



## Certain Skeptical Considerations on International Human Rights Law

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### ABSTRACT

This article aims to go beyond the romanticized paradigm emanating from human rights and international law in general. Considering that the intention of the present author is wide and over encompassing in its scope, this paper intends to dwell only on certain specific issues. First, it examines whether powerful states still do what they like even though they are constrained by the rules of International Law. Then it moves to examine the most pressing issues of migration law, which again demonstrates that the system is far from satisfactory. Lastly, it interrogates the concept of universalism proclaimed in International Human Rights Enterprise. Acknowledging that the idea of universalism is a noble, perhaps, despite its sophisticated stratification and promotion on the part of international global community it became the powerful political vernacular to clothe unveiled political intentions in the universalism attached veil. It is shown how universalism transcended its metaphysical faculty and turned into the paradigm of imperialism for those who can actually avail. In the end of the day, the aim of the author is not to completely exhaust these issues, but to trigger certain skeptical thoughts, that something ultimately went wrong.

**KEYWORDS:** Refugee-Law, Trafficking policy, Victim

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### INTRODUCTION

Over enthusiastic students who engage with International Human Rights Law are full of moral aspirations. They diligently believe that those moral ideals are driving force of the entire humanity and perceive human rights as their physical and natural manifestation or embodiment. In fact, they rightly think so. It is true that "Human rights are expressions of values; values manifest themselves in legal trends; and their instrumental vehicle is ethics." The overall theoretical substance of the human rights is worth admiring, though, sometimes in practice certain things are not always as they are supposed to be. This in turn generates skepticism. Hence, this article aims to guide the over enthusiastic student and probably not only, in the dark sides of the virtue.<sup>2</sup> It should be mentioned that,

my ambition is not to explain or otherwise completely address those not very pleasant aspects of the virtue, since this would be a book length project, something that can be hardly undertaken here. Therefore, the aim of the article is modest. My goal here is to briefly sketch certain issues that can provoke not very aspirational thoughts and in fact can trigger certain skepticism in reader. The issues I picked for the present discussion include the questions about refugee-law, universality, imperialistic policy agendas and the way powerful states frequently behave.

### POWERFUL STATES AND COMPLIANCE

It is suggested that in reality, the world's super powers do what they like. They invade countries, wage

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2 The term is taken from Kapur, R., 2006. Human rights in

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the 21st century: Take walk on the dark side. Sydney Law Review, 28(4), pp. 665-688.

war when it benefits them, choose to join or withdraw from treaties whenever they like. Famous international law scholar Martti Koskenniemi argued that “international law is eventually continuation of politics, which offers framework and a vocabulary for the conduct of politics.”<sup>3</sup> It is extremely hard to refute this idea since very few believe in politically innocent nature of international law.<sup>4</sup> For the purposes of little groundwork, it is well-known fact that states, in particular, powerful ones, with powerful economies and nuclear weapons, wield their political agendas, that consists of certain hidden or non-hidden political incentives and while attempting to give birth to those incentives, they, in fact, devote much time and energy to clothe their intentions under the umbrella of various relevant international legal rules.<sup>5</sup> Sometimes they do so successfully, but sometimes they fail successfully. However, the plain fact of non-compliance and even breaking those rules stemming from international law in question doesn’t in any sense undermine the idea that the international legal rules governing the behavior and the conduct of the state as such exists in the first place. For example, the underlying principles of international law are the principles that of non-aggression and of respect for sovereignty of all states. Russia has successfully breached them all when invaded part of Georgia in 2008 and annexed Crimea in 2014. Unfortunately, International Court of Justice (ICJ) didn’t have a chance to deliver the justice, even though it had great desire to do so, when it found it had no jurisdiction in *Georgia v. Russian Federation (2011)*.<sup>6</sup> Another landmark example is *Nicaragua Case*.<sup>7</sup> ICJ upheld that the relevant standard according which the responsibility for the acts of non-state actors could be attributed to the USA was that of “effective-control” test. However, the threshold for fulfilling the requirements stemming from

the test was ‘high’ and ICJ ruled that USA “fell short of meeting this standard.” Also, so called “multi-lateral” treaty reservation insisted (this can be assumed as a legal trick to flee from certain regulation) by US made ICJ to decide solely on the basis of customary international law. What does it mean in this context? Merely because US invoked so called, “multi-lateral” treaty reservation and didn’t made ICJ to avail from the chance to examine the case in question according UN Charter law, doesn’t in itself stipulate, that in this proper context, no rules exist for regulating use of force regime and *a contrario* merely because of the reason that the relevant rules exist or flow from somewhere doesn’t in itself stipulate, that states will *ipso facto* be in compliance with these rules or even will not breach them, if it seems worthy of pursuing to be in compliance with their political agendas. Also, *Marshall Islands Case* is of great relevance.<sup>8</sup> One upon a time Lauterpacht observed that “judges make choices.”<sup>9</sup> And these choices, in the words of Koskenniemi “reveal their structural bias”<sup>10</sup> and we see it is largely a state-centric. A. Bianchi observes that “In international practice, there is hardly anything that happens randomly,” and structural biases are at work all the time to direct the system into the direction that particular institutions view as desirable. Some of the things that we feel are unjust, unfair, or politically wrong are often produced and supported by the “deeply embedded preferences” that institutions express more or less explicitly.”<sup>11</sup> Hence, United Kingdom - even the norms regulating such conduct existed as such - anyway did what it wanted to, but because of the requirement of “objective awareness” of ‘couldn’t have been unaware’ rule heavily criticized By Judge Crawford, also, with authoritative dissenting opinions from Judges Benouna and Cancado Trindade terming it as “pure for-

- 3 See Martti Koskenniemi, “The Politics of International Law”, 1990. 1 European Journal of International Law, 4-32, at 28.
- 4 Klabbers, J. 2017. The Setting of International Law. In International Law 2nd Edition, 3-23.at.23. Cambridge: Cambridge University Press.
- 5 For further discussion see., Mutua, M. 2001. Savages, victims, and saviors: The metaphor of human rights. Harvard International Law Journal, 42(1), 201-246.
- 6 Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russia), International Court of Justice (ICJ), 1 April 2011, available at: <https://www.refworld.org/cases,ICJ,4da59ab82.html> [accessed 21 March 2020]
- 7 Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America); Merits, International Court of Justice (ICJ), 27 June 1986, available at: <https://www.refworld.org/cases,ICJ,4023a44d2.html> [accessed 21 March 2020]

