

Editorial Team

Audrey Bernasconi
(Senior Editor 2017-2018; 2018-2019)
Alicia Blimkie
(Senior Editor 2017-2018)
Jodie Côté-Marshall
(Associate Editor 2017-2018; Executive Editor 2018-2019)
Emilie de Haas
(Translation Lead 2017-2018; 2018-2019)
Eleanor Dennis
(Associate Editor 2017-2018; Executive Editor 2018-2019)
Peter Gibaut
(Content Editor 2018-2019)
Andrea Gomez
(Translator 2017-2018)
Brianna Gorence
(Executive Editor 2017-2018)
Marc S Lussier
(Associate Editor 2017-2018)
Camille Lustière
(Associate Editor 2018-2019)
Madeleine Macdonald
(Associate Editor Fall 2017)
Alex Moser
(Associate Editor 2018-2019)

Management Team

Mélanie Charbonneau-Gravel
(Outreach Associate 2017-2018)
Soo-Jin Lee
(Management Chair 2017-2018)
Alyssa McLeod
(Outreach Associate 2018-2019)
Jared Miller
(Outreach Associate Fall 2017)
Adam Rossiter
(Outreach Associate 2017-2018)
Shaké Sarkhanian
(Management Chair 2018-2019)

Henry Off
(Associate Editor 2018-2019)
Kevin Pinkoski
(Executive Editor 2017-2018; Editorial Chair 2018-2019)
Kayla Maria Rolland
(Associate Editor 2018-2019)
Alex Sader
(Associate Editor 2017-2018; Senior Editor 2018-2019)
Anabel Samerzhieva
(Associate Editor 2017-2018)
Shaké Sarkhanian
(Editorial Chair 2017-2018)
Arthur Scalabrini
(Associate Editor 2018-2019)
Caroline Schurman-Grenier
(Associate Editor 2017-2018)
Irfan Tahiri
(Associate Editor 2018-2019)

Multimedia Team

Elizabeth Loughheed
(Multimedia Chair 2017-2018; Multimedia Editor 2018-2019)
Yasmine Shadman
(Multimedia Editor 2017-2018)
Kimia Towfigh
(Multimedia Editor 2017-2018)

Founding Members

Andrea Buitrago-Carranza
Jonathan Coulombe
Guilhem de Roquefeuil
Sara Espinal
Amanda Ghahremani
Isabelle Jacovella Rémillard
Talia Joundi
Jeff Li
Sarah Munsch
John Simpson

Cover Photo by Josh Blatt

An endless wave of wildebeests search for greener grass as they migrate across the plains of the Serengeti in Tanzania, as viewed from a hot air balloon.

Une vague ininterrompue de gnous à la recherche de la terre la plus verte alors qu'ils migrent à travers les plaines du Serengeti en Tanzanie, vus d'une montgolfière.

Una ola interminable de ñus busca pastos más verdes mientras migran a través de las llanuras del Serengeti en Tanzania, vistos desde un globo aerostático.

Advisory Board

Payam Akhavan, *McGill University Faculty of Law*
Mohsen Al-Attar, *University of Warwick Faculty of Law*
François Crépeau, *McGill University Faculty of Law*
Mark Drumbl, *Washington and Lee University Law School*
Charles Fombad, *University of Pretoria*
Lorie Graham, *Suffolk University*
Emmanuelle Tourme-Jouannet, *Sciences Po School of Law*
Magnus Killander, *University of Pretoria*
Frédéric Mégret, *McGill University Faculty of Law*
Emmanuel Melissaris, *London School of Economics Department of Law*

Sally Engle Merry, *New York University Faculty of Anthropology*
Jens David Ohlin, *Cornell University Law School*
René Provost, *McGill University Faculty of Law*
Nandini Ramanujam, *McGill University Faculty of Law*
Alison Renteln, *University of Southern California, Gould School of Law*
Juan Carlos Sainz-Borgo, *United Nations University for Peace*
Bruno Simma, *University of Michigan Law*
Cassandra Steer, *McGill University Faculty of Law*
Kimberley Trapp, *University College London Faculty of Law*
Juan Ramón Martínez-Vargas, *Universidad del Rosario*
Frans Viljoen, *University of Pretoria*

The Unrestrained Corporatization and Professionalization of the Human Rights Field 3

J. Sebastián Rodríguez-Alarcón and Valentina Montoya-Robledo

BOOK REVIEW: Jean d'Aspremont, International Law as a Belief System 36

Adrien Habermacher

Social Media and Change in International Humanitarian Law Dynamics 48

Rosine Faucher

Reconciling Sovereignties, Reconciling Peoples: Should the Canadian Charter of Rights and Freedoms Apply to Inherent-right Aboriginal Governments? 75

Matt Watson

The Unrestrained Corporatization and Professionalization of the Human Rights Field¹

J. Sebastián Rodríguez-Alarcón² and Valentina Montoya-Robledo³

Abstract

Human Rights organizations are increasingly becoming professionalized and corporatized. These two characteristics might be problematic as many Human Rights lawyers and organizations may have an ambitious socially driven vision, but struggle to find a balance between economic and social value. If this problem is not solved in time, it could limit the possibility for Human Rights lawyers and organizations to achieve substantial transformations in terms of justice and equality. Based on the revision of literature and ten semi-structured interviews conducted between June 2014 through May 2017 with Human Rights lawyers from North America, Europe, and Latin America, we describe how excessive professionalization and corporatization can take place at two levels: 1) law schools, where disproportionate professionalization and corporatization end up reinforcing privilege and egos, as well as Human Rights work that is only partially critical, while producing legal advocates with good intentions but narrow possibilities for substantial change; and 2) in Human Rights legal practice, where robust negative corporate governance structures and cultures of dominance are replicated in a disproportionate manner at Human Rights institutions, losing sight of substantial change in the conditions that account for the vulnerability of particular communities. We provide possible solutions for the challenges that Human Rights advocates, international organizations, governments, philanthropists, global nonprofits, medium-size nonprofits, grass-roots organizations, law firms, and academia face in relation to the excessive corporatization and professionalization of the field. We propose a set of pragmatic legal, policy, behavioural, economic, and organizational solutions to help promote the work of Human Rights lawyers and organizations in current world affairs to their full potential.

French translation

Les organisations des droits de la personne sont de plus en plus constituées en sociétés et professionnalisées. Ces deux caractéristiques peuvent être problématiques puisque de nombreux avocats et organisations des droits de la personne ont une vision sociale ambitieuse, mais doivent à la fois s'efforcer de trouver un équilibre avec des considérations économiques. Si cette problématique n'est pas résolue, cela pourrait fortement limiter la capacité des avocats et des organisations des droits de la personne d'effectuer des transformations substantielles en termes de justice et d'égalité. En nous fondant sur notre

¹ **Authors' Disclaimer:** We define 'power' as a complex notion that results from the combination of privileges, such as economic and human capital, that derive from greater opportunities and access to resources that help individuals lead, influence, and make enduring and sustainable change in their own societies. However, with great power comes great responsibility. Thus, throughout this article we present the critical notion of how systems that reproduce logics of hierarchization and power imbalances in the Human Rights field ultimately benefit predominately those that are part of the top of the structure, those with more power. We argue how this power dynamic has also embedded Human Rights organizations, including the work of Human Rights lawyers in the field. As legal scholars and Human Rights practitioners, we recognize how we too belong to this structure, yet we want to be critical and purposive in bringing to light alternative ways in which we can all collectively increase the impact that results from our work. The arguments presented throughout this article are not based on the personal experiences of the authors.

² Sebastián Rodríguez-Alarcón is an international human rights lawyer.

³ Valentina Montoya Robledo is a S.J.D. Candidate and LL.M. at Harvard Law School.

analyse de la littérature ainsi que de dix entretiens semi-structurés menés entre juin 2014 et mai 2017 avec des avocats des droits de la personne provenant d'Amérique du Nord, d'Europe et d'Amérique Latine, nous décrivons comment la professionnalisation et la privatisation excessives peuvent se produire à deux niveaux : 1) les facultés de droit, où la professionnalisation et la privatisation disproportionnées renforcent ultimement le privilège et l'égo, ainsi que les travaux reliés aux droits de la personne qui manquent de sens critique. Tout en formant des avocats avec de bonnes intentions, l'approche des facultés diminue la possibilité de changements substantiels; et 2) dans la pratique juridique des droits de la personne, où les structures de gouvernance d'entreprise et la culture de dominance sont reproduites de façon disproportionnée dans les institutions des droits de la personne. Les entreprises perdent alors de vue les changements importants qui seraient nécessaires concernant les problématiques au fondement de la vulnérabilité de certaines communautés. Nous fournissons des solutions possibles aux défis que les défenseurs des droits de la personne, les organisations internationales, les gouvernements, les philanthropes, les organisations à but non lucratif, les organisations locales, les cabinets d'avocats et les universités rencontrent. Nous proposons un ensemble de solutions juridiques, politiques, comportementales, économiques, organisationnelles et pragmatiques qui permettront de promouvoir à leur plein potentiel le travail des avocats et des organisations des droits de la personne les affaires internationales actuelles.

Spanish translation

Las organizaciones de derechos humanos se han vuelto cada vez profesionalizadas y corporativas. Estas dos características pueden acarrear ciertos problemas ya que, aunque muchos abogados y organizaciones dedicadas a los derechos humanos tienen una visión social ambiciosa, es difícil para ellos encontrar un balance entre el valor económico y social. Si este problema no es resuelto a tiempo, esto podría limitar la posibilidad que tienen los abogados y organizaciones de derechos humanos de alcanzar transformaciones sustanciales en términos de justicia y equidad. Basados en una revisión de literatura y diez entrevistas semiestructuradas realizadas entre junio 2014 y mayo 2017 a abogados de derechos humanos en Norteamérica, Europa y Latinoamérica, describimos cómo la profesionalización y corporatización excesivas se llevan a cabo en dos niveles: 1) en las facultades de derecho, donde la profesionalización y corporatización terminan reforzando privilegios y egos, y donde el trabajo en derechos humanos es importante solo parcialmente; y 2) en la práctica legal de derechos humanos, donde estructuras robustas de gobernanza corporativa y cultura de dominancia se replican de manera desproporcionada en instituciones de derechos humanos, perdiendo de vista los cambios sustanciales en las condiciones de vulnerabilidad de determinadas comunidades. Presentamos posibles soluciones para los desafíos a los que abogados en Derechos Humanos, organizaciones internacionales, organizaciones de base, gobiernos, filántropos, organizaciones sin ánimo de lucro globales y de rango medio, firmas de abogados y la academia se enfrentan en relación con la excesiva profesionalización y corporatización de este campo. Proponemos un conjunto de soluciones pragmáticas legales, políticas, conductuales, económicas y organizacionales para ayudar a promover en todo su potencial el trabajo de abogados y organizaciones de derechos humanos en el mundo corporativo actual.

Introduction

I. The Excessive Professionalization of the 'Ideal' Human Rights Lawyer

II. The Corporatization of the Human Rights Field

III. What is Wrong with the Unrestrained Corporatization and Professionalization of the Human Rights Field?

IV. Case Studies

A. Studying in Law School

1. Privileged law schools for privileged students
2. Human Rights experts becoming technicians instead of social changer

B. Working at Human Rights Institutions

C. The Disconnection Effect of Professionalization and Corporatization

D. When Lawyers Cannot Afford to be Human Rights Advocates

E. Increasing Excessive Professionalization Against Low Professional Status of Human Rights Work

F. When only Human Rights Lawyers Can Speak the Language of Human Rights

G. David v. Goliath: Struggles Among Organizations with Different Scopes, Resources, and Capacity

H. Burnout: When Human Rights Lawyers Feel Frustrated with the System and Lose Passion for their Work

V. Possible Solutions

Conclusion

Annexes (at the end of the issue)

I. Informed Consent for Non-Medical Research

II. Anonymous Interview to U.S. 2L Student

III. Anonymous Interview to Lawyer at U.S. International NGO

IV. Anonymous Interview to Lawyer at National NGO

V. Anonymous Interview with Lawyer at Grassroots NGO and Others

VI. Anonymous Interview with Lawyer at International Court

VII. Anonymous Interview with Lawyer at International Human Rights Body

VIII. Anonymous Interview with Lawyer

IX. Anonymous Interview with Lawyer

X. Anonymous Interview with a Private Firm Lawyer

XI. Anonymous Interview with Lawyer at International Organization

Introduction

Amidst the current political context, the massive amount of information available in the world, the rise of nationalism and anti-globalists, populism, and the re-institution of far-wing political agendas, after decades of progress, we start to see a manifestation of Human Rights backlashes throughout several countries around the world leaving a troubled uncertain future.⁴ These backlashes are manifested through harsh laws preventing the financing and functioning of Human Rights organizations, reprisals against Human Rights defenders, women's rights and minority groups, counter-terrorism, rising authoritarianism, and the tendency to depict Human Rights concerns as illegal outside interference in countries' domestic affairs. As a result, Human Rights as a field, and Human Rights organizations as leading institutions that work towards the protection of the rule of law and Human Rights realization, have never been as relevant.

The recognition of Human Rights has allowed communities to identify and understand sociological issues more thoroughly than ever before. With more accessible information and the recognition of issues that have been historically hidden, by looking at the history and politics of Human Rights, one could see how the field has become more complex and harder to work within, moving from of a field more interested in transnational civil, political, social, economic, and cultural rights recognition, to one more interested in the social inequalities that have resulted from the triumph of neoliberal globalization.⁵ As a result, nowadays many competing interests and priority political agendas intertwine, ranging from climate change, privacy, access to healthcare, women's rights, migrant and refugee crisis, counter-terrorism, armed conflicts, anti-democratic regimes, corruption, police and military abuse, and human trafficking, among many other world issues.

Theoretically, the Human Rights field brings hope to redistribute goods and justice among the most excluded and to counteract political interventions, colonialism and repression that tend to reinstate inequality and exclusion. However, while Human Rights as a field remains vital nowadays, Human Rights advocates must think about their shortcomings and successes by offering an internal critique to their work in order to increase its impact potential.

This piece starts by defining the concepts of excessive professionalization and corporatization of the Human Rights field and exposing some of the critiques to these phenomena. We demonstrate how excessive professionalization and corporatization could be problematic as they limit the possibility of achieving substantial transformation in terms of justice and equality for highly vulnerable populations. While corporatization is undeniably a collateral effect of professionalization—and it is important that organizations have robust organizational structures and endowments to operate domestically and globally—through our research, we found that excessive corporatization can create negative organizational and behavioral changes that can be detrimental for the field. We found this based on concrete cases at: 1) law schools where we encountered evidence of how current legal education institutions can reinforce privilege and non-critical Human Rights activism, producing legal advocates with good intentions but narrow possibilities for effecting substantial change; and 2) legal Human Rights practices that often replicate strong corporate structures and cultures, creating problematic dilemmas for Human Rights activists and their role within these structures.

⁴ See Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge: The Belknap Press of Harvard University Press, 2012).

⁵ See Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Cambridge: Harvard University Press, 2018); see also Samuel Moyn, *Human Rights and the Uses of History: Expanded Section Edition* (Brooklyn, NY: Verso Books, 2017).

This piece ends with possible solutions for the challenges international organizations, nonprofits, medium-size nonprofits, community-based and grass-roots organizations, and clinical programs face in relation to the excessive corporatization and professionalization of the field. We aim to strike a balance between doing methodical and rigorous work; we recognize that while Human Rights organizations need to be financially sustainable with clear directives, professional development strategies, and robust organizational structures, they must also strengthen the mechanisms available to enhance social justice transformation in a more effective and efficient manner, while keeping the Human Rights realization vision as the core principle component of its day-to-day practice.

Although extensive literature has analyzed the power dynamics present in the Human Rights field, we found that only a small amount of critical legal scholarship has analyzed the collateral effects of the excessive corporatization and professionalization of Human Rights practice from an organizational, behavioral, and economic perspective.⁶ Based on this reality, in order to provide empirical evidence to support our thesis, between June 2014 and April 2017 we conducted ten semi-structured interviews with law school students interested in the field of Human Rights law, as well as junior and senior Human Rights lawyers, and pro-bono private practice lawyers, who preferred to remain anonymous. These lawyers worked for international organizations, large international Human Rights nonprofits in U.S. cities linked to Latin America, and domestic Human Rights nonprofits in Latin America. Others were students at law school clinics, and lawyers at global law firms. These individuals had also worked in development and government agencies, private foundations and academia. Several had short-term legal and advocacy experience, and others had been working for fifteen to twenty years or more in the field. Numerous interviews were conducted in Spanish since it was the native language of some of the lawyers we interviewed who focused their work predominately in Latin America. For those interviewed from the U.S., Canada, the U.K. and Switzerland, the interviews were conducted in English. The interviews consisted of twelve open-ended questions.⁷ The questions included the reasons that had lead them to become Human Rights advocates, their experience during law school, the type of work they have been doing, what they like and dislike about their work, the types of organizations they have worked for, the obstacles they have faced, their perception of the impact of their work in the communities they work with, and their relationship with those communities.⁸

Following Susan Silbey's critique of the role of law in reaching justice, we agree with the idea that "[to] know what law does and how it works, we needed to know how 'we the people' might be contributing to the law's systemic effects, as well as to its ineffectiveness."⁹ Thus, while this paper celebrates the work of professionals in the Human Rights field, it also critically analyzes it under the concepts of excessive professionalization and corporatization, specifically considering: 1) the struggles legal advocates experience; 2) the obstacles they encounter within the structures and cultures of the organizations and the field of Human Rights, considering the power dynamics present; 3) their vision on these structures; and 4) the extent to which their work effectively generates positive impacts and transformations in society.

Our findings and conclusions are based on a literature review and the interviews we conducted for three years that we further analyze and discuss in our findings. Given the

⁶ See e.g. Christine Jolls, Cass R Sunstein & Richard Thaler, "A Behavioral Approach to Law and Economics" (1998) 50:5 *Stan L Rev* 1471 at 1471.

⁷ See generally Annex I, "Informed Consent for Non-Medical Research" (2014) at 1.

⁸ As this research required the participation of individuals and was expected to be carried out in a safe and ethically responsible manner, participants were asked to sign an informed consent form for non-medical research.

⁹ Susan Silbey, "After Legal Consciousness" (2005) 1:1 *Ann Rev L Soc Sci* 323 at 326.

qualitative nature of this paper, this study does not attempt a quantitative analysis of the object of the study. Instead, this research constructs interpretations and collects ideas that attempt to make explicit the theoretical and practical tensions that exist in the Human Rights field. Our narrative and level of persuasiveness depend on how much of our ideas resonate with other members of the Human Rights community and the readers of this piece. We recognize that the findings do not represent the Human Rights field overall.

I. The Excessive Professionalization of the ‘Ideal’ Human Rights Lawyer

We define the concept of professionalization within Human Rights as a characteristic of the Human Rights field that lawyers specialize in, practice, and study, as they would study any other field of the Law. As critical legal scholar David Kennedy describes it, the Human Rights discipline emerges between the fields of International, Public, and Constitutional Law, devoting students, scholars, and practitioners in this field to an institutional life, a status and a set routine.¹⁰ We depart from the premise that the professionalization of the Human Rights field in recent years has helped lawyers and organizations achieve larger, sustainable results, as a result of clear directives, professional development, and strategy formulations to change economic, social, and political agendas around the world. Without this professionalization effect, the Human Rights field would not have achieved its accomplishments in the past decades. Nevertheless, when professionalization becomes excessive, Human Rights lawyers move away from the idealistic idea of finding purpose in life and fighting for a cause, and their career becomes a day-to-day job without a cause.

Human Rights lawyers work towards strategies to transform history, culture, and power dynamics of communities. Their personal history and the intersection of their personal experiences with collective situations in practice, discourses, and identities, help them define their role as agents of social change within society. This interaction between their personal history and the multiple identities they develop helps them critically analyze and engage in further work that allows them to help transform social structures and the way these structures affect the lives of people.¹¹

Some Human Rights advocates decide to attend law school to translate their philanthropic interests and ideals into legal and political action. Others arrive at law school without a clear idea of their focus. In these cases, students progressively develop an interest in certain issues. From this point onwards, numerous Human Rights lawyers follow the existing structures and traditional career paths that are endorsed by law schools and Human Rights institutions to become the so-called “ideal” Human Rights lawyer—one who brings the expertise and the language of the Law into the field of social justice, aiming to transform the reality of a community.

An affluence of factors motivate people to become Human Rights lawyers. Some, for example, argue that leaders become activists and future advocates when they are exposed to counter-discourses among social groups that form oppositional interpretations. Others go back to moral and religious views of society that respond to ideas of charity, working for others, and creating social value.¹² As Professor Lekkie Hopkins suggests, individuals have unique life experiences, which, depending on their specific social and political background, might expose them to direct experiences and feelings of disappointment and powerlessness

¹⁰ David Kennedy, “International Human Rights Movement: Part of the Problem?” (2002) 15:1 Harv Hum Rts J 101 at 119.

¹¹ See also Lekkie Hopkins, “Creating an Activist Voice: Re-storying the Self in the Light of Contemporary Feminist Understandings of Power and Subjectivity” (2001) 2:2 J Int Womens Stud 1.

¹² See Gustavo Gutiérrez, *Teología de la liberación: Perspectivas* (Salamanca: Ediciones Sígueme, 1972) at 387–88; Phillip Berryman, *Liberation Theology: Essential Facts about the Revolutionary Movement in Latin America and Beyond* (Philadelphia: Temple University Press, 1987).

in relation to the government. It is often through this process of recognition of their own political identities that Human Rights advocates commence a journey that remove them from a context of oppression and marginalization in terms of their socio-political identities, and give them stories of development and transformation.¹³ Yet, in the Human Rights field, these ideals are often immersed in a system that welcomes agents of social change only within the current structure, in a singular way through excessively professionalized and traditional legal channels that limit them from expressing concerns and taking action through substantial changes or mass mobilizations.

If one places two types of Human Rights advocates at opposing ends of a spectrum, on one side, one would have the “idealist transformative advocate”, and on other, the “excessively professional advocate.” On the one hand, the idealist would bring powerful experiences, open spaces for the voices of vulnerable communities to be heard, and innovative ideas that are aimed at transforming the system towards diversity and respect for differences. This type of advocate would promote ideas of hope and change, embrace a world where communities are not systematically disadvantaged and oppressed as a result of their identities or beliefs, and where individuals are treated equally, but not identically, conforming to their specific needs.¹⁴ Anthropologist Stephen Gregory, for example, has referred to some advocates that inspired this notion, bringing powerful and innovative ideas about different ways to identify and tackle racial inequalities that derive from existing power relations and practices, while obscuring and masking inequalities among racial minorities.¹⁵

On the other hand, excessively professional advocates, particularly those at higher levels of power, might continue to be interested in Human Rights and social justice. However, due to their access to privileges and the disproportionate professionalization of their roles, this group of advocates is more likely to be interested in building a prominent career, thinking about the Law, but less interested in its application and its impact, detached from the communities and the contexts for which they advocate. In practice, a number of advocates are located somewhere along the spectrum between the “idealist transformative advocate” to the “excessive professional advocate”.

II. The Corporatization of the Human Rights Field

We define corporatization as the process through which organizations transform their assets into a legal entity with a corporate-style structure.¹⁶ The corporatization of an institution often involves a high level of bureaucracy in decision-making and hierarchy. Among more sophisticated organizations, competition becomes a natural pattern between organizations seeking funding,¹⁷ as well as between lawyers within organizations.

Robust corporate structures within the Human Rights field have become complex and hard to work within. They are a direct consequence of the rapid and changing landscape of the professionalization of Human Rights. Corporate governance per se is not necessarily negative, as the more resources an organization has, the more important it becomes that it has clear directives, a strategy, organizational models, sustainable growth, and financial

¹³ Hopkins, *supra* note 11.

¹⁴ Robert Leckey, “Must equal mean identical? Same-sex couples and marriage” (2014) 10:1 Int’l JL in Context 5.

¹⁵ See Steven Gregory, “Race, Identity and Political Activism: The Shifting Contours of the African American Public Sphere” (1994) 7:1 Pub Culture 147.

¹⁶ This business model often includes a board of directors, managers, and staff members to retain ownership of their work.

¹⁷ John K Eason, “The Restricted Gift Life Cycle, or What Comes Around Goes Around” (2007) 76:2 Fordham L Rev 693 at 733.

stability that result in better relationships between its management, shareholders, board, and stakeholders.¹⁸

In the framework of an economic and political system modeled by market-oriented structures, the profits of private owners control the sector, even more than governments. In the context of Human Rights, one must see that “good corporatization” can strengthen Human Rights and empower individuals, and particularly Human Rights lawyers, by allowing them to participate in disputes against powerful actors on a more egalitarian basis.

We differentiate the concepts of ‘excessive corporatization’ and ‘good corporatization’. We deem the latter essential for the progress and prosperity of the Human Rights field, as it balances the power dynamics, ensures transparency standards, guarantees that clients are treated equally, and allows organizations to be independent. We believe that “good corporatization” in the context of Human Rights also protects the rights of its members, its partners, and clients, along with ensuring long-term, strategic, and sustainable objectives.

For the purpose of this piece, in the case of international organizations and international Human Rights nonprofits, we found that corporatization means that these institutions build a corporate structure where they establish managerial and responsibility hierarchies, distribute tasks among a range of varied commercial functions including programing, communication, development, management, monitoring and evaluation, safety and security, finance and operations, among others.¹⁹ Climbing the corporate ladder implies learning a jargon and developing a set of skills that allow bureaucratic differentiation in terms of salary, responsibilities, and clear distinctions between a junior Human Rights lawyer and a senior one. Human Rights organizations that adopt these corporate characteristics highly resemble corporate behavioral schemes in the way their internal administration operates.

III. What is Wrong with the Unrestrained Corporatization and Professionalization of the Human Rights Field?

The critique of the Human Rights field remains highly theoretical, yet Human Rights lawyers and organizations do not address it. As legal scholar Richard Delgado explains, the practical work in the field of Human Rights often reveals that studies on the doctrine of rights promoted by critical legal scholars and critical race scholars are far from being implemented in practice.²⁰ Critical scholars focus partially on the power dynamics and the oppression present in the field, and the relationship between those with more privileges

¹⁸ See generally OECD, “G20/OECD Principles of Corporate Governance” (Paris: OECD Publishing, 2015), online: <<http://www.oecd-ilibrary.org/docserver/download/2615021e.pdf?expires=1521077867&id=id&accname=guest&checksum=B89A0140D24ED18FFF4DD4F8092EC1C2>>; Richard A Brealey et al, *Principles of Corporate Finance*, 8th ed (Boston: McGraw-Hill Irwin, 2007).

¹⁹ See e.g. Office of the United Nations High Commissioner for Human Rights, “OHCHR Organizational Chart”, online: <www.ohchr.org/Documents/AboutUs/OHCHR_orgchart_2014.pdf>; Office of the United Nations High Commissioner for Human Rights, “OHCHR’s Funding and Budget”, online: <www.ohchr.org/EN/AboutUs/Pages/FundingBudget.aspx> (The Office of the United Nations High Commissioner for Human Rights (OHCHR) has headquarters in New York and Geneva and offices in 13 countries around the world. With over 1058 staff as of December 2013, as well as 689 international Human Rights officers serving in UN peace missions or political offices, OHCHR has four major divisions: the research and right to development division, the Human Rights treaties division, the field operations and technical cooperation division, and the Human Rights Council and Special Procedures division. As of December 2016 OHCHR’s total budget was over \$200 million USD); Human Rights Watch, *Defending our Values: Annual Report 2017* (New York) online: <www.hrw.org/sites/default/files/supporting_resources/english_annual_report_2017.pdf> (Human Rights Watch, a U.S. nongovernmental Human Rights organization with offices across the world, with a budget of \$213,054,325 USD in 2017. Its staff consists of Human Rights professionals including country experts, lawyers, journalists, and academics of diverse backgrounds and nationalities); Amnesty International, *2016 Global Financial Report*, online: <www.amnesty.org/en/2016-global-financial-report/> (Amnesty International, a U.K. nongovernmental Human Rights organization raised €279,000,00 for its operations in 2016).

²⁰ Richard Delgado, “Rodrigo’s Reconsideration: Intersectionality and the Future of Critical Race Theory” (2011) 96:1247 Iowa L. Rev 1247.

and those with less. Legal scholar Dean Spade has argued that “critical intellectual traditions have also made an important argument that equality and rights advocacy not only fails to address the conditions that affect vulnerable people but often actually shores up, legitimizes, or expands harm.”²¹ Critical legal scholar Janet Halley refers to the role that Governance Feminism²² has played in re-victimizing women without acknowledging its own power and responsibility.²³ Her argument can be extended to the Human Rights field as a whole, where many well-intentioned advocates end up re-victimizing those they are trying to protect without assuming responsibility for their powerful actions.

Law schools and Human Rights lawyers have therefore created a structure that normalizes the sources of State power inside and outside the State apparatus. According to historian David Austin, this same structure has socially constructed the concepts of ‘sameness’, ‘equality’ and ‘inclusion’ through formal equality principles to homogenize communities and undermine the necessities of ‘different groups’ with ‘diverse identities’ on the cultural and political stage.²⁴

For the purposes of this paper, we define unrestrained corporatization as the creation of a corporate governance structure where competition, climbing the corporate ladder, learning to speak a jargon, promoting mainly managerial and administrative tasks becomes the main target of Human Rights lawyers and Human Rights organizations, instead of focusing on social transformation and serving the communities that have been victims of violations. In this setting, one could argue that the excessive corporatization of the Human Rights field, in certain contexts, has been transformed into a hierarchical dominant structure by recognizing social problems but failing to fully respond to situations of discrimination and vulnerability affecting different social groups.

