> *Ibid.* at 2651.

<sup>323</sup> *Supra* note 21 at 183, 206: Transnational Legal Process asserts "...that nations will come into compliance with international norms if transnational legal processes are aggressively triggered by other transnational actors in a way that forces interaction ... followed by norm internalization."

<sup>324</sup> *Supra* note 269 at 2603.

<sup>325</sup> *Supra* note 21 at 203.

<sup>326</sup> McDougal and Lasswell referred to in W. P. Nagan, "Strengthening Humanitarian Law: Sovereignty, International Criminal Law and the Ad Hoc Tribunal for the Former Yugoslavia" (1995) 6 *Duke J. Comp. & Int'l L.* 127 at 133.

<sup>327</sup> M. S. McDougal and H. Lasswell, "The Identification and Appraisal of Diverse Systems of Public Order" cited in *supra* note 14 at 76.

<sup>328</sup> *Ibid.*

<sup>329</sup> *Ibid.* at 85.

individual human agents in the international system, New Haven theory calls for “an inclusive authority system”<sup>330</sup> – where international law, promoting universal values of human dignity, is regarded as applicable to all human subjects of the international system and therefore supreme. In reality, however, as recognized by McDougal, “there has been a reversion to dualistic or pluralistic positions, in extreme forms of which the only authority recognized is that of national elites.”<sup>331</sup>

Nevertheless, the New Haven argument for inclusive identifications in the international arena, reaching beyond nation-state loyalties, to create a world community where respect for human dignity is seen as applicable to all base-level subjects of the international system, has significance in the compliance project. Specifically, the need and capacity for stronger transnational inclusivity on the basis of the human constituents of international society as a means of engendering voluntary compliance with the universal prohibitions against genocide, war crimes and crimes against humanity, is highlighted. Thus, along with the power of interaction between international actors to influence the internalization of legal norms prohibiting human rights atrocities, the idea of transnational human inclusivity, emanating from the New Haven school, has particular relevance to the international humanitarian law enforcement effort.<sup>332</sup>

To summarize, theories articulating an interactive international community process<sup>333</sup> highlight “new” or currently under-utilized avenues for improving compliance with international humanitarian law. They assert that obedience to international law is not simply a function of stronger laws or stronger enforcement initiatives, but a mutual process through which the interactions of international actors shape the law and impact upon its political power, as much as the law shapes such interactions through the framework of legality that it provides.<sup>334</sup> Interactions between state and non-state actors in the system establish norms of conduct which, upon repetition, eventually become internalized. These everyday interactions therefore play an important role in compliance with international legal norms.

These theories describe a fluid process which traverses traditional legal boundaries imposed by notions of national sovereignty and merges the public international arena with the private domestic sphere of the nation-state in terms of effective behavioral regulation. Rather than being State-centric, they describe and pursue a means of regulating international conduct capable of bypassing issues of state sovereignty and consent in the enforcement of agreed legal rules. State participants are not the sole, nor necessarily the most powerful, actors in the law enforcement

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<sup>330</sup> *Supra* note 314 at 370.

<sup>331</sup> *Ibid.* at 370.

<sup>332</sup> McDougal and Lasswell’s promotion of the idea of a world community and the need to encourage a general sense of international inclusivity as opposed to national exclusivity, resembles Kant’s perception of international law as a system for achieving and maintaining peace and protecting human rights. According to Koh, Kant envisaged a morally interdependent international society where “strong ties existing among individuals create mutual interests that cut across national lines.” Such a vision did not seek to challenge the established structure of international society as a society of sovereign independent states but rather to incorporate a level of understanding international society reaching beyond the state structure to transnational shared values and mutual interests in the context of fundamental human rights – a conception of interdependence at the most basic elemental level of international society. See H. H. Koh, *supra* note 269 at 2610.

<sup>333</sup> *Supra* note 21 at 186. – features of Transnational Legal Process are similar to the concept of International Legal Process (Chayes, Erlich & Lowenfeld) and the world constitutive process of McDougal, Lasswell and Reisman.

<sup>334</sup> *Ibid.* at 184.

process. Process-based legal theories provide a dynamic framework for the regulation of international conduct, recognizing the evolutionary nature of daily interaction with posited legal rules. As noted by Koh, “transnational law transforms and percolates up and down from public to private, from the domestic to the international level and back down again”<sup>335</sup> to produce norms of conduct based on social interpretation and internalization as much as on the formal law itself.

Compliance with legal norms, through the legal process lens, therefore appears to be governed largely by discursive interaction about the law. Such discussion between international actors exerts a pull towards compliance with the emergent norm of conduct by encouraging conformity and seeking justification and explanation where actors wishing to continue participation in the ongoing international legal process have chosen to stray from agreed behavioral norms. As noted by Chayes and Chayes, in a discourse-based legal process, the requirement to publicly justify errant behavior cannot be avoided as discussion of international legal norms pervades all aspects of international relations and arises in all fora including the media, academic analysis, diplomatic meetings and general public debate.<sup>336</sup>

#### **INTERNATIONAL RELATIONS: CONSTRUCTING INTERNATIONAL SOCIETY – TOWARDS EFFECTIVE REGULATION**

For each development described above in the context of international legal thinking about the relationship of international law to the behavior of international actors, parallel developments can be found in the discipline of international relations, from traditional Realist theories through to contemporary Constructivist thinking.

The international relations theory which mirrors Positivism in its traditional dominance is that of Realism. Realist theories revolve around the same set of assumptions about the existence and operation of the international system, that comprise the foundations of Positivist legal theory – the absence of any central supra-national power with the authority to govern the independent units which constitute the system; the assumption that states are the primary actors in the system; and the perception that “in a decentralized international system, States are sovereign.”<sup>337</sup> According to Realism, the international system is one in which its sovereign constituents are engaged in an ongoing and constant competition for greater strength and control within the system. As Mearsheimer notes, “the basic motive driving states is survival...[and]to maximize their relative power position over other states.”<sup>338</sup> Thus, States are perceived as rational, self-interested actors, influenced primarily by national political and economic factors in their decision-making and action.<sup>339</sup>

In terms of compliance with international law, the international relations theory of Realism adopts “a rational actor conception of compliance”<sup>340</sup> asserting that States will comply with international legal norms only where compliance serves their national interests as determined by political, economic and strategic forces. More contemporary international relations theories –

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<sup>335</sup> *Ibid.*

<sup>336</sup> *Supra* note 79 at 124.

<sup>337</sup> *Supra* note 14 at 86.

<sup>338</sup> J. J. Mearsheimer, “The False Promise of International Institutions” 19 *Int’l Security* (1994/95) at 5, 10.

<sup>339</sup> *Supra* note 111 at 314. – the drive to expand state power is a characteristic feature of modern Realism.

<sup>340</sup> *Supra* note 79 at 3.

such as Institutionalism<sup>341</sup> and Liberalism<sup>342</sup> challenge Realist assumptions by recognizing the independent influence of legal rules in guiding the behavior of international actors.

Institutionalists – or Regime theorists – contend that international legal rules, institutions and regimes provide a normative framework of constraints within which international affairs take place. It is important to note that within regime theory, the term “institution” or “regime” refers to a broader concept than the legal reference to a formal established organization or instrumentality. As Robert Keohane explains, ‘institution’ refers to “connected sets of rules (formal and informal) that prescribe behavioral roles, constrain activity, and shape expectations.”<sup>343</sup> Stephen Krasner posits a similar definition for the term ‘regime,’ that being, “sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors’ expectations converge...”<sup>344</sup> In essence these terms reflect the concept of ‘norms’ as described in contemporary theories of international law. According to Regime theory, compliance with international law is tied to “the functional benefits such compliance provides.”<sup>345</sup> State desire to protect its reputation is identified as one incentive for compliance with international legal norms,<sup>346</sup> with benefits arising from establishing a reputation as a law abiding international citizen.<sup>347</sup> As noted by Keohane, “[i]nsofar as governments want their future commitments to be credible, they should be concerned about maintaining their reputations for compliance with commitments.”<sup>348</sup>

International relations theories such as Liberalism and Constructivism<sup>349</sup> move beyond State-centered Realist assumptions to follow what Oran Young terms the “social practice model,”<sup>350</sup> where the influence of interactive and dynamic social processes on the behavior of international actors is recognized as a central element of the compliance equation. While the formal legal regulatory system remains an indispensable component of these attempts to explain international interaction, it is seen as a framework embedded within a wider context of complex discursive and interactive social forces which exert an independent influence on behavior.

Liberal theories of international relations seek to increase our understanding of the nature of international conduct by considering the State entity in terms of its constituent parts – that is, as an “aggregation[s] of individual and group preferences, interests and values.”<sup>351</sup> Through this lens, individuals are key actors in international activities. As the agents ultimately responsible

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<sup>341</sup> R. O. Keohane, “Compliance with International Commitments: Politics within a Framework of Law” (Panel – International Law and International Relations Theory: Building Bridges) (1992) 86 Am. Soc. Int’l L. Proc. 176 at 178.

<sup>342</sup> See A-M Burley, “International Law in a World of Liberal States” (1995) 6 Eur. J. Int’l L. 503.

<sup>343</sup> R. O. Keohane, cited in *supra* note 14 at 120.

<sup>344</sup> S. Krasner cited in *supra* note 14 at 14.

<sup>345</sup> *Supra* note 269 at 2625.

<sup>346</sup> K. W. Abbott, “Elements of a Joint Discipline” (Panel – International Law and International Relations Theory: Building Bridges) (1992) 86 Am. Soc. Int’l L. Proc. 167 at 169.

<sup>347</sup> eg. continued participation in international relations

<sup>348</sup> *Supra* note 341 at 178.

<sup>349</sup> See A. Wendt, “Constructing International Politics” 20 International Security 71; J. G. Ruggie, *supra* note 23.

<sup>350</sup> O. Young, “Two Models of Effectiveness” (Theme Plenary Session: Implementation, Compliance and Effectiveness April 9-12, 1997) (1997) 91 Am. Soc. Int’l L. Proc. 51 at 52 – in contrast to the formal “regulatory model” of international interaction where the behavior of international actors is considered in the limited context of regulatory prescriptions and enforcement arrangements.

<sup>351</sup> *Supra* note 287 at 356-7. See also T. Franck, “Three Major Innovations of International Law in the Twentieth Century” (1997) 17 QLR 139 at 156.

for political decision-making and action, individuals and private actors can have a significant impact on the emergence of behavioral norms. As Slaughter explains “the primary actors in the international system are individuals and groups acting in domestic and transnational civil society.”<sup>352</sup> By disaggregating the State and focusing on individual actors as the fundamental element of international society, Liberalism, like the New Haven legal theory, dilutes the concentration of power in the nation state. Furthermore, the recognized interdependence of individuals and groups participating in international society serves to broaden and deepen the exposure of the State to a range of macro and micro-level influences.<sup>353</sup>

Expanding on these Liberal ideas, the theory of Constructivism completely dissolves the traditional division between international law and international politics by placing international legal and political interaction within an all-encompassing social framework, invoking social science ideas to analyze international conduct.<sup>354</sup> Constructivism is based on the premise that international legal and political interaction, and emergent institutions or regimes, are essentially social constructs, having both a social foundation and serving an overarching social purpose. Constructivist theory contends that social forces actively shape not only the behavior of international actors, but also their identities and interests.<sup>355</sup>

Constructivist theory draws on and incorporates concepts and ideas from a variety of contemporary international relations theories. The focal points or mechanisms of influence described by transnational relations theorists<sup>356</sup> and international society scholars<sup>357</sup> for explaining and modifying international conduct are aligned with Constructivist ideas, recognizing the emergence and influence of non-state, sub-national and supra-national actors in the international system and acknowledging their effect on the permeability of domestic and international boundaries. All international actors are viewed as both strategically and

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<sup>352</sup> *Supra* note 76 at 202.

<sup>353</sup> See generally A-M. Slaughter, *supra* note 76; B. Kingsbury, *supra* note 287 at 357; K. Abbott, *supra* note 16 – variations of the Liberal approach such as Transnational Liberal Theory, focus on the activities of private individuals and groups across countries and within international institutions and their impact on the development of international norms of conduct.

<sup>354</sup> *Supra* note 349 at 27. All critical international relations theories including neo-Marxism, Feminism, Postmodernism could be termed Constructivist under this description. However, with the evolution of critical international relations theories, Constructivism has come to refer to its own particular school of thought. See also A. C. Arend, *supra* 14 at 125: Constructivism has come to refer to a particular approach for understanding contemporary international relations adopted by writers such as J. G. Ruggie, F. Kratochwil, N. Onuf, and A. Wendt. It is also known as “reflectivism” or “social constructivism” and resembles the British “international society” theoretical framework, developed by scholars such as H. Bull and M. Wight, which asserts that the international system of States is embedded within a “society” of States.

<sup>355</sup> Constructivist theory is based on two key assumptions both of which challenge traditional Realist accounts of international relations: that international political relations revolve around subjective, socially constructed ‘structures’ or understandings of the issue at hand rather than strictly material concerns; and furthermore, that these subjective social understandings in turn effect changes in the identities, interests and behavior of international actors. See A. Wendt, *supra* note 349 at 125.

<sup>356</sup> See T. Risse-Kappen, (ed.) *Bringing Transnational Relations Back In: Non-State Actors, Domestic Structures and International Institutions* (Great Britain: Cambridge University Press, 1995) – transnational relations - regular interactions across national boundaries arising when at least one actor is a non-state agent or does not operate on behalf of a national government or an intergovernmental organisation.”

<sup>357</sup> See H. Bull, *The Anarchical Society* cited in *supra* note 14 at 33; B. Buzan, *supra* note 99.

discursively competent<sup>358</sup> and powerful, with States and their interests subject to the forces of socially constructed understandings and expectations of behavior.<sup>359</sup>

At the heart of Constructivist theory is the concept of an “international society”<sup>360</sup> in which the interests, identities, norms and values of all societal members are fluid rather than externally determined or permanently fixed. Unlike Realism therefore, Constructivism sees State interests and identities as evolving “socially constructed products of learning, knowledge, cultural practices and ideology.”<sup>361</sup> According to this theory, the framework within which international actors operate<sup>362</sup> is a subjective social construction based on evolving shared beliefs and understandings. International actors themselves construct, through social practice and consensus, the identities, norms and roles that govern their interaction with each other. Accordingly, the activities, efforts and discourse of a variety of actors underlies the generation, dissemination and internalization of the rules, norms and processes regulating State behavior.<sup>363</sup> Thus, both State and non-state actors are active contributing members of international society.

Constructivism challenges the deeply entrenched assumption stemming from the Positivist/Realist paradigm that “the interests and preferences of states circumscribe the range of the possible.”<sup>364</sup> It posits several ways for regulating or modifying the behavior of international actors which circumvent state consent, yet operate to influence states, as key actors on the international stage. With its focus on social construction and evolution of international reality, Constructivism, by definition, rejects the notion that state interests are definitive, predictable, and largely intransigent based on external prescriptions and material circumstances. It suggests that State interests are open to change both across time and across contexts. That is to say, State preferences in the long and short term can be varied. Similarly, state interests are not necessarily confined within national boundaries – the cultivation of cross-border interests, such as that advocated by McDougal, of a common interest in human dignity, is entirely possible and plausible within the Constructivist theoretical framework.

In illustration, Martha Finnemore applies Constructivist ideas to her analysis of international norm generation in the area of scientific research and policy development. She demonstrates the creative and constitutive forces of international interaction by considering international organizations as “teachers of norms”<sup>365</sup> – principal actors in the norm initiation and promotion process rather than merely agents of State actors.<sup>366</sup> Specifically, Finnemore argues that States, through an interactive relationship with non-state entities in the international sphere, can experience changes to their internal values and to perceptions of their national interest. While traditional legal and political analysis considers State interest and decision-making as the concrete starting point for both the emergence of international norms and the establishment of

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<sup>358</sup> *Supra* note 23 at 21.

<sup>359</sup> *Supra* note 269 at 2633.

<sup>360</sup> English “international society” school of Grotian heritage referred to in H. H. Koh, *supra* note 269 at 2634. See also B. Buzan, *supra* note 99.

<sup>361</sup> *Supra* note 21 at 202.

<sup>362</sup> ie. fundamental principles of statehood and sovereignty

<sup>363</sup> *Supra* note 16. Like transnational legal process, it is discourse, interaction and practice that comprise the core instruments of Constructivist theory, the key difference being a broader focus on social discourse and practice rather than purely legal interactions.

<sup>364</sup> *Supra* note 23 at preface xii

<sup>365</sup> *Supra* note 316 at 566.

<sup>366</sup> *Ibid.* at 594.

international organizations to promote State-selected norms, Finnemore challenges the unidirectional nature of this process, and, along with other writers such as Keck and Sikkink, points to developments in a variety of international issue areas<sup>367</sup> to argue that "...the goals of the legal principles and fidelity to those principles can become a part of State identity itself."<sup>368</sup> These writers argue that the relationship between international actors (including States) and international norms is "mutually constitutive"<sup>369</sup> and it is this two-way process that drives the development of international norms and determines the interests of State and non-state actors.<sup>370</sup>

Constructivist analysis therefore provides the international community with a workable alternative to the dominant paradigm that sees the control-centre for attitudinal change in relation to international behavioral norms as located inside the State entity. Constructivism proposes alternative forces, independent of the State, which operate at the international or sub-national level to effect changes in State values and interests.<sup>371</sup>

### **INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: A SOCIAL PROCESS**

This overview of developments in international legal and political thought from traditional Positivist/Realist foundations to contemporary process-based structures for regulating the conduct of international actors, provides insight into the variety of ways in which states and other international actors may be influenced towards compliance with international legal norms. Process-based theories of international law and international relations recognize that Positivist/Realist conceptions of external, prescriptive and material forces being the primary determinants of international conduct, provide a limited and hence inadequate explanation of international behavior. Process-based theories adopt a transnational societal perspective, as opposed to a state-based conception of international interaction, in embracing non-state actors as valuable players in the international domain; and in pursuing a voluntarist approach to regulating the behavior of international actors. Contemporary Constructivist approaches, drawing on the interactive social processes that comprise the backdrop to all international relations, add a significant dimension to the standard focus on formal legal rules and enforcement institutions as the fundamental motivating force for compliance with international legal prescriptions. They promote a shift in thinking to consider "the sources of behavioral change,...the roles that non-state actors play in connection with regimes, and the extent to which the development of a community...is critical to the achievement of effectiveness."<sup>372</sup>

Constructivist theories view international affairs through a wider lens, encompassing social interaction – a key influence inherent in international legal and political relations, but overlooked or underestimated in Positivist/Realist paradigms. By incorporating social interaction into

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<sup>367</sup> eg., support for national scientific research bodies; progressive development of the nuclear non-proliferation regime; emergence of the International Committee of the Red Cross. In applying Constructivist ideas to concrete examples of international norm-creation and compliance, these authors acknowledge that it is not possible to empirically determine the relative influence of international social and legal structures on States and vice versa. See A. C. Arend, *Supra* note 14 at 133.

<sup>368</sup> *Ibid.*

<sup>369</sup> *Ibid.* at 131.

<sup>370</sup> In the same way, McDougal argues for the capacity of State actors to redefine incompatible interests "by discovering common interest, and by distinguishing between inclusive and exclusive interests." M. S. McDougal et al., "The World Process of Effective Power: The Global War System" in *supra* note 314 at 393.

<sup>371</sup> *Supra* note 316 at 592.

<sup>372</sup> *Supra* note 350 at 52.

traditional international legal regulatory frameworks, the impact of informal, often invisible influences, in the form of shared expectations, understandings and temporally contingent discourse upon prevailing norms of conduct is recognized. It is social interaction that ultimately influences the generation of behavioral norms of compliance with the law, and more importantly, assists in building a solid commitment on the part of all actors to continuing compliance. By focusing on these issues, attention is directed beyond the purely functional and visible power of formal international legal rules and enforcement institutions to the underlying social mechanisms through which international attitudes and actions are actually influenced in the direction of compliance. Internalized behavioral change becomes the focal point rather than simply formal agreement and superficial or selective compliance. It is contended here that the social process offers a complementary rather than alternative framework for promoting compliance with international law. It points to mechanisms outside of State control which can induce compliance.

Critics may assert that conceiving of the international system as fundamentally a social structure built on social relations between a variety of actors, glosses over or fails to recognize the power differential between State and non-state actors in the international legal system. This is not however the Constructivist intention. In asserting the existence of a general power or capacity to influence international action, possessed by a multiplicity of international actors, Constructivism does not seek to deny the impact of State power on international relations. It simply draws attention to the presence of a more widely distributed power of shared expectation and knowledge, able to be exercised by all international actors, and in doing so, highlights the specific influence of non-state actors with access to this generally available power. States, however, remain an important element of Constructivist theory as major players whose interactions contribute significantly to the construction of the system in which they conduct their affairs.

#### **CONSTRUCTING COMPLIANCE WITH INTERNATIONAL LAW**

Applying Constructivist concepts to the compliance project in relation to international law advances the idea of multiple-actor, international implementation and enforcement of the law<sup>373</sup> as an alternative to externally applied, instrumental forms of enforcement employing coercion, through the threat of formal sanction, as the mechanism for securing compliance.

Constructivism argues that discourse and interchange between societal members constitutes the most powerful mechanism for influencing international actors towards, and maintaining compliance with, international legal norms. Chayes and Chayes provide concrete support for this contention by identifying 'transparency' as an important factor influencing actors towards compliance or non-compliance with positive legal obligations.<sup>374</sup> The Chayes' note that in the competitive environment of international relations, the circulation of information about legal norms and current levels of compliance through constant social interaction provides a degree of transparency regarding the prevailing understanding and practical significance of a given set of legal rules and the consequences of non-compliance.<sup>375</sup> This knowledge is then factored into international actors' decisions between self-interested action and international compliance. Thus, social discourse and interaction in relation to international legal rules comprise an important part

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<sup>373</sup> *Supra* note 44 at 28.

<sup>374</sup> *Supra* note 79 22.

<sup>375</sup> *Ibid.* at 22-23

of the law enforcement process – admittedly less visible than formal law enforcement procedures but equally, if not more, accurate dictators of action.