- 8 Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament, Marshall Islands v India, Preliminary Objections, ICGJ 502 (ICJ 2016), ICJ GL No 158, 5th October 2016, United Nations [UN]; International Court of Justice [ICJ]
- 9 See HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 399 (1958). Accordingly, ROSALYN HIGGINS, PROBLEMS & PROCESS: INTERNATIONAL LAW AND I-low WE USE IT 3 (1994).
- 10 Martti Koskenniemi, The Politics of International Law- 20 Years Later, 20 EUR. J. INT’L L. 7, 11 (2009).
- 11 Bianchi, A. (2017-2018). Choice and (the Awareness of) Its Consequences: The ICJ’s Structural Bias Strikes again in the Marshall Islands Case. AJIL Unbound, 111, 81-87. At.84. See also, MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 607 (2005).

malism” or “formalistic approach,”<sup>12</sup> it still managed to avoid the dispute, because merely it wasn’t aware it had any. The conclusion is pretty much the same, powerful state do as they please, but sometimes they manage to get away from incurring responsibility, but it doesn’t mean that the rules for regulating these conducts are not put at place. The Powerful states also can choose to join or withdraw from treaties if they please to do so or even make absurd and dubious reservations fully defeating the object and the purpose of the treaty. Indeed, some cozy interpretations of the art.2(1) ICCPR even exclude Guantanamo camps from the jurisdiction. One can only imagine, as Prof. Milanovic pointed that, if such technical interpretations were adopted back then places like Aushwitz would be excluded from the insight of the respective treaties.

## WHAT ABOUT REFUGEE-LAW?

The remaining vestiges of alleged Westphalian sovereignty are manifested through widely reiterated dictum by ECtHR that “as a matter of well-established international law, and subject to their treaty obligations, including those arising from the Convention, Contracting States have the right to control the entry, residence and removal of aliens.”<sup>13</sup> Allott enthusiastically called upon “to acknowledge the peoples of the world as the true subjects of international law.”<sup>14</sup> Present discussion concerning human trafficking trilemma also forms the part of common playground between the prerevolutionary world of Vattelien International Law and its concomitant understanding of sovereignty and between migrant victim’s human rights. The word trilemma explicates heterogeneous nature of this crime meaning that while the dominant emphasis is on the state(s)-perpetrator(s) dichotomy, state(s)-victim(s) interaction is frequently left unnoticed, or at least the balance between national sovereignty and migrants’ rights isn’t struck fairly. Fundamentally, victim-centricity of any given international treaty would entail robust protection machinery containing enforceable rights with precisely defined corresponding duties on the part of MSS. Even non-careful appreciation of Palermo Protocol suffices to notice that its art.6,7 entail something more than purely moral aspirations,

but much less than clear legal entitlements. Hathaway indeed rightly asserted that while being overwhelmingly focused on criminal investigation and prosecution, Palermo Protocol ‘meaningfully failed’ to protect victims and sadly added that “only a minority of states has adopted mechanisms even to consider the protection of trafficked persons, and these programs generally offer no more than strictly provisional assistance.”<sup>15</sup> European Institutional Architecture concerning THB claims victim-centricity to be its *raison d’être*,<sup>16</sup> however careful scrutiny suggests that sovereignty nonetheless takes undue precedence.

The first example of such interplay is materialized in unable-to-return paradigm, when victim necessitates protection from host MSS. Under COE Trafficking Convention, granting such protection is analytically and provisionally tied with identification of migrants as victims of human trafficking within the meaning of art.10(1). First, identification process detailed in art.10(2) posits the criteria of ‘reasonable-grounds-to-believe,’ that in essence is particularly vague and affords MSS huge discretion, which enables them to arbitrarily consider what should be counted as reasonable while leaves no corresponding controlling mechanism to victim other than ECHR. In this context, ECtHR reinforces victim-centric approach by affirming in *Rantsev*, that positive obligations towards trafficking victims begin when “the State authorities were aware, or ought to have been aware, of circumstances giving rise to a credible suspicion that an identified individual had been, or was at real and immediate risk of being, trafficked or exploited”.<sup>17</sup> Next, recovery and reflection period regulated within art.13 detonates states’ true intention of utilizing victims as mere means towards achieving greater prosecution ends, since as its literal interpretation suggests ‘taking an informed decision on cooperating with the competent authorities’ is inevitable. In analyzing the later in conjunction with art.14 it becomes logically sound that considering the complex nature of the trafficking itself, victims are needed as witnesses. What is then the added value of the positive decision if it’s apparent that granting residence permit becomes quasi-conditional upon cooperation with MSS. The later explains why states tend to favor interpretation solely supporting art.14(b) over art.14(a). The fundamental question now lies in whether such conventionalized trafficking policy is

12 Nuclear Arms, Dissenting Opinion of Judge Crawford para. 19. Nuclear Arms, Dissenting Opinion of Cancado Trindade paras. 11-13, 23-24, 28-30. Nuclear Arms, Dissenting Opinion of Judge Bennouna, para.1.

13 Boujlifa v. France, para. 42.

14 Philip Allott, State Responsibility and the Unmaking of International Law, p. 26.

15 James C. Hathaway, The Human Rights Quagmire of Human Trafficking, p. 4-5.

16 Wylie, Gillian, McRedmond, Penelope, Human Trafficking in Europe Character, Causes and Consequences, p.3-7.

17 Rantsev v. Cyprus and Russia [GC], para.286.

itself the second exploitation of the victim – by the state of destination. The contention that the victim is reduced to the mere mean is further reinforced by art.16(1), that by its very definition suffices classical understanding of standard readmission agreement. It doesn't matter whether conclusion of criminal proceedings is positive or negative, MSS can send victim back by the virtue of the later provision and the fact of not having proper documentation is no longer an issue thanks to art.16(4). The issue is not of achieving fair balance between competing paradigms, but of no balance at all. Unfortunately, ECtHR didn't have the chance to explicitly pronounce on refugee status and residence permit cases in the context of THB, since *L.R. v. the UK*, *D.H. v. Finland*, *O.G.O. v. the UK* – all three cases were struck out of its list, since applicants were either granted refugee status or indefinite leave to remain. To this accord, EU legal framework concerning THB warrants particular attention; it celebrated its legislative-policy of enhancing victim-centricity in its respective framework.<sup>18</sup> In the realm of EU law, victims-rights-based-approach is not even about sticks-and-carrots-policy evident at COE level, rather, concrete interdependency between identification/assistance and participation in criminal proceedings is self-evident. While, art.11(3) of EU-Trafficking-Directive “ambitiously” encourages victim's non-willingness to cooperate, Recital.17 establishes that “this directive” isn't concerned with the conditions of the residence of the victims. However, the one which is concerned, namely, the 2004/81/EC-Directive, stipulates in art.1 read in conjunction with art.6, that it's very much linked with state-cooperation. Surprisingly, CJEU's contribution of remedying these quasi-standards isn't available to date.