As critical race scholar Kimberlé Crenshaw points out, the Human Rights field creates a power imbalance that can be evidenced in the excessive corporatization and professionalization of Human Rights practice and the reproduction of hierarchies in the Human Rights field.²⁵ Crenshaw explains how a self-selected group of advocates created and further maintained this power imbalance.²⁶ Many Human Rights organizations adopt structures that promote the concepts of equality and meritocracy as a process, but as they get trapped in the Human Rights corporate culture, become less worried about the concepts of substantive equality and fairness as a result,²⁷ even for the members of the field. In accordance with Crenshaw’s critique, the discourses of technical and professional advocates, often with limited or no contact with the populations they advocate for, end up reproducing

²¹ Dean Spade, “Intersectional Resistance and Law Reform” (2013) 38:4 Signs: J of Women in Culture and Society 1031 at 1037.

²² Janet Halley et al, “From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism” (2006) 29:2 Harv JL & Gender 336 at 340 (“I mean the term to refer to the incremental but by now quite noticeable installation of feminists and feminist ideas in actual legal-institutional power. It takes many forms, and some parts of feminism participate more effectively than others; some are not players at all. Feminists by no means have won everything they want – far from it – but neither are they helpless outsiders. Rather, as feminist legal activism comes of age, it accedes to a newly mature engagement with power”).

²³ Janet Halley, *Split Decisions: How and Why to Take a Break from Feminism* (Princeton: Princeton University Press, 2008) at 33.

²⁴ David Austin, “Narratives of power: historical mythologies in contemporary Québec and Canada” (2010) 52:1 Race & Class 19 at 20.

²⁵ See Kimberlé Crenshaw, “Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color” (1991) 43:6 Stan L Rev 1241–99; see also Loretta J Ross, “Reproductive Justice as Intersectional Feminist Activism” (2017) 19:3 Souls 286–314.

²⁶ See Kimberlé Crenshaw, “Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color” (1991) 43:6 Stan L Rev 1241.

²⁷ See Kimberlé Williams Crenshaw “Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law” (1988) 101:7 Harv L Rev 1331.

patriarchal “discourses of deservingness” and compassion that “participat[e] in logics and structures that undergird the relations of domination that are being opposed.”²⁸

In many cases, Human Rights advocacy strategies led by large corporate Human Rights institutions might expand relations and structures of dominance.²⁹ These structures reproduce harmful systems and institutions that strive to change the lives and conditions of vulnerable groups in a non-cohesive or strategic manner, as advocates fail to set long-term strategies with clear outcomes, activities and outputs, or to share information with their peers and partners in order to set collective strategies that respect each individual or organization’s skills and expertise. Some Human Rights advocates get so immersed in these structures of excessive professionalization that they end up working in isolation, involved in tremendous competition that only helps to serve advocate’s egos. They often become technicians in applying the law, while forgetting their initial discontent with the system a lack of interested in collaborate with their peers, and their original intention to achieve social change and empower those affected by injustice and inequality.

In the context of this article, we define excessive professionalization in the Human Rights field, as a law behavior more interested in the concept of Human Rights as a legal tradition, its interpretation, and its broader analysis, and less interested in the human aspect of it, its application, and impact potential in people’s realities.

Excessive professionalization has several problems. As presented by Kennedy, one of the costs of professionalization of the Human Rights field is that it can limit work exclusively to aspirational advocates, leaving behind other pragmatic interdisciplinary professionals such as politicians, doctors, journalists, social workers, and other citizens interested in humanitarian causes and emancipatory struggles.³⁰ Excessive professionalization can further pull local and global elites away from their bases, as lawyers might be the only ones able to access professional training, working on “resolutions and reports” that end up creating more of a symbolic impact, and less of a tangible one.

The excessive professionalization and corporatization of Human Rights as a field can dangerously disturb the notion of social change by absorbing innovative ideas into the existing legal and political *status quo*. Human Rights lawyers might adopt professional language that “[a]s an absolute language of righteousness and moral aspiration came to be used strategically, human rights became less compelling, easy to interpret as nothing but strategy, cover for political objectives, particular interests clothing themselves in the language of the universal.”³¹ As a result, the excessive corporatization of the Human Rights field, particularly at the highest levels of power, has increasingly moved to become a field that could end up perpetuating, through both its aspirational and naïve language and its highly vertical structure, the privileged class of those who can practice it. At international organizations, it could further reinstate colonial traditions in which members of the geo-historical and political elite come into less-advantaged communities with their ‘knowledge’, impose top-down solutions by presenting them as the only possible answer to address social

²⁸ See Dean Spade, “Intersectional Resistance and Law Reform” (2013) 38:4 J of Women in Culture and Society, online: <www.deanspade.net/wp-content/uploads/2014/05/signs-proofs.pdf>, 1031 at 1037.

²⁹ *Ibid.*

³⁰ David Kennedy, “The international human rights regime: Still part of the problem?” in Rob Dickinson et al (eds) *Examining Critical Perspectives on Human Rights* (Cambridge: Cambridge University Press, 2012) 19 at 22.

³¹ *Ibid* at 22.

inequalities, and forget to pragmatically address the needs of the community or listen its voices, concerns and demands.³²

IV. Case-Studies

Based on the background of our interviewees and their experiences, we present five settings as the places where the field of Human Rights predominately operates: legal clinics at law schools, domestic nonprofits, international nonprofits, global law firms, and international organizations.³³ We also present a critique of each of these spaces from the perspective of excessive professionalization and corporatization.

A. Studying in Law School

Advocates we interviewed belonged to law clinics located inside prominent law faculties in Latin American and top tier American and Canadian universities. The clinics gather a minimum of 5 to a maximum of 30 students picked from a pool of candidates who are interested in Human Rights and public interest work. Law clinic professors, many of whom have experience in Human Rights and litigation, select students with high academic qualifications and/or professional experience. Once selected, students work on different Human Rights projects at the domestic and international level. Activities include conducting research, providing technical assistance, developing and executing Human Rights advocacy strategies, leading capacity-building trainings, leading strategic litigation, rights empowerment workshops, and legal counseling for vulnerable or less-advantaged populations. The law clinics appearing in our interviews are often no more than 15 years old. In Latin America, law students receive training in public interest law in the year before graduating from university.³⁴ In American and Canadian law schools, students can decide to receive training in public interest law throughout their studies.

Law schools are one of the most relevant institutions that traditionally encourage, maintain, support, and educate Human Rights lawyers. They are designed to provide advocates with tools to ensure that their political goals translate into legal action. Legal education provides them with new mechanisms to comprehend socio-legal consciousness and with a scenario to “better understand” and develop their personal identities and political action.³⁵ However, while a number of scholars put great effort into intersecting theory and practice to contravene power dynamics along racial, gender, and class lines (among other issues),³⁶ as it was documented in this study, students arrive with socially idealistic goals but only some maintain these ideals upon completion of their programs.³⁷ Under the current power structures that exist among several professions, in the context of Human Rights, a law degree represents a form of privilege that is naturally associated with access to a network and sphere of national and global decision-makers, which might enable a sense of

³² See Scott L. Cummings & Louise G. Trubek, “Globalizing Public Interest Law” (2008) 13 *UCLA J. Intl L. & Foreign Aff.* 1 at 41–42; Brian Z. Tamanaha, “The Primacy of Society and the Failures of Law and Development” (2011) 44 *Cornell Intl L.J.* 209 at 222; Carrie Menkel-Meadow, “The Lawyer’s Role(s) in Deliberative Democracy” (2004) 5 *Nevada L.J.* 347 at 354, citing Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, translated by William Rehg (Cambridge, Mass: MIT Press, 1996) at 107; Kathleen K. Janus & Dee Smythe, “Navigating Culture in the Field: Cultural Competency Training Lessons from the International Human Rights Clinic” (2011) 56 *NYL Sch L. Rev.* 445 at 469.

³³ See e.g., The Inter-American Court of Human Rights, the Inter-American Commission of Human Rights, and U.N. treaty monitoring bodies.

³⁴ Richard J. Wilson, “Three Law School Clinics in Chile, 1970–2000: Innovation, Resistance and Conformity in the Global South” (2002) 8 *Clinical L. Rev.* 515 at 567–68.

³⁵ Matthew Ball, “Legal Education and the ‘Idealistic Student’: Using Foucault to Unpack the Critical Legal Narrative” (2010) 36 *Monash U.L. Rev.* 80 at 80.

³⁶ See Patricia J. Williams, *The Alchemy of Race and Rights* (Cambridge, Mass: Harvard University Press 1991).

³⁷ Ball, *supra* note 35.

entitlement among Human Rights lawyers. However, several other reasons related to corporatization and professionalization could account for this fact.

1. Privileged Law Schools for Privileged Students

Privileged law schools have Human Rights programs and clinics that allow a pool of students to pursue their social justice dreams, while many lower income or public schools do not have these kinds of programs. Often, these privileged schools want to get involved in projects oriented towards high-impact social transformation and have the resources to do so, but at the same time, they want to educate Human Rights lawyers that are professional and “successful enough” to contribute to the social and educational status of the school in terms of quality of education.

One of our interviewees suggested that due to the nature of the work, Human Rights law is taught mostly at top tier law schools with specialized programs.³⁸ Law school clinics with resources to work abroad or even outside cities are limited, so the focus ends up being concentrated in elite schools that have large endowments of over several billions of dollars.³⁹ These institutions often attract and retain a highly selective pool of students with specific backgrounds and credentials to maintain their status. In order to be admitted to a highly reputable institution, students must either be highly intelligent and/or must have had access to resources that enabled them to build higher credentials, such as access to reputable educational programs, and relevant professional or personal experiences. In the Latin American context, this may include coming from elite private high schools, being fluent in multiple languages, having professional parents, among other qualifications. It becomes a cycle: many law schools try to reinforce their academic status by attracting students with credentials who are interested in social transformation, to make them as successful as possible, so they can learn the knowledge to further reinforce the status of the law school upon graduation.

Admissions officers at these law schools want to ensure that they attract highly competitive students with strong indicators of success in terms of where they end up working, their income as lawyers, their influence in national and international politics, and the media coverage of the cases they are involved in, among others. However, several problems can also come into play because of this logic.

According to one of the interviewees, “knowledge can also be used as measure of privileges and wealth. Wealth can pay for good schools, extracurricular activities, unpaid internships, summer schools, language classes, standardized test private lessons and international experiences.”⁴⁰ Another interviewee suggested that if it were not for the scholarships she got due to her academic ability and success, she would have never been able to focus on unpaid Human Rights internships.⁴¹ Furthermore, one of the interviewees suggested that he had to find work at a law firm and then find his way back to Human Rights through pro-bono work, because he did not have the money to find a voluntary position and pay for his basic living expenses.⁴² By following this narrative, top tier law schools not only attract smart people, but also a self-selecting group that has had access to many resources, as well as the knowledge of where those resources are. Although these

³⁸ Annex II, “Anonymous interview with U.S. law school student” (1 March 2015).

³⁹ See Daniel Bonilla, “Legal Clinics in the Global North and South: Between Equality and Subordination – An Essay” (2013) 16 Yale Human Rts & Dev LJ 1 at 8–9.

⁴⁰ Annex II, *supra* note 38.

⁴¹ Annex IX, “Anonymous interview with junior Human Rights attorney” (21 April 2017).

⁴² Annex VIII, “Anonymous interview with senior private practice attorney” (20 April 2017).

institutions in some cases provide opportunities for students in need of financial-aid, these opportunities are often merit-based.⁴³ In contemporary society, higher credentials often go hand-in-hand with greater life opportunities related to wealth and social status. In many countries in Latin America where inequality is rampant and social mobility is limited, it is highly unlikely that low-income students that have attended low-quality schools or the public education system will have the necessary skills or credentials to be admitted to high-quality and often highly-priced universities where Human Rights law clinics operate.

In the North American context, students who want to pursue a career in Human Rights also face a set of challenges mainly associated with finances. In some cases, students acquire large loans in their aim to achieve professional skills that a career in public service will not allow them to repay.⁴⁴ As Noam Chomsky has argued, “Once you have a big debt, you can’t do things you might have wanted to do. Like, you might have wanted to graduate from law school and do public interest law, but if you have a \$100,000 [dollars of] debt to pay off; you’re going to have to go into a corporate law firm. Once you get into it, you’re trapped by the culture and forget about public interest law.”⁴⁵ As presented by one of the interviewees, if she had not received a full-scholarship from an elite U.S. law school to complete her legal studies, she would not had been able to pursue a career in this subject.⁴⁶

In the U.S., the federal government has developed a Loan Repayment Assistance Program that helps former students pay their loans over a decade following their graduation if they work in the public-interest sector. One of the interviewees explains that several law schools have similar types of programs.⁴⁷ Comparable financial-aid programs are present in other careers such as medicine and government schools. Nevertheless, these programs have at least two problems. First, they are focused on certain careers and not on others, which entails that, for example, business school students, and others who might be interested in pursuing careers with a strong social focus, end up losing the possibility of using their skills for public interest work as they get trapped in the corporate culture. Second, many of these programs are designed to pay for the loan once the student graduates from school instead of receiving the funding at the beginning of the program. The result of this is that interest rates have already been escalating for a couple of years before graduation.⁴⁸

In addition, these privileged institutions, connected to their professionalizing effort, can also reinforce the dangerous notion that the most effective way to achieve social change is through a very narrow understanding of the practice of Human Rights law. This notion presents several shortcomings. First, it ignores that law is just one tool in a variety of professional disciplines and non-professional fields to achieve social change.⁴⁹ Second, it narrows the interdisciplinary, critical, and innovative ideas and actions of activists to transform social inequalities, and instead, educates these individuals by placing them into legal systems and institutions that continue to reproduce structures of power imbalance or excessive corporatization.⁵⁰ Third, it assumes that practicing Human Rights law is only a matter of “technical expertise”, according to which students are trained to limit their

⁴³ Annex II, *supra* note 38.

⁴⁴ Annex III, “Anonymous interview with lawyer at a major U.S. international NGO” (3 February 2015).

⁴⁵ Interview with William Hodgkinson, “The Callous System of Student Debt and the Structure of the ‘Free Market’” (15 January 2014) Breakwater Review, online: < <https://chomsky.info/20140514-2/> >.

⁴⁶ Annex II, *supra* note 38.

⁴⁷ Annex VIII, *supra* note 42.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ Julieta Lemaitre, “Legal Fetishism at Home and Abroad” (2007) 3 Unbound 6.

emotions and romanticism of justice, and pushed to place form over substance.⁵¹ Fourth, in the context of Latin America, it creates a counterproductive culture that alienates Human Rights lawyers and public interest lawyers from private practice lawyers by placing them in unchangeable career paths that obstruct any type of dialogue and potential collaboration between the public, social, and private sectors.

ii. Human Rights Experts Becoming Technicians Instead of Social Changers

One cannot make broad generalizations about Human Rights experts. However, based on the interviews conducted, a common pattern was found among clinical Human Rights lawyers and prominent Human Rights scholars. As lawyers get immersed in their careers, over time, several clinical practitioners and professors became more interested in building a prominent career and a personal brand as excessive Human Rights professionals, rather than producing strategic legal tools that disrupt the *status quo* and promote social transformations.

Top tier universities generally attract well-known professional leaders in their respective fields, many of whom have been mindful supervisors that promote environments where mental health and balance are a priority.⁵² Nevertheless, while being part of clinics or research centers, students in top tier universities felt that several faculty members, instead of being Human Rights advocates interested in social change, acted like prominent influencers. Once they have reached the top of the Human Rights field ladder, they seemed more interested in building a personal brand, a successful career, and climbing in the academic “corporate” ladder, than in advocating for the communities they were supposed to advocate for.⁵³

In the path towards personal success, clinical professors can lose track of connecting with the ideals of young law school students, which might discourage eager students interested in pursuing a legal career in social change. For example, one of our interviewees recounted having done interview transcription after a fact-finding mission and preparing a draft for a report. Although she felt fact-finding missions are worthwhile projects as they allow students to strengthen their legal and research skills, as well as be exposed to different global cultures through work exchanges, she lost motivation because she lost track of the higher purpose of the project. She belonged to the lower ranks of the “corporate” Human Rights ladder, with no connection to the top, and with very little influence on the way in which her supervisor oriented the projects, or even a more substantive knowledge about the type of impact the final product of her work was going to have in transforming people’s realities.⁵⁴ In her case, the supervisor never set out a strategy, and there were no clear objectives or outcomes after the report was submitted.

Legal scholar Daniel Bonilla describes how these sorts of small projects can have structural issues as they expect students to understand and evaluate extremely complex social, political, cultural, or economic contexts after spending just a few days doing fieldwork from only legal lens of analysis.⁵⁵ This is problematic, as reports of fact-finding missions not only include descriptive sections but also theoretical, critical, and normative analyses of the country’s overall legal, political and economic context.

⁵¹ Williams, *supra* note 36 at 140.

⁵² Annex VIII, *supra* note 42.

⁵³ Annex IV, “Rodríguez-Alarcón and Montoya-Robledo to an anonymous lawyer at a mid-size Colombian NGO” (15 June 2015).

⁵⁴ *Ibid*, Bonilla, *supra* note 39.

⁵⁵ Annex II, *supra* note 40.

A second problem arises when law clinics from the Global North are primarily the ones that execute these projects. In these cases, North-South collaboration often normalizes behavior based on the questionable premise rooted in beliefs that law schools from the Global North are solid enough to “produce knowledge, after a tangential direct contact with the reality being studied and that a week or two is enough time within which to determine what the problems are, how to evaluate them and how to fix them.”⁵⁶ This completely disregards or gives less visibility to the local knowledge produced at Global South countries. One could even extend this critique to top tier law clinics from elite schools in the Global South where highly privileged students go on short fact-finding missions to peripheral areas of their own countries, hoping that in a very short amount of time they can get ahold of the context and complex issues that communities face.

In order to gain a name in the Human Rights field, many clinical professors want competent and interested law students that can produce quality work for their clinics and their clients. One would imagine this is desirable, since outstanding law students become a good indicator of successful Human Rights interventions that will help the professors in their task. In the process of recruiting these students, Human Rights law clinics adopt selective processes that follow a corporatization approach, to take in “the best and brightest students”. According to one of our interviewees, the pool of applicants for the law clinic where she wanted to practice was rampant, and only a small group was admitted.⁵⁷ Again, this admission depended on certain credentials and networks to which only particular students had access, which relates to the previous critique about privilege.

Prestigious law schools can therefore be the starting point of a structure that inherently promotes and sustains hierarchical structures and power misdistribution. This is often immersed in logics of disproportionate professionalization, corporatization, and competition within a legal career, which impacts the reality of Human Rights practices. These logics could reinforce egos, class, language, country of origin, ethnicity, sex, gender, disability, and other sources of inequality within its members, and its partners, and clients, instead of promoting avenues that break those structures.⁵⁸ Therefore, once activists become Human Rights practitioners and their interests in social justice prevail, those interests adapt to the existing legal and social system. As a result, Human Rights lawyers, both at the higher and lower levels of power, still aim to promote change, but they learn how to convey those ideals primarily by using only the existing social, political, and legal channels.

B. Working at Human Rights Institutions

Human Rights lawyers that were interviewed have worked either in international organizations, domestic small and medium-size nonprofits, large international nonprofits, international organizations, or global law firms. The domestic nonprofits they described are either too small, or have grown rapidly and in an unplanned way. They receive financial resources for operation mainly from international donors such as international organizations, foreign aid and development government agencies, private foundations, larger non-profits, and seldom from the governments of the countries where they operate. Some of these nonprofits devote themselves to one issue, helping a set of populations. Other nonprofits have broader missions, working with multiple vulnerable populations at a time.

Advocates working at domestic nonprofits range from those interested in litigating and helping transform the situation of these communities, to those that are more interested

⁵⁶ *Ibid.*

⁵⁷ Annex II, *supra* note 53.

⁵⁸ Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System: A Critical Edition* (New York: New York University Press, 2004) at 9.

in learning and doing research, while thinking of policy as their main target. Some nonprofits focus mainly on litigation before international courts and advocacy, others focus on domestic judiciary, and some combine their strategies while also working as think tanks. Most of the activists working on these nonprofits are lawyers, but they also include journalists, administrative personnel, anthropologists, economists, sociologists, and political scientists, among others.

These domestic nonprofits, as described by anthropologist Sally Engle Merry, are among the fundamental institutions involved in the process of vernacularization of Human Rights. On the one hand, they often act as intermediaries and translate the language of transnational Human Rights to local contexts and back. On the other hand, being in the middle implies that these nonprofits can become vulnerable to manipulation and subversion by actors including States, communities, and even international organizations and bodies.⁵⁹ Merry explains: “Translators are both powerful and vulnerable. They work in the field of conflict and contradiction, able to manipulate others who have less knowledge than they do but still subject to exploitation by those who installed them.”⁶⁰

The international nonprofits we identified are large organizations with headquarters in major U.S. and European cities, and regional offices across the world. They have a large international staff and sophisticated corporate structures. They focus on several issues with a global scope, and use diverse tactics and strategies (predominately advocacy and communications) to achieve their mission. They have large endowments of over several million dollars, and receive unrestricted and restricted funding from international organizations, anonymous donors, foundations, and private sector corporations among other powerful and influential global actors.

Governments establish and fund international Human Rights judicial and political bodies, such as international and regional intergovernmental Human Rights agencies, treaty monitoring bodies, international courts, and special courts, as well as special political missions.⁶¹ Their main task is to monitor Human Rights situations and thematic issues in countries, analyze individual petitions, and decide on cases brought by victims against States located in different regions. They employ mostly Human Rights lawyers, political scientists, and few administrative personnel; however, they also maintain a highly sophisticated corporate legal structure. They work on cases related to any Human Rights issue brought by victims and nonprofits.

In practice, the work of Human Rights involvement that seeks to protect and transform society is performed in a variety of ways. In this regard, Legal scholar Martha Minow analyses three essential words: “Law” and “Social” “Change”. She explains that “Law” includes actions and inactions in the judicial, legislative and executive branches, and also those activities of private groups or individuals, which either pursue a transformation of the law or law enforcement as such. “Social” includes politics and culture in which people

⁵⁹ Sally Engle Merry, “Transnational Human Rights and Local Activism: Mapping the Middle East” (2006) *American Anthropologist* 108:1 38.

⁶⁰ *Ibid* at 40.

⁶¹ For Intergovernmental Human Rights Agencies see for example: The Office of the U.N. High Commissioner for Human Rights, the Inter-American Commission on Human Rights, and the African Commission on Human and People’s Rights. For International and Special Courts see for example: the Inter-American Court of Human Rights, the African Court on Human and People’s Rights, the European Court of Human Rights, the International Criminal Court, the International Court of Justice, the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL), the Extraordinary Chambers in the Courts of Cambodia (ECCC), the Special Tribunal for Lebanon (STL). For Treaty Monitoring Bodies see for example: Human Rights Committee (CCPR), Committee on Economic, Social and Cultural Rights (CESCR), Committee on the Elimination of Racial Discrimination (CERD), Committee on the Elimination of Discrimination against Women (CEDAW), Committee Against Torture (CAT), Committee on the Rights of the Child (CRC), Committee on Migrant Workers (CMW), Committee on the Rights of People with Disabilities (CRPD), Committee on Enforced Disappearances (CED).

think and experience their society; as well as spaces to debate morality and economic justice. “Change” refers to alterations, renovations and challenging of the *status quo*.⁶²

From a bottom-up perspective, activism and social change can be related with individuals expressing their frustrations with the system in more radical and explicit manners, such as demonstrations and protests, or working directly with communities on a more personal basis for rights awareness and legal empowerment.⁶³ Some strategies include, for example, the work of grassroots organizations empowering communities on their rights and the existing mechanisms they can use to ensure the respect for those rights. Other work may involve producing analytical research by exposing the multiple circumstances that affect social groups in practice, to promote awareness among the community and relevant stakeholders. In some other cases, work might involve direct representation of clients with specific needs before lower courts and impact litigation before high-level courts in each country. The work might also include drafting bills and negotiating with legislatures for the recognition of rights for groups that have been historically discriminated or neglected. Most of this work takes into consideration the suffering and experiences of communities and individual victims and build the type of work based on this, often opening spaces for them to express their own concerns and desires, for their voices to be heard.

From a top-down perspective, the word ‘activism’ is no longer used. Instead, ‘advocacy’, ‘diplomacy’ and ‘negotiation’ are the terms experts use to describe the type of work conducted within large Human Rights organizations, such as international organizations, national governments and international nonprofit organizations. It includes technical work involving liaising, negotiating and drafting domestic and international laws, resolutions, and policies aimed at implementing the changes identified as necessary in achieving social justice.⁶⁴ Additionally, it includes the role of experts in academia conducting research to identify and develop new theories and strategies that can be implemented to improve the work of advocates, law, and policy makers in their respective fields. It involves using international litigation strategies before international courts and treaty bodies to resolve individual cases on thematic issues, and aiming to establish groundbreaking precedents with an international scope that can influence governments from around the world in addressing structural inequalities at the legal and the policy level.

These forms of Human Rights work do not necessarily represent an exhaustive list of what Human Rights legal practice entails. However, these examples suggest that work in this field can be performed in a variety of ways, at different levels, and in traditional and non-traditional ways. These methods sometimes demand excessive technical efforts that are often led by privileged legal professionals who develop work that might centralize and replicate their own backgrounds, their concerns, and the concerns of the same class only accessible to their peers.⁶⁵

C. The Disconnection Effect of Professionalization and Corporatization

The collateral consequences of disproportionate professionalization and corporatization of the Human Rights field are made visible when people working at Human Rights organizations disconnect from the needs and experiences of communities or individual victims for whom they act as advocates. One of the interviewees describes that

⁶² Martha Minow, “Law and Social Change” (1993) 62 UMKC L Rev 171 at 182.

⁶³ Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics, and the Limits of Law* (Durham: Duke University Press, 2011).

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

the relationship between the nonprofit and the communities is fluid.⁶⁶ Other interviewees expressed that they were able to build self-help groups that empowered members of the community in the long term and maintain a strong relationship with them.⁶⁷ Another explained that the relationship went beyond the community and included people not involved in the case but who simply became aware of it.⁶⁸ However, this was not the experience of all interviewees.

Several interviewees shared the dilemmas they faced when interacting with communities, both because of structural constraints of their organizations and the practice of Human Rights law in relation to victims who suffered rights violations. One of the interviewees who worked in an international nonprofit spoke to clients who felt the nonprofit had its own agenda, took information from them and then left them alone; she felt used.⁶⁹ This was not the same experience she had while working in a small domestic nonprofit where contact with the community was constant. Although in this context, administrative disorganization was persistent, the work was completely directed at assisting the community.⁷⁰ Another interviewee shared the ethical dilemma they faced when working with victims. She wondered whether “it was ethical to remove their silence”, and open the doors to traumatic events of the past that could make traumas resurface.⁷¹ Moreover, the interviewee was worried about the dilemma of victims expecting something in exchange for their testimonies and the nonprofit lacking capacity to compensate victims for sharing their stories.⁷² Furthermore, one interviewee suggested that it is very difficult time-wise to have the same lawyer working on technical issues of the case and meeting with the community.⁷³ Another expressed the difficulty of building a relationship with particular communities that were isolated, such as combatants, indigenous communities, and inmates.⁷⁴

The dilemmas described echo what Legal scholar David Kennedy explained in his “Spring Break” piece when referring to a particular episode he experienced as a Human Rights activist in Uruguay. He articulates “the activist’s sense of not knowing what things mean or where they are going in human right work [sic] by exploring the ways our search for the right tactic produced results we could not evaluate, and the ways our inability to know what was intrusive in a situation we had defined as foreign left us confused about our connections and responsibilities.”⁷⁵ He further introduces the element of voyeurism present in Human Rights practice, where perhaps as a consequence of excessive corporatization, the practitioner accesses the life of the victim(s) in problematic ways.

Legal scholar Makau Mutua further categorizes the relationship among 1) savages or victimizers, 2) victims, and 3) saviors who are human rights advocates, part of the “human rights corpus” within the grand narrative of Human Rights.⁷⁶ In this scenario, although lawyers are supposed to be the saviors of “powerless” victims promising “freedom from the

⁶⁶ Annex IV, *supra* note 53.

⁶⁷ Annex V, “Anonymous interview with lawyer at grassroots NGO and others” (6 August 2015).

⁶⁸ Annex VIII, *supra* note 42.

⁶⁹ Annex VI, “Anonymous interview with lawyer at international court” (31 July 2015).

⁷⁰ *Ibid.*

⁷¹ Annex V, *supra* note 67.

⁷² *Ibid.*

⁷³ Annex VIII, *supra* note 42.

⁷⁴ *Ibid.*

⁷⁵ David Kennedy, “Spring Break” (1985) 63:8 Texas L. Rev 1377 at 1378.

⁷⁶ Makau Mutua, “Savages, Victims and Saviors: The Metaphor of Human Rights” (2001) 42:1 Harv Intl LJ 201 at 201–04.

tyrannies of the state, tradition, and culture”,⁷⁷ their position as saviors is deeply problematic because it is embedded in the power dynamics that places knowledge, population, advocacy, and ideas of the Global North over those of the Global South. In this setting, Human Rights legal activism becomes a very particular practice where often well-intentioned professionals try to help victims in the name of an organization and of a belief in justice, and end up providing legal aid without consciously anticipating the consequences of their actions, and having to face indeterminacy, trouble, internal moral questioning, and even guilt about their roles and actions as individual Human Rights advocates.