According to Constructivism, therefore, the regulatory power of international law and its effective enforcement comes not from the legal rules themselves, but from the enforcement effect of continuous social interaction between international actors over time. This assertion does not seek to deny the authority inherent in international legal norms by virtue of their status as *legal* rules.<sup>376</sup> Rather, it seeks to appraise the significance of this inherent legal authority relative to the impact of social interaction on the behavior of international actors in terms of converting formal legal rules into internalized and enduring norms of compliance. It argues that, the power to promote actual compliance resides in a system more subtle and complex than the formal creation of legal rules and institutions of constraint. As Chayes and Chayes submit, the “interpretation, elaboration, application, and ultimately, enforcement of international rules is accomplished through a process of (mostly verbal) interchange among the interested parties.”<sup>377</sup> As such, Constructivism challenges the preoccupation with State consent and the formal law-creation process that pervades the international humanitarian law enforcement project. In its focus on social context and social meanings, Constructivism introduces the possibility of enforcing international legal norms without the need to obtain State consent to the enforcement procedure.

Practical application of the Constructivist approach to effecting normative change among international actors, based on ‘human’ values as opposed to traditional state values,<sup>378</sup> can be found in the concept of Transnational Advocacy Networks (TANs), as described by Margaret Keck and Kathryn Sikkink. According to Keck and Sikkink, TANs, or networks “distinguishable by the centrality of principled ideas or values in motivating their formation”<sup>379</sup> can build new links among States, non-state actors and international organizations. In doing so, such networks “multiply[ing] the channels of access to the international system,”<sup>380</sup> and thereby demonstrate their capacity to pierce the shield of national sovereignty and work towards domestic implementation of, and adherence to, international law through a ‘bottom-up’ and ‘side-to-side’ approach combined with the traditional top-down approach of direct confrontation with State sovereignty and consent. Keck and Sikkink argue that TANs assist in the internalization of international law by international actors through the effective exercise of “moral leverage”<sup>381</sup> where there are observed discrepancies between established legal or social norms and actual conduct.

The Constructivist perspective therefore conceives of formal Positive law as, at base, an idea injected into the social process for subjective discursive development by the international community, into substantive behavioral norms. According to this explanation, State and other international actors can learn from new knowledge, or gain new understandings of old

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<sup>376</sup> *Ibid.* at 118 and 134 – in considering the question of how legal rules operate to regulate conduct, Chayes and Chayes acknowledge that formal legal norms such as treaty norms “have a certain authority stemming from the mere fact that they have been promulgated by an accepted and acknowledged treaty-making procedure.”

<sup>377</sup> *Ibid.* at 118.

<sup>378</sup> *Supra* note 78.

<sup>379</sup> *Supra* note 25 at 1.

<sup>380</sup> *Ibid.*

<sup>381</sup> *Ibid.*

knowledge and beliefs,<sup>382</sup> which in turn, may serve to modify their behavioral choices in relation to specific international legal norms. The creation of formal legal rules therefore serves to initiate, but not necessarily dictate, the constructive process of international norm-generation.<sup>383</sup>

The Constructivist framework introduces a shift in focus from tangible visible legal mechanisms for promoting compliance to what might be termed 'meta-legal' influences which operate at a deeper level to give or deny international law its pull toward compliance. Such influences include moral compulsion, social pressures, informal punitive measures such as exclusion from the transnational legal and political process, national interest, shaming, reputation concerns, and the desire to maintain good international relationships.<sup>384</sup> Constructivism recognizes that while the presence of law itself provides a justification for action in accordance with the law, personal ethics, altruism, common purposes and beliefs, and internalized social norms also provide motivation for actors to cooperate<sup>385</sup> and comply with agreed legal rules. Constructivism therefore emphasizes inherent, and largely invisible, compliance processes which international actors, by virtue of their membership in the international community, are automatically exposed to, and which "serve to influence their behavior more through de-facto engagement...than through conscious decisions about compliance."<sup>386</sup>

Indeed, it may be asserted that the legal framework governing human rights and humanitarian protections recognizes, and actively engages in, such Constructivist activity – that these meta-legal mechanisms of influence are already employed by international supervisory bodies established as part of the human rights treaty system<sup>387</sup> with the express purpose of overseeing implementation, encouraging compliance with agreed norms and addressing alleged violations. It is true that these committees do examine domestic implementation and education initiatives, and promote the international values underlying compliance with human rights norms, using mechanisms of public shaming and justificatory discourse. However, these activities remain embedded the formal legal process, which ultimately depends upon State Cooperation and support.<sup>388</sup> In this context, therefore, the processes of inquiry, investigation and public shaming are contained within the formal legal framework, and are limited as such. Treaty-based supervisory mechanisms do not allow for the exploitation of the reaction and action of third parties not signatory to the relevant treaty, and other international actors, to be readily and informally invoked to engender compliance. It cannot be denied however, that outside of treaty-based supervisory bodies, meta-legal influences are employed and pursued by State and non-State actors on a generally available, informal basis through social channels. It is the wider recognition and concerted expansion of these initiatives, and their capacity to regulate behavior, that is advocated in the process of constructing compliance with international humanitarian law.

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<sup>382</sup> *Supra* note 346 at 171 – for example, the belief that human rights are a matter of international rather than simply national concern.

<sup>383</sup> *Supra* note 350 at 52. This "social practice model" does not discount the impact of formal legal rules and institutions on behavior. Rather it sees existing legal frameworks as "giv[ing] rise to social practices which feature a wide range of integrative activities that stimulate the emergence of informal communities...and trigger processes of social learning."

<sup>384</sup> *Supra* note 79 at 113-114

<sup>385</sup> *Supra* note 269 at 2625

<sup>386</sup> *Supra* note 350 at 52.

<sup>387</sup> Such as the Commission on Human Rights, the Human Rights Committee and the Committee Against Torture.

<sup>388</sup> The three main methods employed by United Nations human rights bodies to encourage universal observance/internalization of human rights norms are: periodic reporting; inter-state complaints procedures; and private communications regarding violations.

In other words, the inherent power of the informal social process is highlighted as the means for building social internalization of, and compliance with, fundamental humanitarian standards.

Constructivism therefore reveals a complex and dynamic enforcement process that extends beyond the state-controlled acts of implementing domestic legislation and establishing international prosecution and punishment mechanisms. It recognizes the social process of enforcement undertaken by a range of international actors occurring “in a variety of public and private fora.”<sup>389</sup> It highlights the importance of transnational social actors – social movements, knowledge-based epistemic communities,<sup>390</sup> non-government organizations, transnational advocacy networks,<sup>391</sup> multi-national corporations and the global media – in guiding state behavior, recognizing them as a significant part of the context within which international law seeks to regulate State conduct. Specifically, Constructivist theory directs attention to the capacity of “non-traditional social actors”<sup>392</sup> to promote “principled and causal ideas”<sup>393</sup> in the international arena and further, to make these ideas matter to actors involved in international legal and political decision-making. In doing so, Constructivism introduces a sociological element to what has traditionally been viewed as a legal challenge – that of enforcing or improving compliance with international law. Unlike the formal process of creating law and establishing international enforcement institutions, the process of building a solid commitment to the substance of international legal rules, and hence engendering voluntary compliance with them, is “conducted below the threshold of public visibility.”<sup>394</sup> As Reisman suggests, these activities and processes comprise a type of “micro-law”<sup>395</sup> which contrasts with “the traditional jurisprudential focus [has been] on mass and aggregate behavior and on norm-setting by the apparatus of the State.”<sup>396</sup>

These ideas question the pervading top-down analysis applied to the creation, implementation and enforcement of international law and challenge many of the constraints placed on the progressive development and enforcement of international legal rules by the traditional Positive law approach. If the process of social interaction and its influence on the behavior of international actors in relation to legal norms, is recognized as a regulatory mechanism equally, if not more powerful, than legal rules and institutions alone, then the distinction between formal and informal rules of conduct breaks down. The nexus, as opposed to the distinction, between informal social norms in the international arena and formal international law becomes the focal point in the effort to improve compliance with the law. This brings to the fore the importance of developing an internalized commitment to international legal norms and the idea that interaction

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<sup>389</sup> *Supra* note 21 at 194.

<sup>390</sup> *Supra* note 346 at 171 - groups with particular knowledge, expertise and beliefs .

<sup>391</sup> TANs establish and maintain links between international non-government organizations, local non-government organisations in countries suffering abuses and supportive officials and agencies within national governments and international institutions.

<sup>392</sup> S. D. Krasner, “Power Politics, Institutions, and Transnational Relations” in T. Risse-Kappen, ed., *supra* note 356 at 311.

<sup>393</sup> *Ibid.*

<sup>394</sup> *Supra* note 99 at 8.

<sup>395</sup> *Supra* note 292 at 181. – “Microlegal systems possess all the desiderata of law, however, they are scaled to their microscopic dimensions.”

<sup>396</sup> *Ibid.* See also S. D. Krasner, “Power Politics, Institutions, and Transnational Relations” in T. Risse-Kappen, ed., *supra* note 356 at 312: notes that taking account of the role of principled ideas and beliefs in international norm-creation “requires taking communicative action rather than instrumental rationality and the logic of persuasion rather than the logic of cost-benefit calculations, more seriously.”

within the international community provides the means for achieving this level of commitment. Essentially then, it is the forces at play within the interactive international social process, that are ultimately responsible for the generation of behavioral and attitudinal norms which comply with international legal prescriptions. According to this paradigm, actual enforcement of international law occurs through a decentralized, non-legal process of inevitable communicative interaction within the international community.<sup>397</sup>

According to Constructivism, the social process is not simply a factor to be added to the functional, rational paradigm pursued to date, but an overarching, all-pervasive and boundary-less context within which the law seeks to moderate behavior. This perspective points to the existence and importance of an international norm-creation powerhouse additional to State-created and enforced international law. Through the Constructivist lens, a process whereby international non-state actors, external and internal to the State, can pro-actively contribute to the development of State policies and State internalization of international norms "in a positive rather than merely negative and constraining way"<sup>398</sup> is described. This points to a 'bottom-up' approach as a key part of the effort to ensure adherence to, and effective internalization of, international law. While legal decision-making in the international arena clearly rests with States, the power to influence States towards decisions in compliance with the law rests with a wide range of actors participating in an ongoing process of international normative regulation. Constructivism sees States as "socially responsive entities"<sup>399</sup> in terms of international decision-making and action as much as they are sanction-responsive. Thus, formal international legal rules and institutions are understood in the context of international society as "human artifact[s] established, maintained and changed by the decisions of politically relevant actors."<sup>400</sup>

Thus, the traditional international framework of state-based interaction is viewed within a wider societal context of broad-based transnational social contact and interaction. In practical terms, state entities are seen not only in their aggregate form, but disaggregated and possessing multiple personalities and multiple motivations for actions. Employing contemporary Constructivist theory in the effort to improve international compliance with international law calls not for replacement of the existing state-based system of international relations, and Positivist framework for creating international law, but rather for "communication, collective understandings, identity and norms of appropriateness [has] to be taken more seriously."<sup>401</sup> The notion that expectations about behavior are created, and in effect, enforced through general processes of collective participation in international society, as much as they are through the operation of the law, is presented as additional, rather than alternative, to the formal legal approach. It provides for a shift in focus without ignoring or denying the relevance of the state-based system in enhancing compliance with international law. As Benedict Kingsbury suggests

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<sup>397</sup> Constructivism finds the power to influence attitudes and behavior of actors at the transnational level in two key departures from traditional thinking: a reliance upon non-state actors to promote ideas and publicize conduct at variance with current social understandings; and a focus on voluntary rather than coerced action – that is, actions borne of an internalized commitment rather than prompted by the existence of an external prescription and enforcement procedure. See also Telford Taylor in A. Roberts, *supra* note 44 at 27 "As one who has taught criminal law for several years, I always try to instil in my students a basic appreciation that most law enforcement is voluntary."

<sup>398</sup> *Supra* note 316 at 593.

<sup>399</sup> *Ibid.*

<sup>400</sup> *Supra* note 305 at 319.

<sup>401</sup> S. D. Krasner, "Power Politics, Institutions, and Transnational Relations" in T. Risse-Kappen, ed., *supra* note 356 at 311.

“compliance [thus] involves conformity with different sets of norms made by and directed to different sets of actors, rather than the traditional model of inter-state rules implemented by national measures.”<sup>402</sup>

Constructivism fundamentally, and particularly in its application to improving compliance with international humanitarian law, “concerns the issue of human consciousness”<sup>403</sup> and the role of human values in international affairs. It entertains the possibility of developing a sense of global inclusivity based upon a universal human interest in compliance with international humanitarian law. In doing so, Constructivism attempts to bridge the perceived gap between state and individual identities in the international arena. In traditional analysis of international relations, the conceptions of a state-based international society and an individual-based global community are seen as mutually exclusive, giving rise to the view that active pursuit of a global community will result in a reduction in power and eventual loss of the state entity in international affairs. Constructivism seeks to overcome the idea that highlighting cross-border common values at the level of individual human beings “will undermine the identity and legitimacy of states and thus corrode the foundation of international society.”<sup>404</sup>

As applied to the argument of this thesis, Constructivist theory emphasizes the complementary relationship between a state-based international society and an individual-based global community<sup>405</sup>. The Constructivist approach is not employed as a means of denying the existence or importance of the State structure as a recognized entity in the international system.<sup>406</sup> It simply challenges the primacy of states to the operation of the system. States are contributory relevant actors, rather than the sole relevant actors, whose interactions influence the development and operation of a continually evolving system, which in turn, influences State interests and behavior. Given the collective nature of social constructions of the State and the strength of the state structure built upon them, any attempt to change entrenched state characteristics including the centrality of state consent to international law and the sanctity of national sovereignty, would depend upon “changing a system of expectations that may be mutually reinforcing.”<sup>407</sup>

Adopting a global perspective, as opposed to an exclusively state-oriented approach, opens the way for more innovative means of regulating the behavior of international actors. Constructivist theories point to the power of “sociological structuralism”<sup>408</sup> – social relations – as a determinant of international behavior in contrast with the Positivist-Realist focus on formal, visible, material incentives for legally compliant conduct. A dynamic process of social interaction is perceived as

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<sup>402</sup> *Supra* note 287 at 357. – “Appropriate levels of compliance...are outcomes of the political interaction [and] ...the weighted claims and responses of the relevant actors in the discursive community.”

<sup>403</sup> *Supra* note 23 at 33.

<sup>404</sup> *Supra* note 99 at 337.

<sup>405</sup> See *Ibid.* at 327. A Global community and a state-based society are conceptualizations often perceived as alternatives rather than co-existing. With an emphasis on the global community, practical embodiment of Constructivist ideas in the international arena places States in a more vulnerable position than traditional legal and political thinking has allowed.

<sup>406</sup> In promoting the influential power of ideas, Constructivism asserts that it is through the discussion of ideas that shared understandings and perceptions emerge in relation to the international legal and political structure within which interaction takes place. In other words, the communication of ideas contributes directly to the construction of international reality. Barry Buzan presents an extreme interpretation of this assertion with reference to the concept of States, noting that “[s]tates...are fictions whose status rests on the strength and breadth of people’s willingness to believe in, or merely accept, their reality.” See *Ibid.* at 329

<sup>407</sup> *Supra* note 349 at 80

<sup>408</sup> *Ibid.*

ultimately responsible for the creation and re-creation of international attitudinal and behavioral norms. As such, the power to change the interests of State actors or vary the significance of fundamental State concerns, over time and across international issue areas, rests with all participants interacting in international society. It is contended here that these ideas must be actively incorporated into the humanitarian law enforcement process. Constructivist, process-based, theoretical perspectives support the need to shift focus in efforts to improve compliance with international humanitarian and criminal law. They advocate a move away from the “essential passivity of Positivism”<sup>409</sup> and its dependency on state consent, towards a more active, multi-directional, multi-dimensional approach to engendering norms of conduct in compliance with the law. This entails a fundamental shift in direction from a narrow focus on law – its implementation, application and enforcement through formal executive, legislative and judicial processes – to a broader focus on the impact of the political and social context within which decision-making in relation to compliance occurs. In this way, state interests can be constructed or re-constructed to support formal domestic implementation and more importantly national internalization of international norms.<sup>410</sup>

The power of the Constructivist model addresses many of the weaknesses of the legal enforcement approach outlined in Chapter Two. In this way, Constructivist ideas complement and enhance traditional law-based regulatory frameworks in the international arena. Constructivist theory adds “the power of discourse”<sup>411</sup> and discourse-related sanction to the formal enforcement powers of prosecution and punishment. Arguably, it brings together several streams of thought in relation to the compliance question. It builds upon the Positivist/Realist foundation of state-based international law while promoting the power of principled ideas and discourse. This conception of international society and its regulation offers new directions for the compliance project, pointing to the strength of social interaction, in addition to the law, as a force to be exploited in seeking to improve compliance with international humanitarian and criminal law.

In closing this discussion of Constructivist insights into the compliance process, the question arises as to how the key features of Constructivist theory apply, in practical terms, to the project of improving compliance with fundamental norms of international law prohibiting genocide, war crimes and crimes against humanity? Drawing on Constructivist understandings of the operation of the international system and applying this to the context of improving compliance with laws prohibiting genocide, war crimes and crimes against humanity, several key points emerge as future directions in the compliance project. These future directions, discussed in Chapter Five, tap into the contemporary interdependence of the international environment, seeing and utilizing compliance with international humanitarian law not simply as “a curb on the will or preferences of [a] state”<sup>412</sup> but also as an incentive or “a condition for realizing the full range of [a state’s] objectives.”<sup>413</sup> The ideas espoused in these strategies are not new,<sup>414</sup> but the need to focus on

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<sup>409</sup> W. M. Reisman, “Theory about Law: Jurisprudence for a Free Society” (1999) 108 Yale L. J. 935 at 936.

<sup>410</sup> See M. Finnemore, *supra* note 316 at 594. – notes that states may adopt policies not simply “as an outgrowth of their individual characteristics or conditions but in response to socially constructed norms and understandings held by the wider international community demonstrat[ing] an embeddedness of states in an international social system.”

<sup>411</sup> *Supra* note 269 at 2639.

<sup>412</sup> *Supra* note 79 at 124.

<sup>413</sup> *Ibid.*

<sup>414</sup> See H. H. Koh, *supra* note 21 at 186. – Two types of intellectual history: history of scholarly discourse *within* international law and history of scholarly discourse *between* international law and its companion discipline of international relations.

them as a means for enforcing international humanitarian law appears to have been largely overlooked, or side-lined, in favor of the formal international legal processes employed to date. This thesis asserts that the alternative avenues highlighted by Constructivism need to become the focus of attention in developing international law enforcement mechanisms and institutions, if such mechanisms and institutions are to be effective in regulating the behavior of international actors.

## CHAPTER 5

The gap between the norms and the reality in human rights and humanitarian law has always been wide. Today the visibility and immensity of violations of international humanitarian law highlight issues of compliance that raise cynicism and doubt. In the long run, humanitarian norms must become a part of public consciousness everywhere. Education, training, persuasion and emphasis on values that lie outside the law, such as ethics, honor, mercy and shame, must be vigorously pursued. This job cannot be left to the law alone. Public opinion and social consensus that have proved so effective in the development of the law should be geared to transforming practice as well.<sup>415</sup>

What does a Constructivist understanding of international affairs mean for the compliance project in practical terms? What steps does the international community need to take to establish norms of compliance with international humanitarian law based on an internalized commitment to the law?<sup>416</sup>

### A TRANSNATIONAL APPROACH TO ACHIEVING COMPLIANCE WITH UNIVERSAL HUMANITARIAN NORMS – FUTURE DIRECTIONS

The international community has to date pursued the development of formal legal rules and processes in the effort to implement and enforce fundamental human rights standards. This approach relies upon State-based negotiation, agreement, and ultimately, consent. Thus, a corollary to the traditional focus on formal law, is a focus on States as the primary actors in international society and the primary subjects of international law. Even in the case of the ICC, the focus has been on acquiring *State* consent to, and ratification of, an enforcement system ultimately aimed at controlling *individual* conduct. Clearly, the purpose of the ICC is to prosecute and punish individual persons responsible for committing genocide, war crimes and crimes against humanity. Paradoxically however, the attention of the international community has been firmly trained on the degree of encroachment upon State power that the ICC represents, rather than the fundamental ethical principle underlying the creation of a permanent ICC – the universal condemnation of these crimes and the need to combat their future perpetration.

Arguably, this continued preoccupation with formal law as a means for setting standards *and* ensuring compliance with agreed standards, emerges from traditional legal and political theories based on Positivist-Realist conceptions of international society. As discussed in the previous chapter, however, more recent theories of international law and politics expand upon the Positivist-Realist framework, to create a new framework and focal point in the effort to improve compliance with the law governing human rights atrocities. Constructivist ideas and theories assert that legal rules and norms of conduct are socially constructed through the mutually

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<sup>415</sup> *Supra* note 41 at 278.

<sup>416</sup> See *Supra* note 269 at 2656 - In considering the best strategies for internalization of international human rights norms, Koh makes the important distinction between social, political and legal internalization.

constitutive activities and interactions of a variety of international actors in contemporary international society. Constructivism highlights the power of social ideas and discourse in changing behavior and points to the pivotal role of non-state actors in enforcing existing legal rules through establishing social norms of compliance. It is contended that future directions for enhancing compliance with international humanitarian and criminal law must involve fundamental changes in perception and a departure from traditional international regulatory processes – essentially, a move away from standard, State-centered legal approaches to regulating conduct, to a recognition of the variety of factors and actors influencing and contributing to the development of international norms. For an international legal regime to be universally effective, as is the objective in the case of serious human rights violations, compliance processes must look beyond the law as the key instrument of enforcement and move beyond the idea of States as the primary creators and targets of these norms. It is necessary to take account of equally powerful but perhaps less ‘tangible’ forces of social regulation, and equally significant, but perhaps less visible, players participating in international society. The task of inculcating an internal commitment to the legal norms and processes proscribing genocide, war crimes and crimes against humanity, therefore involves several shifts in thinking with regard to the ways and means of regulating international society.

This chapter identifies several issues as necessary considerations in improving compliance with international humanitarian law and building a proactive commitment to the law prohibiting genocide, war crimes and crimes against humanity, among all members of the international community. It points to the need to develop a sense of transnational commonality among international actors – a commitment to common humanity – equal in power to the existing international commitment state sovereignty. It suggests that Constructivist insights focused on generating actual compliance, rather than simply creating law and legal enforcement institutions, can assist in building this sense of common human purpose on a transnational basis. Four key directions are considered here, including the need to distinguish between state subjects and individual human subjects as targets of international humanitarian law – in order to develop and encourage recognition of a universal human interest at the state level as well as cultivate a universal respect for fundamental human rights internalized by the individual human constituents of the international community. Beyond differentiating between the subjects of international humanitarian law, Constructivist ideas highlight the dual nature of international humanitarian law, emphasizing the moral content of international humanitarian standards in conjunction with the legal force of humanitarian norms. Thus, the power of ethical and social values in the international arena, is recognized and advocated as a means for improving compliance with international humanitarian law. The importance and influence of non-state actors in promoting these conceptions of international society and actively enforcing international humanitarian law in such a society, constitutes a further area for future attention. Recognizing the above-mentioned factors and relying on non-state actors to further the compliance project, in turn, points to an altered conception of state sovereignty as a necessary and inevitable precursor to (and by-product of) improved compliance in the area of international humanitarian law.