Another example of state superiority is manifested through the non-punishment provision prescribed within art.26(COE), which only prohibits punishing victims for offences they committed as a consequence, or in the course, of having been trafficked. This shouldn't be conflated with the blanket impunity whatever offence has been committed.<sup>19</sup> Why this is unsurprising? Muraszkiwicz explains that the provision predominantly concerns criminal law, imitating the specific interests of the state.<sup>20</sup> Both provisions, art.26(COE) and art.8(2011/36/EU-Directive) particularly substanti-

ate end results. The conclusion is that both provisions will be incorporated in accordance with domestic legal systems meaning further that regional framework does not establish common level of protection. This can be balanced through *Rantsev* reasoning maintaining that, states are required to “ensure the practical and effective protection of the rights of victims or potential victims of trafficking.”<sup>21</sup> In this regard, ECtHR held that “there were sufficient indicators available to the police authorities” for identifying her as a potential victim.<sup>22</sup> It should be added that the language of art.26 provides only for possibility and not the actual imperative. The language of Refugee Convention art.31(1) would be more rights-based. It is rightly asserted that both Convention and Directive would benefit from UN Model Law against Trafficking in Persons which states that “trafficked persons shall not be detained, charged or prosecuted.”<sup>23</sup> Additionally, states can easily exploit an understanding of the victim itself. When non-punishment-clause is triggered? By the virtue of a presumption of victimhood or in the moment of formal recognition of such status. Stoyanova answers: it is made explicit that non-punishment is activated upon formal recognition.<sup>24</sup> Another interpretation by Muraszkiwicz suggests that art.26 must be read in light of art.13 meaning that it's “very counterproductive to that reflection period to permit the punishment of such persons,” which implies that person should be presumed to be victim when reasonable grounds so indicate.<sup>25</sup> I think it's of no paramount significance, which interpretation leads to material truth, the substance of convention's state-centricity is not altered, considering that any interpretation mentioned-above can be abused and employed as bargaining tool *vis-à-vis* victims. For the purposes of empirical verification, *L.E.* case suffices wherein the applicant, though was granted victim-status, but, had been required to wait more than nine months after informing the authorities of her situation before the justice system granted her that status. ECtHR held that the effectiveness of the victim-identification procedure was subject to several procedural deficiencies, establishing a violation of art.4(ECHR). Stoyanova observes that ECtHR's reasoning suggests that the obligation to identify victims and to confer them a specific status, including resi-

18 Supra-Note 17, p.8-9.

19 Piotrowicz, Ryszard, Conny Rijken and Baerbel Heide Uhl, “Routledge Handbook of Human Trafficking,” p.201-202.

20 Muraszkiwicz, Julia Maria, Protecting Victims of Human Trafficking From Liability The European Approach, p.101-102.

21 Supra Note 21, para.284.

22 *Ibid.*, para.296.

23 Supra Note 17, p.107-108.

24 Vladislava Stoyanova, Human Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligations, p.227.

25 Supra Note 17, p.111-112.



dence permits, is absorbed” in ECHR.<sup>26</sup> Also, as Stoyanova commented judgment presumes COE-Convention as not imposing a disproportionate burden.<sup>27</sup> Hence, while *Chowdury* reinforces victim-centricity in affirming that “protection measures include those aimed at facilitating the identification of victims”<sup>28</sup> fundamental essence of COE-Convention or 2011/36/EU-Directive could be exploited as to make each benefit afforded by former or the later dependent on ‘co-operation requirement.’

Last instance of inadequately distributed balance is embodied in the compensation mechanism. Underlying problem concerning art.15(COE-Convention) is the backdoor to national law since the avenues, both material and procedural necessary for a remedy is subject to state’s discretion. While art.15(2) enshrines the possibility to have an access to the right to legal assistance and to free legal aid, it’s still particularly problematic that convention doesn’t strictly address definitions of legal assistance and legal aid. It is true that later is autonomous concept within art.6(ECHR) and it in principle should apply, albeit, considering the applicability standard of art.6(ECHR) ECtHR in *Ferrazzini*, held that it’s not sufficient for the applicant to demonstrate that a dispute is “pecuniary” in nature<sup>29</sup> while in *Maaouia* affirmed that art.6(ECHR) ceases to apply in alien’s cases.<sup>30</sup> Hence, considering the inapplicability of art.6(ECHR) and obscurity around the scope of art.8(ECHR) in this context on legal assistance as distinct form of procedural safeguard, stance taken within art. 15(2) which leaves national law to determine the scope and extent of these rights concerned constitutes huge balancing and distributional problem. The next problem with this provision specifically is that attaching art.15(2) rights is subjected to victimhood and hence the discussion about the material moment of attaching victim status, whether it is upon formal recognition or on reasonable grounds suspicion approach cannot be avoided. Next, art.15(3) refers to national law again, now much more interestingly, substantively tying the right to compensation with again victim status, *but* only against perpetrators. Two conclusion follows one of which has already been alluded above many times. However, positing only *perpetrators* as potential addresses for the purposes of

obtaining compensation is the technique to encourage victims to cooperate with authorities and again diminishes them to mere means, but now it commits so by employing more sophisticated techniques of *victims own rational self-interest of prosecuting perpetrators and claiming damages thereafter*. The Second point lies in diminishing the list of available legal subjects the damages can be obtained from solely to the perpetrators while deliberately MSS themselves are deliberately excluded. The rationale of the criticism is that authorities are themselves frequently responsible for structural and procedural shortcomings or other deficiencies. It’s worth recalling that Cypriot police couldn’t identify that Mrs Rantseva was a victim and they even returned her to the perpetrators. ECtHR awarded 40,000 euro on an ‘equitable basis.’<sup>31</sup> Thus, granting such right to the victims could potentially balance their position *vis-à-vis* states’ domination. A final point concerns temporary residence permits for allowing victims to be present in the state during their case isn’t resolved. It is apparent that art.14 regulating residence permits strictly provides imperative conditions under which victims are allowed to stay. McGregor convincingly points that “it does not include the pursuit of a civil claim for compensation as a ground for applying for such a permit.”<sup>32</sup> This arguably constitutes important drawback in the overall interplay of state-victim distributional relationship.