Major international nonprofits and clinical programs have enough funding to send researchers on fact-finding missions to document Human Rights situations across the world, organize lectures series on the methodologies of clinical work at Global South universities, or lead specific projects such as drafting an amicus brief before a high Court or a submission before an international Human Rights body.⁷⁸ These projects allow students to develop lawyering skills such as gathering facts, documenting witness depositions, drafting legal memoranda through experimental learning methodologies, as well as expanding the network of researchers through partner clinics across universities around the world. Researchers are later expected to write reports and develop advocacy strategies to bring powerful stakeholders and high-profile leaders to pay attention to their issues.⁷⁹ Although identifying Human Rights issues remains a crucial part of the work in the field in giving visibility to such situations and later developing strategies that help mitigate these realities, in fact, institutions are often not accountable for the impact this type of work has in communities, which sometimes causes additional emotional and moral harm among the victims.⁸⁰

As Bonilla presented, in some cases “many of these exchanges are guided by unstated background assumptions that do not promote equal relationships between clinics in the Global North and the Global South, or with the individuals and communities which are impacted by these issues. Rather, the unstated background assumptions which result from unbalanced power structures create dynamics of domination and subordination that hinder the fulfillment of the purpose that clinics are said to pursue.”⁸¹ In the context of legal academia, these dynamics create unequal relationships between the center and the periphery in the ways legal knowledge is created, produced, and used.⁸²

In the context of International Human Rights and judicial bodies, the relationship with the grassroots level or the community level is almost inexistent. For instance, a number of local community organizations or major international non-governmental organizations get immersed in the logics of professionalization, collaboration, and recognition from the State or multilateral bodies, responding to State’s control dynamics. The dialogues about human suffering between professionals that represent the interests of the States or their respective institutions, end up forgetting the real stories of those behind the resolutions that motivate their practice. These institutions are not substantively critical to new forms of mobilization and resistance towards these power dynamics.⁸³

⁷⁷ *Ibid* at 229, 204.

⁷⁸ See Annex II, *supra* note 40.

⁷⁹ *Ibid*.

⁸⁰ Annex VIII, *supra* note 42.

⁸¹ Bonilla, *supra* note 39 at 3.

⁸² *Ibid*.

⁸³ See, for example, Aziz Choudry & Eric Shragge, “Disciplining Dissent: NGOs and Community Organizations” (2011) 8:4 Globalizations 503.

Several large nonprofit organizations work on issues that do not completely address the specific necessities of the population. For example, critical legal scholar Dean Spade has critiqued the manner in which U.S. reproductive and Lesbian, Gay, Bisexual, Trans and Queer (“LGBTQ”) organizations advocate and promote discourses and strategies of legal inclusion, recognition and equality before the law which have not necessarily aided the poverty cycle conditions that trans individuals experience in their lives.⁸⁴ Instead, their strategies have only been directed at benefitting a small portion of white, middle-class and upper-class populations that experience completely different necessities.⁸⁵ In these cases, these types of organizations adopt strategies that are distant from the real necessities of the communities.

D. When Lawyers Cannot Afford to be Human Rights Advocates

In our interviews, we found that working in the field of Human Rights is not easy nor is it inexpensive, which creates a diversity and inclusion problems in the field. People tend to believe that merely because a lawyer or an individual is interested in Human Rights issues they can develop a career in the field, but this is not always the case. Even though several people would have the motivation to work in alleviating poverty and social issues, many are unable to do it either because a career in Human Rights is not as profitable as one in other legal fields and therefore not everyone can afford it, or because entering field itself is difficult and highly-competitive. Some of our interviewees working at low-corporatized domestic nonprofits revealed that their salaries were low and did not even cover their basic personal expenses. According to one of the interviewees, although she had a great interest in Human Rights issues, she had to quit her job at a domestic nonprofit because her father went bankrupt and her salary as a Human Rights lawyer was not enough to cover her living expenses. She had to migrate to a public office and change her career path; although she had been in a fulfilling job that could improve the well-being of others, it was not well-paid.⁸⁶ Another interviewee answered that the salary she received while working for an international nonprofit in a larger city was very low, thus she had to find additional sources of income to cover her living expenses.⁸⁷ For many, this implies a challenge to their mental and emotional wellbeing, as they lack time to rest.⁸⁸ One interviewee explained that he had trouble leaving his job at a law firm to go work full time in Human Rights advocacy because he had to start on a voluntary basis, which implied no salary for a while.⁸⁹ He had to live in unsafe areas of cities around the world since he could not afford anything else.⁹⁰ Now, after a long career in this field, he continues to earn much less money than his peers working at private law firms.⁹¹ However, this was not the case at international organizations such as the U.N., where officials reported receiving generous salaries and benefits in comparison to their counterparts at Human Rights nonprofits doing similar work, exposed to same political contexts, and facing the same security risks.⁹²

In response to the problem of low salaries, it is reasonable that, in order to become sustainable institutions that can fairly compensate their staff for their work, nonprofits have

⁸⁴ Space, “Intersectional Resistance”, *supra* note 21.

⁸⁵ *Ibid.*

⁸⁶ Annex V, *supra* note 67.

⁸⁷ Annex IV, *supra* note 53.

⁸⁸ Annex VIII, *supra* note 42.

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² See United Nations, “Salaries, Allowances, Benefits and Job Classification” (30 January 2018), online: <www.un.org/Depts/OHRM/salaries_allowances/index.html>.

adopted excessive corporatization and commercial strategies to attract new donors who can allow them to operate more functionally. While financial sustainability remains a critical issue for Human Rights nonprofits and lawyers, the problem with this excessive corporatization effect is that nonprofits could go down a slippery slope of pursuing the donors' agendas, which are the powerful actors, instead of their original mission, and in so doing, ignore their vision of making substantial and sustainable social transformations.

E. Increasing Excessive Professionalization Against Low Professional Status of Human Rights Work

Due to the low professional status that many Human Rights lawyers face within the legal profession for not being “real lawyers” that deal with black letter law, the Human Rights field has increasingly professionalized the entry requirements and the career path. This means that many Human Rights lawyers with a passion for transforming oppressive realities are dismissed from the sector either because they do not have the professional qualifications to start a career in the field, or because they do not fit the internal paradigm of professional standards at Human Rights organizations. One of the advocates interviewed mentioned that in particular elite and right-wing contexts, being a social justice or Human Rights lawyer has a low professional and social status. She mentions that in these settings, she rather describes herself as a researcher or public interest lawyer than a Human Rights lawyer. She is afraid of being stigmatized as either less legally and more politically driven, superficial, “not too professional” and left-wing.⁹³ This stigmatization pushes the Human Rights movement even further into professionalization, which makes it “look more serious” and gives status to Human Rights lawyers, despite the fact that this disproportionate professionalization might not be helping the vulnerable communities in a direct manner.

In response to the low status of Human Rights and its characterization as not professional enough, the recruitment process—especially at international nonprofits and international organizations—has increasingly become stricter in attracting more competent and talented Human Rights lawyers who may bring legitimacy and who could cover an extensive international scope of work. In both settings, lawyers usually come from Global North top tier law schools and have the necessary networks and work experience to be hired. Consequently, the Human Rights field is such an exclusive field that most of the time it indirectly creates a circle that only benefits those at the top of the system, those who are more privileged. The above argument is exemplified if one analyses the nationality, languages, education and work experiences that advocates have in their curriculums before starting professional work in the field of Human Rights.

After reviewing the job requirements for ten positions published at the websites of major international Human Rights nonprofits, private foundations, international organizations and Human Rights government institutions from the Global North,⁹⁴ we found that in many of these organizations, technical expertise, international experience, public speaking, public relations, project management, and a clear understanding of the power dynamics in the grantee/grant maker relationship, as well as the ability to handle this

⁹³ Annex IV, *supra* note 53.

⁹⁴ Bonilla, *supra* note 39 at footnote 1 (Based on Daniel Bonilla's critique in “Legal Clinics in the Global North and South: Between Equality and Subordination – an essay”, the words ‘Global North’ are not used as geographic terms, but rather concepts related to historical distribution of wealth among countries that are “politically stable”, “militarily strong”, and “culturally dominant”. ‘Global North’ refers to countries such as the U.S., Canada, continental Europe, Australia, or Japan. On the other hand, the words ‘Global South’ refer to “a group of countries with a colonial history, [that are] politically unstable, relatively [less wealthy or] poor, militarily weak...and culturally subordinated.” In the context of this article, ‘Global South’ refers to countries with some exceptions situated in Asia as well as Latin America, Africa, and Eastern Europe.)

relationship accordingly were required.⁹⁵ Applicants were also required to have excellent writing and oral skills in English, although in some cases other language skills were desirable for certain positions in the field depending on the geographic location. Bachelors and advance university degrees, masters or equivalent, preferably in law, policy, economics, or international relations were also required.

After reviewing the profiles of U.N. staff that appears on online job search websites like LinkedIn or Idealist, which lists background information on the education and other credentials of current employees of these organizations, we found that a greater percentage of these advocates came from predominately elite universities from Global North countries.⁹⁶ One interviewee described that stigmas regarding qualifications become an issue within the Human Rights industry especially for qualified or overqualified advocates coming from the Global South and not being native English speakers. In his case, the interviewee observed that younger students originally from higher-income countries, educated at universities in the Global North, with less or no experience in the field, and even without law degrees, or advanced degrees, were hired more easily than highly educated and experienced lawyers from the Global South.⁹⁷

A dichotomy exists when one realizes that if a person wants to be ‘competitive’ in the Human Rights market, the person is required to be fluent in English, and ideally in an additional languages, have volunteered or done a number of unpaid internships with a nonprofit or international organization domestically or abroad, and have studied at a highly ranked and reputable Global North institution, all dynamics that are also present in other for-profit fields.⁹⁸ As a result, only those that come from specific countries and a privileged background can have access to these types of experiences and credentials, both to cover their tuitions and living expenses without receiving a salary. This dynamic excludes by default a large group of individuals with different types of qualifications who could be highly interested in Human Rights and pursuing a professional career to achieve social justice. They might come from diverse backgrounds and bring innovative visions on how to conduct matters, and even belong to vulnerable communities with firsthand experience of their problems. However, due to their lack of opportunities reflected in their restricted access to prominent legal education programs, resources, and networks, they are not even considered as potential candidates in this field. We saw this pattern in the interviews conducted: the ten interviewees went to elite law schools either in their home countries or abroad in Global North countries, and all of them fit in the standard of privilege, highly educated, experienced, and professional Human Rights lawyer.

The weight of credentials is not surprising in the existing social and economic *status quo*, modeled by our market oriented society, the existing current foreign policy dynamics between the Global North and the Global South, and the social demands that the economy impose upon individuals to be competitive in a global market. However, for a field that aims to be fully global, to reach inclusion and equality at its core among the most marginalized ones, to ensure access to justice, and to empower the most vulnerable, maintaining such logics and structures is unreasonable and contradictory.

F. When Only Human Rights Lawyers Can Speak the Language of Human Rights

⁹⁵ Idealist, “Human Rights and Civil Liberties” (5 July 2016), online: <www.idealists.org/en/?areasOfFocus=HUMAN_RIGHTS_CIVIL_LIBERTIES&type=ALL>.

⁹⁶ LinkedIn, “People who work at United Nations” (5 July 2016).

⁹⁷ Annex VIII, *supra* note 42.

⁹⁸ See Aoife Nolan & Rosa Freedman, “The human rights sector must stop exploiting unpaid interns” (12 January 2015), *The Conversation*, online: <www.theconversation.com/the-human-rights-sector-must-stop-exploiting-unpaid-interns-34994>.

The Human Rights field, given its public origins and its main concerns, often implies a language and vocabulary that centralizes the debate of Human Rights among those with more decision-making power against those with less or minimal power.⁹⁹ Only those who speak the language present in legal theories, international legal scholarship, treaties, general observations and comments, case law, and sometimes philanthropy can take part in Human Rights disputes. Although this is also the case in any other legal field, in the context of Human Rights, where the violation of the rights of vulnerable people are the main issues in dispute, excessive professionalized language can legitimize the hierarchy that divides lawyers from the rest of the population, and those coming from elite schools from the rest. It can reinstate an oppressive system affecting those with less power, privileges, and who have neither access nor tools to speak this language, but rather an interest in disrupting power misdistribution and injustice.

In addition, the gap that exists between those documenting Human Rights violations, those interacting with the communities, on the one hand; and those discussing the reports presented at international organizations, and working at global forums concerned about the same Human Rights violations, on the other, is vast. One of the interviewees describes the huge disconnect she felt between what she saw in the communities and their desires, on the one hand, and what she had to write to multilateral organizations in order to seek funding, on the other.¹⁰⁰ From a colloquial language that better addressed the experiences of the members of a vulnerable community, she had to adopt a technical language that donors encourage as part of the requirements to obtain funds. No member of the community could have expressed her sufferings without the “translation” service that the interviewee provided as a Human Rights professional. Her experience brings back Sally Engle Merry’s argument previously referred to when describing the vernacularization of the field.

The interviewee also commented on having to change the type of language she used originally in her reports to protect a set of victims as a result of a change in the political context because donors, including the State, were no longer interested in the previous language used and its implications. In particular, she worked for an organization that had worked for seven years using the concept of “forced displacement”, but then that concept faded away because the concept of “victim” emerged as the acceptable one.¹⁰¹ This language transformation, although it might seem formal, implied that the organization lost a big part of the work it had been doing for almost a decade.¹⁰² Language transformation in order to receive financial resources from donors implied that the process with communities was partially broken.¹⁰³ The organization had to renew its business model, and the lawyer had to promote a new language of Human Rights that ended up ignoring many of the claims of the forcibly displaced community she had been building trust with for years.

In the context of academia, Human Rights legal theorists often develop refined critical theories that serve to distinguish and categorize negative sociological issues among specific groups. They operate under a logic where only those with their background and credentials can participate in their debates and understand the language they use to describe such situations. Those who cannot have access to such spheres and institutions are systematically excluded from such conversations. However, while reputable scholars and

⁹⁹ Dustin N Sharp, “Human Rights Fact-Finding and the Reproduction of Hierarchies” in Philip Alston & Sarah Knuckey, eds, *The Transformation of Human Rights Fact-Finding* (New York: Oxford University Press, 2016) 69 at 69.

¹⁰⁰ Annex V, *supra* note 67.

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

high-level decision makers continue advancing these academic conversations, many vulnerable communities continue living their lives without sufficient transformations in their social or economic realities. As described by two of the interviewees, very few Human Rights scholars have direct contact with the communities that have suffered Human Rights abuses.¹⁰⁴ If they do, it often occurs in a hierarchical or paternalistic way that sets a distinction between them and the affected people. Yet, they keep sophisticating a language that broadens the gap with the realities of the communities they are supposed to be working with.

G. David v. Goliath: Struggles Among Organizations with Different Scopes, Resources, and Capacity

The difference in terms of access to resources is huge between small organizations and large ones. One of the interviewees described her work for a small domestic organization that was purely interested in helping a population. The work was encouraging and intellectually appealing, but highly disorganized in terms of management, and thus they received less funding than other more “corporate-like” nonprofits. However, she did encourage some type of organized scheme, emphasizing that nonprofits without a financial team are not sustainable.¹⁰⁵ Another interviewee explained that even for the victims the survival strategies are complex, and that sometimes organizations have trouble supervising and understanding the dynamics and needs of the vulnerable populations they work with. In one case, 40% of the victims dishonestly stated that they lived out of the capital city to receive funding from the State, asking public officials to pay for a working day.¹⁰⁶ The small organization she worked for had limited resources to tackle these dynamics, and as long as they kept happening, the possibility of getting additional funding in the future was reduced.

Small organizations respond to the problem of not getting enough funds to operate by immersing into a snow-ball effect of excessive corporatization, often simulating private model schemes, as they are forced to reproduce logics of organization and management mirroring their larger peers to conduct their work in the field.¹⁰⁷ As they start professionalizing their language, many times they end up forgetting about their own constituency, the trust bonds built with communities for years, or even their original mission.

H. Burnout: When Human Rights Lawyers Feel Frustrated with the System and Lose Passion for Their Work

Two ideas come into play when thinking of Human Rights work as a job without emotions. On the one hand, excessive professionalization and corporatization of the Human Rights field has promoted a view of Human Rights technicians who lose interest and passion for their work the more they advance their professional paths, because they realize substantive change is often difficult to achieve, and tackling the existing power dynamics is challenging. As a result, with time, Human Rights lawyers become increasingly concerned with their personal brand and legal technocracy rather than with trying to change people’s lives, make an impact, or achieve social change. On the other hand, many Human Rights advocates, due to the difficult cases they deal with, end up suffering from serious distress.

According to one of the interviewees, when she worked at a domestic nonprofit, she saw international Human Rights bodies as a ‘God’ that understood human suffering and injustice, but once the case reached the jurisdictional body, she discovered that many of the

¹⁰⁴ *Ibid.*, Annex V, *supra* note 67.

¹⁰⁵ Annex V, *supra* note 67.

¹⁰⁶ *Ibid.*

¹⁰⁷ Space, Normal Life, *supra* note 63.

people working there, who generally are high-profile experts, are not emotionally attached to the cause. Instead, they just see their work there as a “normal” job. As stated by one interviewee, “they are more interested in feeding their ego than in helping people.”¹⁰⁸ This excessive reliance on technocracy and egos derived from the politicization of such professions ends up affecting the strategy crafting process as well as the possible outcomes of working with communities to help them transform their lives.

Another interviewee commented on all the stress she suffered associated with the difficult cases she took, and how many organizations that think of Human Rights lawyers more as experts than as human beings in touch with immense sufferings lack effective mental health aids to help advocates respond to this collateral emotional damage.¹⁰⁹ “In some of these cases, when you hear advocates laughing nervously when telling a case, it is not because they are laughing at victims, but because by distancing themselves from the cases they cope with their own frustration and stress.”¹¹⁰ She also described good practices in a nonprofit that had a psychological therapist contracted to help advocates deal with their emotions.¹¹¹ She referred to outstanding supervisors that promoted free time policies inside the workplace, and psychological outlets to help advocates deal with emotions in a healthy way, and not just by blocking them.¹¹²

V. Possible Solutions

In practice, several problems relate to the excessive professionalization and corporatization of the Human Rights field. Yet several solutions can be proposed and implemented with the aim to improve good corporate governance and the substantive social transformation that Human Rights Law and practice can produce.

At the international level, Human Rights bodies at international organizations can work to guarantee that the discussions that occur at these organizations turn into inclusive spaces, while breaking the existing gap between these powerful institutions and civil society. These conversations should move from global and diplomatic discussions to local realities. Given that most of these gatherings take place in international affairs hubs like New York, Washington D.C., London, Brussels, and Geneva, these bodies should strike a balance by trying to bring these conversations to the regional level, as well as bring regional representation to global spaces and forums, so a greater number of Human Rights activists and lawyers can directly engage with these bodies and improve effective dialogues in a less vertical manner. By doing so, international Human Rights bodies and international organizations must work in making the language that they use more accessible to people from all backgrounds¹¹³ — one that is not just accessible to people with the credentials and privileges to be in these spaces, and that does not exclude from these conversations those for whom they advocate. Instead, this language should open spaces so that the members of vulnerable communities can always speak for themselves when they feel they need to.

Human Rights advocates should also implement forms of affirmative action by making high-level Human Rights institutions spaces that experience diversity, inclusion, and equality principles, instead of corporate-style institutions that respond to strong for-profit

¹⁰⁸ Annex V, *supra* note 67.

¹⁰⁹ Annex VIII, *supra* note 42.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ Annex VII, “Anonymous interview to lawyer at international human rights body” (2014–2017).

commercial rationalities that lose sight of their own mission.¹¹⁴ Organizations should not become institutions that segregate those members of the communities whom they work for, and privilege only members that are already part of the field, while increasing the competition to access the field reproducing logics of racism, classism, ableism, and settle-colonialism.¹¹⁵ Therefore, empowerment, implementation, accountability, impact measurement mechanisms, organizational mobility, work-culture shifts, as well as diversity and inclusion strategies, have been suggested as solutions to better engage with people in legal and political struggles.

For instance, one of the interviewees identified herself as a grassroots trans activist that has worked hand-in-hand with trans communities in the poorest areas in Colombia. Just like her peers, many times she felt like an outlier within the Human Rights community. Even though she felt highly critical and had the credentials to participate in such spaces, her ideas were often taken for granted. She did not speak their sophisticated language nor knew how to act in spaces like international organizations where Human Rights debates at the highest levels often take place. When a private foundation awarded her a fellowship to work at an international Human Rights body, she mentioned how she felt empowered. She felt that her radical ideas were being listened to and were becoming influential among high-level decision makers.¹¹⁶ Currently, she is a respected and inspirational trans leader in her country tackling power dynamics between the trans movement and the gay and lesbian movement. Therefore, Law, but also Human Rights institutions at the highest levels, can take the symbolic role of embracing the work and ideas of excluded individuals that can help deconstruct unjust structures as well as develop new strategies that tackle systemic inequalities. By adopting rights empowerment and implementation strategies, advocates and critical legal scholars could try to make individuals aware of their abilities as citizens, and help them find solidarity in collective action.

In terms of capacity building, international organizations and international nonprofits must work to equip civil society with the necessary tools so that they can directly engage and advocate effectively when they don't have the skills or resources to complete this type of work.¹¹⁷ In addition, these bodies should allocate resources for the implementation of standards previously recognized by these bodies. Whether these come as the result of political discussions between certain Human Rights bodies or individual complaints, international Human Rights bodies must increase their implementation role to guarantee that their work is substantially improving domestic realities in countries where Human Rights abuses persist. They should also assist governments, ensuring that governments guarantee that their Human Rights policies allocate budget and human resources to follow up on the implementation of decisions and recommendations made by these bodies.

For example, international organizations in partnership with international nonprofits should critically develop mechanisms that not just invest on norm-building work or evaluate countries compliance with international norms, but also set a full body of work that monitors the application and implementation of international Human Rights legal standards in each country. This should also include impact measurement guidelines of such standards to track the real effect of such norms into country realities. Political resolutions, recommendations, international case decisions, and Human Rights principles will continue to be the core basis of Human Rights Law, yet new conversations should arise in terms of how

¹¹⁴ Duncan Kennedy, "A Cultural Pluralist Case for Affirmative Action in Legal Academia" (1990) 1990:4 Duke LJ at 705.

¹¹⁵ Spade, Normal Life, *supra* note 63.

¹¹⁶ Annex VII, *supra* note 113.

¹¹⁷ *Ibid.*

those existing standards are and should be communicated, discussed, and applied at the local level, which should increase the impact accountability of Human Rights organizations.

In addition, international organizations must have an open conversation about their diversity and inclusion policies to question whether their staff is reflective of egalitarian values, and how as organizations these institutions can contribute to bridging the gap between those with power and those without it. They should respond to stereotypes that place advocates from the Global North or native English speakers as better trained to make effective use of Human Rights legal knowledge, worthy of respect, and recognition *per se* than those from the Global South; question its culture of meritocracy; but also open the path to people coming from more vulnerable settings and interdisciplinary professional backgrounds.

International nonprofits must discuss their resources and whether their day-to-day work effectively contributes to the causes they work for in each country. It is crucial to determine whether their role should be an integral one that executes each of the tactics that currently exists in the Human Rights field, or one of giving international visibility to the people that would not have a voice or importance without intermediaries.¹¹⁸ Given the reality of the amount of economic resources these organizations receive from large donors, it is paramount to create a culture among these organizations about their 'institutional responsibility' with their smaller peers.¹¹⁹ One that is realistic of each organization's resources, human capital, and competitive advantage, and that creates a social consciousness of promoting capacity building among smaller organizations, so that large international nonprofits transfer their 'know-how' to smaller organizations with the goal of building a more robust and skilled Human Rights movement in each country. At the same time, however, a culture that values the knowledge and personal skills that grass roots organizations already have, and the personal skills of how they locally approach their communities and realities.¹²⁰

Within a market-based society, resources will continue to determine the level of competition and culture among these organizations; however, as their assets continue to grow exponentially, the brand equity must be used ethically and responsibly. Given the capacity that international organizations, global top tier universities, and large nonprofits have, these organizations and educational institutions must be the first institutions to adopt, implement and respect the standards they advocate for. They should be the primary example of change that external stakeholders can see as a good-practice reference. Their staff must be diverse, and their structure must reflect the vision of the organization in a more horizontal way. The structure should value people in all professional levels, respect merit, promote diversity, boost innovation and maintain the vision as the core component of its work culture.

As one of the interviewees suggests in the nonprofit sector, a good practice would be limiting the periods of people directing the organizations or including employees from different levels in the Board to allow a work culture of transparency and dialogue between employees and leadership at each organization, against the idea of the vertical corporate ladder based on timing or experience only; and rotating them to other projects or tasks in order to allow oxygen to come in and bring new voices of other innovative leaders and their

¹¹⁸ Annex II, *supra* note 38.

¹¹⁹ Annex III, *supra* note 44.

¹²⁰ Annex VIII, *supra* note 42.

ideas to the table.¹²¹ Another idea could be to decentralize work and responsibilities,¹²² to redistribute the power from high-profile Human Rights lawyers to other activists and people from the communities that historically have had less power; or to innovate operational models of strategy, organizational behavior, and management that respond to nonprofit structures and promote operational models that improve nonprofit functioning and reliability. More innovation and research from nonprofit management and social impact experts is needed to address these problems.

In the context of Human Rights clinical education, in order to avoid reproducing dynamics of subordination between the academic center and the periphery, Bonilla proposes three principles that should be followed by clinics: “mutual recognition of the parties involved in the project; using consensus to establish, interpret, and apply the rules governing the clinical exchange; and prioritizing the social justice objectives pursued over the educational and professional development purposes that are also part of the programs of cooperation advanced by the clinics.”¹²³ Likewise, the path to access the Human Rights field must be re-constructed critically. Law schools, nonprofits, governments, and international organizations should not use unpaid internships as forms of free labor that disregard labor rights, or as forms that help identify and measure privilege. Instead, internships should be based on factors that dismantle power structures and recognize talent, potential, and needs-based financial aid. As presented by Darren Walker, president of the Ford Foundation,

The right internship can put a young person onto a trajectory for success. This is precisely why those of us who oversee internship programs ought to make sure they provide a hand up to all people of promise, not merely a handout that, best intentions aside, accelerates a cycle of privilege and reward.¹²⁴

In the context of academia, universities at large should take the opportunity to expand the vision that only law schools and particularly Human Rights lawyers can enable social change. By informing the students of other professional and non-professional avenues for social transformation, they can promote more creative paths that promote social change, empower disadvantaged communities, as well as foster knowledge, debates, and dialogues on the importance of mutual collaboration between these fields, once students are part of these institutions, in order to achieve collective, interdisciplinary, and sustainable impact.

Schools can promote forgivable loan programs in faculties besides law schools for other professionals who want to engage in public interest and social impact work.¹²⁵ In this regard, they can also strengthen interdisciplinary approaches towards social transformation that can facilitate a greater understanding between the passion for social change and the technical mechanisms to achieve that transformation. In addition, by creating bridges between law students, policy and socially business driven students,¹²⁶ as well as others pursuing alternative professional careers, they can understand how the intersection of Human Rights, businesses, and other fields can result in high-impact and long-term social

¹²¹ Annex VI, *supra* note 69.

¹²² Annex IV, *supra* note 53.

¹²³ Annex II, *supra* note 38 at 4.

¹²⁴ Darren Walker, "Internships are not a privilege", *The New York Times* (5 July 2016), online <www.nytimes.com/2016/07/05/opinion/breaking-a-cycle-that-allows-privilege-to-go-to-privileged.html?smid=tw-share>.

¹²⁵ *Supra* note 41; see also Michael Beer et al, *Higher Ambition: How Great Leaders Create Economic and Social Value*, (Boston: Harvard Business Review Press, 2011).

¹²⁶ We define socially business driven students as students in the disciplines of business and economics that are programmatically interested in the fields of universal healthcare, poverty alleviation, financial inclusion, venture philanthropy, gender pay gap, etc. or in fields such as nonprofit management, social strategy, diversity and inclusion, monitoring and evaluation, communications, and fund-raising.

transformations. For example, one way to achieve this is by incorporating changes in MBA curricula and redesigning courses to advance management thinking and practice at non-profit and other Human Rights organizations. These changes enable training higher-ambition leaders with greater social purpose and value.

Several career paths, other than Law, can also produce social change. However, a paradigm shift in terms of training and career path avenues is needed to have more individuals at different fields and disciplines interested in delivering superior economic and social value in distinct ways to scale up social change and Human Rights realization. At the more programmatic level, when large Human Rights organizations bring strategic cases before international Human Rights bodies or domestic high-courts, this type of work must adopt many ethical guidelines that clearly set out the type of partnership and collaboration that is expected with affected communities. The guidelines should include among others: understanding and building the work on local experiences, and not just on top-down impositions; maintaining open communication channels between the lawyers and the community without leaving that communication for particular moments in which lawyers need something from the victims; constantly informing the community of the stage of the process and what can be expected; bringing in the goals of the community to the particular goals of the case; making legal language accessible to the community; and, once impact is made, organizations should accompany victims in creating sustainable educational and financial plans that allows them to reach new opportunities and investments that increase their life opportunities, such as better education opportunities, housing, and savings.

At the individual level, Human Rights advocates should try to go beyond their technical skills, acknowledge their privilege, and start reconnecting with the communities in any way they can. Pragmatic and interdisciplinary Human Rights Law Practice requires going beyond legal expertise taught at law schools into community-based practices. As legal practitioner Shin Imai argues,

The lawyering skills transmitted through the conventional law school courses do not prepare students for this type of community practice. In order to transmit community lawyering skills, clinical courses should utilize a counter-pedagogy that allows students to absorb the lessons of collaborative relationships, the recognition of personal identity and race, and the ability to take community perspectives. By doing so, we will be preparing future lawyers to play a positive role in the work for social justice.¹²⁷

Without this necessary transformation, advocates can get immersed in a system where their imagination for change, their feelings, their idealism, and their deep connection with the communities they are supposed to work with gets limited, and their scope of action to transform realities becomes restricted.