The key issues explored in this chapter move beyond the limitations of the traditional, state-centered assumption that the implementation and enforcement of international law is at base “an internal matter for states.”<sup>417</sup> These ideas challenge the persistent and arguably exclusive international attraction to establishing specialized supra-national enforcement authorities with

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<sup>417</sup> *Supra* note 44 at 28.

ever-stronger enforcement capabilities as the preferred means of securing compliance with international law. A focus on these issues advances the notion of transnational and sub-national involvement in international enforcement.

At this juncture, it is important to emphasize that, in proposing the future directions outlined here, I do not seek to claim that active pursuit of these ideas will result in universal compliance. As noted by Chayes and Chayes, it would be unrealistic for any enforcement procedure to make such a claim.<sup>418</sup> However, by directing the attention of the international community to these issues, we begin to pursue a new approach to the enforcement of international humanitarian law that is “theoretically sound and practically effective.”<sup>419</sup>

As noted in Chapter 4, the Positivist, Realist and Constructivist theoretical frameworks for compliance need not be perceived as mutually exclusive. As Koh surmises, drawing on Kenneth Waltz’ tri-level analysis of international relations, one’s conception of the international community may assume one or all of the following forms: a stand-alone international system; a collective of independent nation-state entities; or a mass aggregation of individuals and groups.<sup>420</sup> These various descriptions comprise different levels or layers of the one phenomenon, with traditional theoretical approaches attempting to explain compliance in terms of one of these levels. Process-based legal and political theories such as Constructivism, however, “seek to supplement these [international system and domestic level] explanations with reasons for compliance that are found at the transactional level: interaction, interpretation and internalization of international norms...”<sup>421</sup> And it is in this supplementary capacity that Constructivism’s focus on the ability of transnational actors to effect change, strengthens the enforcement effort. It builds on the existing legal framework in emphasizing “the positive transformational effects of repeated participation in the legal process.”<sup>422</sup> Furthermore, transnational social forces draw power from increased international institutionalization – the establishment of formal international enforcement authorities and procedures. As noted by Risse-Kappen, “the more the respective issue-area is regulated by international norms... the more permeable should state boundaries become for transnational activities.”<sup>423</sup>

This chapter argues that, given the existence of a legal institutional framework, attention must now be directed to the issues and processes described below in the effort to enhance compliance with international humanitarian law. There may be nothing new about these mechanisms per se, but in the formal legal campaign to improve the enforcement of international humanitarian law, they appear to have been neglected, or perhaps overlooked entirely, in the rush to establish formal, visible, externally powerful institutions aimed at coercing international actors into conformity with legal norms.

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<sup>418</sup> *Supra* note 79 at 111.

<sup>419</sup> *Ibid.*

<sup>420</sup> K. Waltz, *Man, the State and War* cited in *supra* note 269 at 2649

<sup>421</sup> *Ibid.* at 2649.

<sup>422</sup> *Ibid.* at 2650.

<sup>423</sup> T. Risse-Kappen, Introduction, T. Risse-Kappen, (ed.) *supra* note 356 at 7.

## SUBJECTS OF INTERNATIONAL HUMANITARIAN LAW – STATE AND HUMAN ACTORS; STATE AND HUMAN FACTORS

In considering the ways and means of achieving universal respect for fundamental humanitarian norms, it is necessary to identify the *subject* in question – that is, the entity whose actions we seek to influence. International law generally regulates relations between States. International human rights law comprises a departure from this tradition in seeking to regulate the conduct of states in relation to their citizens. International humanitarian and criminal law, particularly in regard to the prohibitions against genocide, war crimes and crimes against humanity, are even more distinctive in providing for individual responsibility, in addition to state responsibility, in recognition that the acts constituting these crimes are ultimately carried out by individual persons. Thus, genocide, war crimes and crimes against humanity are recognized as ‘state crimes,’ generally taking place pursuant to a state or organizational policy, as well as individual crimes. States *and* individuals are therefore explicitly recognized as subjects of the law prohibiting these crimes.

It is submitted here that attention must be directed to the fact that both States *and* individuals are conduits for committing genocide, war crimes, and crimes against humanity – therefore both States and individuals bear responsibility for such acts. Consequently, both States and individuals comprise the target subjects of efforts to improve compliance with the law in this area and ultimately, prevent the commission of these crimes. In developing mechanisms for effective enforcement of international humanitarian law, therefore, the *subject* of such initiatives must be clarified, as different initiatives may be carried out by, and targeted towards, different actors within the international system.

The international community must therefore recognize that international humanitarian law runs counter to the traditional international legal paradigm bounded by state relations, state subjects, and state values. Perhaps more than any other subject matter governed by international law, international *humanitarian* law and its goal of protecting fundamental human rights exemplifies the evolution of international law from a purely inter-state, reciprocity-based regulatory system to a system with the capacity to regulate individual conduct and protect individual rights.<sup>424</sup> Thus, the international system in the area of international humanitarian law has responsibility for protecting and pursuing “human values” as well as guarding “state values” and interests.<sup>425</sup> As noted by Louis Henkin, the progressive internationalization of human rights has “injected specific human values into inter-state politics and law.”<sup>426</sup> The classic international law paradigm of reciprocal legal rights and obligations agreed between states is therefore overturned in the case of international humanitarian law which seeks to protect individual human beings, over and above serving State interests.

It is contended that, at present, consent-based, State-made international humanitarian law largely begins and ends with State subjects, remaining state-focused and rarely penetrating beyond the level of State representatives and national policy-makers to reach individual citizen subjects of

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<sup>424</sup> The post-WWII ratification of the Geneva Conventions and Additional Protocols, along with the entry into force of the ICCPR and the ICESCR, signify the formal turning point in this regard, marking the transition from “a jurisprudence exclusively delineating the rights and duties of states towards one also delineating the rights and duties of individuals.” T. Franck, “Three Major Innovations of International Law in the Twentieth Century” (1997) 17 QLR 139 at 152-153.

<sup>425</sup> *Supra* note 78 at 184.

<sup>426</sup> *Ibid.* at 207.

the law.<sup>427</sup> Arguably, events such as the establishment of the ad hoc tribunals for the Former Yugoslavia and Rwanda, along with the adoption of the Rome Statute providing for the creation of a permanent ICC, represent important steps in recognizing individuals as the ultimate building blocks of, and participants in, the international system. In providing for the prosecution of individuals, by an international tribunal, for violation of fundamental human rights and humanitarian standards, these mechanisms formally recognize that, in order for these international legal rules to be effective, they must impact upon the layer of international participants existing below the state. However, despite this formal recognition of the need to reach individual ordinary citizens of a nation state, the substantive focal point in the process of negotiating, obtaining agreement to, and implementing the ICC has been, and remains, the State entity.

Furthermore, in terms of effective enforcement of international humanitarian law, it is contended that recognition of individuals as subjects of the law, through an enforcement institution empowered to prosecute persons responsible for committing genocide, war crimes and crimes against humanity, is limited to punitive enforcement. Arguably, individuals are recognized as target subjects in the context of punishment and accountability – that is, after violation of the law has occurred – while little attention is directed towards the individual as an international subject in the context of ongoing compliance.

Substantive recognition of private individuals as the base-level “constitutive unit[s] of the international system”<sup>428</sup> involves the concomitant recognition that the enforcement of international humanitarian law is fundamentally “an exercise in directed social and psycho-social change.”<sup>429</sup> And it is this type of internal change, beginning and ending at the level of human actors, that must occur in order for formal legal prescriptions and punitive processes to be effective.

In seeking to enforce international humanitarian and criminal law prohibitions against genocide, war crimes and crimes against humanity, it appears that a fundamental shift in focus is necessary in terms of the international community’s perception of the target subject of these laws. It is necessary to recognize and actively engage private individuals – the human element of the international system – in the process of implementing and effectively enforcing international humanitarian law. As Burley warns, the international community “must be willing to look behind the label ‘sovereign state.’”<sup>430</sup> However, in doing so, the state as an international actor and entity in itself cannot be ignored. As noted by Burley, “[l]ooking only to the rights of individuals and recognizing states only to the extent that they effectuate those rights, can be a prescription for disaster.”<sup>431</sup>

Thus, the international humanitarian law enforcement effort must take equal account of the two target subjects of the law and differentiate between these subjects in developing effective compliance strategies. It is important to recognize the differential social processes influencing

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<sup>427</sup> While it is recognized that the treaties protecting fundamental human rights oblige States parties to implement international norms into national law, it is asserted that this level of implementation, when it occurs, is limited to formal legislative implementation which does not necessarily equate with social internalization at the general level of individual citizens.

<sup>428</sup> *Supra* note 23 at 20.

<sup>429</sup> *Supra* note 162 at 26-27.

<sup>430</sup> *Supra* note 22 at 184.

<sup>431</sup> *Ibid.* at 185.

state and individual conduct and apply this to the compliance project accordingly. The international community must recognize that if we seek to alter the behavior of individuals as well as States, an exclusive focus on the traditional, inter-state legal approach does not provide a sufficient or effective means of reaching both subjects.

Just as the provisions of international humanitarian law and criminal law target both individual and state subjects, compliance strategies too must be appropriately targeted, taking account of the very real differences between these two types of legal subject. While a particular strategy – such as disseminating and emphasizing the binding obligation of the law and the threat of punishment in the event of violation – may have a greater effect on individual human actors than on State entities; a different strategy such as ethics-based enforcement involving the strategic exploitation of moral leverage in the international arena, may have a greater impact on state behavior than the power of formal international legal obligation.

#### **LEGAL FORCE; MORAL POWER – THE DUALITY OF NORMATIVE OBLIGATION INHERENT IN INTERNATIONAL HUMANITARIAN LAW**

In recognizing and differentiating between State and individual subjects of international humanitarian law, it follows that a range of social processes, including but not limited to State-based international law, may contribute to the regulation of State and individual conduct in accordance with humanitarian norms.

It is submitted that a duality of normative obligation exists within international humanitarian law. That is to say that, inherent in humanitarian law is a dual pull towards compliance, based upon its ethical foundation as well as its legal expression. However, with the international community's focus on the development of formal legal rules and processes to enforce fundamental humanitarian standards, the moral basis and influential power of these norms, has arguably been overlooked. In seeking to explain this dual nature of international humanitarian law and to illustrate the appeal to ethics as an additional basis for engendering respect for fundamental humanitarian standards on a transnational scale, a brief discussion of the distinction between legal and moral rules is worthwhile.

Ethical rules are essentially moral principles of human conduct governing good and bad, right and wrong, behavior. Various theories seek to explain the origins of these standards of conduct. Some theorists state that moral rules originate from a metaphysical or 'otherworldly'<sup>432</sup> source or that an innate moral sense exists in every individual; still others argue that empirical realities dictate rules of behavior necessary for human survival or alternatively, that moral principles are a social construction – norms expressly or implicitly agreed upon by the members of a particular society.<sup>433</sup> Regardless of their origin, moral rules are distinct from legal rules primarily because they are not created by a political entity such as the State. Furthermore, moral rules are not enforceable by formal state institutions or authorities, such as police, courts and judges (unless a particular moral rule has been enacted into legal rule).<sup>434</sup> Moral rules therefore entail an

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<sup>432</sup> Warner, D., "An Ethics of Human Rights: Two Interrelated Misunderstandings" (1995) 24 Den. J. Int'l L. & Pol'y 395 at 398.

<sup>433</sup> *Supra* note 14 at 16-17.

<sup>434</sup> *Ibid.* at 17 [Note: sanction for violating moral rules may exist in other forms, for example divine punishment or social punishment processes]

obligation to a power other than the State – to oneself, to society or to a divine being.<sup>435</sup> This ‘higher’ normative aspect of ethical rules is supported by Hans Kung when he asserts, “[A]n ethic is more than law – ethical obligations are more than legal obligations...Treaties, laws, agreements are only observed if there is an underlying ethical will to observe them.”<sup>436</sup>

By contrast, legal rules, in the Positivist sense, are distinctive in their creation by, and enforcement through, the processes of the state or system of governance. Thus, “legal obligation is owed to the body politic.”<sup>437</sup> Importantly too, Positive legal prescriptions must contain a degree of certainty and specificity in order to be perceived as legitimate by those to whom the rules are addressed. It is this perceived legitimacy that essentially gives legal rules their binding quality.<sup>438</sup> As stated by Arend, “[a]ctors perceive law to be of a different normative character than moral rules...They regard it as legally binding.”<sup>439</sup>

Notably, the existence of a legal rule is not necessarily contingent upon the existence of a moral rule and vice versa. The two can, and do, operate separately and independently in many areas of regulation. However, the two may also operate in tandem.<sup>440</sup> Natural law theories offer the clearest example of this link, arguing that legal rules are “those rules derived from, and consistent with, fundamental moral principles.”<sup>441</sup> Arguably international humanitarian law too falls into this category.

International humanitarian law grew out of the ideas and actions of Henry Dunant and the committee he established, known as the International Committee of the Red Cross (ICRC). The ICRC, founded on the belief in a universal moral concern to alleviate human suffering, espoused a set of humanitarian principles for protecting and assisting victims on both sides of war.<sup>442</sup> Thus, in situations of war and violent conflict, a belief in “man’s innate sense of what is just, good, humane”<sup>443</sup> was actively pursued. The ethical essence of this regulatory system is captured in a clause of the Geneva Conventions stipulating that, “in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of public conscience.”<sup>444</sup>

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<sup>435</sup> *Ibid.* at 18.

<sup>436</sup> *Supra* note 70 at 54 and 145.

<sup>437</sup> *Supra* note 14 at 20.

<sup>438</sup> *Ibid.* at 21.

<sup>439</sup> *Ibid.*

<sup>440</sup> eg. Islamic law constitutes a form of regulation where legal rules of conduct are inseparable from moral rules derived from religion. Clearly where the law and legal system is based upon a religious code, it is not possible to separate legal motivations for compliance from moral motivations. While inseparable, nonetheless it is asserted that the moral or religious basis for action strengthens the legal pull towards compliance. The capacity or incapacity to separate legal from moral/religious motivations in no way detracts from the argument that, where legal rules embody recognized moral principles (such as the prohibitions against genocide, war crimes and crimes against humanity), both internal moral and external legal justifications for compliant conduct may be emphasized in the effort to establish universal norms of compliance.

<sup>441</sup> *Ibid.* at 19.

<sup>442</sup> The fundamental principles of the Red Cross were proclaimed by the 20<sup>th</sup> International Conference of the Red Cross in Vienna, 1965, in M. Veuthey, at 97(Appendix).

<sup>443</sup> R. I Geraldson, “Introduction: What is International Humanitarian Law? The Role of the International Committee of the Red Cross” (1982) 31 *Am. Univ. L. Rev.* 817 at 817.

<sup>444</sup> ‘Marten’s Clause’ in Geneva Conventions of 1949 and Additional Protocols, *supra* note 44.

In referring to principles of humanity, fundamental humanitarian standards arguably reflect the concept of human dignity – a term which lacks formal definition, but appears to be “clearly accepted as a universal social good.”<sup>445</sup> In illustration, the Universal Declaration of Human Rights declares that “all human beings are born free and equal in dignity and rights;”<sup>446</sup> and the International Covenant on Civil and Political Rights stipulates that “all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”<sup>447</sup> An essential element of the concept of human dignity, therefore, is its inherent or intrinsic nature, with all individuals, by virtue of being human, possessing an “untouchable and inalienable”<sup>448</sup> dignity. At its most basic level, respect for human dignity implies the right not to be deprived of life, liberty or personal security – the most fundamental “rights in relation to the person.”<sup>449</sup> As such, it denotes the very essence of international humanitarian law.

International humanitarian law, unlike other areas of international law, is more than just an obligation created by law and owed by the State to other States, or toward individuals within its jurisdiction.<sup>450</sup> Beyond its legal construction and application to the State, the *human foundation*<sup>451</sup> of international humanitarian law places an obligation on all individuals to all others. However a focus on the purely legal nature of international humanitarian legal obligations perpetuates the idea of State-based, consent-governed duties, losing sight of the human values at the core of the law – ethical values which cannot be negotiated or ‘watered down’ in the same way as international law. As Finnemore notes, “...humanitarian values are premised on a worldview not easily accommodated within...a states system [where] the unit of concern is the state...”<sup>452</sup> They comprise values applicable to all persons, thereby transcending State boundaries and controls.

Thus, the existing body of international humanitarian law, founded upon ethical humanitarian principles and expanded into a comprehensive set of legal standards, is the product of a norm-creation process based upon the merging of ethics and law and stemming from a purely moral

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<sup>445</sup> O. Schachter, “Human Dignity as a Normative Concept” (1983) 77 Am. J. Int’l L. 848 at 849.

<sup>446</sup> Article 1 *Universal Declaration of Human Rights* adopted 10 December 1948, *supra* note 35.

<sup>447</sup> Article 10 *International Covenant on Civil and Political Rights*, *supra* note 36.

<sup>448</sup> *Declaration Toward A Global Ethic* adopted by the Parliament of the World’s Religions, 1993 in H. Kung, and H. Schmidt, *supra* note 70 at 15.

<sup>449</sup> Jean-Jacques Rousseau quoted by A. Hay in “Introduction to the American Red Cross/Washington College of Law Conference on International Humanitarian Law” (1982) 31 Am. Univ. L. Rev. 811 at 814.

<sup>450</sup> It is important to note that in arguing that both legal and moral justifications for action should be recognized and emphasized in efforts to ensure compliance with humanitarian norms, my thesis is quite distinct from the H.L.A. Hart thesis concerning the minimum moral content of a legitimate valid law. My argument asserts that the prohibitions against genocide, war crimes and crimes against humanity constitute fundamental moral principles of respect for human dignity, independent of their expression in legal form. Therefore, the focus of enforcement initiatives should encompass the fact that these acts are not only legally proscribed, but most fundamentally, morally proscribed. Unlike other areas of international law, therefore, the moral appeal of the law prohibiting human rights atrocities, is equally as strong as its legal force (eg. Law of the Sea, International Environmental Law, International Trade Law undoubtedly possess some minimum moral content, however it could not be argued that their overriding pull toward compliance is based on moral appeal). Furthermore, my argument focuses on the need to emphasize the fundamental moral protections contained in the law as justifications for adherence to the law.

<sup>451</sup> In referring to the ‘human foundation’ of humanitarian law, my reference is to the human dignity content of the law and to the human subjects and objects of the law. See *Furundzija case* cited in Meron, *supra* note 41 at 266-267 – the ICTY noted: “The essence of the whole corpus of international humanitarian law as well as human rights law lies in the protection of the human dignity of every person...the general principle of respect for human dignity is...the very *raison d’être* of international humanitarian and human rights law.”

<sup>452</sup> *Supra* note 24 at 71.

appeal. The potential exists therefore to draw on the dual forces of moral and legal obligation in the effort to effectively enforce the law. Yet, despite this duality of potential influence, the international community has traditionally focused on the development of *legal* rules and processes in the effort to implement and enforce humanitarian standards, largely overlooking the value of ethical principle. As demonstrated in Chapter Three, the international community is primarily focused on the legal nature of genocide, war crimes and crimes against humanity rather than the humanitarian principled nature of the legal prohibitions. The translation of basic ethical principles into legal norms has arguably resulted in a focal shift to the law and away from the moral considerations underlying the law.

It is contended that, in the area of international protections against genocide, war crimes and crimes against humanity, it is necessary to depart from prevailing perceptions that, for all actors, the primary motivation for adhering to international law is the law itself.<sup>453</sup> A combination of legal and moral regulatory force is essential to building a strong, stable, universal norm of compliance among all actors. Rather than being a question of alternative paths of ethics *or* law, the two are cumulative and complementary in international humanitarian law and as such, *both* should be utilized as motivations for compliance. As international humanitarian standards possess both moral and legal obligatory force, both the legal *and* moral justifications for action should be recognized and emphasized in efforts to ensure compliance with the agreed standards. Arend supports this strategy in noting, “[i]t may well be that any form of legal order is at its healthiest when there is a generally diffused sense that it is morally obligatory to conform to it.”<sup>454</sup>

#### **META-LEGAL MOTIVATIONS FOR COMPLIANCE – THE POWER OF ETHICS AND SOCIAL VALUES IN THE INTERNATIONAL SYSTEM**

Extrapolating from the above discussion of the dual nature of international humanitarian law norms, the question of how international actors may be influenced by non-legal forces to comply with legal norms falls to consideration.<sup>455</sup> How do ethical and meta-legal motivations for compliance with the law operate in the international arena? What sanctions do they invoke to promote compliance? How can the moral essence of international humanitarian law be utilized as a justification for compliance?<sup>456</sup> Can social norms operating within the international system successfully tap into the decision-making processes of international actors – through social interpretations of legal obligations and ethical actions – so as to build a transnational universal

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<sup>453</sup> R. J. Beck, A. C. Arend, & R. D. Vander Lugt, (eds.) *International Rules: Approaches from International Law and International Relations* (Oxford: 1996) - “Adherence to the law may not be motivated by it.”

<sup>454</sup> *Ibid.*

<sup>455</sup> In considering internal, meta-legal motivations for compliance, it is not claimed that legal approaches to humanitarian law enforcement have relied exclusively upon external, institutional compliance processes. Clearly, all theoretical approaches seeking to regulate the behavior of international actors acknowledge that “a combination of internal motivations and external pressures” add up to a “culture of compliance.” However, in the humanitarian law enforcement project, it is external, institutional pressures for compliance that have been the focus of attention to date. As noted by Henkin, “The principal inducements to compliance with international law, the principal contributions to a culture of compliance, are external.”

<sup>456</sup> The meta-legal moral motivations for compliance, outlined in this thesis, are distinguished from Hart’s notion of ‘minimum moral content’ in that the *entire*, or *maximum* moral content of the humanitarian legal prohibitions against genocide, war crimes and crimes against humanity is advocated as basis for engendering compliance with these laws.

human interest in compliance with the law prohibiting genocide, war crimes and crimes against humanity, among all international actors.