## DO WE CARE ABOUT THE FATE OF ASYLUM-SEEKERS?

Well, in theory we of course do care. The bunch of treaties are adopted to this accord. Is the protection of those treaties real? Maybe yes, if only the jurisdiction is triggered, though.

To start with, *X. and X.* CJEU judgment renders *Non-Refoulement* principle ‘theoretical and illusory.’ Court disappointedly reasoned that applications for humanitarian visa with the intent to apply for asylum falls solely in the domain of national law.<sup>33</sup>

This formalistic easy-way approach eliminates protection afforded by Art.4(CFR), which as elucidated by Charter Explanations, must be construed as including substance of Art.3(ECHR),<sup>34</sup> to the nonsense upon stilts, since a visa refusal materializing in consequence of preventing an access to safety goes against the protection machinery inherent in these respective instruments. ECtHR confirmed in *M.S.S.* that

26 Vladislava Stoyanova, L.E. v. Greece: Human Trafficking and the Scope of States’ Positive Obligations under the ECHR, p.17.

27 <https://strasbourgobservers.com/2017/04/28/chowdury-and-others-v-greece-further-integration-of-the-positive-obligations-under-article-4-of-the-echr-and-the-coe-convention-on-action-against-human-trafficking/>

28 Chowdury and Others v. Greece, para.110.

29 Ferrazzini v. Italy [GC], para.25

30 Maaouia v. France [GC], para.38

31 Supra Note 18, para.342.

32 Supra Note 17, p.269.

33 C-638/16 PPU, X and X v État belge, paras.40-52.

34 2007/C 303/02, EXPLANATIONS, pp.2-5.

“legitimate concern to foil the increasingly frequent attempts to circumvent immigration restrictions must not deprive asylum-seekers of the protection afforded by these conventions,”<sup>35</sup> while in *Hirsi* affirmed that “the effect of which is to prevent migrants from reaching the borders of the State may amount to refoulement if it exposes the applicant to ill-treatment.”<sup>36</sup> Also, as AG Mengozzi suggests if refusal is capable of leading applicant towards facing the ‘real risk’ of being exposed to irreversible harm, the provision permitting issuance of LTV enshrined in Art.25(CCV) transforms into the duty of such issuance aimed at preventing the risk from being materialized.<sup>37</sup> His rationale lies in duly considering non-refoulment factors unless visa-denial occurs within the meaning of Art.32(CCV). CJEU could have concluded that MSs must set forth the reasons for refusal of a visa under Art.32(1)(b) where its denial would have the direct consequence of exposing applicant to the real-risk of serious ill-treatment prohibited by Art.4(CFR).

The underlying impact of such interpretation is manifested through the deprivation of migrants’s individually enforceable right against MSs enabling her to claim not to be subjected to refoulment where substantial grounds are shown for believing that person being refouled will be exposed to irreversible harm upon return. Such conclusion is attained through allegedly formalistic interpretation of *lex specialis* ‘Implementing-EU-Law-Clause’ that in reality served diametrically different purpose of expanding the field of application otherwise restricted by Art.1(ECHR). This interpretation is beneficial for MSs, since *per Căldărăru*, Art.3(ECHR) applies to Art.4(CFR),<sup>38</sup> by the virtue of sharing same ‘meaning and scope’ *ratione materiae* according to Art.52(CFR). Also, in *Abdulla*, the later approach was confirmed to be interpretative technique generally followed in EU-asylum-case-law.<sup>39</sup> Now, MSs can virtually contribute to the paradigm of “Fortress Europe” without actually considering their primary CFR non-refoulment-obligations, because, they materially ceased to apply. The last glimpse of hope disappeared from Pandora-box after ECtHR delivered its recent 2020 judgment in *M.N.* maintaining that in case of non-nationals, a requirement of ‘de-facto-control-and-physical-power’ over them applies and thus established that jurisdiction hasn’t been triggered

pursuant to Art.1(ECHR).<sup>40</sup> CJEU’s stance is substantiation of a broader spectrum of objectives grounding CEAS rationale.

Court’s stance suggests that it contributes to make foundational political underpinnings even more solid, since its end result, which, *per* Moreno-Lax, “is meeting more of a control task than a protective function” is duly accomplished.<sup>41</sup> The concept of border management amalgamated with alleged humanity-centrism is reinforced through its legally unconvincing approach. CEAS’s underlying logic implying that only persons ‘genuinely in need’ of protection should benefit from it<sup>42</sup> now becomes impossible to grasp how illegitimizing otherwise not very legal pathways will help to strengthen hypocritically conflated rationales of protecting others and being protected from ‘others’ simultaneously. What this judgment suggests is that EU’s fortress mentality is not theoretical and illusory, but practical and effective and as Armstrong explains if such trend of legal walls will continue to take place “Fortress Europe will be nearly impenetrable.”<sup>43</sup> Added value is the absence of the legal channels for regular admissions, leaving “refugees with no option but to use the services of traffickers and smugglers to flee oppression.”<sup>44</sup> As Costello suggests the containment politics has its apparent human dimension, since “as the demand for refuge grows, access to asylum contracts and the demand for the services of smugglers grows,”<sup>45</sup> meaning further that the loss of human lives doesn’t but increase accordingly. This in turn suggests that CEAS underlying rationales consisting of “a series of conflicting objectives”<sup>46</sup> of balancing refugee protection with immigration control, whereas later arguably translates into illegitimizing legal routes, is either wrong path to follow<sup>47</sup> or is deliberate externalization-oriented policy choice that explicitly intends not what it gloriously affirms, but is conversely implicit in its intention to reduce the level of refugee application to the possible minimum.<sup>48</sup> In this vein, Fitzgerald correctly noted that “states have deliberately blocked the most path, even for refugees.”<sup>49</sup> This rationale upon

35 M.S.S. v. Greece and Belgium, para.216.

36 *Hirsi* Case, para.180.

37 Case C-638/16 PPU, OPINION OF AG MENGGOZZI, para.132.

38 C-404/15 and C-659/15 PPU, para.90-94.

39 C-175/08, *Abdulla* Case, para.51-53.

40 *M.N. and Others v. Belgium*, [GC], para.118-120.