In order to do so, Human Rights lawyers should speak the language of the people they are trying to empower. Meet them. Leave their safe spaces to try to build empathy and listen and attend to their concerns. Report to the communities on how the work is going and hearing what the communities have to say in terms of their goals and wishes. Advocates should also open institutional spaces so that members of vulnerable communities can speak for themselves. It becomes paramount to successfully empower victims while at the same time avoid their re-victimization. As one of our interviewees presented, she proposed to rethink the ethical dilemma of how to help the victims, empower them, and give them back using their skills and knowledge to help them with particular needs, create financial inclusion plans,

¹²⁷ Shin Imai, "A Counter-Pedagogy for Social Justice: Core Skills for Community-Based Lawyering" (2002) 9:1 Clinical L. Rev 195 at 226–27.

and education tools, while also being able to gather information.¹²⁸ Some have suggested this dilemma can be worked out through participatory action research (PAR)¹²⁹ that:

...seeks to understand and improve the world by changing it. At its heart is collective, self-reflective inquiry that researchers and participants undertake, so they can understand and improve upon the practices in which they participate and the situations in which they find themselves. The reflective process is directly linked to action, influenced by understanding of history, culture, and local context and embedded in social relationships. The process of PAR should be empowering and lead to people having increased control over their lives.¹³⁰

This type of research links activism with knowledge and could break some of the excessive professionalization of Human Rights by bringing communities to self-reflect and participate with their own empowerment.

Finally, following Spade's argument in the article "For Those Considering Law School", Law should not necessarily be considered the most effective tool to dismantle systems of oppression or to improve the living and social conditions of marginalized communities.¹³¹ Despite the fact that lawyers, and particularly Human Rights lawyers, have an important supportive role when providing legal counseling services to vulnerable communities to ensure not to reproduce logics of power and hierarchy. Lawyers can help movement leaders find strategies to promote legal transformations when it becomes necessary, and effectively target the weak points and grey areas where the legal system presents shortcomings. However, most of the Human Rights work that can be done in any social movement does not necessarily require a law degree. Social impact work can also be done through trainings, empowerment workshops, art, communication strategies, support networks, media visibility, financial and economic inclusion, or direct participation of members of the communities that advocate, all of which require diverse forms of disciplinary training other than Law.

Spade's argument is supported by one of our interviewees who suggested that often Law is ineffective as the only remedy to solve structural inequalities, since it can often legitimize and reproduce those same inequalities.¹³² She raised an example of how trans individuals are not considered citizens by laws in many countries in Latin America, and don't have access to justice mechanisms.¹³³ When trans women are assaulted, they are not able to report their cases to the police, as the police often further abuse them. Thus, community-based approaches that enhance alternative protection mechanisms for these groups and empowers them on their identities and political recognition could even be more effective than using Law as the only tool to protect their rights.¹³⁴

Conclusion

¹²⁸ Annex VIII, *supra* note 42.

¹²⁹ See, for example, Amy Ritterbusch, "Bridging Guidelines and Practice: Toward a Grounded Care Ethics in Youth Participatory Action Research" (2012) 64:1 The Professional Geographer 16.

¹³⁰ Fran Baum, Colin MacDougall & Danielle Smith, "Participatory action research" (2006) 60:10 J Epidemiology & Community Health 854 at 854.

¹³¹ Dean Spade, "For Those Considering Law School" (2010), online: <www.deanspade.net/wp-content/uploads/2010/10/For-Those-Considering-Law-School-Nov-2010.pdf>.

¹³² Annex VII, *supra* note 113.

¹³³ *Ibid.*

¹³⁴ *Ibid.*

Building on Kennedy, we acknowledge that "...we routinely underestimate the extent to which the human rights movement develops in response to political conflict and discursive fashion among international elites, thereby overestimating the field's pragmatic potential and obscuring the field's internal dynamics and will to power".¹³⁵ As a result, the excessive professionalization and corporatization of the Human Rights field on its way to 'positively' transform society is problematic due to the embedded power imbalances present under this structure. The ideas that motivate the corporatization and professionalization of the Human Rights field are aimed at raising funds to conduct their work and promoting a higher social and professional status of the Human Rights field. Many questions arise from the decision of adopting excessive corporatization and professionalization as a path towards achieving these ends. One of the main questions is how to strike a balance between the aim for social transformation and the challenge for financial and political resources that Human Rights organizations face. To be able to fund the professionalization of Human Rights lawyers, corporatization becomes a necessary consequence. However, other questions arise. What is the real danger when large and powerful corporations not operating in good faith try to influence the focus, policy, or strategy of a Human Rights organization? What occurs when donors set their own political agenda on the organization's work plan, imposing clear political or disjunctive plans? What happens when the legal requirements of such incorporation due to the legal regime make these Human Rights organizations adapt to robust and unfair corporate structures?

This has already been the case of universities and think tanks, where funds come from powerful actors, and those actors then have unfair and potentially dangerous influences on the organizations that they are supposed to be helping to prosper.¹³⁶ The fiscal control and accountability objective of such logics seem to be necessary to have a more effective system. Yet the consequences of disproportionate corporatization and professionalization of the field can be detrimental for the aims of social transformation that the movement claims in its foundations.

The responsibility from private sector actors remains unresolved due to the tensions that exist between the Human Rights field and the private sector. However, a critical approach to this tension seems necessary to have a more comprehensive strategy of new forms that drive to enduring, sustainable change. One that involves non-traditional actors, like corporate actors and socially driven business that operate in good faith into Human Rights conversations, as well as one that breaks the privilege among Human Rights lawyers.

Based on the problem described, one could argue on the one hand that if someone wants to build a career in the Human Rights field, this person must immerse in the logics of excessive corporatization and professionalization to be part of and remain in the field. On the other hand, one could critically analyze whether current structures and the social dynamics that lead into the excessive professionalization and corporatization of the Human Rights field and its way of promoting social change is the ideal one. Managing Human Rights nonprofits poses unique challenges that have not been adequately addressed in leading mission-driven organizations, managing organizational change, behavior, strategy, operations theory, and practice until now. One such issue is the need to balance multiple demands on the organization, including economic, human resources, and social goals. Although Human Rights advocates and organizations might be operating in good faith, as capitalism, market requirements, and globalization inescapably become part of the structure of the Human Rights field, they quickly get immersed in logics that push both advocates and

¹³⁵ Kennedy, *supra* note 10 at 118.

¹³⁶ See Jane Mayer, *Dark Money: The Hidden History of the Billionaires Behind the Rise of the Radical Right* (Toronto: Random House of Canada, 2016).

organizations to be less radical and vocal about important issues, as they know that drastic changes are near impossible in a system that only allows subtle changes and rejects massive mobilizations. As established by Dauvergne and LeBaron, “Without a doubt most activists still want to speak truth to power. But nowadays they are entangled in this power.”¹³⁷ Instead of challenging a system of global capitalism, they are simply now conforming to the logics of it.

The unrestrained corporatization and professionalization of the Human Rights field has served as a tool to arguably legitimize and perpetuate the existing misdistribution of wealth and power.¹³⁸ These power structures are based on privilege and supremacy that continue to systematically affect communities that are already disadvantaged. Authors like Foucault, Kennedy, Crenshaw, Spade, Moyn, Lemaitre, and Bonilla have developed significant responses to the social movements’ theory from a more constructivist perspective that reshapes the way in which the system has been structured. These authors present strategies that challenge the conformation to the ways in which the system has been created and the way that legal regimes regulate and govern knowledge and practices. By trying to put practices into more institutional forms, Human Rights advocates should not follow the rules of behavior that the system imposes upon individuals.¹³⁹ Instead, advocates should deconstruct oppression and resist institutional forms that directly reproduce racialized, gendered, and other subjections, as well as centralized power among specific social groups.

These types of discourses that legitimate oppressive dynamics should not engage in efforts embedded in pedagogies of demobilization and re-colonization led by national or historic “global political and economic power elites.”¹⁴⁰ Effective Human Rights work should neither reinforce a system where Human Rights lawyers replicate logics of excessive corporatization that result in power dynamics of compassion and charity. Instead, Human Rights advocates should aim for substantive social change and equality among its citizens by learning more from small and grassroots organizations or individuals that have been strongly committed against colonial discourses and politics of mobilization, but lack the technical knowledge and resources to make their work sustainable or replicable for bigger communities.¹⁴¹ Human Rights lawyers should then work in reshaping political spaces with more decentralized forms of organization and with greater community participation and engagement from other professional and non-professional fields, and gain a better sense of social responsibility to the communities who they advocate for.¹⁴² One of the interviewees commented that the relationship between the organization and the victim should become stronger and based on ethical grounds in order to empower the victims and compensate them for their engagement.¹⁴³

By writing this article, we do not intend to deconstruct the structure of a field that for decades has fostered dialogue, amplified the voices of the most marginalized ones, and evidenced dynamics of subordination and control that lead to social problems that have been historically and deliberately hidden. This paper is not intended to criticize specific persons or institutions, but rather, to recognize that while we admire that good people with good intentions fight for Human Rights, all of us as humans must be humble and recognize

¹³⁷ Peter Dauvergne & Genevieve LeBaron, *Protest Inc.: The Corporatization of Activism* (Malden, MA: Polity Press, 2014) at 2.

¹³⁸ Delgado, *supra* note 20.

¹³⁹ See also Anthea Roberts & Martti Koskeniemi, *Is International Law International?* (New York: Oxford University Press, 2017).

¹⁴⁰ Aziz Choudry, “Transnational Activist Coalition Politics and the De/Colonization of Pedagogies of Mobilization: Learning from Anti-Neoliberal Indigenous Movement Articulations”, (2007) 37:1 *International Education* 91 at 97.

¹⁴¹ Choudry & Shragge, *supra* note 83 at 511–14.

¹⁴² *Ibid* at 514.

¹⁴³ Annex VI, *supra* note 69.

that sometimes we make mistakes, and these must be corrected. There are few individuals with such noble ideas, dedicating their professional careers and personal lives to make positive and enduring change to transform society for the well being of others. However, Law as a tool, its structure and the fields that result from it, including the Human Rights field, must pragmatically help redistribute goods and justice. These should connect and collaborate between lawyers and organizations, as well as with other legal fields and disciplines to build strategic and collective impact. Human Rights organizations must also adopt good corporate governance standards, and identify more opportunities to open spaces for members of vulnerable groups to raise their voices beyond the legal path. The Human Rights field should also serve as a bridge to give opportunities to those that cannot access it from its roots—one that embraces egalitarian values, and that tackles poverty and discrimination, the deep-rooted origins of social inequality.

BOOK REVIEW: Jean d'Aspremont, International Law as a Belief System

*Adrien Habermacher**

Abstract

In his latest monograph, Jean d'Aspremont argues that the way in which international lawyers think about and practice international law can be perceived as a belief system. This system is based on certain fundamental doctrines, such as sources, responsibility, statehood, interpretation, *jus cogens*. These doctrines comprise rules and rest on an imagined genealogy. The belief system also relies on self-referentiality to justify its different components, and creates an experienced sense of constraint among international lawyers. d'Aspremont focuses on the discourses in the field of international law to expose their structure and reveal the often fictive connections they entertain, with the historical developments that gave birth to them. Despite the complexity of presenting overlapping notions, d'Aspremont offers convincing and well supported claims. Understanding his arguments, however, often requires familiarity with the theoretical debates surrounding certain notions and instruments. Most importantly, previous exposure to the practice of international legal argumentation is necessary to make sense of the author's assertions. The author does not advocate for radical reform of the way we practice international law; rather, he invites us to suspend our entanglement in this set of beliefs as a reflective exercise. The readers will have to decide for themselves whether this leads them to reform or entrench current international law paradigms. They can, however, seize the analytical tools proposed by d'Aspremont to better understand their own practice, improve the effectiveness of their own practice, and teach the art to the next generation of international lawyers.

French translation

Dans sa plus récente monographie, Jean d'Aspremont soutient que la manière dont les juristes spécialistes en droit international pensent et pratiquent celui-ci peut être perçue comme un système de croyances. Ce système est basé sur certaines doctrines fondamentales, tels que les sources, la responsabilité, l'état, l'interprétation, et le *jus cogens*. Ces doctrines comprennent des règles et s'appuient sur une généalogie imaginaire. Le système de croyances est aussi basé sur l'auto-référentialité pour justifier ses divers composants, et crée un sentiment de contrainte parmi les juristes du droit international. d'Aspremont met l'accent sur les discours dans le champ du droit international pour en exposer la structure et pour révéler les liens souvent fictifs qu'ils entretiennent avec les développements historiques qui leur ont donné naissance. Malgré la complexité inhérente à la superposition de plusieurs notions, d'Aspremont offre des affirmations convaincantes et bien fondées. Comprendre ses arguments, cependant, requiert souvent une certaine familiarité avec les débats théoriques autour de certaines notions et instruments. Encore plus important, une exposition préalable à la pratique de l'argumentation internationale juridique est nécessaire pour donner du sens aux affirmations de l'auteur. L'auteur ne prône pas pour une réforme radicale de la manière dont nous pratiquons le droit international; au contraire, il nous invite à suspendre notre enchevêtrement dans cet ensemble de croyances comme un exercice réflexif. Les lecteurs

* Adrien Habermacher is completing his doctoral thesis at McGill University Faculty of Law, where his research focuses on the role of institutional cultures in select Canadian law faculties.

devront décider par eux-mêmes si cela les amène à reformer ou confirmer les paradigmes contemporains du droit international. Ils peuvent cependant se saisir des outils analytiques proposés par d'Aspremont pour mieux comprendre leur propre pratique, améliorer l'effectivité de celle-ci, et enseigner ce savoir-faire aux futures générations de juristes en droit international.

Spanish translation

En su más reciente monografía, Jean d'Aspremont señala que la manera en la que los juristas internacionales piensan y practican el derecho internacional puede ser percibida como un sistema de creencias. Este sistema está basado en ciertas doctrinas fundamentales, como las fuentes, la responsabilidad, la categoría de estado, la interpretación y el *jus cogens*. Estas doctrinas comprenden ciertas reglas y permanecen en una genealogía imaginada. El sistema de creencias también se basa en una auto-referencialidad con el fin de justificar sus componentes, y crea un permanente sentido de restricción en los juristas internacionales. D'Aspremont se enfoca en los discursos en el campo del derecho internacional para exponer sus estructuras y revelar las frecuentemente ficticias conexiones que ellas presentan con los desarrollos históricos que les dieron nacimiento. A pesar de la complejidad y de las nociones superpuestas, d'Aspremont ofrece pretensiones convincentes y bien fundadas. Entender sus argumentos requiere sin embargo, de un nivel de familiaridad con los debates teóricos que giran en torno a ciertas nociones e instrumentos. Aún más importante, una exposición previa a la práctica de la argumentación legal internacional es necesaria para entender las proposiciones del autor. El autor no advoca por una reforma radical de la manera como practicamos el derecho internacional; por el contrario, nos invita a suspender nuestros enredos en este conjunto de creencias como un ejercicio de reflexión. Los lectores tendrán que decidir por ellos mismos si el artículo los lleva a reformar o a afianzar los paradigmas actuales de derecho internacional. Ellos pueden sin embargo, tomar las herramientas analíticas propuestas por d'Aspremont para entender mejor su propia práctica, mejorar la efectividad de su propia práctica, y enseñar el arte a la siguiente generación de juristas internacionales.

- I. Introduction
- II. Jean d'Aspremont's Expository Claims: International Lawyers Experience International Law Through Fundamental Doctrines That They Perceive as Rules, Associate to An Imaginary Genealogy, and Justify by Recourse to Other Fundamental Doctrines
- III. The Doctrine of Statehood and the Montevideo Convention Illustrate How the Belief System Manifests Itself in International Law
- IV. Where Do We Go From Here? Let's Suspend the Belief System, Reject Apostasy, and Choose Our Own Path Forward
- V. Closing Remarks On the Use of Vocabulary and the Pedagogical Potential of d'Aspremont's Approach

I. Introduction

Sources; responsibility; statehood; interpretation; jus cogens. Anyone with some exposure to the field of international law will recognize here elementary building blocks of the topic. These items, and there might be others, are constitutive elements of international law discourses. For those of us more acquainted with the field, they immediately evoke, respectively, Art 38(1) of the Statute of the International Court of Justice (ICJ);¹ the International Law Commission (ILC) Articles on the Responsibility of States;² the Montevideo Convention;³ Art 31 of the Vienna Convention on the Law of Treaties (VCLT);⁴ Art 53 of the VCLT.⁵ We make these immediate and unequivocal connections because we are trained to deploy these tandems together. Moreover, we often refer to the sources and interpretation tandems to justify the use of these few building blocks. This constitutes a system of thought that structures our practice of international law. Furthermore, this system relies on theories that are often closer to founding myths than accurate historical accounts. It is this entire construct that Jean d'Aspremont invites us to reexamine in *International Law as a Belief System*.⁶

d'Aspremont's first steps are to explain the constitutive elements of the belief system he is exposing, namely the fundamental doctrines. He defines their characteristics and conditions of realization, as well as demonstrates the fundamental character of such doctrines in internal legal argumentation (Chapter 2). The author then shows how internal legal argumentation deploys fundamental doctrines, those of sources and interpretation in particular, to explain the existence and function of the fundamental doctrines themselves, which is the inherent self-referentiality of the belief system (Chapter 3). To continue his demonstration, the author focuses on several manifestations of the belief system, such as the use of instruments deemed as formal repositories of the doctrines, and the invention of genealogical connections between such instruments and the doctrine to allow them to play the role of repositories (Chapter 4). Finally, once he has successfully laid out his expository claims and adequately supported them, d'Aspremont invites us to temporarily suspend the previously exposed belief system (Chapter 5). He does not direct us to any specific destination once we accept to set aside the belief system, although he guards against a permanent rejection of it (so-called apostasy).

In the following, I will summarize and critique d'Aspremont's *International Law as a Belief System*. I will adopt the same sequential approach as the author: I too will start by spelling out the intertwined expository claims regarding the structure of the belief system and its characteristics. I will also, then, use illustrations to substantiate this analytical framework previously exposed, and show how the author grounds his analysis in the functioning of international legal argumentation. Thirdly, I will expose what would be a suspension of the belief system, consider the consequences of adopting this framework, and analyze the end goal of the author. As a way of conclusion, I will make observations on the terms d'Aspremont chose to present his arguments, and comment on the pedagogical potential of his work.

¹ *Statute of the International Court of Justice*, 26 June 1945, Can TS 1945 No 7 art 38(1) (entered into force 24 October 1945).

² *Responsibility of States for Internationally Wrongful Acts*, GA Res 56/83, UNGAOR, 56th Sess, Supp No 10, UN Doc A/RES/56/83 (2001).

³ *Montevideo Convention on the Rights and Duties of States*, 26 December 1933, 165 LNTS 19 (entered into force 26 December 1934) [Montevideo].

⁴ *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 art 31 (entered into force 27 January 1980).

⁵ *Ibid* at art 53.

⁶ Jean d'Aspremont, *International Law as a Belief System* (Cambridge: Cambridge University Press, 2018) [d'Aspremont, *Belief System*].

II. Jean d'Aspremont's Expository Claims: International Lawyers Experience International Law Through Fundamental Doctrines That They Perceive as Rules, Associate to An Imaginary Genealogy, and Justify by Recourse to Other Fundamental Doctrines

At the core of the belief system articulated by d'Aspremont lie the fundamental doctrines. The author attributes three constitutive characteristics to these doctrines: ruleness, imaginary genealogy resting on formal repositories, and self-referentiality. These three characteristics are necessary and cumulative for fundamental doctrines; they are conditions of existence. They are also mutually reinforcing, and there are, therefore, overlaps in their rationale, and definitions.

The first element is that of ruleness.⁷ d'Aspremont only gives meager explanations about this characteristic beyond that it “refers here to the need to represent fundamental doctrines as sets of rules”.⁸ For this definition to avoid the pitfall of circular reasoning, it would have been helpful to unpack further what is meant here. Even more since the “experienced sense of constraint” – which could have been a way to describe what a rule is or does – is analyzed later as a distinct aspect of the belief system emanating from all three characteristics of the fundamental doctrines, rather than attached to ruleness in particular.⁹ We can only regret the outstanding puzzle about this “prerequisite of the other conditions of realization”.¹⁰

The second condition of realization and defining characteristic of the fundamental doctrines is the imaginary genealogy.¹¹ International lawyers anchor fundamental doctrines in formal repositories. They create a link, reputedly genealogical, between an instrument and a doctrine. Such instruments can be international conventions, landmark decisions of international tribunals, or even the works of the International Law Commission. Most often, these instruments do not initially come to life for the purpose of serving as such repositories. When that is the case, the genealogy nonetheless erases the competition of powerful interests that crafted them over time. This is why the genealogical link, later created, is fictive. International lawyers imagine this genealogy through an implicit, collective choice to associate a fundamental doctrine to one (and sometimes more) key artefact. While these repositories exist independently of the doctrines and may have binding force on certain states on their own, as is the case for treaties or judicial decisions, they take a much broader meaning in the international legal order than their initial purpose through association with a fundamental doctrine. This choice itself tends to follow the rules contained in certain fundamental doctrines (sources and interpretation), and therefore reinforces the overall system.

Accordingly, the third characteristic is self-referentiality.¹² Fundamental doctrines constitute self-explanatory frameworks. They have the potential to “invent and dictate their own formation and functioning.”¹³ The rules enshrined in the doctrine of sources regulate

⁷ *Ibid* at 37–39.

⁸ *Ibid* at 31.

⁹ *Ibid* at 47–54.

¹⁰ *Ibid* at 38.

¹¹ *Ibid* at 39–45.

¹² *Ibid* at 45–47, 55–70.

¹³ *Ibid* at 45.

the making of international rules. The rules enshrined in the doctrine of interpretation regulate how they function. Because the doctrines are perceived as sets of rules, the doctrines regarding the making and interpretation of international rules apply to them. By the same token, once the said rules apply to the fundamental doctrines themselves, it confirms that they are indeed a set of rules. The characteristics of fundamental doctrines are, thus, mutually reinforcing.

The author's presentation of self-referentiality, however, needs further explanation. The author treats all fundamental doctrines as part of a single group and does not differentiate among them regarding their characteristics. The "self" prefix here points to the idea that fundamental doctrines, in general, rely on other fundamental doctrines for justification. However, we need to clarify that it is always on the same two fundamental doctrines, namely sources and interpretation, that all fundamental doctrines, including these two, rely on for this purpose. While all the fundamental doctrines share the characteristics the author presents, the doctrines of sources and interpretation occupy a special place in the framework; they are even more fundamental than the other doctrines since they provide justification for all doctrines. While d'Aspremont chose not to introduce such further classification among these doctrines, we need to keep this distinction in mind. Indeed, while the doctrines of statehood or responsibility require recourse to the doctrines of sources and interpretation in the self-referential operation described above, they are themselves unable to provide justification for other doctrines.

The three characteristics of rulelessness, imagined genealogy, and self-referentiality define the fundamental doctrines. International lawyers deploy them in their discourse about international law. International lawyers hear each other speak of the rules pertaining to sources, responsibility, statehood, interpretation, *jus cogens*; they also hear each other refer to them in association with the corresponding instruments as repositories; they further hear each other justify these fundamental doctrines through the use of other fundamental doctrines in the same terms. Thus, international lawyers repeatedly experience the foregoing system. This experience gives rise to an acceptance of fundamental doctrines as truth in international law.¹⁴ International lawyers commit themselves to this structure of thought in international legal argumentation, adopt it, and perpetuate it. The experience of international law discourses generates a sense of constraint toward fundamental doctrines operating as transcendental validators. This is how, according to d'Aspremont, international law can be perceived as a belief system.

III. The Doctrine of Statehood and the Montevideo Convention Illustrate How the Belief System Manifests Itself in International Law

The foregoing summarized the framework proposed by d'Aspremont in Chapters 2 and 3 to apprehend how international legal argumentation operates. Chapter 4 offers illustrations of how the belief system manifests itself. It provides the reader with historical demonstrations of the imagined character of the genealogical link between fundamental doctrines and formal repositories. It also shows how the belief system creates a justificatory space allowing international lawyers to formulate arguments without the need to endlessly justify their premises. In general, the discussion of "manifestations of the belief system" anchors the theoretical framework developed in the previous chapters to examples of international legal argumentation. Chapters 2 and 3 only briefly referred to examples and remained largely focused on abstract concepts. The mutually reinforcing characters of many aspects of the author's theoretical claims warrant this sequential choice. Providing an overview of the entire analytical framework before exploring in depth how it applies to

¹⁴ *Ibid* at 47–48.

certain objects bypasses the need to justify in advance a point that would be developed later, avoiding unnecessary overlap. Chapter 4 can give substance to the elements previously exposed as it brings together several elements that have already been justified independently of one another. Moreover, this strategy also serves to emphasize the general character of the claims about fundamental doctrines. It highlights how these claims do not depend on the adequacy between the proposed framework and a specific object, but constitute an approach to interpret international legal argumentation generally. It is, thus, harder to reject the overall framework if one finds an object to which it does not apply perfectly, or if the reader does not consider a chosen example to allow for generalization. Although the author's choice came with the risk of a drier read in Chapters 2 and 3, this tradeoff contributes to the demonstration and serves his arguments.

The doctrine of statehood is one of the few examples that d'Aspremont develops in Chapter 4.¹⁵ The doctrine of statehood comprises the requirements for an entity to be a state in the international system: a permanent population, a permanent territory, an effective government, and the capacity to enter into international relations. While the question of whether to recognize a state has always been a site of fierce competition between regional and global political interests (think of Palestine), states and their international lawyers nonetheless justify their decisions of whether to recognize a state on the basis of the above criteria. d'Aspremont, for instance, points to the written statements that several states submitted to the International Court of Justice in 2009 when it examined the legality of the unilateral declaration of independence of Kosovo.¹⁶ This example is convincing, but may not be the strongest available to the author. There are certainly discourses about statehood that display the same pattern outside of judicial proceedings before the ICJ, and such examples would grant greater support for the underlying argument.

International lawyers anchor this doctrine in the 1933 Montevideo Convention on Rights and Duties of States.¹⁷ The Montevideo Convention was a regional treaty, negotiated and signed only by states in the Americas.¹⁸ d'Aspremont affirms that it is only in the 1950s and 1960s, an era when decolonization gave birth to many new states, that international lawyers searched for a universal doctrine for recognizing states, and constructed a genealogical link with the Montevideo Convention. He further argues that the drafting history demonstrates that the main focus of this treaty was non-intervention, rather than recognition of states. The imagined genealogy of the universal doctrine of statehood and recognition therefore lies in "the product of a codification of American public international law on non-intervention."¹⁹

Lastly, other doctrines justify the validity of the doctrine of statehood contained in the Montevideo Convention. This Convention forms part of international law as it is understood as a set of customary rules. The doctrine of sources, which rests on Art 38 of the ICJ Statute, provides that norms that have acquired a customary status are binding on all states. The VCLT, being itself the repository of the doctrine of interpretation, also contemplates in Art 38 that rules from a treaty can become binding on states that are not a

¹⁵ *Ibid* at 79–86.

¹⁶ *Ibid* at 80, n 43; see also <www.icj-cij.org/en/case/141/written-proceedings>.

¹⁷ See Montevideo, *supra* note 3.

¹⁸ International Court of Justice, "Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Request for Advisory Opinion): Written Proceedings" (17 April 2009), online <www.icj-cij.org/en/case/141/written-proceedings> (The States parties to the Montevideo Convention are Brazil, Chile, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, United States, and Venezuela).

¹⁹ *Ibid* at 86.

party to the treaty through international custom. These other doctrines justify bypassing the dissonance between, on the one hand, the inherent limited regional reach of the Montevideo due to its treaty nature, and on the other, the universal character of the rules it now provides for.

International lawyers thus discuss the rules of statehood contained in a doctrine that they have built into international law, via an already existing instrument initially designed for other purposes, and through reliance on other doctrines. The insistence on deploying this doctrine in discourses promoting or rejecting the recognition of new states, rather than pointing to the political advantages of either position, speaks to the sense of constraint that accompanies the doctrine of statehood. International actors acquired this sense of constraint through the experience of being exposed to and practicing international legal discourse in that way. The doctrine of statehood is therefore a manifestation of the belief system constitutive of international legal argumentation.

d'Aspremont acknowledges that “[m]any international lawyers today question the very modes of legal reasoning put in place by the doctrine of statehood,”²⁰ calling for its amendment or even replacement. This does not weaken the claim that it is a fundamental doctrine. On the contrary, it confirms this status. Fierce contestation demonstrates that the doctrine of statehood plays a fundamental role in international legal thought and practice. It is because the doctrine of statehood forms part of the grammar of international law that its content must be modified (or maintained).²¹ It is one of the components of international law argumentation system based on belief in the rulelessness of certain fundamental doctrine, belief in their grounding into a formal repository, and belief in the possibility to justify it by reference to other fundamental doctrines.

IV. Where Do We Go From Here? Let's Suspend the Belief System, Reject Apostasy, and Choose Our Own Path Forward

Once d'Aspremont has presented us with this belief system, he invites us to suspend it. We should set aside the inherent self-referentiality of the belief system, and approach the formation and functioning of fundamental doctrines without reference to the doctrine of sources or the doctrine of interpretation.²² This also means setting aside the imagined genealogy. As a result, we could make room in our understanding of international law for the multiple interventions that shaped the doctrine and that the belief system obscures. The making of fundamental doctrines would thus no longer be understood “as a state-centric law-making process”.²³ Rather, we would come to see the many sites of struggles where a multitude of international lawyers shape the modes of legal reasoning around fundamental international law doctrines. This process is one of “inventing tradition.”²⁴ State agents purposefully negotiating instruments with the aim of codifying international law into formal repositories are part of this process; “strong power structures, overarching agendas and hierarchies” play an important role.²⁵ Any actor “who is sufficiently well versed in the modes of legal reasoning recognised and practiced by international legal

²⁰ *Ibid* at 79.