At first glance, the concept of ethical regulation in the international arena seems a novel suggestion springing from idealistic circles of academia, philosophy and religion with little relevance or application to the pragmatic demands of international law and politics. While it may be an attractive idea in theory, pragmatists argue that a global ethic holds slim prospects for effective regulation of international conduct. If legal norms have failed to attract compliance, attempts to “inject an ethical dimension into international relations”<sup>457</sup> seem idealistic and facile – an exercise in wishful thinking – in light of the demands of politics, culture, history, economics and ideology on State and individual behavior. Notably, however, the last decade has witnessed increased interest in religious and philosophical thinking on the topic of a universal or global ethic, by a variety of international actors from various disciplines. Calls for the development of a Declaration of universal principles for human interaction have gained considerable volume and momentum, highlighting the general failure of international legal approaches to account for the influence of “meta-legal”<sup>458</sup> forces on the conduct of international actors, particularly States. Specifically, factors such as reciprocity, reputation and public opinion, based upon social norms of right and wrong, appear to play an influential role in international affairs, potentially as strong as considerations of national or individual self-interest. As noted by the World Commission on Culture and Development, “[i]n the present fashion of stressing only self-interest, we run the danger of underestimating the power of moral and humanitarian appeals and motives in guiding international cooperation.”<sup>459</sup>

In considering the impact of ethical obligations in the context of international affairs, it is noteworthy that ethical discourse (as with legal discourse), in its traditional usage, concerns relations between individual natural persons or groups of persons. By contrast, in the international arena, political and legal discourse primarily concerns the activities of non-human entities such as States, international organizations, or the international system as a whole.<sup>460</sup> Arguably, this conceptualization of ethics as held by individuals rather than States has contributed to the lack of attention given, to date, to ethical values as a pull toward compliance with international law.

The ensuing discussion considers the impact of ethics and social values in the international arena in order to propose a shift in thinking from formal legal, State-centered strategies towards an ethical, human-centered approach to the enforcement of international humanitarian law. It is argued here that the role and influence of informal normative mechanisms, such as ethics, and social or political values, such as reputation, are underestimated and hence under-utilized, in the formal legal approach to enforcing international humanitarian and criminal law. Despite significant legal developments promoting and pursuing the *humanitarian* element of international humanitarian law, the law remains the mechanism relied upon for the enforcement of these internationally recognized rules. The attention of the international community is largely

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<sup>457</sup> International Commission of Jurists, *The Review* No.61 (1999) at 25.

<sup>458</sup> Colonel G.I.A.D Draper cited in M. Veuthey, “Implementation and Enforcement of Humanitarian Law: the Role of the International Committee of the Red Cross” (1983) 33 *Am. Univ. L. Rev.* 83 at 89.

<sup>459</sup> Report of the World Commission on Culture and Development, *Our Creative Diversity* (Paris: UNESCO, 1996) at 50.

<sup>460</sup> D. Warner, “An Ethic of Human Rights: Two Interrelated Misunderstandings” (1995) 24 *Den. J. Int’l L. & Pol’y* 395 at 397.

focused on highlighting existing law, or creating new law where current law is seen to be inadequate or ineffective in preventing mass violations of fundamental human rights. A 'top-down,' supra-national, formal legal approach has been the favored strategy to date in seeking to achieve compliance with agreed fundamental humanitarian standards. As Reisman notes, prevailing ideas about what constitutes a functional legal system both in domestic and international settings are limited by the persistent and narrow association of law with the power and operation of the State.<sup>461</sup> Thus, traditional theories of law are constructed around a "hierarchical international assumption"<sup>462</sup> which concentrates attention on the idea of "an internationally distinct enforcement agency."<sup>463</sup> By contrast, a strategy that harnesses the power of ethical norms and social values as a means for effecting compliance among international actors offers a more diffuse, multi-dimensional approach to enforcement.<sup>464</sup>

Reisman's notion of "microlegal systems"<sup>465</sup> or systems in which "the norms are unwritten, uncodified, and often consciously unperceived,"<sup>466</sup> resonates with the argument for ethical and social motivations for regulating behavior in the international arena. It recognizes that formal Positive law is not the only, nor necessarily the most powerful, means of engendering compliance with the law. In explaining and drawing attention to the concept of microlaw, Reisman contends that the overriding and enduring focus on formal institutional enforcement "confuses function and institution."<sup>467</sup> While microlaw is often dismissed as a form of law,<sup>468</sup> such dismissal can be roundly challenged by drawing on the Positivist logic that defines a legal system as one which distinguishes between permitted and forbidden behavior through the application of sanctions. Reisman defines sanctions underlying a legal system as "responses sufficiently forceful to clearly characterize offending behavior as unlawful and to prevent, deter, correct, or effect ..."<sup>469</sup> such behavior. According to this definition, microlegal systems operating alongside the law and applying sanction through social processes and interactions, while "commensurately low-key and often non-verbal,"<sup>470</sup> are nonetheless present, operational and influential in terms of effecting behavioral change.

Clearly, sanctioning and enforcement are essential elements of a legal system, however, these functions need not be attached to a particular or single formal institution. As articulated by Reisman, while specialized enforcement agencies may be developed, the law may also be enforced coarchically<sup>471</sup> through informal social expectations and responses to violations of a generally respected collective norm. Sanctions such as social ostracism or branding/labelling players' actions unethical may appear trivial and largely invisible in comparison to formal

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<sup>461</sup> *Supra* note 292 at 176.

<sup>462</sup> *Ibid.* at 177.

<sup>463</sup> *Ibid.*

<sup>464</sup> In arguing for a greater focus on internal ethical and social motivations for compliance, I am not asserting that internal motivations for compliance are not currently used in international law enforcement processes, or that external motivations in the form of formal sanctions have been exclusively relied upon by the international community to date. Rather, I submit that the primary focus is on external, institutional determinants of compliance. I seek to emphasize that "the global community is as much a state of mind as it is networks or more tangible interactions" and as such, increased attention must be directed towards internal motivations.

<sup>465</sup> *Ibid.* at 175.

<sup>466</sup> *Ibid.*

<sup>467</sup> *Ibid.* at 177.

<sup>468</sup> *Ibid.* at 176.

<sup>469</sup> *Ibid.* at 167. (check end of quote)

<sup>470</sup> *Ibid.*

<sup>471</sup> *Ibid.* at 177.

punishment rendered by an institution such as the ICC, however the power and impact of social sanctions increases when the wider context and importance of international societal interaction is considered. As Reisman surmises, “[T]he microsanktions of microlegal systems to which we are actually susceptible may be much more significant determinants of our behavior than conventional macrosanktions which loom portentously, but in all likelihood will never be applied to us.”<sup>472</sup> Thus, it is argued that generally agreed and respected international social values and ethical principles and the informal sanctions and social pressures brought to bear in instances of violation, can and do play a role in the ongoing effort to ‘humanize’ the behavior and attitudes of States and individuals in the direction of permanent and universal compliance with the prohibitions against genocide, war crimes and crimes against humanity. Thus, non-state actors, including non-government organizations, national and international media, and the general public are central to the enforcement process, in emphasizing and publicizing the humanitarian essence of the legal rules proscribing genocide, war crimes and crimes against humanity, and promoting the social norm of conformity to these laws on a moral basis.

Traditional Realist conceptions of international relations deny that State actors may be influenced by such meta-legal considerations and forces. However, drawing on Constructivist theory, it is contended that morality, as applied to individual conduct and attitudinal development in an everyday social setting, can equally apply to nation-states as actors interacting within international society. This conception of international morality is supported by Teson who submits, “just as in individual morality, ...governments must refrain from immoral acts even if they serve the national interest.”<sup>473</sup>

In advocating the potential influence of moral principle in international interactions, it is not claimed that the simple promotion of ideas of universal human brotherhood alone, can successfully compel compliance with laws prohibiting human rights atrocities. Such a suggestion would be pure idealism. Rather, it is contended that self-serving national interests may be constructed on the basis of allegiance to ethical principles and recognized social values. In other words, “moral leverage,”<sup>474</sup> exercised strategically through informal mechanisms, may compel States to alter their conduct in the direction of continued and committed compliance if such compliance is translated into economic and political gains for a particular nation-state. As noted by Chayes and Chayes, “[m]ore subtle and perhaps more menacing, in an increasingly interdependent world where not many states can achieve many of their objectives by their own exertions, are various kinds of reputation effects.”<sup>475</sup>

Thus, instead of concentrating solely on formal treaty provisions and specialized enforcement mechanisms as the means for improving compliance with established international humanitarian and criminal law, it is important to take account of other forms of pressure, not articulated in formal legal agreements, but underlying their formal existence, that may prove equally effective. Arguably, an increased focus on meta-legal compliance-inducing processes emphasizing the ethical underpinnings of international humanitarian law, suggests a shift from Positive legal thinking to insights more aligned with Natural Law theories. By exercising moral leverage, in conjunction with legal leverage, a perpetrator of genocide, war crimes and crimes against

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<sup>472</sup> *Ibid.*

<sup>473</sup> F. R. Teson, “Realism and Kantianism in International Law” (Panel - The Jurisprudence of International Law: Classic and Modern Views) (1992) 86 Am. Soc. Int’l L. Proc. 113 at 116.

<sup>474</sup> *Supra* note 25.

<sup>475</sup> *Supra* note 79 at 152.

humanity may suffer not only the consequences of being a 'law-breaker' but also the effects of being labelled a violator of universally accepted ethical humanitarian standards. As suggested by Oran Young, "the prospect of being found out is often just as important, and sometimes more important, to the potential violator than the prospect of becoming the target of more or less severe sanctions of a conventional or material sort."<sup>476</sup>

While the effect of these meta-legal forces may be difficult to prove in any empirical sense, it cannot be discounted because, at the very least, such informal social sanctions, drawing on generally accepted moral values, are no *less* likely to induce compliance than the fear of prosecution and punishment offered by current formal enforcement mechanisms.

The idea of utilizing monitoring and enforcement mechanisms derived from socially interactive processes in the international arena, is not in itself a novel one. Informal, non-legal mechanisms such as diplomatic pressure, trade-related incentives and economic aid have long been used by state actors in the international setting to encourage or induce desirable behavior. However, active employment of purely social motivations for compliance with legal norms – sanctions activated and pursued by a variety of State and non-state international actors in their daily interactions – has gained little attention in efforts to enforce international humanitarian and criminal law. Therefore, in addition to the obligatory language and conception of the law, the force of ethical values and social expectations in the international arena must be maximized in the compliance effort. As Henkin notes, a range of factors may assume significance in the process of law observance by international actors, including a common interest in maintaining good international relations and a desire to establish a reputation for principled behavior.<sup>477</sup> Chayes and Chayes support this contention in arguing that socially activated and directed sanctions exert highly persuasive pressures towards compliance: "even in the absence of [such] material inducements, the threat of exposure or shaming is a powerful spur to action."<sup>478</sup>

Thus, a proposed 'social ethics-based' strategy for effecting universal respect for the prohibitions against genocide, war crimes and crimes against humanity involves a focus on developing a global commitment to, and common interest in, agreed legal responsibilities, expressed in the form of ethical and social norms, applicable to all actors – public, private, collective, and individual. In theory, pursuing an ethical commitment to upholding fundamental humanitarian standards based on a social consensus of respect for human dignity addresses many of the weaknesses and inadequacies of the current law-based enforcement system. In practice however, any attempts to constrain international decision-making and action on the basis of ethical principle are viewed with extreme skepticism. The everyday realities of contemporary international politics and the overwhelming power of individual and national self-interest, combine to cast doubt on the normative force of moral guidelines. Just as humanitarian legal standards on paper have not been mirrored in practice, many argue that promoting these laws as ethical or social rules, above and beyond their existence as legal rules, will have little practical effect beyond symbolism.

Constructivism challenges this assertion through its "principled beliefs"<sup>479</sup> analysis of the workings of international society in relation to various notable historical events and behavioral

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<sup>476</sup> Oran Young cited in *supra* note 79 at 152.

<sup>477</sup> L. Henkin cited in H. H. Koh, *supra* note 269 at 2621.

<sup>478</sup> *Supra* note 79 at 230.

<sup>479</sup> Goldstein and Keohane in J. G. Ruggie, *supra* note 23 at 17.

practices. The progressive expansion of the human rights regime, the abolition of slavery, the ending of apartheid, and the stand against chemical and nuclear weapons<sup>480</sup> are a few of the international developments cited as evidence of the impact of ethical beliefs on international conduct.<sup>481</sup> Constructivist writers such as Forsythe and Sikkink draw on these illustrations to support the contention that, in some cases, shared moral expectations can lead international actors – be they individuals or states – “to redefine their interests or even their sense of self.”<sup>482</sup> Meron points to the experience of the Helsinki Declaration to illustrate the impact of moral commitments, *embodied and espoused in social norms*, as distinct and important motivations for compliance with formal legal obligations.<sup>483</sup> Others, such as Finnemore, point to institutional features of the international landscape such as the establishment of the International Committee of the Red Cross (ICRC) and the universally recognized body of humanitarian norms contained in the Geneva Conventions as examples of the operation of moral force in the regulation of international society. As Finnemore argues, “...Realism’s rejection of morality as a significant force in world politics provides little explanation for the creation of the ICRC and the widespread ethical convictions it encompasses.”<sup>484</sup>

In explaining the prospects for a change in orientation to take account of the regulatory power of moral or ethical rules at the global level in the area of international humanitarian law, support can be found in efforts over the past decade, by various sectors of international society, to pursue ‘a global ethic,’<sup>485</sup> ‘universal human duties and responsibilities,’<sup>486</sup> and ‘a world public order of human dignity.’<sup>487</sup> Numerous criticisms have been directed toward these efforts as idealistic, reducing the force of law to a merely ethical appeal, and futile in the *realpolitik* environment of international relations. However, as asserted by the InterAction Council, “a better social order both nationally and internationally cannot be achieved by laws, prescriptions and conventions alone, but needs a global ethic.”<sup>488</sup>

The continuing occurrence of massive human rights violations around the world demonstrates that existing law fails to attract universal compliance. While various reasons can be cited for non-compliance with international legal prohibitions against genocide, war crimes and crimes against humanity, including the lack of a supra-national enforcement mechanism, political imperatives, and cultural differences, these reasons may have less credibility if the call for

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<sup>480</sup> See Forsythe, 1991, Sikkink 1993 in J. G. Ruggie, *supra* note 23 at 19.

<sup>481</sup> In relying on these examples, it is recognized that the impact of ethical values on the outcomes in these issue areas cannot be weighed or measured. As the Chayes’ note, *supra* note 79 at 153: “it is hard to demonstrate in any particular case that these sorts of considerations operated to deter a State from violating its treaty commitments. The motivations for state action are always multiple, and in the case of deterrence there is the additional difficulty of proving a negative. However, it can hardly be denied that ...at least in some cases, they must tip the balance in favor of compliance.”

<sup>482</sup> *Ibid.*

<sup>483</sup> *Supra* note 41 at 275.

<sup>484</sup> *Supra* note 24 at 87.

<sup>485</sup> *Declaration Toward A Global Ethic* adopted by the Parliament of the World’s Religions, 1993 in H. Kung, and H. Schmidt, *supra* note 70.

<sup>486</sup> *The Universal Declaration of Human Duties and Responsibilities* adopted by the Third Millennium Project of the City of Valencia and presented to UNESCO April 1999, in Y. Kim, *A Common Framework for the Ethics of the 21<sup>st</sup> Century* (Paris: UNESCO, 1999)

<sup>487</sup> M. S. McDougal, H. D. Lasswell, & L. Chen, *Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity* (New Haven: Yale University Press, 1980)

<sup>488</sup> Introductory Comment to *A Universal Declaration of Human Responsibilities*, *supra* note 70 at 2.

compliance emanates from ethical grounds or social expectations in addition to legal prescriptions.

A further reason underlying the inadequacy of legal regulation in the field of humanitarian law, and a key argument in support of a global ethic, is that the current approach to human rights – rights that the individual possesses as against the State – focuses on the placement of the individual in a national context, sharing a commonality of rights and values with other individuals within those territorial and cultural boundaries. As such, discourse associated with humanitarian law, though it has been internationalized in one sense, still largely fails to highlight the very basic, cross-border commonalities associated with human existence. As McDougal asserts, current international norms and practices demonstrate “increasingly fragmented identifications with no rational relation to basic humanity or to potential contributions to the common interest.”<sup>489</sup>

Furthermore, the framing of humanitarian norms in terms of legal *rights* arguably de-emphasizes, if not overlooks, the fundamental *responsibilities* attached to effecting these norms. Formal implementation processes for the enforcement of international humanitarian law arguably direct little attention to the notion of individual responsibility in the attainment of universal respect for human dignity – responsibilities placed upon all people, and owed to all other people, separate and aside from the responsibilities and powers of the State. In effect, the formal legal approach to enforcing humanitarian law, with its focus on State consent and State implementation of international norms, fails to draw on the foundational idea that “all human beings are born free and equal in dignity and rights...endowed with reason and conscience and should act toward one another in a spirit of brotherhood.”<sup>490</sup>

Clearly, the development of a universal common interest in upholding the values and responsibilities contained in the proscriptions against genocide, war crimes and crimes against humanity – is an essential condition for their effective enforcement. If such a “transformation of individual and collective consciousness”<sup>491</sup> is required among all subjects or actors in international society, a global ethic – a set of moral principles with universal social application and appeal – arguably provides the mechanism for this change. The fundamental importance of recognizing this common interest, over and above individual or national interests, may be better and more readily accepted as an ethical or social value rather than as an agreed international legal obligation. In other words, while an emphasis on the legal nature of international humanitarian obligations means an emphasis on limitations on the power of the State, an emphasis on inherent human values, with cross-cultural and transnational relevance applicable to human existence, means a focus on standards and constraints governing human action on a global scale.

Thus, Constructivist recognition of the social dimension of transnational relations reveals a mechanism through which moral values or principled beliefs can exercise influence within the formal legal and political framework of international society. This case for the role of ethical

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<sup>489</sup> M. S. McDougal, H. D. Lasswell & L. Chen, “Human Rights and World Public Order: Human Rights in Comprehensive Context” (1977) 72 Nw. Univ. L. Rev. 227 at 265.

<sup>490</sup> Article 1 – *Universal Declaration of Human Rights*, *supra* note 35.

<sup>491</sup> Declaration of the Parliament of the World’s Religions *supra* note 70 at 31.

and social values in the international system gives substantive power to the effort to implement a permanent and universal social expectation of obedience – a norm of compliance – with fundamental humanitarian principles prohibiting genocide, war crimes and crimes against humanity. A focus on ethical and social norms views individuals, as distinct from States, and as key decision-makers and actors in international society, emphasizing individual responsibility for actions in relation to all other individuals.<sup>492</sup>

Shifting attention to the power of ethical principle as an enforcer in the international system (in addition to, and alongside the force of law), requires acknowledgement that the formal establishment of legal institutions represents a visible, surface-level step in what is, at its core, a socially managed and supported commitment. Clearly, the characterization of a rule or institutional process as legally binding, alone, may make little difference to its normative influence in the context of international humanitarian and criminal law violations. Rather, it is the discourse – the constant discussion and reinforcement of these rules as social expectations with a legal and ethical obligatory basis – that is the key to altering individual and state behavior. Thus, it is the *social norms*, based on *human* rather than State values, and drawing on generally understood notions of principled behavior, that become an independent and powerful reason for compliant action.

Notably, calls for the development of a set of universal principles for human interaction have gained momentum in recent times.<sup>493</sup> The Parliament of World Religions took the lead, in 1993, drafting a ‘Declaration Toward a Global Ethic,’ based on a consensus of fundamental moral principles found in the ancient teachings of the world’s major religions. Building on this framework, the InterAction Council – a body of former Heads of State from all regions of the world – drafted a Universal Declaration of Human Responsibilities, in an effort to balance human rights with human responsibilities and to reconcile ideologies, beliefs and political views, previously viewed as irreconcilable.<sup>494</sup> Alongside these developments, calls for a universal set of ethical values and standards increased with various international organizations openly supporting the idea. Specifically, the Commission on Global Governance called for the creation of a ‘global civic ethic,’ stating that the standards and constraints set by commonly accepted values and norms “must be the cornerstone of global governance.”<sup>495</sup> The World Commission on Culture and Development also highlighted the need for a “global ethics”, asserting that the

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<sup>492</sup> As McDougal argues, there is a “...community of the whole of humankind; transcending all national boundaries.” M. S. McDougal, “The Dorsey Comment: A Modest Retrogression” (1988) 82 Am. J. Int’l L.

<sup>493</sup> Throughout the 1990s, a number of international conferences were convened to consider various problems with global impact including, the environment, population, sustainable development and human rights. In response to the urgent need to direct international attention and effort toward these global aims, the process of identifying and synthesizing values common to all cultures and societies “that could serve as the basis for...collective efforts toward peace and prosperity,” assumed importance. Y. Kim, *supra* note 486. at 11.

<sup>494</sup> *Universal Declaration of Human Responsibilities*, *supra* note 70 at 2 and 4.

<sup>495</sup> Report of the Commission on Global Governance, *Our Global Neighbourhood* (New York: Oxford University Press, 1995) at 47. The Commission identified a set of core values shared by people of all cultural, political and religious backgrounds including respect for life, liberty, justice and equity, mutual respect, caring and integrity. The Commission also articulated a list of rights and responsibilities based on these values, including: rights to a secure life, equitable treatment, opportunity to earn a fair living, participation in governance at all levels, equal access to information and equal access to the global commons. Responsibilities include: to consider the impact of our actions on others, to promote equity, to protect the interests of future generations, to safeguard the global commons, to preserve humanity’s cultural and intellectual heritage, to be active participants in governance and to work towards eliminating corruption.

moral concern “to protect the integrity and respect the vulnerability of human being”<sup>496</sup> is universal in appeal. Building on these precedents, the UNESCO Universal Ethics Project, developed a ‘Common Framework for the Ethics of the 21<sup>st</sup> Century,’ identifying a set of ideas, values and norms<sup>497</sup> based on “the commonality of ethical practice in the daily life of different cultures and the commonality of the tasks which humanity faces.”<sup>498</sup>

Given these substantial and noteworthy efforts to promote an ethics-based approach to the regulation of human conduct, the suggestion that the ethical essence of humanitarian legal rules be pursued as a motivation for compliance with the law, does not seem so far-fetched. Nevertheless, critics of an ethics-based approach to the regulation of human conduct assert that a global ethic ‘reduces law to ethics’<sup>499</sup> and is far removed from a practical solution to the world’s problems.<sup>500</sup> In response to these claims, it is asserted that the purpose of directing the international community’s attention to global human values and moral principles is to provide an additional motivation for compliance with existing humanitarian legal standards. Rather than harming the humanitarian law enforcement project, or detracting from the established legal rules, expression of these legal norms in terms of transnational ethical and social values underlying and supporting the law, can only serve to strengthen the normative authority of these rules. That there are indications of a gradual acceptance of these ideas is undeniable, UNESCO’s Universal Ethics Project providing a salient example.