41 Violeta Moreno-Lax, ‘Life After Lisbon: EU Asylum Policy as a Factor of Migration Control’ p.165.

42 Recital 12 QD

43 Ashley Binetti Armstrong, “You Shall Not Pass! How the Dublin System Fueled Fortress Europe,” pp.369.

44 *Supra* Note 42, p.163.

45 Cathryn Costello, ‘Overcoming Refugee Containment and Crisis’ (2020) p. 18.

46 *Supra* Note 42, p. 149.

47 *Supra* Note 44, pp. 370-372

48 *Supra* Note 44, pp. 375-378.

49 David Scott FitzGerald, “Remote Control of Migration:

which CEA system is notoriously premised is best captured by AG Mengozzi who meticulously noted that “it is crucial that, at a time when borders are closing and walls are being built, the Member States do not escape their responsibilities, as they follow from EU law”.<sup>50</sup> Quite sadly, CJEU was concerned not to “undermine the general structure of the system established by Regulation No 604/2013.”<sup>51</sup> The Court’s position about externalization of migration is motivated by the desire of non-interference in this crucial field. Hence, through demonstrating alleged judicial passivism, CJEU itself underlined limited reception capacities of the Member States and while being hesitant to incur the label of ‘bomb-detonator’ or ‘chaos-creator’<sup>52</sup> hadn’t risked its legitimacy in the face of Commission and other MSS, but was reluctant to prevent CEAS’s true policy considerations from being materialized any further.

Bearing in mind that the exercising of extraterritorial control by the use of visas become one of the main indispensable routes to quasi-survival underlying CEAS immigration rational, the amplitude of law is turned into a slave of political considerations, wherein the possible human-rights-salvation lies beneath the judicial activism capable of breaking this vicious circle the system is currently trapped in. However, when in this very context the court reasonings, *per* Stoyanova, are “formally convincing, but politically unsurprising”<sup>53</sup> the implications in relation to international protection are duly brought about. These implications best captured by Costello are measured in human lives.<sup>54</sup> Even in times of hyperactive border-externalizing policies aiming at shifting geographical borders as to prevent the access to the jurisdiction of destination states<sup>55</sup> the issuance of humanitarian visas can still be considered as relief for thousands. Both ECtHR and CJEU are intermediary institutions between from the one hand illegitimizing ‘legal-routes’ coupled with endorsing non-entrée policies’,<sup>56</sup> and between dozens of desperate decisions on having affairs with smugglers and traffickers from

the other. In fact, considering such socio-political atmosphere both courts can not only set common rules for MSS about how to play, but how to play well. In contrast, the incoherency they demonstrate proves contrary.

The second example of such judicial passivism is *M.N.* ECtHR judgment.<sup>57</sup> ECtHR was called upon to establish whether Art.3(ECHR) required MSs to issue short-term humanitarian visas. It was first opportunity for ECtHR to adjudge on the applicability of *non-refoulement* principle inherent in Art.3 to the foreign embassies and consulates of MSS. ECtHR decided not to interfere with current political hurdle and found easy way out: delivered inadmissibility decision, maintaining that ‘de facto control and physical power’ test didn’t apply over non-national.<sup>58</sup> Baumgärtel commented that despite the logically expected disappointment this outcome was quite susceptible.<sup>59</sup> Had the jurisdiction been triggered pursuant to Art.1(ECHR) non-refoulement obligation could give rise to myriad procedural guarantees capable of strengthening migrant’s overall position. To this accord, FitzGerald rightly notes that externalization policy directly ties the process of border-management with the activation of material jurisdiction,<sup>60</sup> since the modern conception of human rights and its associated policy is **often** meticulously attached with well-established notion of territorial-jurisdiction. The rationale of this judgment merely indicates that COE HRL simply excludes the candidates for international protection from its protective scope, meaning further that MSS are not dutybound to account ECHR in their considerations of such claims, while migrants and refugees cannot advance claims based on ECHR anymore. Added value is the absence of the legal channels for regular admissions. Thus, “as the demand for refuge grows, access to asylum contracts and the demand for the services of smugglers grows,”<sup>61</sup> accordingly. The overall conclusion emanating from European HRL is the following: **X. and X.** CJEU judgment enlightened that no CFR obligations arise, because MSS are not implementing EU Law, while *M.N.* ECtHR judgment on its part euthanized by affirming that no jurisdiction follows from ECHR too. Spijkerboer noted about the former that “It would have needed a lot of courage to take another position than the court did,”<sup>62</sup> which I think equally applies also to the later.

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Theorising territoriality, Shared coercion, and Deterrence,” p.18

50 Supra Note 38, para. 4.

51 Supra Note 34, para. 48.

52 *Ibid.*

53 <https://www.ejiltalk.org/m-n-and-others-v-belgium-no-echr-protection-from-refoulement-by-issuing-visas/>

54 Cathryn Costello, “Overcoming Refugee Containment and Crisis,” p. 18.

55 David Scott FitzGerald, “Remote Control of Migration: Theorizing territoriality, Shared coercion, and Deterrence,” pp. 8-10.

56 Thomas Gammeltoft-Hansen, James C. Hathaway, Non-Refoulement in a World of Cooperative Deterrence, pp. 240-244.

57 ECtHR, *M.N. and Others v Belgium* [GC], 5 May 2020.

58 *Ibid.*, para. 118-120.

59 <https://strasbourgobservers.com/2020/05/07/reaching-the-dead-end-m-n-and-others-and-the-question-of-humanitarian-visas/>

60 Supra Note 3, p. 16.

61 Supra Note 2, p. 18.

62 THOMAS SPIJKERBOER, Bifurcation of people, bifurcation of law: externalization of migration policy before the EU Court of Justice, p. 267.