²¹ See William Sewell, “The Concept(s) of Culture” in Victoria Bonnell, Lynn Hunt & Richard Biernacki, eds, *Beyond the Cultural Turn: New Directions in the Study of Society and Culture* (Berkeley and Los Angeles: University of California Press, 1999) 35; See also *ibid* (“the act of contesting dominant meanings itself implies a recognition of their centrality” at 56–57).

²² d'Aspremont, *Belief System*, *supra* note 6 at 104–15.

²³ *Ibid* at 106.

²⁴ *Ibid*.

²⁵ *Ibid* at 109.

professionals” nonetheless has the potential to also shape this process.²⁶ The functioning of fundamental doctrines would equally appear as a series of uncoordinated interventions “by a great variety of actors involved in international law discourse.”²⁷

Suspending the belief system entails a rupture with formation and interpretation-based self-referentiality. It constitutes an un-learning process. In turn, this allows to reveal the complexity of international law discourse; it streams from a chaotic combination of interventions, some purposeful and some not, by heterogeneous actors advancing disparate interests. This messiness creates, and continuously shapes, how international lawyers think and engage with international law in their argumentative practice. By exposing international law as a belief system, d’Aspremont hopes to make room in our minds for this complex reality. In the author’s words, “this book is aimed primarily at providing new reflective tools to professionals of international law with a view to allowing them to liberate themselves, albeit temporarily, from inherited patterns of legal thought they have been trained to reproduce and respond to.”²⁸

Once he has achieved this objective, d’Aspremont, however, refuses to direct us to a preferred outcome. On the contrary, he made “the choice to abstain from controlling the consequences of the suspension of the international belief system”;²⁹ this is what he calls his “consequentialist agnosticism.”³⁰ This does not mean that he refuses to consider potential consequences. Indeed, he acknowledges that his arguments “[come] with a risk”: “a consolidation of the current power structures and forms of violence.”³¹ On the other hand, he also affirms that his arguments can at the same time constitute “an unprecedented empowerment of reformers.”³² The tone and vocabulary d’Aspremont deploys in mentioning these two opposing scenarios in the epilogue give us some indication that he would prefer the latter over the former. In the introduction, the author gave an even clearer indication of his preference in the following sentence: “[t]he reformist empowerment promoted by the unlearning of the fundamental doctrines accompanying [the] suspension of the belief system is discussed in the Epilogue [...] of this book.”³³ Nonetheless, we must recognize that beyond such clues, he does not engage in a vigorous promotion of either scenario, and leaves this ambition “for later and for others.”³⁴ We can see here an attempt to guard the proposed image of international law against two kinds of critiques: if he advocated for a specific end goal, opponents of this particular end goal could easily discard the core of d’Aspremont’s work, approaching international law as a belief system, as an undesirable journey to take given that they do not adhere to the destination itself; on the flip coin, critics could reject the stated end goal if the guiding metaphor did not convince them. d’Aspremont’s affirmation that his arguments “[come] with no transformative urge”³⁵ therefore constitute an effective shield to protect the baby when the bathwater gets thrown out.

²⁶ *Ibid* at 108.

²⁷ *Ibid* at 113.

²⁸ *Ibid* at 117.

²⁹ *Ibid* at 117–18.

³⁰ *Ibid* at 118.

³¹ *Ibid*.

³² *Ibid*, see also *ibid* at 19.

³³ *Ibid* at 19.

³⁴ *Ibid* at 120.

³⁵ *Ibid*.

However, there remains one exception to d'Aspremont's consequentialist agnosticism. It lays in the explicit rejection of the possibility of apostasy, that is, a permanent "renunciation by international lawyers of all their current beliefs in terms of modes of legal reasoning."³⁶ This is because he deems this possibility neither possible, nor desirable. The author affirms that it would be impossible to fully distance oneself from the "cognitive biases created by the fundamental doctrines."³⁷ Moreover, complete rejection of the belief system would mean the collapse of the possibility of communication. There needs to be a set of commonly accepted truths for anyone to deploy any argument without an endless regression of justifications. The author thus argues that in spite of its flaws, getting rid of the belief system would terminate "international law as an argumentative practice."³⁸ Given that this belief system is what makes discourses about international law possible for advocates of change as well as for proponents of the status quo, neither should wish for its disappearance. This is why the author carefully opted for the term "suspending" rather than "terminating" the belief system.

In rejecting the possibility of apostasy, the author takes a stand regarding the desirability of international law generally. In guarding against what could terminate international law as an argumentative practice, he works from the unspoken assumption that international law ought to exist, and that we ought to be able to communicate about it. d'Aspremont does not address this premise, and does not tell us why international law is itself desirable or necessary. The presence of subtle clues revealing the author's preference for a reformist agenda that I exposed earlier further undermines the contention that he is indeed agnostic as to the consequences of his arguments. The author still relies on assumptions that are not ethically neutral. Using the idea and vocabulary of "agnosticism" may have been appealing to convince a wider readership, but it is nonetheless an inexact description of his position.

V. Closing Remarks On the Use of Vocabulary and the Pedagogical Potential of d'Aspremont's Approach

Reading d'Aspremont attentively is also important in order to properly apprehend the nature of his overall argument. The author carefully reminds his readers on numerous occasions that the belief system he proposes is an image rather than "an accurate depiction of the inner operation of the international legal discourse."³⁹ Indeed, the title of the book is "international law *as* a belief system," and not "international law is a belief system" [emphasis added]. Although this phrasing has become a hackneyed cliché for a publication title, the author here deploys it wisely since it accurately signals that he is putting forth a metaphor rather than a definition. The depiction of international law as a belief system is not definite; it is one of many possible accounts of how the fundamental tenets of international law are formed, function, and are deployed in legal discourse. The author not only acknowledges this, but goes as far as to state at the outset that his image does not have "any kind of rational or empirical superiority" on competing narratives.⁴⁰ This breeze of modesty is refreshing in academic writing.

³⁶ *Ibid* at 121.

³⁷ *Ibid* at 20.

³⁸ *Ibid*.

³⁹ *Ibid* at 117.

⁴⁰ *Ibid* at 3.

Another choice of terms throughout the monograph deserves some attention here. In the above review, unsurprisingly, I used the vocabulary found in the book to speak of the analytical framework developed there: for instance, “fundamental doctrines” and “formal repositories.” The book, however, is only the final product of the author’s research and crafting of arguments that had been in the making for some time. The terms the author chose in the monograph and the way he framed his arguments evolved until the final phases of his writing. Reading the book, I was struck by the difference in vocabulary between the written product and the way I had heard the author present the same arguments at a lecture at McGill’s Faculty of Law on 30 March 2016.⁴¹ At the time, he presented his project as focused on the “mysticism” of international legal argumentation, and spoke of “gospels” and “canons” in reference to the doctrines and authoritative texts. The book hardly features such religious vocabulary, with the exception of “apostasy.”⁴² One needs to search for a footnote in the first chapter to find the author’s admission to previously using such vocabulary in presenting his arguments.⁴³ The use of this very vocabulary triggered several questions after the lecture; Jean d’Aspremont had to clarify that he was not arguing that international legal argumentation was a theological exercise, and he distanced his claims from Pierre Schlag’s approach to “law as the continuation of God by other means.”⁴⁴ The gospel and canons analogies must have appeared appealing at first for the author, on the one hand as ways to instigate curiosity for his arguments, and on the other as a tribute to international law’s roots in *jus naturalis* and Christianity. However, it must have also become clear to the author that this way of presenting the arguments raised too many questions, directed the audience’s attention to the analogies rather than the substance of the arguments, and eventually obscured the meaning of the author’s claims. This was so, despite the numerous examples of theological vocabulary used for similar descriptive and analytical purposes in international legal scholarship. In responding to questions after the lecture, Jean d’Aspremont ‘confessed’ to moving away from the idea of mysticism in his description of the phenomena at play in international legal argumentation, while still describing the core dichotomy as one between gospels and canonical texts.⁴⁵ The costs of this “self-serving and purely opportunistic use of vocabulary”⁴⁶ proved to be too high in the end, and the author properly chose to sacrifice wordplays for clarity. This anecdote on the genealogy of the book’s vocabulary tells us something about how the ‘packaging’ of academic arguments matters, and also how the exercise of presenting arguments to peers while the writing of the monograph is still in progress is not (just) indulging in self-promotion, but actually contributes to refining the author’s thoughts and presentation thereof.

Lastly, this monograph not only represents a great eye-opening moment for international lawyers in terms of better understanding their own practice, it also constitutes an excellent tool for them to teach international legal argumentation. d’Aspremont claims that international lawyers experience the belief system at play, integrate it and perpetuate it. Arguably, most of this happens implicitly, through emulation. It can nonetheless happen explicitly. Those of us engaged in teaching the practice of international law in a variety of ways (delivering lectures, coaching moot court competitions, supervising externships, etc.)

⁴¹ Jean d’Aspremont, “Mysticism of International Legal Argumentation,” (30 March 2016) (lecture delivered at the Faculty of Law, McGill University, 30 March 2016). For a recording of the lecture, see Jean d’Aspremont, “Mysticism of International Legal Argumentation,” (30 March 2016), podcast online: *Inter Gentes Journal of International Law and Legal Pluralism* <www.soundcloud.com/intergentes/lecture-by-professor-jean-daspremont> and <www.intergentes.com/interview-with-jean-daspremont> [d’Aspremont “Mysticism”].

⁴² See d’Aspremont, *Belief System*, *supra* note 6 at 23–24.

⁴³ See *ibid* at 8, n 22.

⁴⁴ Pierre Schlag, “Law as the Continuation of God by Other Means” (1997) 85:2 *Cal L. Rev* 427.

⁴⁵ d’Aspremont, “Mysticism”, *supra* note 42 at 0h:49m12s–0h:51m:46s.

⁴⁶ *Ibid* at 0h:47m:45s.

can use the framework proposed by d'Aspremont to teach how to structure arguments in international law. This book "is demanding for its readership because it requires a simultaneous familiarity with theoretical debates and literacy in the doctrinal intricacies of the modes of legal reasoning associated with the fundamental doctrines of international law,"⁴⁷ as we can see from the many controversies and explanations relegated to footnotes. I would thus not recommend assigning this book as a reading for beginners in the field. Instructors can nonetheless seize the arguments they will find therein to present to their students how they need to use fundamental doctrines as rules, ground them in specific formal repositories, and rely on the doctrines of sources and interpretation to justify these and other fundamental doctrines in order to practice international legal argumentation. Here, I depart from the consequentialist agnosticism professed by Jean d'Aspremont, and strongly encourage international lawyers to use this revelatory book to better apprehend their own structures of thought and practice, through the suspension of the belief system, in order to better transmit them to the future generation of international lawyers.

⁴⁷ d'Aspremont, *Belief System*, *supra* note 6 at 122.

Social Media and Change in International Humanitarian Law Dynamics

*Rosine Faucher**

Abstract

On August 15, 2017, the International Criminal Court (ICC) issued an arrest warrant against Mahmoud Mustafa Busayf Al-Werfalli. The pre-trial Chamber founded most of its decision on social media-based evidence published by the Al-Saiqa Brigade's Media Centre. An unprecedented move. But what about new crisis maps that are put together during strife? Or the Kony2012 campaign? To be sure, social media already punctually influences the dynamics of IHL, requiring this phenomenon to be analyzed in greater depth. Do some particularities of the information available through social media have the potential to change the current state of IHL's monitoring, enforcement and prevention dynamics? This essay aims to analyze how the nature of information, and who can create and access it, can impact IHL. This piece is meant to start a dialogue on a topical issue and initiate a reflection on its ramifications rather than present a definitive analysis. Accordingly, this essay sheds light on how social media and IHL are intertwined and explores how social media has the potential to change IHL in profound ways. It is argued that the type of information accessible through social media has the potential to enhance the conflict prevention and monitoring capacities of different IHL actors, while also facilitating IHL enforcement. Finally, this piece provides recommendations to address the different challenges social media platforms present within the IHL context, including further research in specific areas.

French translation

Le 15 Août 2017, la Cour Pénale Internationale (CPI) émit un mandat d'arrestation contre Mahmoud Mustafa Busayf Al-Werfalli. Dans un geste sans précédent, la chambre préliminaire a fondé sa décision en partie sur des preuves provenant de médias sociaux publiées par le centre médiatique de la Brigade d'Al-Saiqa. Toutefois, qu'en est-il des nouvelles cartographies de crise créées pendant les conflits? De la campagne Kony2012? La manière dont les réseaux sociaux ont gagné une influence ponctuelle dans les dynamiques du droit humanitaire internationale (DHI) requière une analyse en profondeur de ce phénomène. Les particularités de l'information rendue accessible par les réseaux sociaux ont-elles le potentiel de changer l'état actuel du DHI en termes de surveillance, de mise en œuvre et de prévention? Cet essai tente d'analyser comment la nature de l'information, ainsi que qui la crée et y a accès, peut influencer le DHI. Au lieu de présenter une analyse définitive, le but de cet essai est d'entamer le dialogue sur cette question d'actualité et d'initier une réflexion quant à ses implications. Par conséquent, il est mis en lumière les entrecroisements entre le DHI et les réseaux sociaux, et exploré comment ces derniers ont le potentiel de changer le DHI de façon considérable. Cet article soutient que le type d'information accessible à travers les réseaux sociaux a le potentiel d'améliorer la prévention des conflits et les capacités d'observation des différents acteurs du DHI, tout en facilitant la mise en vigueur de ce dernier. Enfin, cet essai suggère des recommandations pour répondre aux défis posés par les réseaux sociaux dans le contexte du DHI, y compris en matière de poursuite de recherches futures sur des aspects spécifiques.

Spanish translation

El día 15 de agosto de 2017, la Corte Penal Internacional emitió una orden de detención contra Mahmoud Mustafa Busayf Al-Werfalli. La Sala de Cuestiones Preliminares se basó principalmente en una prueba obtenida mediante redes sociales. Esta fue publicada por el Centro de información mediática de la Brigada Al Saiqa. Sin duda se trata de una medida sin precedentes. ¿Pero qué se puede decir acerca de los mapas de crisis agrupados durante conflictos? ¿O sobre la campaña Kony2012? Lo cierto es que los medios y redes sociales ya tienen influencia sobre el Derecho internacional humanitario, lo que implica que este fenómeno sea analizado con mayor profundidad. O es que acaso ¿existen ciertas particularidades de la información disponible en redes sociales que tiene el potencial de alterar el estado actual de la supervisión, aplicación y prevención del Derecho internacional humanitario? Este ensayo tiene como objetivo analizar la naturaleza de la información con la que se cuenta, quién la puede crear y quién puede acceder a la misma, así como el impacto que esto tiene en el Derecho internacional humanitario. Asimismo, pretende constituir el inicio de un diálogo sobre temas de actualidad y dar lugar a reflexiones sobre sus ramificaciones en lugar de presentar un análisis definitivo. Por consiguiente, este ensayo arroja luz sobre cómo los medios sociales y el Derecho internacional humanitario interactúan, y explora si los medios sociales tienen o no el potencial de cambiar el Derecho internacional humanitario de manera profunda. En ese sentido, se sostiene que el tipo de información disponible en medios sociales tiene el potencial de mejorar la prevención de conflictos y la capacidad de supervisión por varios actores del Derecho internacional humanitario, a la vez que facilita su aplicación. Por último, este ensayo propone recomendaciones para hacer frente a los desafíos que presentan las plataformas de medios sociales en contextos de conflicto armado, incluyendo mayores investigaciones en campos específicos.

Introduction

I. IHL & Social Media

A. Social Media According to the Literature

B. Challenges

C. What about Traditional Media?

D. The Importance of Information for IHL

E. Conclusion

II. IHL Compliance & Social Media

A. Monitoring

1. Legal Framework

2. Social Media's Added Value to NGOs' Undertaking

3. Consequences of Social Media Use by NGOs in IHL Monitoring and Reporting Dynamics

B. Prevention

1. Legal Framework

2. Social Media's Added Value in the Prevention Context

3. Elevated Relevance of Prevention

C. Enforcement

1. IHL's Current Enforcement Framework and its Limits

2. Changing Evidentiary Dynamics

3. Social Media Related Evidentiary Hurdles

4. Solutions to Social Media Related Evidentiary Hurdles

D. Further Structural Change

1. Closing Remarks on Monitoring, Prevention and Enforcement

2. Further Procedural Shift to Address IHL's Paradox

III. Recommendations

Conclusion

A. Limits

B. Concluding Remarks

Introduction

Social media is a burgeoning phenomenon. Facebook, Twitter and YouTube are the main user-generated platforms that come to mind, but many others are being created every day. Social media is ubiquitous! It is part of most people's lives and has profoundly altered many different practices, like business. International Humanitarian Law (IHL) dynamics do not seem isolated from this phenomenon. Indeed, social media is used more and more by IHL actors across the board. For example, armed groups like the Islamic State of Iraq and Syria (ISIS) continue to recruit Canadians on social media in 2017.¹ It is alleged that 46,000 Twitter accounts are used to support ISIS.² And although social media platforms do have anti-terror policies and preventive mechanisms, terror-related content can still be found today on Twitter, Facebook, and the like. Some might also remember the criticized *Kony 2012* social media campaign by the Non-Governmental Organisation (NGO) Invisible Children, which demanded the arrest of Joseph Kony, leader of the Lord's Resistance Army, for having committed war crimes.³

On August 15, 2017, the International Criminal Court (ICC) issued an arrest warrant against Mahmoud Mustafa Busayf Al-Werfalli. Al-Werfalli is a Libyan Major in the Al-Saiqa Brigade,⁴ an elite force which was controlled by the Libyan Ministry of Defense after Qaddafi's fall.⁵ The arrest warrant was issued because the ICC considered there was reasonable ground to believe that Al-Werfalli was criminally responsible for charges of murder as war crimes in the context of the ongoing armed conflict on Libyan territory under article 8(2)(c)(i) and 25(3)(a) and (b) of the Rome Statute.⁶ Much of the information that the pre-trial Chamber of the ICC relied on when issuing an arrest warrant for Al-Werfalli was social media content published by the Al-Saiqa Brigade's Media Centre.⁷

In one video posted on Facebook on June 3, 2016, Mr. Al-Werfalli shoots a hooded person several times until the person falls on the ground, dead.⁸ That is only one of the events on which the ICC relied to issue the warrant, as six other videos were analyzed and used, all of which were posted on social media by the Brigade.⁹

This example shows how social media already punctually affects the dynamics of IHL, which is why this phenomenon should be analyzed more systematically and in greater depth. Do some particularities of the information available through social media have the

* Rosine Faucher is a research associate with the Law, Governance & Society Lab, where she works on human rights and climate governance related projects.

¹ Nicole Bogart, "ISIS is still trying to recruit Canadians on social media, CSIS warns", *Global News* (2 March 2017), online: <<https://globalnews.ca/news/3280939/isis-recruiting-canadians-online-csis-warns/>>.

² *Ibid.*

³ Kate Dailey, "Kony2012: The rise of online campaigning", *BBC News Magazine* (12 March 2012), online: <<https://www.bbc.com/news/magazine-17306118>>.

⁴ International Criminal Court, "Case Information Sheet, Situation in Libya: The Prosecutor v. Mahmoud Mustafa Busayf Al-Werfalli ICC-01/11-01/17" (July 2018), online: <<https://www.icc-cpi.int/libya/al-werfalli/Documents/al-werfalliEng.pdf>> [ICC Info Al-Werfalli].

⁵ Francesco Finucci, "Libya: military actors and militias" (2013), *Global Security*, online: <https://www.globalsecurity.org/military/library/report/2013/libyan-militias_finucci.pdf>.

⁶ ICC Info Al-Werfalli, *supra* note 4.

⁷ *The Prosecutor v. Mahmoud Mustafa Busayf Al-Werfalli*, ICC-01/11-01/17, Warrant of Arrest (15 August 2017) at para 3 (International Criminal Court), online: <www.icc-cpi.int/CourtRecords/CR2017_05031.PDF>.

⁸ *Ibid* at para 11.

⁹ *Ibid* at paras 11–22.

potential to change the current state of IHL's monitoring, enforcement and prevention dynamics? Through this essay, I will analyze how the nature of the information, and who can create and access it, can impact the application of IHL and its focus. The nature of this piece is theoretical. Social media being a recent phenomenon, this paper has a descriptive undertone and requires some speculation. For these reasons, the scope is deliberately restricted to analyzing the potential salutary effects of social media on IHL dynamics. The following issues are not addressed here but deserve further research: the nature of social media in the context of means and methods of warfare and the uses and pitfalls of social media in contemporary conflicts.

This piece is meant to start a dialogue on a topical issue and initiate a reflection on its ramifications rather than present a definitive analysis. Accordingly, I argue that the type of information accessible through social media has the potential to enhance the conflict prevention and monitoring capacities of different IHL actors, while also facilitating IHL enforcement. This, in turn, can have a salutary effect on IHL compliance overall, while also increasing justice and bringing IHL closer to its beneficiaries.¹⁰

This paper is divided in the following form. Section II examines the literature on social media, while also analyzing how social media and IHL are intertwined. Section III explores how social media has the potential to change IHL compliance dynamics by altering monitoring, prevention and enforcement of IHL obligations and their violation. Finally, section IV looks into general recommendations that could help address the different challenges social media platforms present within the IHL context, and section V concludes on the topics discussed.

I. IHL & Social Media

In this section, I attempt to explore the general benefits and challenges of social media as a new platform for gathering information and as being different in nature from traditional media. I also explain the importance of information in the context of IHL.

A. Social Media According to the Literature

Social media is a recent phenomenon. Nevertheless, such information platforms have become ubiquitous. Information sources are generally evaluated by the content they render accessible (what) as well as who can access it (who).¹¹ First, social media is unique in terms of who can access and provide information through its channels. Indeed, social media tends to be categorized as a non-conventional tool enabling to reach a large amount of people¹² and disseminating user-generated content.¹³ While traditional media is often seen as

¹⁰ Note that while IHL has different beneficiaries, i.e. combatant, civilians, armed forces, etc., this paper focuses on the repercussions that changes within IHL have on individuals, more so than on armed forces.

¹¹ Search for Common Ground, "Communication for Peacebuilding: Practices, Trends and Challenges" (2014) at 10-11, online: <<https://www.sfcg.org/wp-content/uploads/2014/02/communication-for-peacebuilding-practices-trends-challenges.pdf>> [Search for Common Ground].

¹² Sarah Költzow, "Monitoring and Evaluation of Peacebuilding: The Role of New Media" *Geneva Peace Building Platform* (September 2013) at 10, online: <<http://www.gppplatform.ch/sites/default/files/PP%2009%20-%20Monitoring%20and%20Evaluation%20of%20Peacebuilding%20The%20Role%20of%20New%20Media%20-%20Sep%202013.pdf>> [Költzow].

¹³ Stacey B Steinberg, "#Advocacy: Social Media Activism's Power to Transform Law" (2016) 105:3 *Kentucky LJ* 413 at 432.

more linear and top-down,¹⁴ social media is presented as a bottom-up tool allowing democratization of information access.¹⁵ This is probably why some qualify social media as the “people’s broadcaster.”¹⁶ More generally, some argue that social media provides a “ground truth” not otherwise available.¹⁷ This favours community engagement, allowing certain groups, to express themselves and access information.¹⁸

Second, the information provided through social media is generated and published in real time. It is thus more rapidly accessible.¹⁹ Geo-referencing, and direct-reporting are also options that social media offers.²⁰ These characteristics are said to increase the accuracy of information available on social media.²¹ Additionally, social media is an open source technology. Hence, everything is accessible for free.²² This particular aspect has been recognized to enable information to reach a “larger number of beneficiaries more frequently than through conventional means.”²³

B. Challenges

As presented above, social media seems to be a tool which can solve many information access problems. Yet social media also comes with dangers and challenges, which are very important to acknowledge in order to favour an adequate use of this tool in the context of IHL. To simplify what has been extensively discussed by the literature, I address these challenges using three categories. First, social media faces technical challenges. Indeed, the issue of unprecedented volume, or what some qualify as an “overflow” of information, makes it harder to select adequate information.²⁴ Additionally, videos, images, and other textual supports sometimes face quality issues, which transpose into reliability concerns.²⁵

¹⁴ Roger Bronson Rozario, “New Media and the Traditional Media Platforms: Introspection on the Differences in Technical and Ideological Factors and Audience-integration Patterns between New Media and Traditional Media” (2013) 12:3 *Artha J Soc Sci* 43 at 52; Andrea Ceron, “Internet, News, and Political Trust: The Difference Between Social Media and Online Media Outlets” (2015) 20 *J Computer-Mediated Com* 487 at 489, 492 [Rozario].

¹⁵ Search for Common Ground, *supra* note 11 at 6.

¹⁶ Sarah Joseph, “Social Media and Promotion of International Law” (2015) 109:1 *Am Soc’y Intl L* 249 at 253.

¹⁷ Anand Varghese, “Social Media Reporting and the Syrian Civil War” (7 June 2013) United States Institute for Peace at 2, online: <www.usip.org/sites/default/files/PB-151.pdf>.

¹⁸ Timo Lüge, International Federation of the Red Cross and Red Crescent Societies, *How to Use Social Media to Better Engage People affected by Crises: a brief guide for those using social media in humanitarian organisations* (September 2017) at 1, online: <www.icrc.org/fr/download/file/57272/icrc-ifrc-ocha-social-media-guide.pdf>.

¹⁹ Anne Herzberg & Gerald M Steinberg, “IHL 2.0: Is There a Role for Social Media in Monitoring and Enforcement?” (2012) 45:3 *Isr L Rev* 45:3 at 505 [Herzberg & Steinberg]; see Költzow, *supra* note 12 at 9–10.

²⁰ Költzow, *supra* note 12 at 10.

²¹ *Ibid.*

²² Jason Cone, “The Promise of Social Media for Humanitarian Action?” *Program on Humanitarian Policy and Conflict Research* (10 May 2012), online: <<https://reliefweb.int/report/world/promise-social-media-humanitarian-action>>.

²³ Költzow, *supra* note 12 at 10.

²⁴ *Ibid* at 12.

²⁵ *Ibid.*

Second, practitioners as well as academics highlight the bias emanating from information on social media.²⁶ Here, “bias” does not refer to the phenomenon of fake news but rather to the lenses through which one perceives events and which, potentially unconsciously, influences one’s depiction of such events. Indeed, the lack of context, characteristic of information sourced on social media,²⁷ and caused by Twitter’s character limit for example, does not necessarily allow the reader or viewer to understand which narratives are vehiculated through the content. Yet, everyone has access to social media platforms. It has been recognized that social media can thus misinform²⁸ as reports can easily be fabricated and/or falsified.²⁹ More strikingly, social media has been used by dissident groups³⁰ to intimidate, recruit (as in the case of ISIS), incite terror and promote narratives of hate.³¹ The viral nature of social media platforms creates the potential for misinformation to be broadcast widely, which is concerning since many still equate the wide distribution of information with authenticity.

Third, social media poses ethical, privacy, and security problems. In the context of IHL, confidentiality issues are particularly at stake because of how they affect security. For example, a video or image aimed to be published in a small circle can become viral in seconds and go through a “crisis of visibility,” thus exposing the identity of victims and third parties.³² From a judicial process standpoint, this has been viewed as potentially problematic as it can jeopardize witness safety.³³ Moreover, the publication process on social media platforms can allow the information provider to remain anonymous, which becomes an evidentiary burden in a judicial context.³⁴ Throughout this paper, I will attempt to address the many concerns outlined above and suggest solutions (see in particular section III.3).

C. What about Traditional Media?

Despite the challenges of social media outlined above, it is important to evaluate its use within the context of IHL in light of its counterpart, traditional media. Although this type of information may be more one-sided, traditional media sources usually employ a

²⁶ To further read about such biases and where they come from, see for example, Cass R Sunstein, *#Republic: Divided Democracy in the Age of Social Media* (Princeton: Princeton University Press, 2017).

²⁷ Ellie Mae O’Hagan, “Does social media really bring us closer to the reality of conflict?” *The Guardian* (10 March 2014), online: <<https://www.theguardian.com/commentisfree/2014/mar/10/social-media-bring-us-closer-reality-conflict-exploited>>; Herzberg & Steinberg, *supra* note 19 at 513.

²⁸ O’Hagan, *supra* note 27; Herzberg & Steinberg, *supra* note 19 at 511.

²⁹ Herzberg & Steinberg, *supra* note 19 at 515; Malachy Browne, Liam Stack & Mohammed Ziyadah, “Streets to Screens: conflict, social media and the news” (2015) 18:11 *Info Com & Soc’y* 1339 at 1343 [Browne et al].

³⁰ David Heitner, “Civilian Social Media Activists in the Arab Spring and Beyond: can they ever lose their civilian protections?” (2014) 39:3 *Brooklyn J Intl Law* 1207 at 1208.

³¹ Herzberg & Steinberg, *supra* note 19 at 519.

³² Sam Gregory, “Ubiquitous Witnesses: who creates the evidence and the live(d) experience of human rights violations?” (2015) 18:11 *Info Com & Soc’y* 1378 at 1382.

³³ Herzberg & Steinberg, *supra* note 19 at 531.

³⁴ *Ibid* at 514, 530.

quality-control system.³⁵ This means that verification and validation processes should have been performed before the publication of information. On the other hand, the source of information available on social media is, by nature, harder to trace.³⁶ Thus, the original source as well as its quality are more easily identified when information comes from traditional media.

However, the reality is that social media becomes the only option when traditional media has been unable, or reluctant, to cover conflict zones.³⁷ Indeed, traditional media has refused to cover certain events with their own personnel because of the potential risk of exposure for journalists and eyewitnesses.³⁸ For example, “Syria has been the most dangerous war for journalists and for citizen journalists and activists.”³⁹ This leaves social media as one of the only tools to cover the conflict without facing these on-the-ground dangers.⁴⁰ Thus, it seems that social media has started to fill the informational vacuum created when traditional media cannot access a conflict zone for security or interest reasons.