It is contended that a focus on the ethical and global nature of international humanitarian law norms offers a starting point for inculcating a commitment to the law – a solid commitment extending beyond the transience of individual or national self-interest. Without a moral and social commitment to the common interest of preventing genocide, war crimes and crimes against humanity, action to this end will not become a reality. As noted in the Declaration of the World Parliament of Religions, “we know that religions cannot solve the environmental, economic, political and social problems of Earth. However, they can provide what cannot be attained by economic plans...or legal regulations alone: a change in the inner orientation...of people.”<sup>501</sup>

Effectively tapping into international ethical and social values as motivators for compliance with international humanitarian law relies upon the role and influence of non-state international entities, including individuals, transnational corporations, international organizations, non-government organizations and the global media, to promote and sustain continuous discourse in this area.

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<sup>496</sup> Report of the World Commission on Culture and Development, *Our Creative Diversity* (Paris: UNESCO, 1996) at 41. According to the Commission, the principles underlying a global ethics include: human rights and responsibilities, democracy and the elements of civil society, protection of minorities, a commitment to non-violent conflict resolution and fair negotiation, and equity within and between generations.

<sup>497</sup> Y. Kim, *A Common Framework for the Ethics of the 21<sup>st</sup> Century* *supra* note 486 at 34.

<sup>498</sup> *Ibid* at 40. The four sections of the framework represent groups of essential ethical values: sustainability for the earth, human fulfilment in the free exercise of both rights and responsibilities, complementarity between the individual and the community, and peace through justice.

<sup>499</sup> *Supra* note 457 at 26.

<sup>500</sup> *eg.* Report of World Commission on Culture and Development, *Our Creative Diversity* (Paris: UNESCO, 1996) at 45.

<sup>501</sup> *Declaration Toward A Global Ethic* *supra* note 70 at 13.

## THE POWER AND INFLUENCE OF NON-STATE ACTORS IN THE COMPLIANCE PROJECT

In considering the practical viability and potential influence of ethical principles and social norms in the international humanitarian law enforcement project, the role of non-state actors must be considered. If ethical and social values are to be effectively exploited as justifications for compliance with the legal prohibitions against genocide, war crimes and crimes against humanity, it is clear that such exploitation has not been, and will not be, pursued by State actors demonstrably preoccupied with potential infringements of national sovereignty and curtailments upon the freedom to pursue national interests. Clearly, the ability to inject meta-legal influences with enforcement power, rests with non-state actors whose active promotion of ethical and legal obligations is not dependent on, or limited by, the granting of state consent.

Employing a state-focused model of international relations to “ground state obligation to international law”<sup>502</sup> in an attempt to enforce existing proscriptions against genocide, war crimes and crimes against humanity is inherently limiting. As noted in earlier Chapters, state sovereignty and national interest operate to stunt *state*-initiated evolution of fundamental humanitarian norms from their legal form to living social norms of state and individual practice. Thus, states cannot be relied upon to proactively acknowledge or promote international social and ethical normative obligations. Consequently, non-state participants in international society must take up the task of drawing attention to the importance and value of these norms as a step towards effective internalization.<sup>503</sup>

The influential power of non-state actors is supported by their pervasive presence, at the intra-state grass-roots level and at the inter-state transnational level, as “actors promoting principled ideas as well as knowledge.”<sup>504</sup> While non-state, meta-legal enforcement action gains strength from its diffuse and decentralized existence, the capacity also exists for such enforcement to occur through consolidated, coordinated channels. Keck and Sikkink use the term ‘Transnational Advocacy Networks’ (TANs) to describe this mechanism, unique to the non-state sector, which draws together disparate groups, including individuals, grass-roots activists in various States, internationally recognized non-government organizations and government officials in national and international bodies, to form a network of people actively promoting a particular set of principled ideas or values.<sup>505</sup>

In highlighting the role of non-government organizations (NGOs) and non-state agencies as a key future focal point in the international humanitarian law enforcement project, it is worth clarifying the nature of non-state involvement that is suggested here. That NGOs throughout the Twentieth Century have been, and continue to be, involved in the development of inter-state legal and political agreements is not in doubt.<sup>506</sup> Clearly, NGO interests and the general public interest feed into, and inform, national positions to the extent that “negotiations with foreign

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<sup>502</sup> P. Halewood, “Introduction to Symposium on Conceptualizing Violence” (1997) 60 Alb. L. Rev. at 568.

<sup>503</sup> ie social internalization.

<sup>504</sup> *Supra* note 356 at 8.

<sup>505</sup> See M. E. Keck, & K. Sikkink, *supra* note 25 at 1 – TANs – networks of activists distinguishable by the centrality of principled ideas or values motivating their formation.

<sup>506</sup> See C. Tinker, “The Role of Non-State Actors in International Law-Making During the UN Decade of International Law” (1995) 89 Am. Soc. Int’l L. 179 at 179 – The involvement of NGOs in law and policy is not a new concept. The terms, ‘Non-governmental organisation,’ ‘global civil society’ or ‘international civil society’ have emerged in an effort to acknowledge the real contribution of non-state groups to the process of international law-making.

parties [must] eventuate in a treaty that is acceptable to interested domestic constituencies.”<sup>507</sup> However, this existing and widely acknowledged form of non-state actor involvement relates to the context of establishing or creating legal rules – NGO input in this setting contributes to the *creation* of the law through the vehicle of the consent-powered State. This level of NGO activity exerts pressure upon States at the stage of consenting to the imposition of a particular regulatory regime, rather than at the stage of *enforcing* agreed rules or standards of conduct. While the role of civil society in the international law-creation process remains significant, it is not the focus of this particular argument. The difference between the well-recognized role of civil society in the ongoing development and expansion of the international legal system, and the role which is identified and advocated here, lies in the objective of the NGO action and the capacity to directly influence the outcome. In other words, the role of non-state actors – individuals and organizations – highlighted in this chapter is that of *enforcement* of existing legal rules – an objective that non-state actors can pursue through direct influence on the behavior of international actors. It is a role where non-state actors operate alongside existing international legal rules and institutions to assist in the process of compliance with the law, rather than the process of obtaining consent to the law.

That non-state actors play an important role in existing international enforcement processes is also not new. Non-state actors are currently relied upon by many international regulatory bodies to carry out monitoring, verification and reporting functions in lieu of States, and to publicize behavior that falls short of compliance. And it is this role and potential that is emphasized here. While there is no doubt that these activities have occurred for some time, and continue to do so – to date, they have not been considered by the international community as recognized enforcement initiatives when it has been faced with the reality of genocide, war crimes and crimes against humanity, despite the existence of a formal legal regime. That is to say, the international community as a whole must turn its attention to the enforcement capacity of non-state resources as an adjunct to its reliance on formal legal enforcement institutions such as the ICC. In addressing the compliance problem, the capacity of civil society to encourage implementation and internalization of the law, and to participate in its continuing enforcement must be further explored.<sup>508</sup> Non-state actors can participate *directly* in the law enforcement and compliance process, their very effectiveness enhanced by the fact that such participation and activity occurs outside the bounds of State consent.

The conception of enforcement as a social mechanism carried out by social actors through their daily interactions overcomes the State-consent limitations of enforcement through formal legal mechanisms. The widespread and strategic use of non-state actors to construct social norms, based on ethically and legally compliant conduct in the international system, constitutes a mechanism whereby state consent need not govern the extent or effectiveness of enforcement. State consent may remain the ultimate source of formal legal obligation in the international arena, but the effective enforcement of those legal obligations can be pursued non-consensually by non-state entities in the effort to achieve substantive compliance.

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<sup>507</sup> *Supra* note 79 at 5.

<sup>508</sup> *Supra* note 26 at 413 – “NGOs are increasingly injected into many areas of international affairs. Not only do they contribute to the process by which international law and policy are made, but they help set the agendas for action by governments ... and implement advocacy and publicity campaigns when governments and inter-governmental organisations fail to meet their obligations under international law. In academia, there are still many skeptics who are wed to state-centric or state-intergovernmental organisation models of international law and relations.”

If non-state actors are the vehicles for promoting meta-legal motivations for compliance and influencing State actors towards compliance in situations where legal processes have failed to secure State obedience, it is pertinent to ask where these actors draw their enforcement power from? As Sikkink notes, non-state actors, even when joined together in coordinated networks, do not possess any formal power in the international sphere. As such, they must “use the power of their information, ideas and strategies to alter the information and value context within which states make policies.”<sup>509</sup> This power is enhanced when pressure groups and influential individuals, from various origins, coordinate their activities to form a transnational coalition of non-state actors<sup>510</sup> exercising persuasive vocal power through sustained daily discourse.

Krasner contends that Twenty-First century technological developments give the non-state sector significant power enabling invisible permeation of state boundaries through radio, television or internet media.<sup>511</sup> In this context of multiple actors, multiple locations and multiple opportunities for transnational communication, non-state actors can access a variety of “functionally equivalent causal pathways”<sup>512</sup> to influence the attitudes and actions of State and individual participants in international society in the direction of compliance. As Chayes and Chayes conclude “the development and elaboration of norms, and States’ policies on compliance with existing norms, cannot be explained without attributing significant causal power to the activities of NGOs...”<sup>513</sup>

Sikkink explains the potential power of non-state, meta-legal enforcement with reference to the notion of “human rights politics.”<sup>514</sup> According to Sikkink, members of the international civil society continually review and assess the activities of states as against their treaty obligations as well as against less formal social norms of conduct. Where a state fails to comply with agreed norms, this failure is brought to the attention of the violating state in an internationally public manner through strategic ‘advertising’ by civil society networks. The respective state’s violations are articulated along with steps to improve its performance and this information is channelled into the current international discourse. The impact of this non-state activity is felt when the discourse is “translated into political and economic pressures brought to bear on repressive countries.”<sup>515</sup> Sikkink promotes this strategy on the basis of social processes of norm construction.<sup>516</sup> Finnemore too supports the social process of norm construction in her reference

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<sup>509</sup> *Ibid.* at 415.

<sup>510</sup> See P. Chilton, “Mechanics of Change: Social Movements, Transnational coalitions, and the transformation processes in Eastern Europe” in Risse-Kappen, T., *supra* note 356 at 225.

<sup>511</sup> S. D. Krasner, “Power Politics, Institutions, and Transnational Relations” in T. Risse-Kappen, *supra* note 356 at 275 and 276. — “the industrial revolution made states stronger. The technological revolution made states, on balance, weaker...”

<sup>512</sup> T. Risse-Kappen, “Structures of Governance and Transnational Relations: What have we learned” in T. Risse-Kappen, *supra* note 356 at 308.

<sup>513</sup> *Supra* note 79 at 269.

<sup>514</sup> K. Sikkink, “Transnational Politics, International Relations Theory, and Human Rights” (1998) 31 PS 517 at 517.

<sup>515</sup> *Ibid.*

<sup>516</sup> For example, transnational Liberal theory focuses on the activities of private individuals and groups across countries and within international institutions, as playing a significant role in the creation of international norms and institutions. Constructivist international relations theory views State and non-State actors as contributing members of international society. International actors themselves construct the identities, norms and roles that govern their interaction with each other. Accordingly, the activities, efforts and discourse of a variety of actors underlies the generation, dissemination and internalization of the rules, norms and processes regulating State behavior. See K. W. Abbott, *supra* note 16.

to the role of “transnational moral entrepreneurs”<sup>517</sup> in generating and disseminating norms governing acceptable state conduct in relation to its citizens and to other states; and acceptable individual conduct in relation to all other individuals (whether or not such conduct is consistent with the dictates of the law). According to these writers, cooperation between national and international non-state actors and the establishment of links with supportive government officials and representatives of international institutions, along with strategic use of publicity are fundamental elements in the process of internalizing humanitarian norms and hence, enforcing humanitarian law.<sup>518</sup>

In emphasizing the capacity of non-state actors to assist in the law enforcement process, it is not claimed that non-governmental activity is successful in achieving compliant behavioral change in all cases, nor that informal enforcement through non-governmental channels is better or more productive than traditional, inter-governmental legal processes. Rather, it is suggested that a shift in focus to take account of the sphere of impact of non-state actors in the international arena may enhance formal law-based law enforcement efforts. It is argued that non-state actors exercise most influence at the level of international social interaction, interacting in networks, groups, and as individuals, with States, international organizations and other non-state entities to structure international discourse with new ideas and norms. As such, non-state actors tap into the social value underpinnings of international law and the social context within which the law operates. In this way, non-state actors contribute to the generation of social norms consistent with formal legal obligations.<sup>519</sup>

Clearly, the formulation of humanitarian norms through law-based efforts is not enough to fulfil the goal of preventing grave violations in the form of genocide, war crimes and crimes against humanity. Effective enforcement of the laws prohibiting such atrocities requires active transnational promotion, emphasizing the common values underlying the legal norms. As discussed, States themselves are unwilling to engage in this necessary step in the compliance project. The processes of norm promotion and implementation call upon the political willingness of States to commit to the substance and permanent obligation of the law. Even in relation to extreme human rights violations, States have demonstrated a reluctance to allow the significant practical encroachment on national sovereignty that such a commitment entails. Hedley Bull captures this reality in stating, “carried to its logical extreme, the doctrine of human rights and duties under international law is subversive of the whole principle that mankind should be organized as a society of sovereign States. For, if the rights of each man can be asserted on the world stage...then the position of a State as a body sovereign over its

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<sup>517</sup> Transnational moral entrepreneurs see *supra* note 24 for definition.

<sup>518</sup> See: T. Risse-Kappen, “Introduction”, in T. Risse-Kappen, *supra* note 356 at 6 – for detailed consideration of the various domestic and international circumstances under which transnational coalitions and actors who attempt to change policy outcomes succeed or fail to achieve their goals. This book argues that the impact of transnational actors and coalitions on state policies is likely to vary according to: (1) differences in domestic structures; and (2) degrees of international institutionalization ie. the extent to which the specific issue-area is regulated by bilateral agreements, multilateral regimes, and/or international organisations.

<sup>519</sup> See L. Henkin, *supra* note 78 at 202 – “a non-official, non-governmental, but increasingly organized contribution to human rights law enforcement is the role of NGOs and the media in publicizing violations.” See also A. C. Arend, *supra* note 14 at 9. – “if non-state actors are entering into the international negotiating process in different ways, scholars may need to reassess their assumptions about how international law is constituted and implemented.”

citizens...has been subject to challenge and the structure of the society of sovereign States has been placed in jeopardy.”<sup>520</sup>

Non-state actors can access and actively pursue that element of international law found wanting in the creation of formal legal agreements – the genuine will to commit to the substantive goals of the law. In doing so, non-state actors become enforcement agents additional to, and in concert with, the established international humanitarian and criminal law regime, working to achieve the less visible components of effective enforcement necessary for the actualization of international legal norms.<sup>521</sup> As argued by Sikkink, “in the human rights issue area, the primary movers behind the international actions leading to changing understandings of sovereignty are transnational non-state actors organized in principled issue networks...driven primarily by shared values or principled ideas.”<sup>522</sup>

The extensive reach of the global civil society is another feature, unique to the non-state environment, which serves to increase the informal enforcement power of these international actors. Non-state actors in their many forms, particularly through the formation of transnational advocacy networks, target both state and individual subjects of international law, permeating state borders with the information, ideas and principled beliefs that they promote. As noted by Chayes and Chayes, with access to the national and international political process, from ground-level domestic constituents through to state officials and representatives of international organizations, the “technical, organizational and lobbying skills [of NGOs] are an independent resource for enhanced compliance.”<sup>523</sup>

In drawing attention to the enforcement capabilities of non-state participants in international society, in conjunction with the other key focal points outlined in this chapter, an attempt is made to ‘fill the gaps’ or address the limitations associated with the traditional positive law approach to the enforcement of international humanitarian law. A focus on the role and force of non-state activity in the international arena recognizes that the presence of the international civil society cannot be discounted as a powerful means of “persuading [the] parties to move toward increasing compliance with [legal] norms and guiding the evolution of the normative structure in the direction of the overall objectives of the regime.”<sup>524</sup> Non-state actors use their information and communication powers to act as independent, non-state-controlled policing agencies, monitoring and publicly assessing the actions of states.<sup>525</sup> When non-compliance is discovered, non-state actors can publicly expose and shame state violators, without fear. As Chayes and

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<sup>520</sup> H. Bull, *The Anarchical Society* (1977) at 146.

<sup>521</sup> See L. Henkin, *supra* note 78 at 206 – “the inadequacy of intergovernmental responses has engendered an additional form of enforcement. This includes the activities of NGOs (national and international), which sometimes work with governments and through international bodies and work with the media to mobilize public outrage and create a sense of shame which might help terminate...or deter violation.”

<sup>522</sup> *Supra* note 99 at 411.

<sup>523</sup> *Supra* note 79 at 21.

<sup>524</sup> *Ibid.* at 229. See also T. Risse-Kappen, “Introduction”, T. Risse-Kappen, *supra* note 356 at 4. – “Such knowledge-based or normative principle-based transnational and transgovernmental issue networks seem to have a major impact on the global diffusion of values, norms and ideas. Almost nobody denies that transnational relations exist; their presence is well-established. But...we still have a poor understanding of their impact on state policies and international relations.”

<sup>525</sup> *Supra* note 79 at 164-165.

Chayes submit, "in a real sense, they [NGOs] supply the personnel and resources for managing compliance that States are reluctant to provide to international organizations."<sup>526</sup>

It is recommended that a combined 'bottom-up' and 'top-down' approach is necessary to achieve the ultimate goal of transforming the thinking and conduct of individual and State actors in such a way as to ensure absolute respect for the humanitarian values and laws prohibiting genocide, war crimes and crimes against humanity. Practical implementation of this strategy requires recognition of the multiplicity of non-state actors participating in and engaging with, norm creation in international society.

#### **A ROUGH SKETCH OF FUTURE STRATEGIES FOR ENHANCING COMPLIANCE WITH THE LAW PROHIBITING GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY**

How can we use these tenets of the Constructivist approach to the regulation of international affairs to improve compliance? Can international humanitarian norms be effectively enforced - internalized by State and individual actors - through modes alternative and additional to the law?

As is clear from the preceding discussion and from violent conflicts occurring around the world, the existence of legal rules criminalizing genocide, war crimes and crimes against humanity does not ensure compliance with the law. It is submitted that, in the international arena, consent-based, State-centric legal rules have largely failed to compel states to act in accordance with the law. Moreover, such State-focused international law rarely reaches beyond the level of State representatives and national policy-makers to individual human subjects of the law. Thus, it is contended that future directions for enhancing compliance with the most fundamental obligations of human rights, humanitarian and criminal law must involve a change in thinking - a departure from standard State-centered and State-dependent international law enforcement processes - to an approach that recognizes the variety of factors and actors involved in the continuous generation, modification and maintenance of international attitudinal and behavioral norms. For a system of legal regulation to be continually effective, as is the objective in the prohibition of serious human rights violations, the development of regulatory institutions and processes must look beyond the formal force of law as the key instrument for ensuring compliance and move beyond the assumption that States are the primary creators and targets of these norms. It is necessary to take account of equally powerful, but perhaps less 'tangible' forces of social regulation, working in conjunction with established legal rules proscribing genocide, war crimes and crimes against humanity, and equally significant, but perhaps less visible, players working internally and externally to the State to effect change in line with internationally agreed standards of conduct.

A thorough analysis of the range of possible future steps to be taken to build the necessary will on the part of States and individuals, to respect international humanitarian and criminal law, cannot be undertaken here. However, a few broad directions may be suggested drawing on the fundamental need for a re-orientation in thinking.

Clearly, the orthodox and current view of international law enforcement is that "institutional enmeshment increases the probability of compliance."<sup>527</sup> Thus, the immediate goal in the

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<sup>526</sup> *Ibid.* at 251.

<sup>527</sup> *Supra* note 22 at 180.

humanitarian law enforcement project is the implementation and institutionalization of international legal commitments in national legal and political processes – that is, the “enmeshment” and eventual entrenchment of humanitarian legal norms in domestic decision-making through the introduction of national legislative and institutional amendments or developments in accordance with international law.<sup>528</sup> The first step in the road to internalized compliance with fundamental international humanitarian legal standards is therefore perceived to be the practical, visible task of establishing domestic legal and political mechanisms in support of international legal norms. However, as discussed throughout this thesis, it is arguable that a more immediate and equally important ongoing objective is that of developing a substantive will on the part of relevant international actors to comply with the legal norms in question. After all, it is this implementation tool that will provide the driving force behind the creation of meaningful, internationally compliant judicial and political processes in the domestic context. And it is this oft-neglected element that must exist not only *prior to* the formal domestic implementation of international norms, but in perpetuity and notwithstanding the continued existence of State-supported institutions, if effective compliance with international humanitarian norms is to be maintained.

To clarify, it is not the *theory* of compliance that is contested in this thesis, Rather, it is the *process*. Compliance with international humanitarian and criminal law (as with any law) depends on “the clarity of obligations and on the implications of non-compliance...”<sup>529</sup> for individuals and States contemplating perpetration of genocide, war crimes and crimes against humanity. Extrapolating from this, it can be concluded that, the clearer the terms of the commitment and the stronger the impact of measures invoked for non-compliance, the greater the resultant pressure towards compliance, which ultimately leads to internalized compliance. The dominant interpretation of this theory has been that State-sanctioned, institutional enmeshment offers the best means of clarifying international obligations and specifying the consequences of non-compliance. Thus, it is institutional enmeshment that has been viewed as the key to internalized, and hence improved, compliance.

However, as this thesis argues, State-dependent, formal humanitarian law enforcement measures, whether at the international or national level, will fail to secure effective compliance if an underlying commitment to the goals of the law is not cultivated among the individual human subjects of the law as well as among State entities. Therefore, while formal institutional enmeshment or national implementation of international humanitarian legal norms may enhance the internalization process, the question remains: how do we get to the stage of institutional implementation? What processes can be employed to encourage a functional willingness to comply with humanitarian legal prescriptions?

It is suggested here that the content of international humanitarian legal obligations, along with the consequences of non-compliance can be clarified, specified and widely promoted through informal, non-legal mechanisms to pressure both State and individual subjects of the law towards compliance. This thesis asserts that the international community can draw on the technical, legal

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<sup>528</sup> *Ibid.* “Enmeshment refers to a situation in which domestic decision-making with respect to an international commitment is affected by the institutional arrangements established in the course of making or maintaining the commitment.”; See also H. H Koh, *supra* note 21 at 204.