Another interesting example *N.D. and N.T.*, concerned the applicability of the prohibition of collective expulsions to push backs at Spanish Border.<sup>63</sup> The ECtHR applied “genuine and effective access” and ‘cogent reasons’ test and came to the conclusion that these “badly behaving” migrants weren’t subjected to the collective expulsion. It is still positive that ECtHR reiterated supremacy of non-refoulement principle, affirming that its findings “does not alter the obligation of States to protect their borders in a manner compliant with Convention rights.”<sup>64</sup> However, the threat this judgment poses to international protection mechanism is that while Court posits the criteria of “genuine and effective access” it doesn’t interpret genuine and effective within the ambit of art.6(ECHR), since in *Maaouia* it affirmed that art.6 ceases to apply in alien’s cases.<sup>65</sup> And instead, in *Khalifa* it adopted much more lenient requirements.<sup>66</sup> If *N.D. and N.T.* are viewed in correlation with *M.N.* inconsistency, *per* Gammeltoft-Hansen becomes apparent since while the ECtHR in the former made the possibility for legal pathways to be genuine and effective, the later confirmed that legal pathways leading to humanitarian visas aren’t protected within ECHR.<sup>67</sup> On the same question Stoyanova expressed her concerns: “if procedures for humanitarian visas are available, this can be used to the applicants’ detriment in the assessment of the prohibition on collective expulsions”.<sup>68</sup>

Ironically, these judgments suggest that Europe’s fortress mentality is real which manifests itself through the building of physical and legal walls, that again are reinforced by European Courts’ judgments. I am disappointed, but I agree with Gammeltoft-Hansen in asserting that European Courts’ general political trajectory don’t make such outcomes surprising.<sup>69</sup> Both European Courts are aware of CEAS underlying rationales comprising gamut of conflicting objectives<sup>70</sup> of balancing refugee protection with immigration control by the alleged means of externalization which in fact is the embodiment of implicit intention of reducing the level of refugee application to the possible minimum.<sup>71</sup> Its inherent logic rooted in the maxim of protecting

only those genuinely necessitating it<sup>72</sup> and European Courts’ reinforcing support to illegitimizing routes questions their legitimacy itself.

## TRACING UNIVERSALITY

The mainstream political dichotomy of International Human Rights Law is grounded in the root idea of propagated universality of human rights norms usually perceived as fundamentally superior supra moral virtue than any other cultural, political, moral or philosophical systems of views existent so far. In this epicycle, the vast majority of the states are in needed of salvation and as a contemporary political agenda suggests the acts of purifications should have been or if not yet should be performed by the western elite, who themselves already attained fundamental moral truth thereof and now try to make other states imbibe or be imbibed by these categorical imperatives, where the indulgence is the complete process of ‘humanrightization’ of the state(s) in question. I agree with Makau Mutua<sup>73</sup> when he asserts that “the idea of human rights-the quest to craft a universal bundle of attributes with which all societies must endow all human beings-is a noble one.” Yet, the idea is a noble one, not are the states themselves. Some of them successfully transformed it in the common vernacular of power and hid their imperialistic ambitions under the veil of universality maxims. The term imperialism is employed to envisage two overlapping dimensions. The first is the imperial dimension of universalism universalizing good and evils. A one-size-fits-all emancipatory practice under recognizes and reduces the instance and possibility for particularity and variation.<sup>74</sup> The second is a clearly delineated context of concrete human rights system having limitations and the structural flaws, as they entail, excuse and justify too much while at the same time in most cases states employing it successfully avoid incurring responsibility.

David Kennedy argues that human rights express the ideology, ethics, aesthetic sensibility and a political practice of a particular western liberalism.<sup>75</sup> This is true since the writings of Locke influencing the American Declaration of Independence viewed the classi-

63 *N.D and N.T v Spain* [GC], 13 February 2020.

64 *Ibid.*, para. 232.

65 *Maaouia v. France* [GC], para. 38.

66 *Khlaifia and Others v Italy* [GC], paras. 245-248.

67 <http://eumigrationlawblog.eu/adjudicating-old-questions-in-refugee-law-mn-and-others-v-belgium-and-the-limits-of-extraterritorial-refoulement/>

68 *Supra* Note 54.

69 *Supra* Note 68.

70 Violeta Moreno-Lax, “Life After Lisbon: EU Asylum Policy as a Factor of Migration Control,” p. 165.

71 *Supra* Note 44, pp. 370-372.

72 Recital 12 QD.

73 Mutua, M., 2001. Savages, victims, and saviors: The metaphor of human rights. *Harvard International Law Journal*, 42(1), pp. 201-246.

74 Kennedy, D. (2002). International Human Rights Movement: Part of the Problem? *Harvard Human Rights Journal*, 15, pp. 101-126.

75 *Ibid.*, p. 15.



cal liberalism as entailing the percepts of universality and political democracy strengthening it cumulatively. What, perhaps, Louis Henkin failed to take into account when arguing that the conception of human rights and most of the rights in the authoritative catalogue of human rights conform to a common moral intuition that is virtually universal today and are in fact congenial-or acceptable-to the principal cultures (yet he later admitted that the freedom of expression is not that universal),<sup>76</sup> is another percept of liberalism frequently termed as an “incommensurability of values,” (and not universal blueprint) which is traditionally understood as an irreducible plurality of incommensurable values which accords to each individual a unique and irreplaceable value, and because individuals are many, so too are [ultimate] values.<sup>77</sup> If one affirms that the personhood partly is also formed by the cultural identity, then there is a presumption, that liberalism should tolerate it if and only if other common moral intuitions don’t suggest us to do otherwise.<sup>78</sup> That’s oxymoron but it at the same time acknowledges the idea of universality while also recognizes the notion of incommensurable and ultimate values. And this is the reason why the line of argumentation developed by Kennedy is true when he argues that one size fits all policy fails to take into account the cultural diversity. If one recalls the devastating critique by Mutua that the central problem with human rights is that it is hopelessly ambiguous, this assertion will turn obvious. It is even clearer in an immensely praised case law of ECtHR. Consider the issue of blasphemy in the context of the freedom of religion and the freedom of expression protected by article 9 and 10 ECHR respectively. In *Otto Preminger-Institut v Austria*,<sup>79</sup> court considered the Austrian measure compatible with the ECHR, since it was necessary in a democratic society to protect “the right of citizens not to be insulted in their religious feelings”, notably the freedom of religion of Christians, who could feel offended by the movie in question.<sup>80</sup> The judges Palm, Pekkanen and Makarczyk in their opinion annexed to *Otto Preminger* argue that: “[T]he Convention does not, in terms, guarantee a right to protection of religious feelings. More particularly, such a right cannot be derived from the right to freedom