Moreover, some NGOs have used social media to fill this informational vacuum. For example, the *Voices Feeds* tried to move to conflict zones within Libya in order to ensure that information about people and conditions continued to be accessible.⁴¹ Such initiative circumvented the absence of traditional media on the ground where there were internet blackouts, while providing ground level information to NATO.⁴² As presented above (see section II.a), social media is an open source of information all can use. This allows more IHL beneficiaries to instantaneously access “ground truth” which would otherwise not be broadcast as quickly, if at all. Moreover, social media may present the potential for increasing the individual’s role within IHL dynamics.⁴³

D. The Importance of Information for IHL

It is in light of the potential uses highlighted above, and the new role social media has played filling current traditional media gaps on the ground, that one can see the potential for such a tool in the IHL context. However, it is important to note that this tool’s value is simply derived from the information that it renders accessible (what) as well as whom it

³⁵ *Ibid* at 511.

³⁶ Klas Backholm et al, “Crises, Rumours and Reposts: Journalists’ Social Media Content Gathering and Verification Practices in Breaking News Situations” (2017) 5:2 *Media & Com* 67 at 68.

³⁷ Gregory, *supra* note 32 at 1380.

³⁸ See Browne et al, *supra* note 29 at 1341.

³⁹ *Ibid* at 1342.

⁴⁰ *Ibid* at 1344.

⁴¹ Steve Stottlemire & Sonia Stottlemire, “Crisis Mapping Intelligence Information During the Libyan Civil War: An Exploratory Case Study” (2012) 4:3–4 *Pol’y & Internet* 24 at 31 [Stottlemire].

⁴² *Ibid* at 27–28.

⁴³ Some have argued for increasing the individuals’ role within the IHL system and the need for IHL to re-center itself around its beneficiaries. See for example, Paolo Benvenuti & Giulio Bartolini, “Is there a need for new international humanitarian law implementation mechanisms?” chapter 29 in Robert Kolb & Gloria Gaggioli, eds, *Research Handbook on Human Rights and Humanitarian Law* (Cheltenham: Elgar, 2013) 590 at 611.

renders it accessible to (who). More importantly, information is a building block of IHL's implementation and of State compliance with IHL.

IHL aims to limit the effects of armed conflict for humanitarian reasons. It “aims to protect persons who are not or are no longer taking part in hostilities,” i.e. the sick, the wounded, prisoners and civilians, and it defines the rights and obligations of the parties to a conflict, be they State or non-State affiliated armed forces, in the conduct of hostilities.⁴⁴ Hence, one of IHL's purposes is to protect its beneficiaries⁴⁵ and information has an enormous role to play to ensure that protected persons remain so throughout conflicts.

First, information is crucial for military purposes. Indeed, the amount and quality of information is essential for commanders during the orchestration of war. Situational awareness, i.e. the depth of understanding of a situation, is necessary for military personnel to make proper decisions; ones respecting the IHL principles of proportionality, necessity and distinction.⁴⁶ An accurate understanding of the situation also greatly influences tactical success.⁴⁷ Thus, more, better and quicker information is essential for parties of armed hostilities to respect their IHL obligations. The Libya Crisis Map is a good example of how social media has been beneficial in enhancing information in a way conducive to respecting IHL. Indeed, maps constructed from on-the-ground Tweets and other social media information were used to inform some of NATO's missions, like the no-fly zone (see section III.2b for more details).

Second, information is also necessary for IHL actors to monitor and enforce respect of IHL obligations (see section III.1 & III.3). Indeed, social media derived information can be an enforcement and witness tool.⁴⁸ For example, as discussed in section I, social media content published by the Al-Saiqa Brigade's Media Centre constituted an essential element of the ICC Pre-Trial Chamber's decision to issue an arrest warrant against elite force Major Al-Werfalli. Additionally, considerations of public interests have even convinced some that divulging information is crucial for enforcement purposes. To some, this justifies ignoring certain confidentiality privileges in order to reach a just result for the international community and the victims of the offence.⁴⁹

E. Conclusion

⁴⁴ Russey D Sumariwalla, “Making a Difference: The Role of International NGOs in the Evolution of International Human Rights and Humanitarian Law (HRHL)” (2011) 19:1 Willamette J of Intl L & Dispute Res 287 at 297.

⁴⁵ Jann K Kleffner, “Improving Compliance with International Humanitarian Law Through the Establishment of an Individual Complaints Procedure” (2002) 15:1 Leiden J of Intl L 237 at 238.

⁴⁶ See Geoffrey Corn & James A Schoettler Jr, “Targeting and Civilian Risk Mitigation: The Essential Role of Precautionary Measures” (2015) 22:3:4 Mil L Rev 785 at 801 [Corn & Schoettler]; Browne et al, *supra* note 29 at 1341.

⁴⁷ See Corn & Schoettler, *supra* note 46 at 806.

⁴⁸ Rozario, *supra* note 14 at 250.

⁴⁹ *Prosecutor v Blagoje Simić, Milan Simić, Miroslav Tadić, Stevan Todorović and Simo Zarić*, IT-95-9, Separate Opinion of Judge David Hunt on Motion by Todorović for Order Requesting Assistance of the International Committee of the Red Cross (7 June 2000) (International Criminal Tribunal for the Former Yugoslavia); see also Emily Ann Berman, “In Pursuit of Accountability: The Red Cross, War Correspondents, and Evidentiary Privileges in International Criminal Tribunals” (2005) 80:1 NYUL Rev 241.

Through this section, I attempted to demonstrate the importance information holds for IHL purposes and how the type of information accessible through social media has, despite such platforms' challenges, proven useful in the context of conflicts. Indeed, existing studies show that digital communication channels can be "critical before, during and after natural disasters, crises and armed conflicts, to save lives and reduce suffering."⁵⁰ It is with this perspective of social media that I will now evaluate its potential for altering various IHL dynamics.

II. IHL Compliance & Social Media

There is a clear consensus across the literature that compliance is one of IHL's most important challenges.⁵¹ It is difficult for States to "abide by their legal obligations,"⁵² thereby leaving existing IHL enforcement mechanisms greatly unused.⁵³ This is so partly because of the lack of States' will to abide by, and enforce upon their counterparts, IHL obligations.⁵⁴ Indeed, the history of IHL shows that States have always refused to put in place "any form of binding supervision of their conduct in armed conflicts."⁵⁵ Conflicts are usually intrinsically tied to sovereignty issues, and States argue that most enforcement mechanisms hinder their sovereignty in some way or another. Although conceptually understandable, this reluctance has fed one of IHL's main paradoxes: that IHL is a state-centric system, which depends on the willingness of States to work,⁵⁶ while it is meant to protect beneficiary individuals like civilians and conflict victims who have no say in the functioning of the framework.

Considering the lack of State compliance with IHL, NGOs have increasingly accepted to be key players in keeping States accountable in order to provide protection to IHL's beneficiaries. Indeed, the International Committee of the Red Cross (ICRC) is qualified by many as "the guardian of IHL," as it actively participates to monitoring compliance, developing the legal framework, and disseminating the norms of IHL.⁵⁷ Although States and armed forces remain the guarantors of IHL because the respect of the law depends on their behaviour,⁵⁸ the literature demonstrates large acceptance of the increasing responsibility of NGOs in IHL monitoring and enforcement efforts.⁵⁹

⁵⁰ Lüge, *supra* note 18 at ii.

⁵¹ Corn & Schoettler, *supra* note 46 at 237.

⁵² "International Humanitarian Law and the Challenges of Contemporary Armed Conflicts" (28th International Conference of the Red Cross and Red Crescent delivered in Geneva, 2–6 December 2003), 03/IC/09 at 20 [ICRC 28th International Conference].

⁵³ *Ibid* at 22.

⁵⁴ *Ibid* at 22, 25; see also Sean Aday, "Social Media, Diplomacy, and the Responsibility to Protect" (17 October 2012), *Take Five*, online: <<https://takefiveblog.org/2012/10/17/social-media-diplomacy-and-the-responsibility-to-protect/>>.

⁵⁵ Toni Pfanner, "Various Mechanisms and Approaches for Implementing International Humanitarian Law and Protecting and Assisting War Victims" (2009) 91:874 *Intl Rev Red Cross* 279 at 307.

⁵⁶ Sumariwalla, *supra* note 44 at 617.

⁵⁷ Pfanner, *supra* note 55 at 291; Kleffner *supra* note 45 at 298.

⁵⁸ Pfanner, *supra* note 55 at 291.

⁵⁹ Sumariwalla, *supra* note 44 at 600.

This participation of civil society has been salutary for IHL as NGOs have proven adept at documenting IHL violations.⁶⁰ NGOs can also provide a point of pressure on governments to incite change.⁶¹ It is thus increasingly recognized that NGOs often fill gaps left by States and by international organizations that are torn between different political views in the context of conflicts.⁶² In light of the above, it would be a mistake to think that the lack of political will inhibit the application of IHL. Rather, NGOs' increasing use of social media, which supports their own rising role, has the potential, I argue, to positively change the IHL compliance dynamics of monitoring and prevention. Moreover, I argue that the information available through social media can facilitate IHL enforcement.

A. Monitoring

1. Legal Framework

States have legal obligations to monitor and report IHL violations, derived from international conventions as well as customary law. Here is a non-exhaustive list. Third party States, as well as the ICRC, have monitoring obligations and functions.⁶³ In the event of a conflict, Protecting Powers and their delegates, appointed for that particular conflict, should be able to go wherever protected persons are in order to monitor the conditions in which such persons are kept.⁶⁴ Moreover, High Contracting Parties or parties to the conflict have the obligation to require from their military commanders reports of any breaches of the Geneva Conventions or of the Additional Protocols.⁶⁵

Customary monitoring obligations also exist.⁶⁶ For example, it is required in certain contexts to identify IHL violation situations without delay, monitor such situations and rapidly emit recommendations.⁶⁷ However, some argue that the monitoring and reporting mechanisms outlined above have proven unused or ineffective.⁶⁸ For this reason, I explore how NGOs, with social media as a new available tool, have the potential to fill this gap.

2. Social Media's Added Value to NGOs' Undertaking

⁶⁰ Gerald M Steinberg & Anne Herzberg, "NGO Fact-Finding for IHL Enforcement: In Search of a New Model" (2018) 51:2 Israel LR 261 at 263.

⁶¹ Kleffner, *supra* note 45 at 602.

⁶² Sumariwalla, *supra* note 44 at 327; ICRC 28th International Conference, *supra* note 52 at 57.

⁶³ Sumariwalla, *supra* note 44 at 593-594.

⁶⁴ Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287 art 143 (entered into force 21 October 1950) [GCIV].

⁶⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3 arts 87(1), 87(3) (entered into force 7 December 1978) [API].

⁶⁶ See generally Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (Cambridge: Cambridge University Press, 2005), online: <<https://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf>>; see also Elizabeth Wilmschurst & Susan Breau, eds, *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Cambridge: Cambridge University Press, 2007).

⁶⁷ EC, Updated European Guidelines on promoting compliance with international humanitarian law, [2009] OJ, C 303/12, art 15(a).

⁶⁸ See e.g. Sumariwalla, *supra* note 44 at 287.

Social media can be used as a tool to aggregate or disseminate information, making monitoring and analysis easier.⁶⁹ Indeed, the nature of the information available on social media, i.e. open, decentralized, geographic, and in real time, enhances the monitoring and reporting capacities of NGOs.⁷⁰ First, social media platforms facilitate conflict monitoring and documenting as many users, who happen to be in places of conflicts, regularly and profusely contribute information to these open-source platforms, without NGOs necessarily needing to be on the ground.⁷¹

Second, social media provides a venue for NGOs to expose IHL violations at very low costs, as information can be published in real time, and can be disseminated immediately to a previously unthinkable number of people. This IHL violation publicity mechanism is a leverage tool which can increase NGOs' pressure on States who are violating their obligations or who are supporting others violating their obligations.⁷² It is, however, important to note this does not increase NGOs' capacity to pressure States that are already indifferent to their messages. Rather, social media platforms simply provide another means for NGOs to shame illegal practices undertaken by parties during a conflict. A few NGOs are known to contribute to IHL monitoring efforts in this way, like Uhsahidi, and its derivatives Crowdmap and Swift River.⁷³

3. Consequences of Social Media Use by NGOs in IHL Monitoring and Reporting Dynamics

As presented above, traditional monitoring and reporting mechanisms are mostly ineffective, which partially explains why compliance is an important IHL concern. However, the type of information available through social media has supported NGOs' active initiative to fill the gaps left by States and international organizations by increasing their monitoring and reporting capacity (see section III.1.b). This can result in salutary changes in IHL compliance mechanisms. First, open-source, geo-referenced, real-time information allows for greater scrutiny of state behaviour during armed conflicts, as more, detailed, and rapidly acquired information is available.⁷⁴ Indeed, this type information makes States' actions more perceptible than before, as it is all recorded, be it through tweets, texts, Facebook or YouTube videos.⁷⁵

⁶⁹ See also Lüge, *supra* note 18 at 6.

⁷⁰ See Search for Common Ground, *supra* note 11 at 17–18.

⁷¹ Herzberg & Steinberg, *supra* note 19 at 505, 507; see also Paul J. Zwier, "Social Media and Conflict Mapping in Syria: Implications for Peacemaking, International Criminal Prosecutions and for TRC Processes" (2015) 30:2 Emory Intl L Rev 169 at 192, 196.

⁷² Herzberg & Steinberg, *supra* note 19 at 504, 506.

⁷³ Search for Common Ground, *supra* note 11 at 15.

⁷⁴ Herzberg & Steinberg, *supra* note 19 at 494.

⁷⁵ Similar arguments are made in relation to the use of new technologies by military forces, increasing the accountability of said forces because new technologies not only record information about the enemy, but also about the armed forces using such technologies. See Jack M. Beard, "Law and War in the Virtual Era" (2009) 103 Am J Intl L 409 at 438.

Second, the amount and type of information available through social media makes it possible to increasingly keep IHL actors accountable.⁷⁶ This is so because the actions of States and armed groups are monitored in more detail, but also because the information that is published by NGOs (retrieved from social media, and/or published, amongst other places, on social media) can greatly impact public opinion, another strong accountability mechanism to which NGOs can resort.⁷⁷ Considering the above, the stakes of ignoring one's own violation or of contributing to another state's violation can arguably become higher faster. Thus, social media creates and enhances the effectiveness of different points of pressure, which can impact IHL compliance of States and armed groups, as more information can be used to engage their responsibility.

To conclude, the information that can be acquired through social media, and how it can affect public opinion, has increased NGOs' capacity to scrutinize and hold accountable States and groups involved in armed conflicts. Social media has thus proven to be a salutary tool in helping NGOs fill monitoring and reporting gaps within the current IHL dynamics.

B. Prevention

1. Legal Framework

In 2005, the World Summit Outcome United Nations (UN) General Assembly Resolution put in place the responsibility to protect (R2P).⁷⁸ The R2P was meant to question, or rather reconceptualize, sovereignty in order to allow the international community to intervene so as to protect, and assist in a timely manner, population or groups of States that failed to duly protect their population.⁷⁹ Unfortunately, this prevention doctrine is still controversial today, as certain States resist the liberty it provides for the international community to intervene. However, there exists a more general obligation, accepted by all High Contracting Parties, and dictated by Common Article 1 of the Geneva Conventions, to respect and ensure respect for these conventions in all circumstances.⁸⁰

Common Article 1 has been argued by many as an alternative prevention obligation to R2P. Said obligation has positive and negative aspects. First, High Contracting Parties have the obligation not to help other parties to violate their IHL obligations. If a Contracting Party aids or assists another in his violation, such State will be equally responsible as the perpetrator State.⁸¹ Furthermore, Common Article 1 suggests a positive obligation: High Contracting Parties are required to take action against violators and use

⁷⁶ Brigitte Rohwerder, *Social Media and Conflict Management in Post-Conflict and Fragile Contexts*, January 2015, GSDRC Helpdesk Research Report 1184, online: Governance and Social Development Resource Centre <www.gsdrc.org/docs/open/HDQ1184.pdf> at 1.

⁷⁷ Herzberg & Steinberg, *supra* note 19 at 506.

⁷⁸ *Resolution 60/1 on the 2005 World Summit Outcome*, A/Res/60/1, UNGAOR, 60th Sess, Supp No 49, UN Doc (2005).

⁷⁹ Kleffner, *supra* note 45 at 305.

⁸⁰ ICRC 28th International Conference, *supra* note 53 at 21.

⁸¹ Draft Articles on Responsibility of States for Internationally Wrongful Acts, 53rd Sess, International Law Commission, UN Doc A/56/10, art 16 (2011).

their influence to make the violations stop.⁸² This interpretation of Common Article 1 is now also crystallized in customary law.⁸³ Despite the existence of such an obligation, the IHL prevention framework is rather lacking.

The creation of R2P was an attempt to recognize the importance of preventing egregious atrocities, at the expense of sovereignty concerns.⁸⁴ The *UN Office on Genocide Prevention and the Responsibility to Protect* was set up around the same time at the R2P was adopted, with similar intentions.⁸⁵ The *UN Office*, amongst other things, has put together guidelines entitled “Framework of Analysis for Atrocity Crimes: A tool for prevention” in order to readily recognize common and specific risk factors of potential genocide climates.⁸⁶ This UN initiative has also tried to provide early-warning mechanisms and enhance prevention capacity. Both the R2P and the creation of the *UN Office* demonstrate that despite States not wanting to abandon their sovereignty and adopt formal binding mechanisms, there is still a consensus that conflict prevention is important, especially when egregious atrocities could be committed. This is also demonstrated by a series of UN General Assembly resolutions that have been adopted through the years.⁸⁷ Considering the above, I will now evaluate how social media has been salutary for IHL prevention dynamics in light of the lacking framework outlined above.

2. Social Media’s Added Value in the Prevention Context

Prevention is enhanced when good warning systems are in place; ones that are close to the ground, field-based, involve local NGOs and empower local stakeholders directly.⁸⁸ The more information is available, the more a warning system is accurate.⁸⁹ Although authors voice concerns as to the quality of the information available through social media (see section II.c), different initiatives, like Ushahidi’s Swift River, attempt to analyze information in terms of its reliability and relevance in order to palliate this concern.⁹⁰ These

⁸² ICRC 28th International Conference, *supra* note 53 at 22.

⁸³ ICRC, “Rule 161. International Cooperation in Criminal Proceedings” online: Customary IHL Database <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter44_rule161>

⁸⁴ Pfanner, *supra* note 55.

⁸⁵ United Nations Office on Genocide Prevention and the Responsibility to Protect, “Our Mandate” online: United Nations <www.un.org/en/genocideprevention/office-mandate.html>.

⁸⁶ United Nations, “Framework of Analysis for Atrocity Crimes: A tool for prevention” (2014), online: UN Office on Genocide Prevention and the Responsibility to Protect <www.un.org/en/genocideprevention/documents/publications-and-resources/Frameworkof%20of%20Analysis%20for%20Atrocity%20Crimes_EN.pdf>.

⁸⁷ See for e.g. *Resolution 1366 on Early Warning and the Prevention of Armed Conflict*, S/RES/1366, UNSC, 4360th meeting, UN Doc 01-52448 (E) (2001) 1; *Resolution 2150 on the Occasion of the 20th Anniversary of the Rwandan Genocide*, S/RES/2150, UNSC, 7155th meeting, UN Doc 14-30151 (E) (2014) 1; *Resolution 22/22 on the Prevention of Genocide*, A/HRC/RES/22/22, UNGA, 22nd Sess, UN Doc GE.13-12981 (2014) 1; *Resolution 28/34 on the Prevention of Genocide*, A/HRC/RES/28/34, UNGA, 28th Sess, UN Doc GE.15-07172 (E) (2015) 1; *Resolution 33/19 on Human Rights and Transitional Justice*, A/HRC/RES/33/19, UNGA, 33rd Sess, UN Doc GE.16-17223 (E) (2016) 1; *Resolution 69/323 on the International Day of Commemoration and Dignity of the Victims of the Crime of Genocide and of the Prevention of This Crime*, A/RES/69/323, UNGA, 69th Sess, UN Doc 15-15498 (E) (2015) 1; *Resolution 7/25 on the Prevention of Genocide*, A/HRC/RES/7/25, HRC, 41st Meeting (2008).

⁸⁸ Search for Common Ground, *supra* note 11 at 14.

⁸⁹ Rohwerder, *supra* note 76 at 2.

⁹⁰ Swift River was put in place to provide a tool during the first moments of crisis to civilians and rescuers. This platform is designed to aggregate, structure and provide an application programming interface for crisis data, e.g. Tweets of an attack, explosion, etc. See Erik Hersman, “Explaining Swift River” Ushahidi (9 April 2019), online: <www.ushahidi.com/blog/2009/04/09/explaining-swift-river>.

tools allow NGOs to identify trends of IHL violations within the information available through social media.⁹¹ Furthermore, other tools analyzing social media information trends allow NGOs to identify potential impacts of IHL violations and specific community vulnerabilities,⁹² such as Ushahidi⁹³ and ICT4Peace.⁹⁴

Thanks to these information analysis tools, crisis and crowd mapping initiatives have drastically increased. For example, the Libya Crisis Map was put in place at the request of the UN, in order to keep the international organization informed about the conflict.⁹⁵ This is salutary for IHL prevention as such maps are early-warning systems themselves.⁹⁶ These initiatives can be used for monitoring purposes, to scrutinize and hold States accountable (see section III.1). Yet more importantly, crisis and crowd mapping can facilitate the coordination of international or humanitarian intervention if States commit IHL violations.⁹⁷ Hence, early-warning system tools, like crowd mapping, which are composed in great part from information available through social media, can change the dynamics of IHL violation prevention. Indeed, they make information readily available in an organized way for IHL actors to be aware, in real time, of existing tensions and instances of violence. This in turn increases the NGOs' and the international community's knowledge and their preventive capacity faster than ever before, thus making it easier to readily intervene in the event of egregious atrocities.

3. Elevated Relevance of Prevention

Some suggest that despite increased prevention capacity, States' lack of will to intervene still remains the main obstacle to prevention. Syria is often cited as an example.⁹⁸ Yet, prevention has become especially pertinent as social media may also alter post-conflict reconciliation dynamics. Indeed, increased information accessibility in real time has affected the truthfulness of post-conflict transition.⁹⁹ While before there was a "blind trade" at the post-conflict stage between justice and truth, since a large amount of evidence of IHL violations was not readily available, it is not the case anymore. Social media provides a new

⁹¹ An example of such tool is the LRA Crisis Tracker, operated by the NGO Invisible Children. This platform aggregates the information provided by Invisible Children's early warning radio network that spreads across the Central African Republic and the Democratic Republic of Congo and is meant to identify instances of violence in real time. "LRA Crisis Tracker" *Invisible Children*, online: <<https://www.lracrisistracker.com/>>. See also Search for Common Ground *supra* note 11 at 13.

⁹² Search for Common Ground, *supra* note 11 at 13-15.

⁹³ Ushahidi started as a monitoring interface during the 2011 Kenyan election because of the instances of unrest and violence. This interface aggregates information that is contributed by text, video, sound recording, or through submitted reports. The content is then accessible in real time, on an interactive platform that maps the location of the source. The way the information is aggregated depends of the need of the user. This thus allows actors involved in crises to have one the ground information, e.g. location of injured population, and deploy its resources accordingly. See "Ushahidi", online: <<https://www.ushahidi.com/enterprise/>>.

⁹⁴ ICT4Peace does not provide a technological interface for on-the-ground information like Ushahidi. Rather, this nonprofit foundation provides reports and capacity building tools for crisis information management and strategy, among other things. See "Crisis Information Management Capacity Building", online: ICT4Peace <<https://ict4peace.org/activities/crisis-information-management-capacity-building/>>.

⁹⁵ Stottlemire, *supra* note 41 at 26.

⁹⁶ Herzberg & Steinberg, *supra* note 19 at 507.

⁹⁷ Stottlemire, *supra* note 41 at 26; Herzberg & Steinberg, *supra* note 19 at 507.

⁹⁸ See Zwier, *supra* note 71.

⁹⁹ *Ibid* at 209.

source of information which keeps the affected population and the international community aware, to a large extent, of violations taking place during the conflict.¹⁰⁰ Initiatives like Eyes in Darfur from Amnesty International have participated to highlight said violations.¹⁰¹

This new post-conflict reality of increased truthfulness may lead to better justice (further discussed in section III.3), but also harder reconciliation.¹⁰² The ‘fog of war’ has given place to a new era where impunity is harder to sustain.¹⁰³ Less impunity is favourable to post-conflict transition. Yet, it can become harder for people to accept giving amnesty to violators of IHL obligations, knowing what they did in extensive detail. Thus, although prevention seems more achievable, reconciliation seems less so. This potential IHL dynamic change reinforces the plea for more prevention initiatives from the international community in the first place. Furthermore, enhancing NGOs monitoring and preventive capacities would be a less intrusive and fatal way for the international community to provide help, rather than intervening in a long-lasting violent conflict.

C. Enforcement

1. IHL's Current Enforcement Framework and its Limits

The framework of IHL provides an array of enforcement mechanisms and State obligations. Amongst other things, enquiry processes can be initiated if parties to a conflict request so.¹⁰⁴ Moreover, States can punish and capture perpetrators of grave breaches.¹⁰⁵ Universal jurisdiction over grave breaches of IHL obligations¹⁰⁶ provides the legal basis for States to enforce their persecution obligations.¹⁰⁷ The IHL enforcement framework also includes a fact-finding commission which can be put in place to enquire into alleged violations.¹⁰⁸ Although fact-finding efforts play in an important role for IHL enforcement, this commission has unfortunately proven largely ineffective due to how it was modelled.¹⁰⁹

¹⁰⁰ *Ibid* at 193.

¹⁰¹ See “Sudan (Darfur): Amnesty International adopts powerful technology in campaign to protect people in Darfur” (6 June 2007), *Amnesty International UK: Press Release*, online: < <https://www.amnesty.org.uk/press-releases/sudan-darfur-amnesty-international-adopts-powerful-technology-campaign-protect-people>>.

¹⁰² See Zwiwer, *supra* note 71 at 211.

¹⁰³ Varghese, *supra* note 17 at 2.

¹⁰⁴ See *Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, 75 UNTS 31 art 52 (entered into force 21 October 1950) [GCI]; *Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 12 August 1949, 75 UNTS 85 art 53 (entered into force 21 October 1950) [GCII]; *Convention Relative to the Treatment of Prisoners of War*, 12 August 1949, 75 UNTS 135 art 132 (entered into force 21 October 1950) [GCIII]; API, *supra* note 65 at art 149.

¹⁰⁵ See GCI, *supra* note 104, art 51; GCII, *supra* note 104, art 52; GCIII, *supra* note 104, art 131.

¹⁰⁶ See also Kleffner, *supra* note 45 at 312; Aday, *supra* note 54 at 50. See also API, *supra* note 65 at art 146.

¹⁰⁷ See GCI, *supra* note 104, art 49.

¹⁰⁸ Sumariwalla, *supra* note 44 at 601; Aday, *supra* note 54 at 23. See also API, *supra* note 66 at art 90(2)(c)(i).

¹⁰⁹ Pfanner, *supra* note 55 at 284–285.

First, the commission is only seized conditional to the parties' consent.¹¹⁰ Second, the commission cannot publicize its findings unless authorized by the parties, thus limiting the impact of the findings on the parties' behaviour. Third, it can only emit recommendations rather than judicial opinions because of its quasi-judicial nature.¹¹¹

A further possibility, that is distinct from States prosecuting grave breach perpetrators nationally using their universal jurisdiction, is referring said perpetrators to an international court or tribunal, be it the ICC or an ad hoc tribunal such as the International Criminal Tribunal for the Former Yugoslavia (ICTY). These international venues, which can establish criminal responsibility, are not to be underestimated as they actively attempt to create concrete standards for the behaviour of state agents, and work towards their implementation.¹¹² Furthermore, using such mechanisms enhances States' accountability¹¹³ and thus goes counter to the culture of impunity that is still largely present in IHL.¹¹⁴ However, States only sporadically resort to the enforcement mechanisms presented above,¹¹⁵ as most require punctual States' consent for them to be used. They thus are quite ineffective in reining in States' behaviour and garnering respect of IHL obligations.¹¹⁶

2. Changing Evidentiary Dynamics

Additionally, although individual criminal responsibility is one avenue to enforce certain IHL obligations, it has intrinsic limitations. Indeed, the ability to get justice is often compromised by the nature of the crimes themselves, as evidence availability issues arise.¹¹⁷ First, cases of war crimes or crimes against humanity raise safety issues, for example. Investigating such crimes is dangerous, and witnesses often decline to testify; if said witnesses are even still alive.¹¹⁸ Social media changes this dynamic, as information gathered through such platforms can have a corroboration function, requiring fewer witness to testify, or none at all, while also strengthening the witness's testimony, further discussed below.¹¹⁹

¹¹⁰ See API, *supra* note 65 at art 90(2)(a); Pfanner, *supra* note 55 at 286. This is so, unless the High Contracting Parties have accepted the ipso facto competence of the Commission, which is the case for about 75 States. See "What is the International Humanitarian Fact-Finding Commission and what is its role in armed conflict situations?" (2017), online: International Humanitarian Fact-Finding Commission <http://www.ihffc.org/Files/en/pdf/2017_ihffc_brochure_english_new.pdf>.

¹¹¹ Pfanner, *supra* note 55 at 285.

¹¹² See also Payam Akhavan, "Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities" (2001) 95 Am J Intl L 7 at 23, 28.

¹¹³ See Zwier, *supra* note 71 at 184.