<sup>529</sup> R. O. Keohane, “Compliance with International Commitments: Politics within a Framework of Law” (Panel – International Law and International Relations Theory: Building Bridges) (1992) 86 Am. Soc. Int’l L. Proc. 176 at 178.

obligations prescribed by international humanitarian and criminal law, as well as the ethical obligations inherent in this body of law in order to promote compliance. Furthermore, the specification and implementation of negative consequences in the event of non-compliance can be pursued through informal, non-legal mechanisms operating alongside, as well as in the absence of, traditional legal institutional processes. Thus, in the absence of formal law enforcement mechanisms, informal networks and processes lying outside the control of States can be activated to compel obedience. As noted by Koh, "this decentralized model is appealing in an era of extreme skepticism about the capacities of governmental and bureaucratic institutions."<sup>530</sup>

It is argued that informal, non-state mechanisms can and should be employed to target both individual and State subjects of international humanitarian law. Non-state actors have the capacity to carry out wide-scale public education and dissemination functions where States fail to fulfil their responsibilities in this regard, while at the same time encouraging and pressuring States to comprehensively meet their international obligations. Furthermore, non-state actors, external and internal to the State, can develop and pursue strategies tailored to the target subject.

Thus, non-state actors invoking informal processes which mirror the content of the law, provide a possible avenue for penetrating even the most authoritarian regimes, at both the international and sub-national level, through differential strategies geared towards instilling a steadfast commitment to humanitarian norms (whether perceived as moral norms, legal norms or both) among individual and State participants in international society.

By focusing on each of the factors discussed earlier in this chapter, a broad framework may be proposed for enhancing the enforcement of international humanitarian law in the future. Clearly, the recognition of individuals as equal subjects of international humanitarian and criminal law, alongside States, and the further recognition of non-state actors as active participants and enforcers of this law, provides a basis for constructing improved humanitarian law enforcement strategies. Combine this with the dual normative pull of international humanitarian law, along with the influential power of ethical and social values in the international arena, and their constructive impact on conceptions of sovereignty and national interest, and a new framework for enforcement of the law is established – one which attempts to address the limitations of the formal legal approach. These factors combine to form a framework that recognizes the continuing inviolability of the sovereign State system (as does the Positive legal framework), but does not seek to contain itself within these boundaries. Rather, this framework seeks to encompass and utilize the complexity of the contemporary international system by building layers, and filling gaps evident in the State-based foundations. And it is the largely untapped potential and activity of non-state actors in the international humanitarian law enforcement process that serves to significantly enhance this proposed framework. As Arend notes, non-state entities can stand as competing or parallel influences to the State<sup>531</sup> in the campaign for compliance, bypassing the need for State consent to their informal enforcement processes. In Hedley Bull's terms, such a framework for enforcement actions comprises a "neomedieval"<sup>532</sup>

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<sup>530</sup> *Supra* note 21 at 271.

<sup>531</sup> *Supra* note 14 at 182.

<sup>532</sup> H Bull cited in A. C. Arend, *supra* note 14 at 166-171 - a neomedieval system is one "defined by actors of increased diversity and heterogeneity and characterized by overlapping international authorities and conflicting loyalties."

system where individual and State participants are subject to “overlapping authority”<sup>533</sup> and as such, have multiple loyalties to supranational, sub-national and national actors.

Thus, in seeking to improve compliance with the international legal norms prohibiting genocide, war crimes and crimes against humanity, and cultivate a transnational commitment to this cause as a universal and common interest for all international actors, it is submitted that non-state entities and informal processes, in conjunction with existing legal mechanisms, must become a focal point in the enforcement project. The key to compliance, as suggested here, is not in any way intended to discount the State entity or the role of Positive legal rules and institutions, but to recognize “the emergence of aggregational [and disaggregational] alternatives to State action”<sup>534</sup> and in doing so, to find ways of motivating States to take the necessary steps for effective implementation and ongoing enforcement.<sup>535</sup>

The activities of non-state actors and networks in strategically using legal norms and social values to produce and exchange information permeating national boundaries, provides a means, unlike the formal legal process, of decreasing fragmentation and increasing commonality among international society members. It provides a means of cultivating a universal common interest in compliance. Non-state actors provide a means of disseminating the law to individual, base-level constituents of international society as well as a mechanism for propounding the ethical values inherent in international humanitarian law, where national governments refuse to recognize the law or view themselves as being outside its applicability. It must be recognized therefore, that the implementation and enforcement of international humanitarian law occurs through the actions of a diverse range of international actors and assumes a variety of forms, geared towards promotion of the universal *human* interest underlying the legal norms, in addition to the establishment and operation of formal legal mechanisms such as international criminal courts.

Just as the campaign for a permanent international criminal court was so vigorously pursued by international lawyers, state officials, non-government organizations and the international public, similarly the international community must now turn its attention to less visible but equally important elements of an effective humanitarian law enforcement campaign. The international community as a whole must look outside the law and the law-creation approach, acknowledging that while State consent is required for law-based initiatives, law enforcement through informal means which tap into already agreed laws, is not so constrained.

The international community must focus its attention on informal enforcement processes and the variety of ways they may be employed for generating compliance. It is clear that strategies for inducing compliance among the target subjects of international humanitarian law rely upon non-state entities operating inside and outside the State to publicize norms of legal and moral obligation where States are disinclined to promote and disseminate such norms of their own accord. Non-state actors also carry out the compliance-inducing functions of reassurance and

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<sup>533</sup> *Ibid.*

<sup>534</sup> T. Franck, “Three Major Innovations of International Law in the Twentieth Century” (1997) 17 QLR 139 at 156.

<sup>535</sup> *Supra* note 44 at 70 – for better or worse, we live in a world of states, and in most cases, the laws of war, like other parts of international law, must be implemented through traditional state mechanisms such as deliberations in governmental departments, national laws, manuals of military law, rules of engagement, government-established commissions of inquiry, and courts. See M. S. McDougal, W. M. Reisman & A. R. Willard, “The World Process of Effective Power: The Global War System” in M. S. McDougal, & M. Reisman, *supra* note 314 at 371 – to say that the nation state is the most important category of participant does not warrant the inference that all nation states are more powerful than all transnational political parties, pressure groups or other organised associations.

deterrence<sup>536</sup> with respect to individual and State actors, by ensuring that information about the content of the law and social norms of compliance are actively disseminated to all levels of international society.

In terms of specifically applying these ideas to the consideration of possible future strategies for enhancing compliance with international humanitarian law, one possible approach which differentiates between human and State subjects of the law, and breaks away from traditional entrenched ways of dealing with these respective subjects under international law, is suggested here.

In short, it is proposed that the obligations of the law and the workings of the international humanitarian and criminal law regime be espoused and emphasized at the level of individual constituents of international society; and that the ethical value and moral essence of the law be actively promoted in the form of social norms, applied to State subjects, in order to construct enduring norms of compliance. This proposal is outlined in further detail below. Before proceeding, however, it is important to note that these strategies are proposed not as alternatives to existing law enforcement processes, but as additional to, current formal law-based initiatives for improving compliance.

#### **INDIVIDUALS AS SUBJECTS OF INTERNATIONAL HUMANITARIAN LAW**

In relation to individuals as perpetrators of genocide, war crimes and crimes against humanity, it is contended that attention must be directed towards emphasizing the *existence and authority of the law as the primary justification for compliance*. The requisite change in this regard is not so much a shift in thinking as a shift in focus – from States – to individuals as relevant subjects of international law. Granted, the Rome Statute for the establishment of an ICC directly addresses this issue, specifically providing for the prosecution and punishment of *individuals* as the subject of its jurisdiction. However, it is submitted that, in developing and implementing this new addition to the humanitarian law regime, (like international legal rules, processes and institutions preceding it), the focus of international activity remains firmly, and arguably necessarily, trained on States given that the ICC constitutes a formal legal institution, involving the creation of formal international law. Consequently, the ICC is dependent upon State consent to its terms and State implementation of its obligations, regardless of the fact that its application is in respect of individual human subjects. It is submitted that, as with all international law, the terms and obligations of international humanitarian law do not filter far beyond the level of State representatives, reaching perhaps to the level of military personnel, but rarely penetrating down to the ground level of civilian citizens. Clearly this level of penetration is necessary if a common commitment to an inclusive human interest is to be built.

While the legal character of humanitarian obligations occupies center-stage in terms of outlining State responsibilities and formally defining the content and scope of the law, it is contended that the legally binding nature of humanitarian obligation is diluted, if it permeates at all, below the level of the State. Chayes and Chayes, offers support for this assertion in noting that

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<sup>536</sup> *Supra* note 79 at 151. Deterrence – “A party disposed to comply needs reassurance. A party contemplating violation needs to be deterred. (Transparency supplies both.) The probability that conduct departing from treaty requirements will be discovered operates to reassure the first and deter the second (and that probability increases with the transparency of the regime).” Efforts to provide information about compliance has a deterrent as well as a reassurance effect.

“[contemporary regulatory] treaties are formally among States and the obligations are cast as State obligations. The real object of the treaty, however, is not to affect State behavior, but to regulate the activities of individuals. The State may be ‘in compliance’ when it has formally enacted implementing legislation...But the ultimate impact on private behavior depends on a complex series of further steps.”<sup>537</sup>

If the goal is to build a sense of transborder inclusivity based upon a common human element protected by compliance with the prohibitions against genocide, war crimes and crimes against humanity, it is suggested that a concerted effort to highlight the applicability of international humanitarian and criminal law to individual citizens of international society may assist in achieving this goal. As States cannot be relied upon to actively promote and disseminate the law, particularly where ongoing obedience to the law conflicts with State interests, the role of non-state actors – domestic and international non-government entities – assumes fundamental importance in this regard. Non-state actors can work at the grass-roots level to disseminate information and raise awareness of international human rights, humanitarian and criminal law obligations within domestic constituencies. Thus, individuals are pressured, through knowledge of the law, to behave in accordance with the law. The capacity of non-state actors to disseminate the law and promote the force of legal obligation among the general population is particularly salient in the context of otherwise impenetrable authoritarian regimes. Here, the operation of transnational advocacy networks, establishing informative and supportive links with underground domestic organizations and individuals, provides an avenue for educating the populace in the absence of State sanction.

Given that the action required under this proposed strategy for targeting individuals as subjects of international humanitarian law - dissemination and implementation of the law at the ground level – is not novel, the processes for carrying out such action will not be discussed in detail here. It is important, however, to note the rationale behind this strategy. It is contended that the value of “populariz[ing] knowledge”<sup>538</sup> about international humanitarian law and standards, beyond the level of national policy-makers and State representatives, to military personnel and civilians, is fundamentally important for a number of reasons. First, the base-level constituents of international society – individual persons - are the ultimate subjects whose behavior we seek to condition in the endeavor to eradicate genocide, war crimes and crimes against humanity. Consequently, it is imperative that an awareness of the existence of international legal rules and enforcement mechanisms, and their application to individuals, filters down to the level of individual actors. It is contended that this knowledge and awareness may result in increased compliance based on the human inclination to obey authority.<sup>539</sup> That is to say, a personal knowledge of international rules and international enforcement mechanisms with the power to attribute individual criminal responsibility offers a continuing form of authoritative regulation in instances where domestic legal and political order has disintegrated. Similarly, with a

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<sup>537</sup> *Ibid.* at 14.

<sup>538</sup> S. Lavrov, “The Russian Approach: The Fight Against Genocide, War Crimes and Crimes Against Humanity” (1999) 23 *Fordham Int’l L. J.* 415 at 419.

<sup>539</sup> Stanley Milgram, *Obedience to Authority* x1 (1974) – “The person who with inner conviction loathes stealing, killing and assault may find himself performing these acts with relative ease when commanded by authority – cited in D. Wippman, “Atrocities, Deterrence and the Limits of International Justice” (1999) 23 *Fordham Int’l L. J.* 473 at 478-479. See also A. Chayes, & A. H. Chayes, *supra* note 79 at 8: supports this idea of drawing the attention of individuals to the content of international law in noting, “in common experience, people...accept that they are obligated to obey the law.”

knowledge of international legal standards and a sense of individual legal responsibility among the general populace, the potential exists for the authority of international law to outweigh, or at least provide an increased level of resistance, in situations where the State itself – a competing form of authority – pursues propaganda and vilification campaigns designed to support the commission of genocide, war crimes and crimes against humanity. As appears to be the case in these circumstances, if moral values are overtaken by obedience to State authority,<sup>540</sup> it is possible that the authority of international law, operating to prosecute and punish, above and beyond the powers of the State, may have some impact on individual action.<sup>541</sup>

Arguably, the effects of widespread dissemination of the law will impact not only on individual conscience, and in turn, action, to build a sense of basic human commonality and inclusivity at the base level, but will also result in bottom-up pressure upon State political and legal processes. Popular sentiment in favor of the law will serve to pressure governments, from a sub-national level, for effective internalization and meaningful domestic implementation of the law, thus assisting to develop the necessary political will on the part of States to comply with international customary and conventional obligations in the area of protecting fundamental human rights.

It is the focus on individuals as targets of the legal standards (rather than simply targets of formal ‘after-the-fact’ law enforcement processes) that is emphasized in this strategy, along with a recognition of the non-government processes that can pursue this function in lieu of States. The importance of individuals as separate subjects - in addition to States – of this body of international law is a key point of this strategy. Where international law has traditionally been seen as a State concern, applicable in the first instance to State entities and therefore directed towards States, individuals should be given equal attention in the case of international humanitarian law. Recognition of the non-state processes available for achieving the goal of public education with respect to fundamental humanitarian standards is also critical. The international community must recognize and turn its attention to this gap in current efforts.

This strategy calls for recognition at the international level, in form and in action, of individual human agents as primary decision-makers and actors in the ongoing enforcement of international humanitarian standards proscribing genocide, war crimes and crimes against humanity. It requires a departure from the current practice of treating international legal rules and processes, and their implementation by States, as central determinants of the conduct of international actors, without regard to the independent powers of base-level participants and the context within which they conduct their affairs.<sup>542</sup> If international legal obligations are circulated among the general public as individual duties and responsibilities, and social norms of compliance established, then individual actors will have additional loyalties concurrent, but not necessarily consistent with their loyalty to State authority, as a guide for action.

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<sup>540</sup> Wippman *Ibid.* at 487. [Milgram notes “A substantial proportion of people do what they are told to do, irrespective of the content of the act and without limitations of conscience, so long as they perceive that the command comes from a legitimate authority.”]

<sup>541</sup> *Supra* note 44 at 18 – support for this contention can be found in The Federal Republic of Germany’s 1992 military manual for all land, sea, and air-based forces which lists 13 factors that “can induce the parties to a conflict to counteract disobedience of the law applicable in armed conflicts and thus to enforce observance of international humanitarian law.” These factors include the existence of penal and disciplinary measures as well as *the personal conviction and responsibility of the individual* (emphasis mine). Other factors listed include: consideration of public opinion, maintenance of discipline; the activities of the ICRC; national implementing measures; and dissemination of humanitarian law.

<sup>542</sup> See McDougal jurisprudence generally; See also W. M. Reisman, *supra* note 409 at 937.

It is necessary to build the personal will on the part of individual actors, as well as the political will of States, to comply with international humanitarian law, for enduring attitudinal and behavioral change to occur. Thus, it is essential that the legal duties and responsibilities imposed upon individuals by international law to refrain from committing acts of genocide, war crimes and crimes against humanity are widely and well-known. As Chayes and Chayes note, “[A]ctors subject to a legal system for the most part acknowledge an obligation to obey its norms – an obligation that goes beyond the fear of penalties that may be imposed for violation.”<sup>543</sup> While the impetus or motivation for such obligation may vary,<sup>544</sup> the obligation itself remains the same.

The content of international instruments prescribing individual duties and responsibilities, such as the Genocide and Geneva Conventions and the Statute of the International Criminal Court must be made known to the base-level constituents of international society in order for the force of law to impact upon its intended subjects. Individual personal responsibility for compliance with international legal standards must be emphasized in international discourse in order for effective enforcement to become a reality. Non-state actors provide a means of creating this “transparency”<sup>545</sup> whereby information about the content and meaning of international rules and procedures for States and individuals is made available to relevant actors, whether or not State authorities actively participate in its dissemination.<sup>546</sup> Clearly the nature of a particular domestic regime will impact upon the ability of non-state actors – transnational and domestic – to attract and direct public attention towards State policy or practice that falls short of, or conflicts with, its international commitments; or to bypass States in seeking to educate citizens about their individual international legal obligations.<sup>547</sup>

Thus, the rationale for focusing attention on individuals as subjects of international humanitarian law is two-fold. First, it is recognized that international humanitarian law, as with all international law, is implemented through the decisions and actions of nation-state governments. As noted by Roberts, “[I]t is usually through their government decisions, laws, courts, military manuals, and training and educational systems, that the provisions of international law have a bearing on the conduct of armed forces and individuals.”<sup>548</sup> However, while such implementation activities are State-driven, it must be remembered that State authorities and decision-making officials are individuals acting for, and on behalf of, the State,<sup>549</sup> and that States themselves are ultimately aggregations of individuals. Consequently, “it is ultimately

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<sup>543</sup> *Supra* note 79 at 116.

<sup>544</sup> *Ibid.* - “whether pure utilitarian calculation, social conditioning, threat of punishment...[or] expectations generated by social interaction.”

<sup>545</sup> *Ibid.* at 135.

<sup>546</sup> *Ibid.*

<sup>547</sup> Nevertheless, even in the most authoritarian domestic systems, the potential exists albeit limited for non-state actors to enter and engage in the social and political process of disseminating knowledge and information about international humanitarian law where the State has not fulfilled this task. See: T. Risse-Kappen, “Introduction” in T. Risse-Kappen, *supra* note 356 at 6 – domestic structures are likely to determine both the availability of channels for transnational actors into the political systems and the requirements for “winning coalitions” to change policies. On the one hand, the more the state dominates the domestic structure, the more difficult it should be for transnational actors to penetrate the social and political systems of the ‘target’ country. See also: M. S. McDougal et al, “The World Process of Effective Power: The Global War System” in M. S. McDougal, & M. Reisman, *supra* note 314 at 374 – Control of the media may permit elites to dominate and direct the popular focus of attention, keeping at center-stage those issues that enhance elite power or maximise the anxiety of the rank and file, banishing to the periphery or beyond those practices that do not contribute to elite power.

<sup>548</sup> *Supra* note 44 at 19.

<sup>549</sup> *Supra* note 14 at 134.

individual's perceptions of the international structure that is critical."<sup>550</sup> Furthermore, in relation to international humanitarian and criminal law, it is the personal responsibility of individuals that must be highlighted, above and beyond their membership of a given State entity. Individuals as international citizens must be made aware of the authority of international law just as they are aware of the authority of domestic law. Individuals must perceive international humanitarian and criminal law to be law applicable to them as independent entities, subject to punishment by a supranational body if the law is broken. For these reasons, it is essential that energy and effort be directed towards building knowledge of the relevant international law and its implications for individual conduct at the ground level as a practical means of improving compliance and contributing to the prevention of genocide, war crimes and crimes against humanity.

#### **STATES AS SUBJECTS OF INTERNATIONAL HUMANITARIAN LAW**

Applying Constructivist theory and principles to the task of bringing State attitudes and actions into conformity with the stipulations of international humanitarian and criminal law, gives rise to a broader functional framework for compliance than that pursued by the formal international legal process. In terms of enhancing compliance with the fundamental principles of international humanitarian law on the part of State actors, it is suggested that the focus on the legal normative power of the prohibitions against genocide, war crimes and crimes against humanity, be shifted to a focus on the ethical normative power inherent in the same, and pursued within the informal social process.

In seeking to cultivate internalized transnational interests aligned with fundamental humanitarian standards, the Realist assumption that effective enforcement and observance of international law occurs when relevant actors' perceptions of self-interest coincide with compliant behavior, cannot be ignored. The future directions outlined below build on this Realist base but add a Constructivist understanding of the international environment to propose ways in which international actors may perceive compliance with international humanitarian law to be a vested interest. These issues for attention emerge from contemporary Constructivist recognition of a complex and interdependent international society where general transnational public knowledge, opinion and interaction assumes much power and influence. A focus on these issues necessarily draws the international community from its historical fixation with formal enforcement of international humanitarian law. Instead, these issues give the concept of enforcement a broader definition, exposing the potential and power of decentralized social forces and informal sanctions to induce compliance.

It must be noted that the use of Constructivist ideas to assist in the humanitarian law enforcement project does not seek to ignore the presence of States or bypass the obstacles inherent in the State system by viewing the international order simply and solely in terms of its base-level individual human constituents. Clearly, the State system presents a challenge for the compliance project –

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<sup>550</sup> *Ibid.* See also R. Fisher, *Improving Compliance with International Law* at 17: "In seeking to influence a government, we are seeking to influence the official conduct of one or more human beings acting pursuant to institutional arrangements." (cited in H. H. Koh, *supra* note 269 at 2627). See also A. Chayes, & A. H. Chayes, *supra* note 79 at 274 – "policy-makers, like private individuals, are sensitive to the social opprobrium that accompanies violations of widely accepted behavioral prescriptions. They are, in short, motivated by a desire to avoid the sense of shame or social disgrace that commonly befalls those who break widely accepted rules." (Oran R Young "The Effectiveness of International Institutions: Hard Cases and Critical Variables" in J. Rosenau and E-O. Czempiel, eds., *Governance without Government: Order and Change in World Politics* (New York: Cambridge Univ Press, 1992) at p177.

a challenge that needs to be confronted on its own terms and in its own context, (recognizing its enduring presence and foundational status) rather than purely through a reconceptualization of the system as something other than State-structured.<sup>551</sup> It would be idealistic to assert that notions of human inclusivity, connectedness and brotherhood will be embraced by States if States can simply be made to perceive the international system as an aggregation of human entities upon which the concept of exclusive nation-States has been imposed. While this is undoubtedly the ultimate goal in the effective enforcement of international humanitarian law, a process that taps into the strength and power of State interests is needed.

The Constructivist approach, as set out in this paper does not seek to “dispense with the State as a principal unit of analysis in international affairs.”<sup>552</sup> In highlighting the interactive presence of non-state actors and the informal norm-generating roles they play to exert influence over international actors, the need to focus on these processes is suggested as additional to, rather than as a replacement for, the State-ordered system. As noted by Kingsbury, “the integrated study of a wide variety of norms and actors is long overdue; but the fashion for abandoning the focus on States is, at best, grossly premature.”<sup>553</sup>

Regardless of the theoretical paradigm adopted, the international system remains, at one level, a system of States, and as such, requires the development of compliance strategies defined to target the nature of the aggregate State entity. Thus, States as subjects of international humanitarian law are addressed as separate from individual subjects, and compliance strategies developed accordingly, even though the goal of universal compliance, built upon a notion of basic human inclusivity and connection, is the common endeavor. The recommended pursuit and exploitation of channels that permeate State boundaries with the provision and strategic use of information of a legal, ethical or social nature, does not attempt to challenge the existing system of States, but to work within the system to improve compliance.