of religion, which in effect includes a right to express views critical of the religious opinions of others.<sup>81</sup> In contextually dependent cases (*Wingrove v. United Kingdom*, and *I.A. v. Turkey*) the court developed the same line of argumentation.<sup>82</sup> Whereas, in *Giniewski v France*,<sup>83</sup> court ruled that the article on anti-Semitism “contributed to a discussion of the various possible reasons behind the extermination of the Jews in Europe.”<sup>84</sup> It is shocking why the court did what it did. In *Giniewski* it affirmed that the discussion on anti-Semitism was essential for holding a discussion, a painful topic for Europe, whereas in Holocaust denial case<sup>85</sup> court deemed it not to be protected within the ambit of article 10 taking into account common heritage and the experience of Europe. If *Giniewski* judgment contributed to discussion, than from a standpoint of courts logic employing its phrasing, what is the reason behind the denial of the holocaust is not capable to “contribute to a discussion” on “the various possible reasons behind the extermination of the Jews in Europe.” And ridiculously, *Wingrove* and *Otto Preminger* movies, which by its very nature were experimental and in fact aimed at only producing discussions, were restricted on the basis of religious sentiments that doesn’t even have normative basis in the convention<sup>86</sup> and in the dissenting opinions of later *I.A.* case was suggested that the time has come to “revisit” the *Otto Preminger* and *Wingrove* jurisprudence, which places “too much emphasis on conformism” and reflects “an overcautious and timid conception of freedom of the press.”<sup>87</sup> It seems that Strasbourg court disregards western liberal foundations (Note that from the standpoint of other cultural views, human rights movements is also a set of views enshrined in western tradition) of the freedom of expression, deals with issues in narrow context and sometimes forgets that “ECHR is a constitutional instrument of European public order.”<sup>88</sup> Again,

76 The Annals of the American Academy of Political and Social Science, Vol. 506, Human Rights around the World (Nov., 1989), pp. 10-16.

77 Lomasky, Persons, Rights, and the Moral Community, p. 52.

78 For detailed discussion, see, Michael Huemer, Ethical Intuitionism (New York: Palgrave Macmillan, 2005).

79 ECtHR, *Otto Preminger-Institut v Austria*, 20 Sep 1994, app. 13470/87

80 *Ibid.*, para 48.

81 See, Dissenting opinions of judges Palm, Pekkanen and Makarczyk, para 6.

82 See, ECtHR, *Wingrove v UK*, 25 Nov 1996, app. 17419/90; *I.A. v Turkey*, 13 Sep 2005, app. 42571/98.

83 ECtHR, *Klein v Slovakia*, 31 Jan 2007, app. 72208/01.

84 *Ibid.*, para 51.

85 ECtHR, *PASTÖRS v. GERMANY*, 3 Oct 2019, App.No. 55225/14.

86 Temperman, Jeroen, Freedom of Expression and Religious Sensitivities in Pluralist Societies: Facing the Challenge of Extreme Speech (April 17, 2012). Brigham Young University Law Review, Vol. 3, 2011.

87 ECtHR, *I.A. v Turkey*, 13 Sep 2005, app. 42571/98., dissenting opinion of judges Costa, Cabral Barreto Jungwiert, para 8.

88 ECtHR, *CASE OF LOIZIDOU v. TURKEY (PRELIMINARY OBJECTIONS)*, 23 March 1995, App. No. 15318/89, paras. 33.

as it is demonstrated above even the Strasbourg court jerry rigs the convention and, sometimes underestimates the paramount significance of the freedom of expression in states with deep cultural and legal tradition defending thereof, but simultaneously, in *Leyla Şahin v. Turkey*<sup>89</sup> again the Strasbourg court ruled that the prohibition imposed on Turkish students wearing a headscarf in class or during exams, is not a violation of article 9, considering concrete cultural peculiarities in stringent universal terms. A Reasonable reader will appreciate that this is upheld in relation Turkey whose cultural identity is deeply influenced by the religion forming its constituent part. Even so praised set of minimum standards and common European consensus are not that common. What about an abortion, euthanasia, same sex marriage? In fact, the universality of human rights is *not* a fact. At best it is a theory.<sup>90</sup> I would suggest the proponents thereof to investigate child labor issues. We can deem unlawful (even bordering with child abuse) the behavior of a middle-class European parent imposing every day twelve hours of work to an eight year old kid, conversely, we can hardly entertain the same opinion in the case of a family living in a Third World country hit by famine or destitution, in which some or all the children work in the fields or in a factory in order to help feed themselves and their relatives.<sup>91</sup> Philosophically, the problem with human rights universalism is that it views the theory of *good* and the theory of *right*<sup>92</sup> as monistic, whereas the good can be monist, but determining what is right need pluralistic context dependent approach (in theoretical sense, when it [universalism] takes itself to be *a priori* granted and doesn't subject itself to *a fortiori* scrutiny) and here universalism fails notoriously.

## POLICY, POWER AND HUMAN RIGHTS

Western policy successfully uses “universalism”. The sense of predestination President Theodore Roosevelt expressed when he referred to peoples and countries south of the United States as the “weak and chaotic governments and people south of us” and declared that it was their “duty, when it becomes abso-

lutely inevitable, to police these countries in the interest of order and civilization.”<sup>93</sup> Certain scholars argued that the United States is not an “international policeman,” acting within the bounds of the law. Rather, it is a lawless “rogue cop” with unlimited power.<sup>94</sup> The main strategy lies within ‘human-rights-emancipation’ where universalism is just a veil to excuse and justify imperialistic ambitions. *Nuclear Weapons Advisory Opinion* (1996) rendered by ICJ<sup>95</sup> is a green light for its policy: “*But at the same time, a use of force that is proportionate under the law of self-defense, must, in order to be lawful, also meet the requirements of the law applicable in armed conflict which comprise in particular the principles and rules of humanitarian law.*” Indeed, ICJ was aware of the different policy, legal and moral considerations shaping endless discussion of the legality of using Nuclear Weapons and its advisory opinion was politically speaking unsurprising. From the conventional international legal perspective, I agree that the whole outcome of the advisory opinion constitutes the legal dilemma pure and simple,<sup>96</sup> but from the standpoint of the humanistic aspirations in general and universality in particular, the main conclusion is still ironic. While, ICJ had delivered the human rights salvation by one hand, when noting that it was in principle impossible to reconcile the usage of nuclear weapons with stringent requirements of IHL, it still took away the final victory by another, when it affirmed in the last paragraph that if the very survival of the state was at stake, then the states have final say in determining whether they desire to legally utilize nuclear weapons as the last available mean emanating from their inherent right of self-defense. Kennedy correctly assesses that human rights are “far from being a defense of the individual against the state, human rights has become a standard part of the justification for the external use of force by the state against other states and individuals.”<sup>97</sup> It is indeed permissible to kill civilians where it is ‘necessary’ and ‘proportionate’ – thing is that it is hard to explain for any Iraqi or Lebanese mother it was ‘necessary’ and ‘proportionate’ to

89 ECtHR, *Leyla Şahin v. Turkey*, 10 Nov 2005, App.no. 44774/98.

90 Moeckli, D., Shah, S., Sivakumaran, S., & Harris, D. J. (2010). *International human rights law*. Oxford: Oxford University Press, p.51.