¹¹⁴ See Akhavan, *supra* note 112 at 8.

¹¹⁵ Aday, *supra* note 54 at 22.

¹¹⁶ See Pfanner, *supra* note 55 at 285.

¹¹⁷ See Zwier, *supra* note 71 at 184.

¹¹⁸ See Keith Hiatt, "Open Source Evidence on Trial" (2015–2016) 125 Yale LJ Forum 323 at 323.

¹¹⁹ See *ibid* at 325.

Second, such crimes raise the issue of the temporal availability of information.¹²⁰ “[T]oday’s investigation concerns yesterday’s atrocities.”¹²¹ If we look at the ICTY for example, certain defendants were brought before the Tribunal long after the alleged crimes were committed. For instance, the trial of Radovan Karadžić started in 2008, although though his arrest warrant was issued in 1995.¹²² The fact that most trials take place five, ten, or even twenty years after the crimes were committed raises evidence admissibility issues, which can compromise establishing criminal responsibility, at the expense of letting a rampant impunity culture survive.¹²³ In this sense, social media can also influence the current evidentiary dynamic by helping attenuate the evidentiary timeline of international justice.¹²⁴

Another issue tied to enforcement and the use of social media content is evidence admissibility. Here, I use the ICC’s admissibility standard as a working example. According to the ICC Rules of Procedure and Evidence, admissibility is evaluated according to the evidence’s relevance and probative value.¹²⁵ The probative value of a piece of evidence is usually assessed in function of two things: its reliability and its credibility.¹²⁶ In this context, while reliability refers to the quality of the piece of evidence¹²⁷ and the form in which the information is delivered, credibility alludes to whether the piece of evidence, reliability aside, depicts reality, and should be believed.¹²⁸ The literature and recent jurisprudence demonstrate that the international criminal courts and tribunals’ standards of admissibility are in fact quite flexible, especially the ICC’s.¹²⁹ Most pieces of evidence are admitted, and it is rather the weight given to them that varies.¹³⁰ A new evidentiary paradigm has emerged within the realm of international criminal law, one that is centred around the weight given to evidence rather than its availability, or lack thereof. Some have argued that this shift comes as a reaction to evidence of IHL violations being more and more available in real time and in a digitalized format, to which social media has contributed.¹³¹

¹²⁰ See *ibid* at 326.

¹²¹ *Ibid*.

¹²² See “Karadžić (IT-95-5/18)” *ICTY: Cases*, online: <www.icty.org/case/karadzic/4>.

¹²³ Akhavan, *supra* note 112 at 8.

¹²⁴ Hiatt, *supra* note 118 at 326.

¹²⁵ Rules of Procedure and Evidence of the International Criminal Court, PCNICC/2000/1/Add.1 s 64(9) (2000) [ICC Rules].

¹²⁶ See Aida Ashouri, Caleb Bowers & Cherrie Warden, “The 2013 Salzburg Workshop on Cyber Investigations: An Overview of the Use of Digital Evidence in International Criminal Courts” (2014) 11 *Digital Evidence & Elec Signature L Rev* 115 at 116 [Ashouri et al]; Wairagala Wakabi, “Judges Admit NGO Reports into Evidence Against Bemba” (July 8, 2013), online: International Justice Monitor <<https://www.ijmonitor.org/2013/07/judges-admit-ngo-reports-into-evidence-against-bemba/>>.

¹²⁷ Martin Floss, “Reliability” in *Encyclopedia of Criminology and Criminal Justice*, 1st ed by Jay S Albanese (2014).

¹²⁸ William J Stewart, *Collins Dictionary of Law*, 3rd ed (2006) *sub verbo* “credibility”.

¹²⁹ The ICC admitted recordings that were not authenticated, since authentication is only one factor to determine the probative value of the evidence. See *Prosecutor v Jean- Pierre Bemba Gombo*, ICC–01/05–01 /08, Decision on the Prosecution’s Application for Admission of Materials into Evidence Pursuant to Article 64(9) of the Rome Statute, (8 October 2012) at paras 80–122 (International Criminal Court). Moreover, the ICC said it would consider the probative value of emails on a case by case basis after the Prosecution objected to their admissibility. *Prosecutor v Lubanga*, ICC–01/04–01/06, Decision on Confirmation Charges, (29 January 2007) at paras 131–132 (International Criminal Court). See also Ashouri et al, *supra* note 126 at 116; see also Hiatt, *supra* note 118 at 329.

¹³⁰ The weight is attributed at the end of the process, once all evidence is admitted, in accordance with Rule 63(2) of the ICC Rules, *supra* note 125. See also *Prosecutor v Lubanga*, ICC–01/04–01/06, Decision on Confirmation Charges para 9 (29 January 2007).

¹³¹ See Zwier, *supra* note 71 at 205.

3. Social Media Related Evidentiary Hurdles

Yet, evidence gathered through social media is not free of hurdles. First, such evidence raises reliability concerns. Indeed, the lack of context that is particular to information gathered through social media (see section II.b) makes it hard to assess if the evidence is reliable. This is reinforced by the open source nature of social media information, as everyone can contribute content regardless of the narrative they promote. It is thus sometimes hard to establish the impartiality of the evidence without context.¹³² Moreover, not only can everyone contribute, but it can be done anonymously. Yet, authors are often in the best position to attest of the evidence's reliability. This provenance issue is thus another hurdle of using social media content as evidence.¹³³ However, these reliability hurdles are not insurmountable and can be addressed in the following ways. If the author is unknown, establishing the chain of custody can increase the evidence's probative value.¹³⁴ Additionally, it is easier to establish videos' probative value because of their self-identification type.¹³⁵ Finally, it is rare that evidence gathered through social media constitutes crime-based evidence, although it can. Rather, said evidence is more generally used as linkage evidence¹³⁶ to corroborate¹³⁷ other primary evidence.

Second, authentication is particularly at stake with regard to evidence derived from social media. Authentication processes are meant to make sure the evidence has not been altered between its creation and when it is presented to the court.¹³⁸ As demonstrated above, international courts nonetheless are flexible in this regard,¹³⁹ and are open to accept transcripts or other corroborative evidence in order to consolidate evidence derived from social media.¹⁴⁰ Alternatively, courts also look into the chain of custody of the evidence in order to make sure it was not manipulated.¹⁴¹

Issues of reliability and authentication, especially relevant in the context of evidence gathered through social media, are not as limiting as they might seem. First, "[w]hen taken in context, corroborated and explained by knowledgeable witnesses, open source evidence can be very compelling."¹⁴² This thus highlights the importance of verification of evidence, which can be done using triangular methods¹⁴³ and/or mostly relevant in the context of

¹³² Wakabi, *supra* note 126.

¹³³ See Ashouri et al, *supra* note 126 at 121.

¹³⁴ See *ibid*.

¹³⁵ See Zwier, *supra* note 71 at 203.

¹³⁶ Herzberg & Steinberg, *supra* note 19 at 1382.

¹³⁷ Browne et al, *supra* note 29 at 1344.

¹³⁸ Ashouri et al, *supra* note 126 at 117.

¹³⁹ See *ibid*.

¹⁴⁰ See *ibid* at 119.

¹⁴¹ See *ibid* at 121; Gregory, *supra* note 32 at 1381.

¹⁴² Hiatt, *supra* note 120 at 327.

¹⁴³ See *ibid*.

social media, crowdsourcing, as discussed below.¹⁴⁴ More importantly, social media derived evidence allows circumventing availability hurdles, as it makes evidence-gathering safer and quicker. Second, reliability and authentication hurdles have proven to affect only the weight granted to the evidence rather than its admissibility, due to the flexible evidentiary standards of international courts and tribunals.¹⁴⁵ The increased use of social media derived evidence can thus participate to the evidentiary paradigm shift from availability to weight, which demonstrates its justice-enhancing potential.

4. Solutions to Social Media Related Evidentiary Hurdles

Two main solutions are available to address the evidentiary hurdles that are specific to evidence gathered through social media. One is crowdsourcing, which contributes to the verification of the evidence once it is gathered. The other is institutionalization of collection, which takes place before and during evidence gathering. First, crowdsourcing is similar to triangulation, which is a long-established verification technique, but operates on a larger scale.¹⁴⁶ Crowdsourcing involves corroborating information gathered through social media by analyzing other information available on the same issue, in order to verify the evidence and enhance the probative value thereof.¹⁴⁷ It is possible to do so with social media derived evidence because of its open source and digital nature. Moreover, systems are available to do so in an automated way, such as Ushahidi's derivatives.¹⁴⁸

A second mechanism, institutionalization or standardization of data collection, would also help enhance evidence reliability. Some authors suggest that an ad hoc protocol should be put in place to create clear standards for data collection.¹⁴⁹ Clear standards could enhance transparency and help coordination between different actors involved in criminal procedures, including NGOs, prosecutors, etc.¹⁵⁰ For example, an E-Court Protocol was instituted by the ICC in order to manage cases that had digital components to them.¹⁵¹ Although this is a post-evidence gathering mechanism, it still shows that institutions are taking actions to integrate digital evidence similar to social media gathered evidence in a reliable way. As a matter of fact, the ICC itself, in analyzing the *raison d'être* of the E-Court Protocol, said that "the exponential increase in the volume of information, together with real problems that have emerged over information management, has meant that standardized protocols are necessary to govern how information can be prepared and presented."¹⁵²

¹⁴⁴ **Fn146:** Abigail Edge, "Social media and the changing face of conflict reporting" (14 July 2016), online: Journalism <<https://www.journalism.co.uk/news/social-media-and-the-changing-face-of-conflict-reporting/s2/a654955/>>; Rohwerder, *supra* note 76 at 2.

¹⁴⁵ Ashouri et al, *supra* note 126 at 122.

¹⁴⁶ See Hiatt, *supra* note 120 at 327; see also Költzow, *supra* note 12 at 12.

¹⁴⁷ Roxana Radu, Nicolo Zingales & Enrico Calandro, "Crowdsourcing Ideas as an Emerging Form of Multistakeholder Participation in Internet Governance" (2015) 7:3 Policy & Internet 362 at 366 [Radu et al]; *see supra* note 17 at 2; Herzberg & Steinberg, *supra* note 19 at 507.

¹⁴⁸ Hersman, *supra* note 90.

¹⁴⁹ See Zwier, *supra* note 71 at 204; see also Lüge, *supra* note 18 at 3.

¹⁵⁰ Radu et al, *supra* note 147 at 366.

¹⁵¹ See *Prosecutor v Lubanga*, ICC-01/04-01/06-1127, Public Decision on the E-Court Protocol para 19 (24 January 2008) cited in Ashouri et al, *supra* note 128 at 121, 124.

¹⁵² *Ibid.*

“Increasingly, social media and online video and image sharing services provide a rich, open-source of information about crimes and their perpetrators.”¹⁵³ Social media derived evidence is extremely relevant within the IHL framework. Indeed, information gathered through social media can be a “witness tool” on the ground and thus has the potential to enhance justice.¹⁵⁴ For example, some YouTube and Facebook videos evidence the use of chemical weapons against civilians by the Syrian government.¹⁵⁵ Hence, it is important to acknowledge social media’s role within IHL dynamics, and how it has contributed to an evidentiary paradigm shift, in order to tap into its potential and address its deficiencies, as I attempted to do above.

D. Further Structural Change

1. Closing Remarks on Monitoring, Prevention and Enforcement

IHL is plagued with an intrinsic paradox, which is unfortunately reinforced by States’ lack of will to put in place constraining compliance mechanisms that do not require their consent every time they are used. Indeed, while the aim of IHL is to protect its beneficiaries, i.e. civilians, wounded and *hors de combat* individuals,¹⁵⁶ IHL is a state-centric system, according to which its application and the respect for the obligations it creates depend strictly on the willingness of States.¹⁵⁷ I argue that social media, despite having certain limits, can nonetheless contribute to attenuating this paradox, as it makes real-time, geo-centred, open source digital information available. This is characterized in different ways which are explored throughout section III of this paper.

First, the information available through social media enhances NGOs’ capacity to protect IHL beneficiaries, as it facilitates monitoring and prevention initiatives. Social media platforms also constitute additional points of pressure on governments’ behaviour towards IHL compliance because of their impact on public opinion. This in turn allows for greater scrutiny and accountability of IHL actors. Second, social media contributes to facilitating IHL enforcement by attenuating evidentiary availability issues, while being a new source of evidentiary content. This brings IHL closer to a victim-centred framework, in which victims’ perspectives, through their social media input, contribute more closely to the monitoring, prevention and enforcement dynamics of IHL. In this sense, a greater, overarching effect of social media on IHL dynamics has been to mainstream the victim perspective throughout while also participating in tackling the impunity culture currently in place.

2. Further Procedural Shift to Address IHL’s Paradox

I suggest a further procedural shift to attenuate IHL’s paradox, that is impacted by, but not directly related to, social media. The literature suggests that an individual complaint

¹⁵³ Hiatt, *supra* note 118 at 324.

¹⁵⁴ Rozario, *supra* note 14 at 250.

¹⁵⁵ See Zwier, *supra* note 71 at 192.

¹⁵⁶ Corn & Schoettler, *supra* note 46 at 238; Kleffner, *supra* note 45 at 297.

¹⁵⁷ Sumariwalli, *supra* note 44 at 617.

mechanism should be put in place to remedy the lack of enforcement IHL is currently facing¹⁵⁸ and to actively include victim-input within the IHL framework.¹⁵⁹ International efforts have already taken a stance on this issue but have never succeeded in creating reform.¹⁶⁰

In the same way that Human Rights Law is supported by a treaty body and a commission, many suggest that it should be so for IHL as well.¹⁶¹ A treaty body that responds to the Geneva Conventions and the Additional Protocols could be established.¹⁶² This could take the form of an IHL Commission, with within it a quasi-judicial Committee on IHL or a Committee of States or IHL experts forming a ‘diplomatic forum.’¹⁶³ Finally, such Commission could provide a reporting system, examine complaints by/against States or armed groups, observe and set fact-finding enquiries and provide quasi-judicial opinions on violations.¹⁶⁴

Instituting an individual complaint mechanism does not come without complexities and limits. As to the complexities, issues of competence, legal basis for jurisdiction and the intricacies of imposing itself on non-state actors arise.¹⁶⁵ Moreover, there are limits to suggesting that such a body be instituted. Some academics and practitioners are concerned that an additional body within the IHL framework would lead to effort fragmentation and might duplicate certain tasks already covered by other institutions such as the ICRC.¹⁶⁶ Although these are sound concerns, another, even more constraining and that has proven to be at the forefront of the lack of IHL enforcement, is the absence of State will.

Despite the limits and complexities outlined above, such a mechanism should still be considered for the following reasons. First, developing a tandem mechanism to the ones which already exist could be designed on the premise that States have to sign such complaint mechanism’s statute or protocol once, thereby replacing the current and problematic ‘consent on a punctual basis system’ of the fact-finding commission and enquiries (see section III.3.a). This would be more sustainable as it could circumvent the punctual consent issue in the long term. Second, the dynamic change provoked by instituting the mechanism would be salutary for IHL as it would allow IHL to re-appropriate its violations, which are

¹⁵⁸ Marco Sassòli, “Possible Legal Mechanisms to Improve Compliance by Armed Groups with International Humanitarian Law and International Human Rights Law,” (Paper “Curbing Human Rights Violations by Non-State Armed Groups” delivered at the Centre of International Relations, University of British Columbia, Vancouver, 13-15 November 2003), online: Armed Groups Project <<http://www.armedgroups.org/index.php?option=content&task=view&id=45>>.

¹⁵⁹ Corn & Schoettler, *supra* note 46 at 238.

¹⁶⁰ See “Hague Appeal for Peace and Justice for 21st Century” (2000) art 13, online: <<http://www.haguepeace.org/resources/HagueAgendaPeace+Justice4The21stCentury.pdf>>; “Draft Instrument Establishing an Individual Complaints Procedure for Violations of IHL” (14 July 2000), online: Amsterdam International Law Clinic <www1.jur.uva.nl/aile/Individual%20complaints%20and%20international%20humanitarian%20law.pdf>; Corn & Schoettler, *supra* note 46 at 239.

¹⁶¹ Kleffner, *supra* note 45 at 306; ICRC 28th International Conference, *supra* note 52 at 23, 61.

¹⁶² ICRC 28th International Conference, *supra* note 52 at 23.

¹⁶³ *Ibid* at 62-63.

¹⁶⁴ *Ibid* at 61.

¹⁶⁵ Corn & Schoettler, *supra* note 46 at 243-4, 248.

¹⁶⁶ ICRC 28th International Conference, *supra* note 52 at 24.

currently drifting towards *Human Rights Law* bodies.¹⁶⁷ This re-appropriation would be eased by the evidentiary paradigm shift to which social media contributes, as discussed in section III.3.b. Also, such a mechanism would reinforce the ICC's current efforts to establish behaviour standards for States. This could thus lead to increased compliance and justice, and could potentially favour IHL advancement since more standards of behaviour would be created. Finally, this mechanism would be more victim-centred, thus bringing IHL closer to its beneficiaries.

III. Recommendations

Although recommendations have been made throughout this paper to address certain specific concerns or hurdles raised by social media in the context of IHL, more general recommendations should be considered in closing. First, developing standards for recording the information seems crucial if social media is to play an important role within the IHL framework. Such standards can take the form of guidelines or tool sets,¹⁶⁸ general or specific, regarding data encryption and coding in a protocol-like manner.¹⁶⁹ What is important to highlight in these standards is the importance of what is recorded and the manner in which it is done.¹⁷⁰ For example, the depth of understanding provided by the data recording is as important as the crime it tries to denounce.¹⁷¹ Moreover, both sides of the story are crucial, as they help establish the content's impartiality, so such standards or protocol need to consider issues of disappearing archives.¹⁷² An informal tool, Creating a Verification Process and Checklist(s), can be useful during the transition period, to record information in a more standardized way.¹⁷³ Moreover, NGO best practices can be circulated,¹⁷⁴ like the ICRC's guide *How to Use Social Media to Better Engage with People Affected by Crises: a brief guide for those using social media in humanitarian organizations*.¹⁷⁵

Second, emphasis should be put on strengthening capacity. Although the international community is usually reluctant to intervene in conflicts, enhancing NGOs capacities regarding social media analytical and sharing tools could present itself as a more sustainable and less political way to contribute to monitoring, prevention, and enforcement efforts.¹⁷⁶ Information sharing reinforces the need for clear and common standards, so as to

¹⁶⁷ *Ibid* at 23; Kleffner *supra* note 45 at 293-295.

¹⁶⁸ Radu et al, *supra* note 147 at 366; Gregory, *supra* note 32 at 71.

¹⁶⁹ See Gregory, *supra* note 32 at 198, 204; Arvinder Sambei, "Intelligence Cooperation versus Evidence Collection and Dissemination," chapter 7 in Larissa van den Herik and Nico Schrijver, eds, *Counter-terrorism Strategies in an International Fragmented Legal Order* (Cambridge University Press, 2013) 212 at 234.

¹⁷⁰ See also Gregory, *supra* note 32 at 1382.

¹⁷¹ See also Corn & Schoettler, *supra* note 46; see also Browne et al, *supra* note 29 at 1341.

¹⁷² For example, Twitter shut down a Hamas account. Yet, the content of that account represented valuable contemporary information that allowed to contextualize the situation at a particular point in time. See Browne et al, *supra* note 29 at 1342, 1345.

¹⁷³ Craig Silverman et al, "Verification Handbook: A definitive guide to verifying digital content for emergency coverage" (28 January 2014) ch 9, online: European Journal Center <verificationhandbook.com/downloads/verification.handbook_fr.pdf>.

¹⁷⁴ See Zwier, *supra* note 71 at 205.

¹⁷⁵ Lüge, *supra* note 18.

¹⁷⁶ See also Kleffner, *supra* note 45 at 310; see also Sambei, *supra* note 169 at 234.

make collaboration more timely and effective. Supporting increased capacity could also help better integrate the information and development communities into mass atrocities prevention.¹⁷⁷ Third, an overarching recommendation is to increase academic research efforts on the issue. I have attempted to shed light on certain IHL dynamic changes, yet, on the one hand, my analysis needs to be scrutinized, while, on the other hand, and more importantly, there are myriads of consequential issues I do not address throughout this paper, and what I have addressed may change in the years to come.

Finally, a fourth recommendation associated with the one just discussed is to conduct further research on the nature of social media in the context of means and methods of warfare and accordingly, the uses and pitfalls of social media in contemporary conflicts. Can social media be included under the umbrella of civilian objects, considering its potential positive and important contribution to civilian protection and IHL compliance? Civilian objects are “all objects that are not military objectives,”¹⁷⁸ while objects providing military advantage and contributing to the success of a military action are considered as military.¹⁷⁹ However, when in doubt, there is a clear presumption that the object is civilian.¹⁸⁰ This IHL dichotomy is important as it sets what are permissible targets. Indeed, there is a strict prohibition on attacking civilian objects.¹⁸¹ This prohibition derives from the principle of distinction which provides an absolute obligation to distinguish between military and civilian objectives when launching an attack.¹⁸² The civilian-military dichotomy thus limits the scope of military endeavour. Moreover, what are the implications of social media use in conflicts for targeting operations?

Considering this, and how social media can alter IHL dynamics, it would be pertinent to evaluate in another piece if social media is a military or civilian object, and if such qualification is necessary in the first place. Some have concluded that “computer data are objects under international humanitarian law” and that they are construed as military.¹⁸³ If it is so, this could have potential negative effects on civilians, as autocratic governments could justifiably impose internet blackouts on their population, for example. On the other hand, social media information could cause civilian objects to become lawful objects of attack, leading to a potential expansion of acceptable target sets and the escalation of conflicts. Accordingly, it seems it would be beneficial to bring this issue forward and characterize social media in the hopes of directing States and armed groups’ behaviour. The current theoretical grey zone calls for research considering the consequences of determining these elements could have a significant impact on IHL dynamics.

¹⁷⁷ Kleffner, *supra* note 45 at 310.

¹⁷⁸ API, *supra* note 65 at art 52(1).

¹⁷⁹ *Ibid*, art 52(2).

¹⁸⁰ *Ibid*, art 52(3).

¹⁸¹ *Ibid*, art 52(1).

¹⁸² *Ibid*, art 48; Jonathan Crowe & Kylie Weston-Scheuber, *Principles of International Humanitarian Law* (Cheltenham, GBR: Edward Elgar Publishing, 2013) at 53.

¹⁸³ Kubo Maćák, “Military Objectives 2.0: The Case for Interpreting Computer Data as Objects under International Humanitarian Law” (2015) 48:1 Israel L. Rev 55 at 80.

Conclusion

A. Limits

There are intrinsic limits to the research I have presented. First, an essential one that is not specific to the issue of social media's influence on IHL dynamics, is that without States' consent it is hard for IHL to change.¹⁸⁴ This issue is not as prevalent when evaluating how social media affects IHL dynamics. Indeed, social media provides new points of pressure and circumventing mechanisms to mitigate States' lack of will, like pressure by public opinion, crowdsourcing, and increased scrutiny.¹⁸⁵ A second limit is that, although there are more tools to analyze and monitor social media trends than ever before, one needs to ensure that human oversight remains over the increasingly automated process of data collection.¹⁸⁶

Third, there are also ethical issues with the use of social media, one commonly raised being the elite capture or grab. Indeed, some argue that most social media content is generated by people living in urban centres and within a certain demographic.¹⁸⁷ Although NGOs are committed to bridge this gap by providing social media space to poorer and more remote areas,¹⁸⁸ this is an important and unresolved element to consider when dealing with technology-related topics like this one. Finally, some are worried that since part of the data gathered through social media has been used for military purposes, this could blur the line between combatant and civilians.¹⁸⁹ This is a very valid concern which needs to be addressed by conducting a thorough analysis on whether social media is a civilian or military objective, as discussed in section IV.

B. Concluding Remarks

Social media, this recent phenomenon that is now ubiquitous, presents benefits and drawbacks. It has democratized and increased access to information worldwide. Moreover, social media platforms are unique in the information they provide: real time, geo-referenced, open source. Despite these benefits, social media also comes with challenges. At a technical level, the quantity and quality of information generated is difficult to control. Moreover, these platforms' content lacks context, potentially disguising bias as reality. Finally, social media comes with privacy issues, as information can become viral in no time, which can also sometimes jeopardize the security of people in pictures or videos.

Despite the challenges outlined above, social media has played an important role within crisis and humanitarian contexts, as it has filled gaps its counterpart, traditional media, has failed to bridge. Indeed, social media has provided an alternative source of information

¹⁸⁴ ICRC 28th International Conference, *supra* note 52 at 20.

¹⁸⁵ Pfanner, *supra* note 55.

¹⁸⁶ See also Lüge, *supra* note 18 at 6; Gregory, *supra* note 32 at 72.

¹⁸⁷ Költzow, *supra* note 12 at 12.

¹⁸⁸ Stottlemire, *supra* note 41 at 31.

¹⁸⁹ *Ibid* at 29.

for places which typically receive little or no traditional media coverage. Moreover, it has given NGOs the capacity to help areas suffering from internet blackouts and extreme violence. For the reasons outlined above, it is important to critically assess the role of social media, and the information it can provide, within the IHL context. Analyzing how social media has the potential to alter IHL dynamics is all the more important as information is a building block of IHL frameworks. Indeed, information is crucial during conflicts, to inform military endeavour and allow armed forces to respect the IHL principles of proportionality, distinction, and necessity. Information is also essential for IHL compliance more broadly.

“Both civilian life and military operations depend to a growing degree on information and activities confined to cyber-space [...]. If the law of armed conflicts is to retain its relevance, it ought to reflect this change.”¹⁹⁰ I have argued throughout this paper that the type of information available on social media can be salutary for IHL compliance. Indeed, social media can positively contribute to changing monitoring, prevention, and enforcement dynamics in the following ways. First, social media facilitates NGOs monitoring and reporting efforts, thus enhancing their capacity in this regard. This is so because social media renders it less costly to gather information on conflict situations and expose IHL violations to an extended public. Social media also helps NGOs hold States more accountable. Social media has thus provided ammunition, i.e. information, and new points of pressure, i.e. reporting platform and public opinion influencers, for NGOs to alter state behaviour within the IHL context.

Second, although a very rigid and lacking IHL framework exists for conflict prevention, social media has had a salutary effect in this regard by helping fill the gaps. Indeed, the information available through social media contributes to early-warning system initiatives because of its particularities, thus providing more knowledge for the international community and civil society to react to early signs of egregious crimes. This changes IHL dynamics by enhancing the preventive capacity of the international community and NGOs, which becomes crucial as post-conflict dynamics have also changed; reconciliation is becoming increasingly difficult as there is no more blind trade between justice and truth.

Third, social media also has the potential salutary effect of facilitating IHL enforcement. Social media contributes to making evidence gathering faster and safer, thus decreasing availability issues that are especially common when dealing with evidence of war crimes and crimes against humanity. Moreover, although admissibility hurdles of reliability and authentication are particularly at issue for social media derived evidence, they have a limited impact, as international courts and tribunals generally apply a flexible admissibility standard. Despite reliability and authentication only impacting the weight attributed to social media derived evidence, these hurdles can and should be addressed using verification techniques, like crowdsourcing, and establishing collection institutionalization.

To conclude, accepting social media as an integral part of IHL dynamics could mean more prevention, greater scrutiny, and more victim-responsive justice, amongst other things. Social media can be effective as it permits to partially circumvent issues like lack of

¹⁹⁰ Maćák, *supra* note 183 at 80.

State will by providing new points of pressure for actors willing to hold States accountable and enhance IHL compliance. Accordingly, social media acts as an enabling tool for actors like NGOs, who have been pushing for such changes for a long time.

For this reason, I suggest a further structural change somewhat independent of social media. I support the proposition that an individual complaint mechanism should be put in place despite the existing concerns in this regard. This mechanism could circumvent the States' consent issue in the long term. It would also contribute to more justice and thus increased compliance as it would allow IHL to re-appropriate its violations and perpetrators. Furthermore, such a system, supported by the rise of social media in IHL's evidentiary context, would be more victim-centred and thus would better fulfil the objectives IHL seeks to achieve. IHL was set up to protect its beneficiaries: the wounded, the civilians, the combatants *hors de combat*, all these individuals that have no say in the current state-centric IHL framework. Acknowledging the increasing role of social media within the IHL framework and implementing an individual complaint mechanism has downfalls to be certain, but social media's potential for attenuating a paradox plaguing contemporary IHL undoubtedly justifies scrutinizing further its uses and the hope they generate.

Reconciling Sovereignties, Reconciling Peoples: Should the Canadian Charter of Rights and Freedoms Apply to Inherent-right Aboriginal Governments?

*Matt Watson**

Abstract

Should the Canadian Charter of Rights and Freedoms apply to constrain the actions of Aboriginal governments in Canada exercising the “inherent right” of self-government? Is the Charter’s application to these governments necessary to secure the human rights of those they govern, or would it amount to a violation of aboriginal sovereignty that, in any case, would do undue violence to the cultural practices and traditions of Aboriginal communities? This article seeks to contribute to the larger debate over how to balance the rights of individuals with the rights of groups by laying out a methodical, clear-eyed analysis of the strengths and weaknesses of the major arguments found in the literature for and against the Charter’s application. I argue that while the Charter’s application to inherent-right governments would amount to a limit on Aboriginal sovereignty, this is justifiable, in light of the fact that Aboriginal sovereignty should not be construed as absolute, and given the Supreme Court of Canada’s assertion that the purpose of the Canadian Constitution’s recognition of Aboriginal rights is reconciliation. I claim that requiring that the right of Aboriginal self-government be exercised in accordance with the Charter would further the goal of reconciliation, whereas allowing the right to be exercised irrespective of the requirements of the Charter would impede it. I thus conclude that the Charter should apply to inherent-right governments, although I stress that it should be applied in a flexible manner, in recognition of the fact that the proper safeguarding of rights can occur in different ways in different cultural contexts.