Turning now to the issue of building *State* commitment to international humanitarian standards, the power of non-legal motivations for State decision-making and action in accordance with the laws prohibiting genocide, war crimes and crimes against humanity, is examined. As discussed in Chapter 3, with reference to the ICC Statute, the ongoing support and willingness of States to account for these crimes and prevent their occurrence in the future, is critical to the success of such legal enforcement mechanisms. It is suggested that, in order to build this commitment to a level sufficient to overcome the forces of national self-interest and State sovereignty, it is necessary to direct attention to social or moral justifications for adherence to the law.

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<sup>551</sup> *Supra* note 78 at 207

<sup>552</sup> *Supra* note 287 at 371. See also, J. A. Camilleri and J. Falk, *The End of Sovereignty?: The Politics of a Shrinking and Fragmenting World* (1992)

<sup>553</sup> *Supra* note 287 at 371. See also Henkin, L., *supra* note 78 at 207 – an international system of states is likely to be long with us, and state values – independence, autonomy, impermeability – are likely to remain dominant values of the system. Worldwide communication...and an interdependent world economy have eroded state frontiers...but they have not seriously endangered ...state insistence on internal autonomy or sovereignty. See also M. E. Keck, & K. Sikkink, *supra* note 25 – In a world where the voices of states have predominated, networks open channels for bringing alternative visions and information into international debate. Political scientists have tended to ignore such non-governmental actors because they are not “powerful” in the classic sense of the term. At the core of network activity is the production, exchange, and strategic use of information. This ability may seem inconsequential in the face of the economic, political and military might of other global actors. But, by overcoming the deliberate suppression of information...networks can help reframe international and domestic debates.”

Essentially, this strategy seeks to promote and utilize the influence of meta-legal forces on State conduct. As described earlier in this chapter, State concerns with protecting international reputation and attracting favorable public opinion, arguably stemming from established or internationally recognized common values regarding right and wrong, appear to impact upon State decision-making in international affairs.

Thus, the promotion of a social norm of transnational human inclusivity is suggested to build State commitment to the fundamental standards of international humanitarian law. It is suggested that such inclusivity can be achieved through an increased focus on ethical values and the humanity of the law. Clearly, this suggestion to emphasize the morality of compliant conduct as a means for securing State compliance is open to virulent skepticism, particularly from the Realist-Positivist perspective which sees State behavior as dictated solely by the national interest – “an overriding motivation that is the same for all international actors.”<sup>554</sup> To answer this skepticism, it is contended that the exercise of “moral leverage,”<sup>555</sup> strategically applied to State decision-making and action, can impact upon the national interest by its moral value alone, or alternatively, through the translation of moral values into political and economic interests. The processes through which such moral leverage may operate are discussed below.

In light of the interdependent nature of contemporary international society and the ideas outlined in Chapter 4, it is difficult to deny that State conduct is affected, and may be determined or modified by, international discourse and social interaction. As noted by Martha Finnemore, States are “social entities shaped in part by international social action.”<sup>556</sup> Flowing from this, it can be argued that international social norms and values are inextricably linked with conceptions of self-interest in an interdependent international society. Thus, applying a theory of socialization to international State actors, it is both possible and plausible for State internalization of humanitarian norms to occur in pursuit of the all-important national interest.<sup>557</sup> This contention is supported by Chayes and Chayes in observing “[i]n theory, the sovereign state is entitled to pursue its course in silence, without regard to the reactions of others. As a practical matter, however, this expedient is not open in contemporary international society...there are too many audiences, foreign and domestic, too many relationships present and potential, too many linkages to other issues to be ignored.”<sup>558</sup>

The interdependence of contemporary international society therefore provides one answer to arguments based on the dominant power of national interest. The question then arises as to the

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<sup>554</sup> F. R. Teson, “Realism and Kantianism in International Law” (Panel - The Jurisprudence of International Law: Classic and Modern Views) (1992) 86 Am. Soc. Int’l L. Proc. 113 at 113-114.

<sup>555</sup> “Moral Leverage involves what some commentators have called the ‘mobilization of shame’ where the behavior of target actors is held up to the light of international scrutiny. Network activists exert moral leverage on the assumption that governments value the good opinion of others. Insofar as networks can demonstrate that a State is violating international obligations or is not living up to its claims, they hope to jeopardize its credit enough to motivate a change in policy or behavior.” See *supra* note 25 at 23.

<sup>556</sup> *Supra* note 24 at 566 - State policies and structures...are influenced by changing intersubjective understandings about the appropriate role of the modern state.”

<sup>557</sup> *Supra* note 21 at 199 - “through a complex process of rational self-interest and norm internalization...international legal norms seep into, are internalized, and become entrenched in domestic legal and political processes. In this way, the normativity of transnational legal process helps drive how national governments conduct their international relations. “

<sup>558</sup> *Supra* note 79 at 119 - conditions of the ‘New Sovereignty’ according to Chayes & Chayes - “When a state’s conduct is challenged as inconsistent with a legal norm or otherwise questionable, the state, almost of necessity, must respond.”

power of social norms in 'constructing' national interests. While interdependence may provide the ideal environment for conditioning the behavior of State actors, the power of the social norms themselves and the processes through which States may be socialized to pursue human values and a common human interest (at the level of protecting against genocide, war crimes and crimes against humanity), on par with State values, must be considered.

Kingsbury draws on socio-psychological studies to argue that the perceived fairness of a rule or social norm will enhance its power to induce compliance.<sup>559</sup> Add to this the permeability of State borders<sup>560</sup> enabling the penetration of information and ideas about internationally accepted norms and values, and the concept of transnational social influence gains power "alongside the better theorized impact of economic, political and military variables."<sup>561</sup>

Thus, the promotion of an internationally accepted social norm, articulating a common interest in human dignity achieved by demonstrating ongoing respect for the prohibitions against genocide, war crimes and crimes against humanity, seems entirely feasible. In a discursive, interactive social environment, ideas constitute the basis of power,<sup>562</sup> such power emanating from "people's acceptance of that idea as a basis for action."<sup>563</sup> Shirley Scott asserts that it is of little consequence whether participants in the social order actually believe the idea or not – it is "demonstrated acceptance"<sup>564</sup> and repeated expression of the shared idea that fuels its effect. And, as Henkin points out, "with acceptance [of international rules] comes observance, then the habit and inertia of continued observance."<sup>565</sup> It is arguable therefore, that active social promotion of internationally accepted human values condemning genocide, war crimes and crimes against humanity, can "lead nations into default patterns of compliance."<sup>566</sup>

The key to engendering State compliance therefore appears to lie in the construction of enduring State interests which dictate compliance with fundamental humanitarian principles. As explained by Alexander Wendt, "the process by which egoists learn to cooperate is at the same time a process of reconstructing their interests in terms of shared commitments to social norms."<sup>567</sup> It matters little whether the commitment to these principles is based on genuine humanitarian interests or some other continuing national interest, the realization of which necessitates conduct in compliance with social and ethical norms prohibiting genocide, war crimes and crimes against humanity. Lachs explains the strength of this strategy, noting: "[S]o long as the[se] interests remain the same...the underlying motivations, be they common or complementary, continue to sustain the relationship thus established."<sup>568</sup> It is submitted that the very nature of the

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<sup>559</sup> *Supra* note 287 at 355.

<sup>560</sup> See S. D. Krasner, "Power Politics, Institutions, and Transnational Relations" in T. Risse-Kappen, *supra* note 356 at 259.

<sup>561</sup> P. Chilton, "Mechanics of Change: Social Movements, Transnational coalitions, and the Transformation Process in Eastern Europe" in T. Risse-Kappen, *Ibid.* at 191 – "Even though domestic structures may inhibit the activity of independent social movements, as they did in the majority of East bloc countries prior to 1989, transnational contacts may still be established b/w movements...Where this occurs, weak social movements are empowered, and have a greater impact on regime transformation than might otherwise be expected."

<sup>562</sup> *Supra* note 111 at 317.

<sup>563</sup> *Ibid.* – author explores possibility that the significance of international law lies in the "idea of international law."

<sup>564</sup> *Ibid.* at 318.

<sup>565</sup> *Supra* note 269 at 2621-2622.

<sup>566</sup> *Ibid.* at 2655.

<sup>567</sup> A. Wendt, "Anarchy is What States Make of It" at 417 in A. Chayes, & A. H. Chayes, *supra* note 79 at 123.

<sup>568</sup> M. Lachs, "Some Reflections on Substance and Form in International Law" in W. Friedmann, L. Henkin, & O. Lissitzyn, *supra* note 8 at 100.

international system – the interdependent, interactive social process – provides a constant control for ongoing, State-interested compliance.

The power of the social process, drawn from “the interconnectedness of transnational, national and sub-national arenas,”<sup>569</sup> ensures that all States, no matter how isolated and authoritarian, are vulnerable to the pervasive influence of social norms and values. The need for social acceptance provides a means of securing State compliance that does not rely upon State-controlled formal law. Thus, the international environment and the social interactive process provide the conditions for promoting compliance, but the actual influence of ethical and social factors upon state compliance remains to be explained. More specifically, it is contended that while state sovereignty and the ruling pursuit of national interests represent obstacles or limiting factors in the international legal effort to comprehensively and effectively enforce international humanitarian law, the same entrenched concepts constitute valuable tools in the Constructivist effort to enhance compliance with the law.

### MORALITY AS A NATIONAL INTEREST

In contending that ethical ideas and principles may be employed to engender state compliance with international humanitarian law, the criticism is raised that if legal rules fail to attract State support, in competition with national political and economic interests, moral pressure has an even lower chance of success in the *realpolitik* environment of contemporary international relations. In response to this skepticism, it is contended that, aside from the potential for purely principled action on the part of States, effective exploitation of ethical values through the social normative process can translate into pragmatic social, political and economic consequences such that the desire to address and avoid public shame becomes a national interest and hence, a strong motivation for State adherence to the law which may eventually result in a socialized internalization of the respective norms. A number of points can be made in response to this skepticism and in support of this suggested strategy.

It is argued that the concept of morality, traditionally associated with human decision-making and action, can and should be applied to State actors as key units and participating members of international society. Just as international legal norms apply to individuals and States alike, so too should international ethical standards. Given that States “act by and on behalf of human beings,”<sup>570</sup> it can reasonably be argued that “considerations of good and evil, right or wrong...are inevitable and legitimate.”<sup>571</sup> It is submitted that moral appeals to conscience, generally perceived as applicable to individual personal behavior, have equal validity in their application to State entities in the effort to improve State compliance with international humanitarian law.<sup>572</sup>

A focus on morality may impact on State conduct in several ways. First, there is the existing, inherent moral value of obedience to agreed legal norms and the concomitant social value of

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<sup>569</sup> M. S. McDougal, et al., “The World Process of Effective Power: The Global War System” in M. S. McDougal, & M. Reisman, *supra* note 314 at 354.

<sup>570</sup> *Supra* note 79 at 25.

<sup>571</sup> Hoffman in *Ibid.* at 117.

<sup>572</sup> F. R. Teson, “Realism and Kantianism in International Law” (Panel - The Jurisprudence of International Law: Classic and Modern Views) (1992) 86 Am. Soc. Int’l L. Proc. 113 at 115: “Claims that an international act enhances national glory, ethnic or religious pride or similar justifications presuppose that... there is a national interest held by the nation as a moral being that endures over time.”

being regarded as a good and law-abiding international citizen, rather than a law-breaker. Secondly, there is the ethical essence, particular to international humanitarian law, operating in conjunction with, and in addition to, the general moral tendency to obey authority. In other words, pressure to comply with the law on the basis of a principled commitment to humanitarian standards and the threat of being labelled an unethical, as well as unlawful, international citizen in the event of violation, is exerted. It is contended here, that use of moral leverage, in and of itself, has the potential to influence State action in the face of competing national political interests. As noted by Afran, “[i]ndeed, it is doubtful that governments will take the sometimes difficult measures necessary to comply with their treaty commitments without the pressure and the threat of condemnation.”<sup>573</sup> Finally, there is the use of moral leverage as a mechanism for inducing compliance, where the actual reason for ensuing compliance may be the pursuit of some national interest that requires social inclusion and acceptance as an ethical member of international society, for its realization. And it is this use of morality that is advocated here as a strategy for improving State compliance with international humanitarian law. It is morality applied in this context – subsumed within social norms and practices defining acceptable conduct – that offers significant challenge to the Realist contention that neither law nor morality matters in international relations.

The complex interdependence of today’s international system creates a strong “national interest to avoid isolation in the international community”<sup>574</sup> – an interest which is socially directed and thus, largely out of the control of States. As Robert Putnam submits, “the sanction for violating is not penal, but exclusion from the network of solidarity and cooperation.”<sup>575</sup>

The process for ensuring that social acceptance translates into a powerful national interest depends upon the coordinated and strategic activities of non-state actors and their ability to penetrate State boundaries to tap into the ‘bottom-up’ lobbying power of domestic constituents, as well as applying pressure from outside the State. As noted by Krasner, States are no longer able “to obstruct completely transnational information flows.”<sup>576</sup> It is simply a matter of recognizing the potential enforcement power residing in transnational non-state activity, harnessing internal, sub-national pressures for State compliance, as an adjunct to external supranational, formal and informal pressures.<sup>577</sup> Just as international legal organizations and institutions impose legal pressure by providing publicly visible forums of accountability and punishment of State actions, and affirm the importance of legal norms, so too non-state transnational actors and networks use social processes to provide an equally public and vocal, rather than institutionally visible, means of applying moral suasion.<sup>578</sup>

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<sup>573</sup> N. H. Afran, “International Human Rights Law in the Twenty-First Century: Effective Municipal Implementation or Paean to Platitudes” (1995) 18 *Fordham Int’l L. J.* 1756 at 1761.

<sup>574</sup> *Supra* note 79 at 22.

<sup>575</sup> R. Putnam cited in *Ibid.* at 27.

<sup>576</sup> S. D. Krasner, “Power Politics, Institutions, and Transnational Relations” in T. Risse-Kappen, *supra* note 356 at 259.

<sup>577</sup> *Supra* note 79 at 269 – “...in some circumstances, NGOs seem to be able to go over the heads of governments to mobilize a process of public shaming and reputational pressure unrelated to vote-getting or other aspects of domestic political power.”

<sup>578</sup> *Ibid.* at 25 - “It is remarkable that lawyers and IR scholars, whose everyday stock-in-trade is persuasion, should pay so little attention and attach so little significance to the role of argument, exposition and persuasion in influencing state behavior.”

In fact, the differences between the non-state, informal compliance processes and State-based formal legal processes are not so extreme. As noted by Chayes and Chayes, "their programs parallel the treaty strategy"<sup>579</sup> as they collect information, monitor, review and evaluate the conduct of States and expose violators. Undoubtedly, the impact of non-state advocacy networks and non-government organizations acting as "transnational moral entrepreneurs"<sup>580</sup> upon State compliance will vary according to domestic political systems. However, as Risse-Kappen points out, the level of formal international institutionalization in a given issue area, also impacts positively upon the viability of transnational activity in the compliance project.<sup>581</sup> The greater the degree of formal international regulation, "the more channels transnational coalitions have available to penetrate the political systems and the more they should be able to use international norms to legitimate their demands."<sup>582</sup> Thus, the establishment of the ICC enhances humanitarian law enforcement not only in the conventional sense of court-based enforcement, but also through a symbiotic relationship with informal non-legal or meta-legal compliance-enhancing processes.

Finnemore uses the introduction of scientific research and policy development into State practice as an illustration of how States may be influenced or "taught"<sup>583</sup> by interactive and social processes to pursue new policies as a national interest.<sup>584</sup> It is contended that the same argument may be applied to the issue of promoting the human essence and value of universal constraint in terms of genocide, war crimes and crimes against humanity. Supportive and compliant member States may unilaterally, and through their membership of international organizations, join with non-state actors to promote the independent value of fundamental humanitarian norms, adding the strength of State voices to the communicative and persuasive process.

Thus, the attention of the international community must be directed towards the potential within the Constructivist process of social interaction for the socialization of moral conduct compliant with international humanitarian and criminal law. The idea that the moral essence of humanitarian law, espoused in social norms of behavior among members of international society, can have a significant impact upon State actors contemplating or engaging in prohibited behavior, through reputational effects threatening economic or other national interests, must be considered as a law enforcement mechanism potentially as effective as formal legal processes.

#### SOVEREIGNTY AS A HUMAN INTEREST

Flowing from the above discussion of transnational non-state actors exercising moral leverage within the international system to redefine national interests, the final focal point for future

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<sup>579</sup> *Ibid.* at 111.

<sup>580</sup> See E. A. Nadelmann "Global Prohibition Regimes: The Evolution of Norms in International Society" 44 *Int'l Org* (1990) 479 at 482: defining transnational moral entrepreneurs as NGOs who "mobilize popular opinion and political support both within their host country and abroad"; "stimulate and assist in the creation of like-minded organisations in other countries"; "play a significant role in elevating their objective beyond its identification with the national interests of their government"; and often direct their efforts "toward persuading foreign audiences, especially foreign elites, that a particular prohibition regime reflects a widely shared or even universal moral sense, rather than the peculiar moral code of one society." In *supra* note 269 at 2612.

<sup>581</sup> T. Risse-Kappen, "Introduction" in T. Risse-Kappen, *supra* note 356 at 33.

<sup>582</sup> *Ibid.*

<sup>583</sup> *Supra* note 24.

<sup>584</sup> *Ibid.* – explores the causes and processes underlying the development of State interests in scientific research. Discusses how international organisations such as UNESCO pursued science policy as a cause and promoted its value among member States, resulting in its gradual widespread adoption without the force of legal obligation.

action illuminated by Constructivist thinking, and applied to the humanitarian law enforcement effort, falls to consideration. The core international legal and political value of State sovereignty provides the opportunity for constructing a social norm or interpretation of sovereignty aligned with compliant conduct in relation to the prohibitions against genocide, war crimes and crimes against humanity, which can be promoted by non-state and sympathetic State actors. As Keck and Sikkink argue, through “blurring the boundaries between a state’s relations with its own nationals and the recourse both citizens and states have to the international system, advocacy networks are helping to transform the practice of national sovereignty.”<sup>585</sup>

In an international environment such as that described above, where non-traditional international actors, fuelled by information and the power of communication, have evolved to play a prominent role in Twenty-First century international affairs as active participants in the daily discourse and interaction of international society, a concomitant evolution in the nature and conception of State sovereignty is arguably inevitable. Many writers view the impact of transnational relations and non-state actors on the international environment in terms of the threat that such developments pose to traditional notions of sovereignty in the form of a nation-state’s exclusive control over its territory and its internal affairs. These writers describe this evolution as representing a gradual decline in the formerly ruling principle of sovereignty. The debate over the continued centrality or decline of state sovereignty in international affairs will not be entered into here. Instead, the potential to adapt the concept of sovereignty, which, regardless of its arguable decline in practical terms, demonstrably remains a central focal point in negotiations for increased international legal regulation, is considered.<sup>586</sup>

This discussion therefore accepts the entrenched and fundamental principle that is State sovereignty and considers whether State sovereignty itself can be harnessed as an aid, rather than an obstacle, to improving compliance with international humanitarian law. Can the notion of sovereignty, in its traditional and well-guarded form, be interpreted to encompass actions and responsibilities in compliance with international humanitarian law? In other words, how can we tap into the long-established strength and value of the international commitment to state sovereignty in order to assist the international humanitarian law enforcement process?

Given that sovereignty remains “an institution internalized in state interests,”<sup>587</sup> this discussion considers the power of, and processes for, transforming the international community’s conception of State sovereignty in such a way that its maintenance and protection accords with the goals of international humanitarian and criminal law, and hence assists the compliance project. In an international legal and societal context which perpetuates and supports the factors outlined in this chapter, the construction of an alternative conception of State sovereignty seems altogether viable. If international discourse and social interaction among international and domestic actors can assist in the international humanitarian law regulatory process through the generation of norms of compliance with international humanitarian law, and their eventual internalization by States and individuals, surely the well-entrenched, already universally

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<sup>585</sup> *Supra* note 25 at 1.

<sup>586</sup> As noted by Henkin, “the enforcement machinery established by the Covenants and Conventions indicates how strong the commitment to state values remains, and how resistant states are to “intrusion” on their autonomy, even for purposes of promoting the human values they have embraced by international legal undertakings.” *Supra* note 28 at 202.

<sup>587</sup> *Supra* note 349 at 79

internalized principle of State sovereignty can be reconstructed through dialogic means into a concept consistent with human values of respect for fundamental humanitarian standards.

As posited in preceding chapters, in order to secure universal respect for and compliance with international humanitarian legal norms, it is necessary that all international actors internalize the universal human interest in the same way that they have internalized an enduring respect for state sovereignty. It is suggested here that the internalization of respect for fundamental humanitarian standards may occur *through* the concept of state sovereignty. It is argued that within the classical juridical conception of state sovereignty, an inclusive human notion of the sovereignty of the people can be found. The duty of a sovereign to protect and serve the interests of its subjects is well-recognized<sup>588</sup> and has become increasingly important with the emergence of the international human rights regime.<sup>589</sup> Roth argues that “popular sovereignty is without doubt at the core of the system of sovereign equality embodied in the UN Charter.”<sup>590</sup> Roth looks to the Universal Declaration of Human Rights and its stipulation that “the will of the people shall be the basis of the authority of government”<sup>591</sup> to support his assertion that sovereignty ultimately resides with the citizens of a nation-state.<sup>592</sup>

This “human-rights based conception of popular sovereignty”<sup>593</sup> is arguably contained within monarchical conceptions of the “sovereign’s sovereignty”<sup>594</sup> and juridical conceptions of “state autonomy over its resources and subjects.”<sup>595</sup> It conceives of sovereignty in terms of the constituents of a State, but a common denominator of both the State and its constituents. As noted by Perez, “sovereignty must be about how persons, who in the past have been objects of state ownership, become subjects who speak for themselves.”<sup>596</sup> Arguably such a reconceptualization of sovereignty has been slowly occurring with the continuous evolution of the international human rights regime.<sup>597</sup> As Reisman notes, contemporary international society has witnessed and contributed to a “change in the content of the term ‘sovereignty.’”<sup>598</sup> It is this content that requires more active promotion and vocal advocacy in the context of humanitarian law enforcement.