91 <https://oll.libertyfund.org/titles/leoni-freedom-and-the-law-lf-ed>

92 Jason Brennan, “Beyond the Bottom Line: The Theoretical Aims of Moral Theory,” *Oxford Journal of Legal Studies* 28 (2008): 277–96.

93 Cited in Mutua, M. (2001).

94 Peter Erlinder, “Human Rights or Human Rights Imperialism - Lessons from the War against Yugoslavia,” (2000) 57 *Guild Prac* 76.

95 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 226, International Court of Justice (ICJ), 8 July 1996, available at: <https://www.refworld.org/cases/ICJ,4b2913d62.html> [accessed 21 March 2020]

96 Valentin Jutner. ‘Irresolvable Norm Conflicts in International Law: The Concept of a Legal Dilemma.’ (2017), Oxford: Oxford University Press.

97 Kennedy, D. (2002).

kill his son.<sup>98</sup> The powerful legal vocabulary of human rights universalism would suggest that “not one more civilian should be killed, than is necessary,”<sup>99</sup> which demonstrates that humanitarian vernacular excuse and justify too much and fails to deliver what it initially promised. Examples include: The joint US–Belgian operation in the Congo in 1964, the landing of US troops in the Dominican Republic in 1965, the 1976 rescue of Israeli nationals at Entebbe Airport, Operation Eagle Claw, Passage of resolving the Iranian hostage crisis in 1980, and purported rescue of US medical students in Grenada in 1983.<sup>100</sup> The mere coincidence is that states with oil reserves need to be emancipated and civilized and this holy pursuit should be undertaken indeed by the knight-in savior-skin. And here starts the story where hidden western imperial claws are not that hidden. Iraqi needed democracy and human rights more than ever and USA was ready to help. This was an invasion but justified by the language of power. Yet, in *Sadam Hussein* case before the ECtHR, the court considered that “on the sole basis that those States allegedly formed part (at varying unspecified levels) of a coalition with the US, when the impugned actions were carried out by the US, when security in the zone in which those actions took place was assigned to the US and when the overall command of the coalition was vested in the US.”<sup>101</sup> It escaped responsibility under ‘coalition approach’.<sup>102</sup> Another example of human rights imperialism is Yugoslavia. The thousands of innocent civilians who died as a result of the bombing of Yugoslavia and Kosovo, and the hundreds of thousands of civilians in Kosovo who were displaced only after the bombing began.<sup>103</sup> And here one of the main things to answer is whether the bombing accomplish the stated “human rights” or strategic objectives of NATO?<sup>104</sup> It is regrettable that when in the case of *Bankovic*,<sup>105</sup> the at-

tempt to deliver the justice ended up being declared inadmissible as certain activities by NATO members were not covered by the reach of convention since Yugoslavia was not a contracting party. It appears that in some cases human rights acclaimed universality is not that universal. To this accord, *Behrami and Sarmati Cases*<sup>106</sup> identify that whenever states act under the auspices of IO acts perpetrated by the states are attributable to those IO-s, but as in this case UN wasn’t party to ECHR, the states avoided incurring responsibility. Regrettably, useful way for powerful states to play emancipators and abuse the power under the umbrella of International Organizations and then escape the responsibility also employing umbrellas of the later. Luckily, this trend is now vastly challenged and the ECtHR *Al-Jedda* judgment<sup>107</sup> did demonstrate “an incredibly important development – the Court has laid down a clear statement rule for interpreting SC resolutions that can go a long way in providing a meaningful human rights check on the Security Council.”<sup>108</sup>

## CONCLUSION

In the end of the day I hope over enthusiastic students, myself included, will start questioning international law and human rights more in depth. This article intended to generate skepticism, but it in no way suggest to fall into existential nihilistic crisis. After all, despite this critical appraisal this doesn’t mean that progress hasn’t been made. Only through criticizing, posing correct and relevant questions and having always the spirit of readiness to intellectually challenge those whims and bias states not very sometimes have, will realize the idea of ideal mentioned in previous sections. The idea of ideal someone might contend is subjective, albeit, not much demanding minimum requirement at least should consist of international peace and security among all nations, to enable people of humankind to pursue their own happiness worthy of pursuing their own. After all, underlying moral idea should lie somewhere here and if moral progress had really taken a place, we must be close to its attainment than anyone has ever managed it before.

98 David W. Kennedy, 2012. The International Human Rights Regime: Still Part of the Problem? In *Examining Critical Perspective on Human Rights*, ed. Rob Dickinson, Elena Katselli, Colin Murray, Ole W. Pedersen: 19-34. Cambridge, UK: Cambridge University Press.

99 *Ibid.*

100 Crawford, J., & Brownlie, I. (2012). *Brownlie’s principles of public international law*.

101 *Hussein v Albania App (n 11), para 1.*

102 See, Maarten den Heijer, ‘Issues of Shared Responsibility Before the European Court of Human Rights’ (2013) 60 *Netherlands International Law Review* 411.

103 Peter Erlinder, “Human Rights or Human Rights Imperialism - Lessons from the War against Yugoslavia,” (2000) 57 *Guild Prac* 76.

104 *Ibid.*

105 ECtHR, *Bankovic and others v. Belgium and others*, 12 Dec 2001, app.no. 52207/99, para.80.

106 See Joined cases, ECtHR, *Behrami and Behrami v. France*, App.no. 71412/01, and *Saramati v. France and others* (Application no. 78116/01), judgment of 2 May 2007.

107 ECtHR, *CASE OF AL-JEDDA v. THE UNITED KINGDOM*, app.no. 27021/08, 7 July 2011.

108 Marko Milanovic, *Al-Skeini and Al-Jedda in Strasbourg*, *European Journal of International Law*, Volume 23, Issue 1, February 2012, p.137.

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