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<sup>588</sup> B. Kingsbury, “Whose International Law? Sovereignty and Non-State Groups” (Theme Panel I: Theoretical Perspectives on the Transformation of Sovereignty, April 1994), (1994) 88 Am. Soc. Int’l L. Proc. 1 at 56.

<sup>589</sup> See *supra* note 78 at 192-196.

<sup>590</sup> B. R. Roth, “Popular Sovereignty: The Elusive Norm” (Panel Discussion – Implementing Democratization: What Role for International Organisations) (1997) 91 Am. Soc. Int’l L. Proc. 363 at 365.

<sup>591</sup> UDHR, *supra* note 35.

<sup>592</sup> See *supra* note 590 at 365. See also: F. R. Teson, “Realism and Kantianism in International Law” (Panel - The Jurisprudence of International Law: Classic and Modern Views) (1992) 86 Am. Soc. Int’l L. Proc. 113 at 114 – “Under Liberal Democratic Theory, the government is the agent of the people. It is hired by the citizens of the state to serve their interests. These are the terms of the vertical social contract – the contract between people and government.” See also W. M. Reisman, “Sovereignty and Human Rights in Contemporary International Law” (1990) 84 Am. J. Int’l L. 866 at 867.

<sup>593</sup> W. M. Reisman, “Sovereignty and Human Rights in Contemporary International Law” (1990) 84 Am. J. Int’l L. 866 at 870. See also: K. Sikkink, “Human Rights, Principles Issue-Networks, and the Sovereignty in Latin America” (1993) 47 Int’l. Org. 411 at 411 – considers human rights as a case study of the reconceptualization of State sovereignty.

<sup>594</sup> *Supra* note 593 at 869.

<sup>595</sup> A. F. Perez, “Who Killed Sovereignty? Or: Changing Norms Concerning Sovereignty in International Law” (1996) 14 Wis Int’l L. J. 463 at 464.

<sup>596</sup> *Ibid.* at 490.

<sup>597</sup> See *supra* note 78 at 192-196.

<sup>598</sup> *Supra* note 593 at 869.

The interpretation of sovereignty as “the continuing capacity of a population freely to express and effect choices about the identities and policies of its governors”<sup>599</sup> and its promotion within international legal interactions goes some way towards aligning the concept of state sovereignty with the goals of international humanitarian law. Furthermore, a popular sovereignty conception of international law and politics recognizes and takes account of the individual constituents of international society and the “bottom-up pressures that drive transformation in the international system.”<sup>600</sup>

Acknowledging the human context associated with the exercise of state sovereignty, the question then becomes one of process – what process can be employed for popularizing the human factors inherent in the concept of sovereignty? Constructivism posits that respect for state sovereignty, as with any other normative practice, was constructed, and can be reconstructed, through the dialogue and interaction of participants in international and national society. Chayes and Chayes support the Constructivist approach with their description of “the New Sovereignty”<sup>601</sup> and its constitutive power. According to the Chayes’, the ‘new sovereignty’ describes the transformative processes inherent in the nature and context of contemporary international relations. Chayes and Chayes argue that the inter-connectedness and interdependence of today’s international system significantly curtails the ability of States to act unilaterally in pursuit of their own interests. In other words, very few nations today survive independently without the need to establish and maintain external relations. As such, States operating in today’s international system depend in some way upon maintaining “membership in reasonable good standing in the regimes that make up the substance of international life.”<sup>602</sup> Thus, a state wishing to continue its external interactions and relations is pressured to submit to accepted rules and norms.<sup>603</sup> As noted by Chayes and Chayes, “[a State’s] behavior in any single episode is likely to affect future relationships...and perhaps its position within the international system as a whole.”<sup>604</sup> The realities of contemporary international economic and political interdependence and the need for States to act cooperatively in order to achieve their objectives,<sup>605</sup> provide ideal conditions for socialization towards, and promotion of, the human content of State sovereignty.

The notion of popular sovereignty is considered here as a way of using the well-protected State priority of sovereignty to assist the humanitarian law enforcement effort. Again, social discourse and interaction provides the process for popularizing this interpretation within the international community. The idea of sovereignty as belonging to the people, and encompassing their continued protection from harm, matches current ethical and social values in the international system. The pressure upon States to adopt and behave in accordance with this conception of sovereignty is reputational, as well as practical. It is submitted that States do not wish to be seen

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<sup>599</sup> *Ibid.* at 872.

<sup>600</sup> *Supra* note 595 at 489.

<sup>601</sup> *Supra* note 79.

<sup>602</sup> *Ibid.* at 27.

<sup>603</sup> A. Chayes, “Compliance without Enforcement” Remarks (Theme Plenary Session: Implementation, Compliance and Effectiveness) (1997) 91 *Am. Soc. Int’l L. Proc.* 53 at 56.

<sup>604</sup> *Supra* note 79 at 27. See also H. H. Koh, *supra* note 269 at 2636. – concurs with this appraisal of international affairs in noting that “sovereignty no longer means freedom *from* external interference, but freedom *to* engage in international relations.”

<sup>605</sup> See *supra* note 79 at 27 – “The largest and most powerful states can sometimes get their way through sheer exertion of will, but even they cannot achieve their principal purposes – security, economic well-being, and a decent level of amenity for their citizens – without the helps and cooperation of many other participants in the system, including entities that are not states at all.”

as fighting for sovereignty in its limited territorial sense, while denying its application in terms of protecting the sovereign constituents of that territory.<sup>606</sup> Furthermore, in practical terms, if States wish to exercise sovereignty in terms of the freedom to pursue national interests, which invariably require the maintenance of some external relations, then the need to maintain a position of good standing in the international community remains a continuing incentive for compliance.

Risse-Kappen points to the human rights issue area to illustrate how non-state transnational actors have “weakened state control”<sup>607</sup> in the direction of improved compliance with basic human rights standards.<sup>608</sup> Patricia Chilton contends that the informal pressures applied through transnational networks linking international human rights organizations with national activists played a significant role in the East German and Czechoslovakian ‘peoples’ revolutions of the late 1980s.<sup>609</sup> Chilton asserts that “popular pressure [had] forced totalitarian regimes to collapse or make transitions to democracy.”<sup>610</sup> While these events and instances are not identical to the project of ensuring permanent national and transnational compliance with internationally agreed humanitarian standards, it is contended that they are comparable to the issue of humanitarian law enforcement in respect of the goals desired and the processes employed for achieving them. Arguably, regime transformations represent the pinnacle of effecting change in State behavior. And it is the role of transnational advocacy networks in providing a means of “undermining the legitimacy”<sup>611</sup> of oppressive regimes, through supporting internal opposition in conjunction with international condemnation, that has contributed to such radical changes, and could similarly and plausibly contribute to the building of State commitment to fundamental humanitarian obligations. As Keck and Sikkink asserts, “[V]oices that are suppressed in their own societies may find that networks can project and amplify their concerns into an international arena, which in turn can echo back into their own countries.”<sup>612</sup>

Applying this to the issue of compliance with international humanitarian law, it is contended that if external and internal popular pressure can impact upon State actors to contribute to the complete transformation of domestic regimes, then the potential exists for the same mechanisms to encourage compliance with the prohibitions against genocide, war crimes and crimes against humanity. Arguably, if the international community directs the same level of attention as is currently devoted to formal, inter-State legal processes for the enforcement of the law, to the establishment of coordinated, transnational linkages based on inclusive humanitarian principles

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<sup>606</sup> *Supra* note 593 at 869.

<sup>607</sup> *Supra* note 356 at 294.

<sup>608</sup> See *supra* note 79 at 257 – Helsinki Final Act 1975 – “Soviet citizens reading the text of the Final Act in the papers, were stunned by the humanitarian articles; it was the first they had heard of any kind of international obligations in the human rights field of their government.” See also *supra* note 356 at 12 – points to the influence of anti-apartheid coalitions of activists in various countries on South African domestic policy.

<sup>609</sup> *Supra* note 356 at 294.

<sup>610</sup> *Ibid.* at 189 – Poland, Hungary, East Germany, Czechoslovakia, Bulgaria, Romania.

<sup>611</sup> *Ibid.* at 309.

<sup>612</sup> *Supra* note 25 at x. See also S. D. Krasner, “Power Politics, Institutions, and Transnational Relations” in T. Risse-Kappen, *supra* note 356 at 270 – Keohane and Nye noted (R. O. Keohane & J. S. Nye, Jr., “Transnational Relations and World Politics: An Introduction” *International Organization*, v 25(3) 1971 at 337) – transnational relations could challenge state control. Transnationals could change attitudes, increase the ability of some states to affect developments in others, and contribute to the emergence of private foreign policies that oppose or impinge on state policies.”

and social norms, State subjects of international humanitarian law may be pressured towards committed compliance.<sup>613</sup>

### THE SOCIALIZATION OF STATE COMPLIANCE

In advocating these strategies, and drawing on these illustrations, it is recognized that regime transformations or changes in State policies “cannot be divorced from other explanations.”<sup>614</sup> In other words, the influence and impact of non-state actors and activity on State conduct is not posited as the solution, or even the determining factor, in these outcomes. It is however, submitted that non-state actors and activities comprise a contributory element that remains largely untapped by the international community in its endeavors to improve State compliance with the laws governing genocide, war crimes and crimes against humanity. As noted by Chilton, “causal connections are difficult to prove where massive social and political change occurs. Events on this scale have multiple and complex causes...Nevertheless, empirical evidence suggests that there are connections...”<sup>615</sup>

A further challenge to these and other examples of international action where an appeal to conscience and human values has arguably impacted upon State practice,<sup>616</sup> is contained in the criticism that such ‘moral’ action on the part of States is merely coincidental, motivated in fact by self-interest rather than by a genuine concern for humanity or morality.<sup>617</sup> Recognizing this, the argument for drawing on the moral underpinnings of international humanitarian law as a means of enhancing State compliance, remains the same. It is compliance with the prohibitions against genocide, war crimes and crimes against humanity that we are seeking to achieve, regardless of the motivation. Whether such compliance is achieved through the cultivation of a genuine concern for human suffering, or is instead the by-product of other pursuits, is both unknown and unimportant to this thesis. As long as the commitment to compliant conduct is sufficiently strong to ensure enduring compliance, the actual motivations behind the commitment are of little consequence.

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<sup>613</sup> *Supra* note 25 at 2 – refer to transnational campaigns around indigenous rights, labor rights, and infant formula, and contemporary cases in which TANs are prominent including human rights, women’s rights and the environment. Several important characteristics: the centrality of values or principled ideas, the belief that individuals can make a difference, the creative use of information, and the employment by non-governmental actors of sophisticated political strategies in targeting their campaigns.

<sup>614</sup> P. Chilton, “Mechanics of Change: Social Movements, Transnational coalitions, and the Transformation Process in Eastern Europe” in T. Risse-Kappen, *supra* note 356 at 224.

<sup>615</sup> *Ibid.* at 221. Also at 224: “...regime transformations can[not] be accounted for in a mono-causal way. Explanations of the 1989 events based on economic factors, political leadership factors, and military factors are complementary in some way to our attempt to assess the impact of the civil factors. None is convincing as a simple explanation in itself.” See also: K. Sikkink, “Human Rights, Principles Issue-Networks, and the Sovereignty in Latin America” (1993) 47 *Int’l. Org.* 411 at 411 – Comparative study of the impact of international HR pressures on Argentina and Mexico in the 1970s and 1980s – explores emergence and nature of the principled HR issue-network and the conditions under which it can contribute to changing both state understandings about sovereignty and state HR practices.

<sup>616</sup> Other oft-cited examples include abolition of slavery; outlawing certain weapons of destruction; protection of civilian, wounded and prison populations in situations of conflict.

<sup>617</sup> See *supra* note 78 at 191-192 - One may question whether these developments reflected an authentic concern for HR. The principal values pursued were state values – systemic interests in peace and in international trade or the national interest of the state involved. The human value – the welfare of the particular individuals – was an indirect beneficiary.

The reason why ethical values and social expectations are advocated as a means of influencing States in the direction of compliance is because they constitute powerful normative forces within any society, in addition to the force of legal obligation. Furthermore, if their universality as moral values is challenged on cultural relativist grounds, their existence in the form of social and legal norms cannot be denied. It is in its existence as a social value that the ethical core of humanitarian law may exert its strongest pressure as a meta-legal motivation for compliance, given that sovereign States do not want to be seen in international society as admittedly having no concern for fundamental humanitarian protections.

Thus, it is accepted that the internal attitude of States may not be transformed in terms of inculcating a *pure* commitment to ethical human values. However, if States are forced to practice or behave in accordance with the legal, moral and social norms prohibiting genocide, war crimes and crimes against humanity, for self-interested reasons and those interests remain powerful and non-variable, then it is submitted that State practice will lead to internalized expectations among the national and international populace, resulting in constant internal and external pressures towards compliance.<sup>618</sup>

Thus, the obstacles inherent in the *legal* approach to State compliance with international humanitarian law, when placed within the *social* context of international interaction, may in fact assist the law enforcement process through means parallel and supplementary to the law. Informal social processes may constitute a persuasive and pervasive influence upon State conduct equal, and additional, to that of formal law. It is submitted that the power of social construction and exploitation of moral leverage lies in the fact that "modern States are bound in a tightly woven fabric of international agreements, organizations and institutions that ... penetrate deeply into their international economics and politics."<sup>619</sup> The importance and necessity of being an accepted and acceptable member of the interdependent international society offers strength to the informal humanitarian law enforcement effort. Chayes and Chayes support the value of this approach in noting that, achieving compliance "through these interacting processes of justification, discourse, and persuasion is less dramatic than using coercive sanctions. But there is limited scope for the enforcement model in today's international system."<sup>620</sup>

Clearly, the activities and efforts of non-state actors such as the media, non-government organizations and transnational advocacy networks are vitally important in the process of engendering state compliance. The power of non-state actors to participate in the enforcement of humanitarian law in respect of State subjects, by promoting internalization of the legal norms on the grounds of international ethical and social values (given that the formal legal process already promotes internalization on the grounds of legal obligation), and translating these normative obligations into national interests, must be recognized. Essentially, this strategy seeks to focus on "human right over human wrong"<sup>621</sup> as a means of influencing State behavior. Unlike the formal legal approach to enforcement of international humanitarian law where "the system prevents States from pursuing policies they may want to pursue"<sup>622</sup> and "the force exercised ...

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<sup>618</sup> Indeed, it is possible that non-state actors and networks too may be driven to action by aims that stretch beyond the moral terms of the humanitarian laws they seek to enforce.

<sup>619</sup> *Supra* note 79 at 26.

<sup>620</sup> *Ibid.* at 28.

<sup>621</sup> *Supra* note 1.

<sup>622</sup> *Supra* note 24 at 594.

is constraint,<sup>623</sup> the strategy outlined above directs attention to proactive, non-state initiated forces which impact upon States through the “identification and definition of preferred [State] policies”<sup>624</sup> by actors external to the State.

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<sup>623</sup> *Ibid.* at 593.

<sup>624</sup> *Ibid.* at 594.

# CONCLUSION

“The challenge to humanity is to adopt new ways of thinking, new ways of acting, new ways of organizing itself in society, in short, new ways of living ...This truly exceptional time in history calls for exceptional solutions. It means an open mind...and a readiness to seek fresh definitions, reconcile old opposites, and help draw new mental maps...that will lead us to a future in which the pursuit of individual freedom will be balanced with a need for common well-being.”<sup>625</sup>

The international community has traditionally focused on the development of formal legal rules, processes and institutions in the effort to implement and enforce fundamental human rights standards, largely overlooking the moral basis of these norms. Legal regulation has been perceived as the most effective mechanism for influencing the behavior of international actors towards compliance, while fundamental ethical principles of humanity have largely been disregarded in the international effort to prevent grave human rights violations. International legal regulation embodies a State-centric, ‘top-down’ approach to influencing the conduct of international actors, whereby attention is confined to the potential impact of agreed legal norms on State sovereignty and national interest rather than focusing on the cultivation of a universal interest in respecting these norms, based upon the common transnational link of human participants in international society.

This strategy has resulted in a body of universally recognized formal legal norms protecting the human rights to life, liberty and personal integrity. However, the reality of their constant breach, in the form of genocide, war crimes and crimes against humanity, indicates a gap between universal recognition and universal practice of these norms, arguably illustrating the limitations of the formal, legal, State-based approach to attaining respect for international humanitarian standards. Extrapolating from this, there is little to indicate that a similar gap will not also pervade the operation of new law-based enforcement mechanisms such as the recently endorsed International Criminal Court, if current law-limited enforcement strategies continue to be pursued.

As the newcomer to the international humanitarian law regime, the Rome Statute, providing for the establishment of a standing international criminal law enforcement body, is undeniably an important milestone in the international humanitarian law enforcement project. It is important to the formal legal process, supporting existing prohibitions against genocide, war crimes and crimes against humanity, with a mechanism for prosecution and punishment. It is equally important to the justice process as a publicly visible institution tasked with holding perpetrators accountable for these crimes. Finally, it is important to the meta-legal, non-state, informal enforcement processes, providing a legal framework from which moral and social norms can be drawn to support compliance on the basis of international social and ethical values. Downs

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<sup>625</sup> Report of the World Commission on Culture and Development, *Our Creative Diversity* (Paris: UNESCO, 1996) at 110 and 120.

reinforces the importance of, and need for, an ongoing commitment to existing legal mechanisms in noting: "while it may be appropriate to dismiss realism for its wrongheaded adherence to the claim that [formal] enforcement must be the cornerstone of any significant international Cooperation, it is premature to dismiss [formal] enforcement as largely irrelevant. Like...any other strategy for promoting Cooperation, it has strengths and limitations."<sup>626</sup>

A shift in thinking aimed at transforming existing international humanitarian law arrangements into more than formal, state-based undertakings as to future conduct is necessary. The international community as a whole needs to move beyond the standard legal approach to improving compliance with international humanitarian obligations – beyond the practical, superficial focus on the development of formal national and international institutions to implement and enforce humanitarian law – towards internalization of an active and enduring commitment to humanitarian norms and the regime established for their enforcement.

Constructivist thinking highlights various focal points for future action in the international effort to achieve compliance with international humanitarian law. Notably, a fundamental shift in perspective is necessary – from an exclusive focus on legal rules to a broader approach incorporating the regulatory power of ethical principle and social norms; from a concentration on state responsibility to an equal emphasis on individual responsibility; from parameters set by the demands of national self-interest to a wider framework of a global common interest; from a centralized 'top-down' law enforcement approach to a more diffuse approach, incorporating informal, 'bottom-up' enforcement pressures.

Thus, in order to build an internalized commitment and requisite will on the part of international actors to comply with formally expressed legal rules prohibiting genocide, war crimes and crimes against humanity, future enforcement efforts must recognize the ultimate objective of State *and* individual internalization of norms of compliance with the law. Furthermore, the ethical humanitarian underpinnings of the legal rules must be emphasized and employed as a motivation for compliance, in addition to legal justifications. Finally, the power of non-state actors, and their transnational networks, to encourage compliance at the domestic and international level, in particular their ability to transform State and individual interests in the direction of compliance, must be recognized and tapped. Essentially, attention must be directed to the combined power of various non-state actors and non-legal mechanisms in building a strong internal and steadfast commitment on the part of State and human actors, to the legal regime governing human rights atrocities.

Fundamentally therefore, in the international humanitarian enforcement effort, it is necessary to depart from prevailing perceptions that, for all actors, the primary motivation for adhering to international law is the law itself.<sup>627</sup> Specifically, it is contended that, in the international environment of today, moral justifications for compliance with humanitarian norms should be highlighted at the level of state-state negotiation, while the legal authority of these norms requires greater emphasis at the grass roots level of individual human actors. Thus, a combined 'bottom-up' *and* 'top-down' approach is necessary to achieve the ultimate goal of transforming the thinking and conduct of individual and State actors in such a way as to ensure respect for the humanitarian values and laws prohibiting genocide, war crimes and crimes against humanity –

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<sup>626</sup> *Supra* note 85 at 344.

<sup>627</sup> R. J. Beck, A. C. Arend, & R. D. Vander Lugt, (eds.) *International Rules: Approaches from International Law and International Relations* (Oxford: 1996). ["Adherence to the law may not be motivated by it."]

an approach whereby the base-level and top-level constituents of international society are viewed as equal subjects of the law; and the moral underpinnings of the legal norms are engaged as a means of encouraging compliance.

The advantage of the established legal framework for the prohibition, prosecution and punishment of international crimes such as genocide, war crimes and crimes against humanity; the limitations inherent in the continued pursuit of a state-based formal legal approach; the key future directions for improved compliance as suggested by Constructivist theory; and the proposed compliance-inducing strategies outlined in this thesis all highlight (rather than ignore) the stark reality of sovereign state power in the context of committing genocide, war crimes and crimes against humanity<sup>628</sup> as well as in the context of committing to prevent the occurrence of these atrocities. With similar clarity, these discussions also highlight the interdependence of international society, and in doing so, reveal the complex forces of change operating within and upon international actors to promote and enhance compliance with international legal norms.

The Constructivist perspective demonstrates that it is not only useful, but imperative, that pressures for attitudinal and behavioral change towards compliance with fundamental international humanitarian norms be applied from the bottom up as much as from the top down.<sup>629</sup> In essence, this calls for strategies that view state actors not as primary or controlling units of international interaction but as one type of actor with identified strengths and weaknesses among many other international actors with different strengths and weaknesses. It also calls for strategies that consider influences operating outside and alongside the law.

Under such strategies, all international actors are engaged in a common endeavor – that of preventing the commission of genocide, war crimes and crimes against humanity through maintaining universal compliance with the law prohibiting these crimes. In this endeavor, it is international discourse and social interaction around the idea of transnational *human* inclusivity, rather than nation-state exclusivity, that is the key feature.

While these new directions bring optimism to the cause of effectively enforcing international humanitarian law, it is clear that effective enforcement of international prohibitions against genocide, war crimes and crimes against humanity is a complex endeavor. However, it is reasonable to conclude, and imperative to recognize, that each and all of the factors identified here may play a significant role in motivating human and State actors towards compliance with the laws prohibiting genocide, war crimes and crimes against humanity.

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<sup>628</sup> where these crimes are pursued as part of state policy

<sup>629</sup> See J. E. Alvarez, "Foreword: Why Nations Behave" (1998) 19 Mich. J. Int'l L. 303 at 316 – The attempt to construct a "recipe book" for effective international regulation may...reveal that 'top-down' regulatory models premised on the primacy of international rules [formal international law] may not always work well.

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