French translation

Réconcilier les souverainetés, réconcilier les peuples: La Charte Canadienne des droits et des libertés devrait-elle s’appliquer aux gouvernements autochtones de droit inhérent ? La Charte Canadienne des droits et des libertés devrait-elle pouvoir limiter les actions des gouvernements autochtones qui exercent leur ‘droit inhérent’ à l’autonomie gouvernementale au Canada ? L’application de la Charte à ces gouvernements est-elle nécessaire à la préservation des droits humains de ceux qu’ils gouvernent ou, au contraire, cela constituerait-il une violation de la souveraineté autochtone qui ferait indûment violence aux pratiques et traditions des communautés autochtones ? Cet article cherche à contribuer au plus large débat sur la manière de balancer les droits de l’individu avec les ceux des groupes en proposant une analyse méthodique et lucide des forces et des faiblesses des arguments principaux rencontrés dans la littérature à la fois pour et contre l’application de la Charte. J’argumenterai que, bien que l’application de la Charte aux gouvernements autochtones de droit inhérent poserait une limite à la souveraineté autochtone, cette

limitation est justifiable, puisque d'une part la souveraineté autochtone ne devrait pas être entendue comme absolue, et que, de l'autre, la Cour Suprême du Canada a affirmé que le but de la reconnaissance des droits des autochtones dans la Constitution canadienne est la réconciliation. J'affirme que requérir que le droit à l'autonomie gouvernementale autochtone soit exercé conformément à la Charte participerait à la promotion la réconciliation, alors qu'au contraire permettre un exercice du droit indépendant des exigences de la Charte l'entraverait. Je conclurai donc que la Charte devrait s'appliquer aux gouvernements de droit inhérent, toutefois je souligne abondamment le besoin que celle-ci soit appliquée de manière flexible, en reconnaissance du fait que la préservation appropriée des droits peut prendre diverses formes au sein de divers contextes culturels.

Spanish translation

¿Debería aplicarse la Carta de Derechos y Libertades de Canadá para restringir la capacidad de los gobiernos indígenas de ejercer el "derecho inherente" al autogobierno? ¿Es necesaria la aplicación de la Carta a estos gobiernos para garantizar los derechos humanos de quienes gobiernan, o equivaldría a una violación de la soberanía indígena que, en cualquier caso, violentaría indebidamente las prácticas y tradiciones culturales de las comunidades indígenas?

El presente artículo busca contribuir al debate más amplio sobre cómo equilibrar los derechos individuales con los derechos de los grupos, mediante un análisis metódico y claro de las fortalezas y debilidades de los principales argumentos encontrados en la literatura a favor y en contra de la aplicación de la Carta.

Sostengo que, si bien la aplicación de la Carta a los gobiernos de derechos inherentes supondría un límite a la soberanía indígena, el límite es justificable, dado que la soberanía indígena no debe interpretarse como absoluta y debido a la afirmación del Tribunal Supremo del Canadá que la reconciliación es el propósito del reconocimiento de los derechos indígenas en la Constitución canadiense.

Afirmo que exigir que el ejercicio del derecho al autogobierno indígena se ejerza de conformidad con la Carta promovería el objetivo de la reconciliación, mientras permitir el ejercicio del derecho independientemente de los requisitos de la Carta lo impediría. Por lo tanto, concluyo que la Carta debe aplicarse a los gobiernos de derechos inherentes, aunque recalco que debe aplicarse de manera flexible, reconociendo que la salvaguarda adecuada de los derechos puede ocurrir de maneras distintas en diferentes contextos culturales.

Introduction

I. Preliminaries

II. Arguments for the Charter's Application

- A. The Human Rights Argument*
- B. The Equal Citizenship Argument*
- C. Taking Stock*

III. Arguments Against the Charter's Application

- A. The No Consent Argument*
- B. The Alien Values Argument*
 - 1. A Less Alien Alternative?
- C. The Sovereignty Argument*

IV. Rethinking Reconciliation

- A. Is the Charter's Application Consistent with an Expansive View of Reconciliation?*

V. Section 1 and a Flexible Application of the Charter

Conclusion

Introduction

In the notorious 1992 case of *Norris v Thomas*, Hood J. of the British Columbia Supreme Court found that the plaintiff, David Thomas, a member of the Lyackson Band (part of the Coast Salish People), had been “grabbed” and taken against his will by other members of the band to a ceremonial longhouse.¹ He was imprisoned there for four days without food and forced to undergo a spirit dancer initiation ceremony that included being made to walk naked in a creek and being bitten and whipped by his captors. According to his testimony, at no time did he consent to the treatment he received. The Court found—over the protestations of the defence that the defendant band members’ conduct amounted to the exercise of an Aboriginal right protected by s. 35(1) of Canada’s *Constitution Act, 1982*—that there was insufficient evidence to show that such a right existed.² Moreover, Hood J. reasoned, if there did exist an Aboriginal right to conduct spirit dancing initiation ceremonies, “those aspects of it which were contrary to English common law, such as the use of force, assault, battery, and wrongful imprisonment, did not survive the introduction of English law in British Columbia.”³ His Honour further wrote that “[w]hile the plaintiff may have special rights and status in Canada as an Indian, the ‘original’ rights and freedoms he enjoys can be no less than those enjoyed by fellow citizens, Indian and non-Indian alike.”⁴

This case represents a particularly stark example of the way in which the collective rights of an Aboriginal group might come into conflict with the individual rights of specific members of that group.⁵ How, if at all, should the law of Canada be brought to bear in such scenarios? Should the rights of the individual trump those of the collective? Should it be the other way round? This paper will wade into this larger debate by laying out a methodical, clear-eyed analysis of the strengths and weaknesses of the major arguments found in the literature for and against applying the Canadian *Charter of Rights and Freedoms* to Aboriginal “inherent-right” governments in Canada. Is the *Charter’s* application to such governmental action—i.e., action taken pursuant to the inherent right of Aboriginal self-government believed by many to be contained within s. 35 of the *Constitution Act, 1982*⁶—necessary in order to protect the basic human rights of individual Aboriginal Canadians living under those governments? Or would the *Charter’s* application do violence to the cultures and

* Dr. Matt Watson is a Lecturer in the TC Beirne School of Law at the University of Queensland.

¹ *Norris v Thomas* [1992] 2 CNLR 139 at para 9, 1992 CarswellBC 740 (BCSC).

² *Ibid* at para 103.

³ *Ibid*.

⁴ *Ibid* at para 110.

⁵ For a specific discussion on this case as drawing out a tension between individual and collective rights, see generally Thomas Isaac, “Individual versus collective rights: Aboriginal people and the significance of *Thomas v Norris*” (1992) 21:3 *Man LJ* 618; Canada, Canadian Human Rights Commission, *Balancing Collective and Individual Rights: Implementation of Section 1.2 of the Canadian Human Rights Act* (Ottawa: Canadian Human Rights Commission, 2010). For an extended argument that viewing this case and others like it solely within the individual rights versus collective rights paradigm obscures how courts are actually deciding these cases, see also Avigail Eisenberg, “The politics of individual and group difference in Canadian jurisprudence” (1994) 27:1 *CJPS*.

⁶ Section 35(1) reads: “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.” For the view that s. 35 encompasses an inherent right to self-government, see *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol 2 (Ottawa: Canada Communication Group, 1996) at 166-167 [Royal Commission: Restructuring the Relationship]; Canada, Department of Indian Affairs and Northern Development, *Aboriginal Self-Government: The government of Canada’s approach to implementation of the inherent right and the negotiation of Aboriginal Self Government* (Ottawa: Minister of Public Works and Government Services Canada, 1995) at 3-4; Kerry Wilkins, “...But we need the eggs: the Royal Commission, the *Charter of Rights* and the inherent right of Aboriginal self-government” (1999) 49:1 *UTLJ* 53.

traditions of these communities, thus failing to respect Aboriginal sovereignty and the inherent right of self-government? After canvassing the key arguments on both sides, I conclude that it is appropriate for the *Charter* to be applied, in a culturally sensitive manner, to inherent-right governments, since this would best advance the goal of reconciliation that animates the Constitution's recognition of Aboriginal rights in s. 35.

I. Preliminaries

Whether the *Charter should* apply to inherent-right Aboriginal governments—that is, whether it is appropriate that it apply—might be thought of as the wrong question to ask. Perhaps instead we should simply focus on whether it *does* apply as a matter of law. On that score, the current state of the law would appear to be that Aboriginal governments exercising *inherent* (as opposed to delegated) powers of self-government do not fall within the scope of section 32 of the *Charter*—which states that the *Charter* applies to “the Parliament and government of Canada” and to “the legislature and government of each province”—and thus are not automatically subject to the *Charter's* provisions.⁷ There is, however, considerable uncertainty on the point, and it is one that has generated significant scholarly disagreement.⁸ Further, as constitutional law scholar Patrick Macklem has argued, it is likely that the courts *would* apply the *Charter* to exercises of the inherent right of self-government where this right is exercised in the context of a formal self-government agreement that specifically states that the *Charter* is to apply⁹—i.e., where the *Charter's* application is *consented* to by the relevant Aboriginal government and the federal and provincial governments.¹⁰

⁷ See, e.g. Wilkins, *ibid*; Kent McNeil, “Aboriginal governments and the *Canadian Charter of Rights and Freedoms*” (1996) 34:1 Osgoode Hall LJ 61; Kent McNeil, *Emerging Justice: Essays on Indigenous Rights in Canada and Australia* (Saskatoon: Native Law Centre, University of Saskatchewan, 2001) 215; Peter Hogg and Mary Ellen Turpel, “Implementing Aboriginal self-government: constitutional and jurisdictional issues,” (1995) 74:2 Can Bar Rev at 192 & 214, citing *RWDSU v Dolphin Delivery*, [1986] 2 SCR 573 (as authority for the proposition that s. 32 represents an exhaustive statement of the bodies that are bound by the *Charter*).

⁸ See Hogg and Turpel, *ibid* (claiming, notwithstanding their view that s. 32 is an exhaustive list of the entities subject to the *Charter*, that the “it is probable that a court would hold that Aboriginal governments are bound by the *Charter*” at 214); Royal Commission: Restructuring the Relationship, *supra* note 6 (“[t]he *Canadian Charter of Rights and Freedoms* applies to Aboriginal governments and regulates relations with individuals within their jurisdiction” at 160). For a book-length argument for why the *Charter* should apply to Aboriginal governments, see also David Leo Milward, *Aboriginal Justice and the Charter: Realizing a Culturally Sensitive Interpretation of Legal Rights* (Vancouver: UBC Press, 2012). Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) at 202, 225, 226, 199, and 201 has written that whether the *Charter* applies to exercises of the inherent-right of self-government depends on whether one adopts an ‘inclusive; or ‘exclusive’ interpretation of s. 32. (Favoring an inclusive interpretation, he argues that the *Charter* should be read as applying where inherent-right governments implement “internal restrictions” that “clash with *Charter* guarantees”, but permitting these governments to introduce “external protections” that “protect interests associated with indigenous difference” at 225-226. If the question that is asked is the perfectly general one of whether the *Charter* applies to Aboriginal governments, the answer is surely yes. That is, whether the *Charter* applies to a given Aboriginal government depends on what sort of governmental authority the Aboriginal government is exercising—i.e., on “whether it is delegated, treaty-based, or inherent in nature” at 199. It is uncontroversial, for instance, that Aboriginal governments exercising delegated statutory authority are subject to the *Charter*. When it comes to “treaty-based Aboriginal governmental authority, the *Charter* applies at least to federal and provincial participation in the treaty process, and by extension to the treaty itself” at 201). See also Peter Hogg, *Constitutional Law of Canada*, 5th Ed (Toronto: Thomson Reuters, 2018) at §37-13.

⁹ It is in fact the stated policy of the federal government that “the *Canadian Charter of Rights and Freedoms* should bind all governments in Canada, so that Aboriginal peoples and non-Aboriginal Canadians alike may continue to enjoy equally the rights and freedoms guaranteed by the *Charter*. Self-government agreements, including treaties, will, therefore, have to provide that the *Canadian Charter of Rights and Freedoms* applies to Aboriginal governments and institutions in relation to all matters within their respective jurisdictions and authorities” (Crown-Indigenous Relations and Northern Affairs Canada, “The Government of Canada’s Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government” (n.d.), online: Indigenous and Northern Affairs Canada, <www.aadnc-aandc.gc.ca/eng/1100100031843/1100100031844#inhrsg>).

¹⁰ See Macklem, *supra* note 8 (“[E]ven if the *Charter* does not independently apply to the exercise of inherent Aboriginal governmental authority, it likely applies on consent of the parties” at 201).

This point brings us, however, to another potential practical obstacle that might lie in the way of applying the *Charter* to inherent-right governments—s. 25 of the *Charter*. Section 25 states that:

The guarantee in this *Charter* of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

- (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
- (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.¹¹

If section 25 is given a literal interpretation,¹² then even if the *Charter* would technically apply to an inherent-right government where that government has consented to the *Charter*'s application—i.e., even if s. 32 would not preclude its application in these circumstances—s. 25 would nevertheless appear to prevent the *Charter*'s other provisions from having any real effect on the government's actions. For example, since Aboriginal self-government is now increasingly understood (albeit without the benefit of a dispositive judicial pronouncement on the question) to be encompassed by s. 35(1)¹³—and thus by s. 25—the latter provision would appear to preclude the possibility that the *Charter* could be used to strike down or otherwise constrain exercises of the inherent right, since that would amount to 'derogating' from an Aboriginal right contemplated by s. 25.¹⁴ I do not, however, regard the provision as an insuperable obstacle on this score. A full analysis of how s. 25 ought to be interpreted—and how such an interpretation would affect the *Charter*'s application to inherent-right governments in particular—must await another day. However, analyses of the legislative history of s. 25 not only reveal that there was no consensus that a right to self-government was included in the "Aboriginal rights" referred to by s. 25 (or by 35(1)), but also demonstrate that s. 25 was included for the specific purpose of ensuring that the *Charter*'s s. 15 equality guarantees could not be used to strike down legal rights granted to Aboriginal peoples *qua* Aboriginal peoples (on the grounds that such special rights amounted to

¹¹ *Constitution Act, 1982*, s 25, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*Canadian Charter*].

¹² There is a dearth of judicial treatment of s. 25, with the result that the proper interpretation of the section is still very much an open question. Cf *R v Kapp*, 2008 SCC 41 [2008] 2 SCR 483 (the majority decision, in obiter, adopted the view that s. 25 is not an "absolute bar" to *Charter* review, but rather an "interpretive provision informing the construction of potentially conflicting *Charter* rights" at para 64; Bastarache J. favored an interpretation of s. 25 according to which the provision is a "shield" for the rights it encompasses, rendering them immune from *Charter* review, but also asserted that this shield is "obviously" not an absolute one, at paras 93 and 97).

¹³ See Ian Peach, "More than a Section 35 Right: Indigenous Self-government as Inherent in Canada's Constitutional Structure" (2011) at 2–3, online (pdf): Canadian Political Science Association <www.cpsa-acsp.ca/papers-2011/Peach.pdf> (the Supreme Court "has [hinted] at an openness to finding a right of self-government within section 35 of the Constitution Act, 1982, but it has yet to clearly pronounce on the question and, instead, continually encourages governments to negotiate a resolution to the self-government claims of Indigenous peoples". For such a 'hint', see generally *R v Pamajewon*, [1996] 2 SCR 821 [*Pamajewon*]. Peach also notes "[l]ikely the strongest case law on the existence of an aboriginal right to self-government is the decision of the British Columbia Supreme Court in *Campbell v British Columbia (Attorney General)*, 2001 BCSC 1123, though this case was never appealed to a higher court"). See also the Royal Commission on Aboriginal Peoples' Final Report, *supra* note 9, at 95, which called for "explicit recognition that section 35 includes the inherent right of self-government as an Aboriginal right." This is in fact the official policy position of the Canadian federal government: "[T]he Government of Canada recognizes the inherent right of self-government as an existing Aboriginal right under section 35 of the *Constitution Act, 1982*" Crown-Indigenous Relations and Northern Affairs Canada, *supra* note 9.

¹⁴ For what I believe to be an ultimately misguided attempt to blunt the apparent force of s. 25 by way of positing a tenuous distinction between having a right to self-government and *exercising* such a right, see also Brian Slattery, "First Nations and the Constitution: A Question of Trust?", (1992) 71 Can Bar Rev 261 at 286–287.

discrimination against non-Aboriginals).¹⁵ To instead read s. 25 as a total shield protecting the exercise of Aboriginal self-government from *Charter* scrutiny would thus appear to ignore legislative intent, and to turn away from a purposive interpretation of the provision. This “complete shield”¹⁶ interpretation would also sit very uncomfortably with current s. 35 jurisprudence, as it would imply that whereas policy concerns may rightly limit s. 35 Aboriginal rights (per the *Sparrow* test¹⁷), the *Charter*’s provisions could never do so. Further, as David Milward has pointed out, “the odd time that any Supreme Court of Canada justice has ever commented on this issue [of the effect of s. 25] it has been in favour of the *Charter*’s having some application to Aboriginal governments.”¹⁸ Milward draws the conclusion that “[i]f the Court is ever called upon to directly decide this issue, irrespective of any present or future composition, the justices may be deeply concerned about exempting Aboriginal governments from the *Charter*.”¹⁹

Ultimately, however, even if the *Charter*’s application to inherent-right governments were straightforwardly precluded as a matter of law, exploring the issue of whether it would be a good thing for the *Charter* to apply to constrain the actions of these governments would still be worthwhile, since what the law is and what the law should be can plainly be two separate things.²⁰ Further, the question of whether it is normatively appropriate for the *Charter* to apply to inherent-right governments need not be held in abeyance until such time as we have definitive word from the courts that ss. 32 and 25 permit the *Charter* to be applied in this manner. For the very question of how these provisions should be read, it can be

¹⁵ See Hogg and Turpel, *supra* note 7 (“[T]he main purpose of section 25 is to make clear that the prohibition of racial discrimination in section 15 of the *Charter* is not to be interpreted as abrogating aboriginal or treaty rights that are possessed by a class of people defined by culture or race. It is, therefore, designed as a shield to guard against diminishing aboriginal and treaty rights in situations where non Aboriginal peoples might challenge the special status and rights of Aboriginal peoples as contrary to equality guarantees” at 214). See also Milward, *supra* note 8; Bruce Wildsmith, *Aboriginal Peoples and Section 25 of the Canadian Charter of Rights and Freedoms* (Saskatoon: University of Saskatchewan Native Law Centre, 1988) at 2–4.

¹⁶ See Celeste Hutchinson, “Case Comment on R v Kapp: An Analytical Framework for Section 25 of the *Charter*”, (2007) 52:1 McGill LJ at 182. See also Wildsmith, *ibid* at 182.

¹⁷ R v *Sparrow*, [1990] 1 SCR 1075 at paras 67ff (QL) [Sparrow].

¹⁸ Milward, *supra* note 8 at 66.

¹⁹ *Ibid*.

²⁰ See e.g. Kent McNeil, “Aboriginal Governments and the *Charter*: Lessons from the United States,” (2002) 17:2 CJLS 73 (the article “leaves aside the unresolved question of whether the *Charter* currently applies to [inherent-right Aboriginal] governments as a matter of Canadian constitutional law, seeking instead to shed some light on the normative issue of whether the *Charter* should apply” at 74). For other works touching on this normative question (some of which also tackle the doctrinal question of whether the *Charter* does apply to Aboriginal governments), see Milward, *supra* note 8; Menno Boldt & J Anthony Long, “Tribal Philosophies and the *Canadian Charter of Rights and Freedoms*” in Menno Boldt & J Anthony Long, eds, *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985) 165; John Borrows, “Contemporary Traditional Equality: The Effect of the Charter on First Nation Politics” (1994) 43 UNBLJ 19; Thomas Isaac and Mary Sue Maloughney, “Dually Disadvantaged and Historically Forgotten?: Aboriginal Women and the Inherent Right of Self-Government” (1992) 21 Man L Rev 453; J Anthony Long and Katherine Beaty Chiste, “Indian Governments and the *Canadian Charter of Rights and Freedoms*” (1994) 18:2 Am Indian Culture & Rsch J 91 [Long and Chiste]; Timothy Dickson “Section 25 and Intercultural Judgment” (2003) UT Fac L Rev 141; Sharon Donna McIvor, *Self-Government and Aboriginal Women in Margaret Jackson & N. Kathleen Sam Banks, eds, Ten Years Later: The Charter and Equality for Women: A Symposium Assessing the Impact of the Equality Provisions on Women in Canada* (Burnaby: Public Policy Programs, Simon Fraser University at Harbour Centre, 1996) 77; Teresa Nahane, “Dancing with a Gorilla: Aboriginal Women, Justice and the *Charter*” in *Royal Commission on Aboriginal Peoples: Aboriginal Peoples and the Justice System, Report of the National Round Table on Aboriginal Justice Issues* (Ottawa: Canada Communication Group, 1993); Bryan Schwartz, “The Application of the *Canadian Charter of Rights and Freedoms* to Aboriginal Governments” in Bryan Schwartz, ed, *First Principles, Second Thoughts: Aboriginal Peoples, Constitutional Reform and Canadian Statecraft* (Montreal: Institute for Research on Public Policy, 1986); Aki-Kwe/Mary Ellen Turpel, “Aboriginal Peoples and the *Canadian Charter of Rights and Freedoms*: Contradictions and Challenges” (1989) 10:23 Can Wom Stud 149 [Turpel, “*Canadian Charter of Rights and Freedoms*”]; Mary Ellen Turpel, “Aboriginal Peoples and the *Canadian Charter*: Interpretive Monopolies, Cultural Differences” (1989-90) 6 Can Hum Rts YB 3 [Turpel, “Interpretive Monopolies”]; Royal Commission: Restructuring the Relationship, *supra* note 6 at 226-234; Wilkins, *supra* note 6; Dan Russell, *A People’s Dream: Aboriginal Self-Government in Canada* (Vancouver: UBC Press, 2000); Bill Rafoss, *The Application of the Canadian Charter of Rights and Freedoms to First Nations’ Jurisdiction: An Analysis of the Debate* (Masters of Arts In the Department of Political Studies, University of Saskatchewan, 2005) [unpublished].

argued, requires that we at least turn our mind to the issue of the likely beneficial or deleterious effects of the competing interpretations.²¹ In addition, even if we take the very firm line that it should never be open to judges to engage in this kind of consequentialist reasoning when determining the meaning of a disputed constitutional provision, it is not at all clear that the courts will do so as well—and thereby come down against the *Charter's* application to inherent-right governments—should they be forced to rule directly on the issue.²² Thus even if we think that the consequences of the *Charter's* application in these cases should not inform the courts' interpretations of ss. 32 and 25, it seems only prudent that we get clear on those consequences, given the possibility that the courts may well apply the *Charter* to inherent-right governmental action at some point in the future.²³

As a final preliminary matter, it is worth making clear that the question of whether it would be appropriate to apply the *Charter* to inherent-right governments is of course relevant to the question of whether it is appropriate as a general matter for the *Charter* to apply to Aboriginal governments of any sort. By focussing on the question of whether the *Charter* should apply to inherent-right governments, we take the case against applying the *Charter* to Aboriginal governments *generally*—i.e., whether the Aboriginal government acts pursuant to statutory authority (such as the *Indian Act*²⁴), or pursuant to a self-government agreement, or via the exercise of the inherent right of Aboriginal self-government, or via some combination thereof—at its strongest. This is so because in these cases, where what is contemplated is the imposition of restrictions on how the inherent right of self-government can be exercised, our concerns over diminution of Aboriginal *sovereignty* will be at their most acute. If, even on this relatively inhospitable terrain, we can make the case that the *Charter* ought to apply, it seems highly likely that the same will be true in contexts where the relevant Aboriginal government is not acting purely pursuant to the inherent right of self-government, but rather is exercising delegated statutory authority or acting in accordance with a self-government agreement.

II. Arguments for the Charter's Application

²¹ For an argument to this effect, see especially Milward, *ibid* at 68, who claims that the *Charter's* application to inherent-right governments, which would see the *Charter's* protections afforded to a wider segment of Canadians than they otherwise would be, is in keeping with a purposive interpretation of the *Charter*—given, as he argues, that “in *Hunter v. Southam*, Chief Justice Dickson stated at 58 that the goal of the purposive approach is to secure for individuals the full benefit of the *Charter's* protection.” See also Patrick Macklem, *supra* note 9, who concludes at 209 that “[i]nterpreting section 32 of the *Charter* as applying to the exercise of Aboriginal governmental authority recognized by the Constitution best accommodates [the] competing concerns” of respect for “collective values of community and responsibility” and “protect[ing] less powerful members of Aboriginal societies against potential abuses of Aboriginal governmental authority.”

²² See Milward, *ibid* at 67. See also Hogg and Turpel, *supra* note 7 (“[d]espite the silence of section 32 on Aboriginal governments, it is probable that a court would hold that Aboriginal governments are bound by the *Charter*” at 214; their subsequent analysis in that article, however, would seem to restrict this prediction to scenarios in which “[self-government institutions have been created or empowered by statute,” or “[w]here self-government institutions have been created by an Aboriginal people and empowered by a self-government agreement” at 214; they equally note that “[i]t is unlikely that a court would regard section 25 as giving Aboriginal governments blanket immunity from the *Charter*, even though the governments were exercising powers of self-government derived from a treaty or from an Aboriginal right (the inherent right)” at 214–215).

²³ It is probably also worth considering here that it is not out of the question that the federal and provincial governments might seek to amend s. 32 to explicitly allow for the *Charter's* application to all Aboriginal governments. This was of course attempted via the 1992 Charlottetown Accord, which proposed to enshrine the right of Aboriginal self-government in the Constitution and, in s. 26(c) of the Accord's text, to amend s. 32 to refer to “all legislative bodies and governments of the Aboriginal peoples of Canada in respect of all matters within the authority of their respective legislative bodies.”

²⁴ *Indian Act*, RSC 1985, c I-5.

Those who advocate for the *Charter's* application to inherent-right Aboriginal governments generally offer two main arguments for why the *Charter* should apply.²⁵ The first argument usually runs something like this: the *Charter* must apply to Aboriginal governments in order to safeguard the basic human rights of all Aboriginal Canadians, especially the most vulnerable members of Aboriginal communities. The second argument put forward focuses not on the freedom of individual Aboriginals, but on the institution of Canadian citizenship. Specifically, the argument is that “differential access to *Charter* rights would compromise the character of Canadian citizenship by denying a substantial part of its benefit to aboriginal Canadians.”²⁶ Let us consider both arguments in turn.

A. *The Human Rights Argument*

The human rights protection rationale for the *Charter's* application to inherent-right governments, as summarized above, is rather straightforward. The argument is that the *Charter's* provisions protect basic human rights, such as the right to freedom of expression and association, and the right to be free from arbitrary detention, along with other, less fundamental sorts of rights such as rights to minority language education.²⁷ Further, the argument runs, Aboriginal Canadians living under inherent-right governments are entitled to the protection of their basic human rights, and the *Charter's* application to inherent-right governments would be an effective means of providing them with such protection.²⁸ Therefore the *Charter* ought to apply.

B. *The Equal Citizenship Argument*

This second argument for the *Charter's* application to inherent-right governments asserts that differential access to the *Charter* denies Aboriginal Canadians full citizenship. Specifically, the claim is that the ideal of equal citizenship is undermined when Aboriginal Canadians have, relative to non-Aboriginals, less opportunity or, worse yet, no ability to invoke the *Charter* as against their own inherent-right governments. Surely if the Canadian state demands that Aboriginal citizens obey its laws, these individuals are entitled to equal protection of the law in return? On this view, Canadian citizenship cannot but be damaged where a discrete and

²⁵ See Wilkins, *supra* note 6 at 82–83.

²⁶ *Ibid* at 83 (Wilkins is here describing an argument that is often employed, but does not endorse it).

²⁷ See Leslie Green, “Are Language Rights Fundamental?” (1987) 25:4 Osgoode Hall LJ 639 (Green argues that language rights, too, are “fundamental”).

²⁸ It is perfectly consistent with this view to concede that the Canadian *Charter* may not be the most effective possible means of protecting Aboriginal Canadians living under inherent-right governments from having their human rights violated by those governments. It is clearly possible, for instance, to argue that a more effective means of providing such protection is by way of bills of rights drafted by the relevant Aboriginal community itself, along the lines of the already existing Labrador Inuit *Charter* of Rights and Responsibilities. See Hogg and Turpel, *supra* note 7 (“[T]he solution might be the development of an Aboriginal Charter (or Charters) of Rights which could exist alongside the Canadian *Charter*” at 213). See also Isaac, *supra* note 5, at 629. Even if Aboriginal-drafted charters are all to the good, however, this would not undermine the central thesis of this paper—that the Canadian *Charter* should presently be applied to inherent right Aboriginal governments. That thesis clearly can coexist with a belief that we should hope for a future in which inherent right governments are constrained by Aboriginal-drafted charters. Further, since, as the quotation from Hogg and Turpel indicates, it seems clear as a matter of law that the creation of such Aboriginal-drafted charters would not automatically supplant the Canadian *Charter* (see Hogg and Turpel, *supra* note 7, at 218: “Any such Aboriginal Charter ... could be interpreted alongside the Canadian *Charter*, although it would not replace the Canadian *Charter*”; see also Milward, *supra* note 8, at 76–77), the question of whether the Canadian *Charter's* application to inherent-right governments would do more harm than good would remain a very live one even in a future environment in which these governments were also constrained by Aboriginal-drafted charters.

sizeable segment of the population is completely denied access to the *Charter's* protections.²⁹ According to this logic, there is an irony to Aboriginal groups' demands to be recognized as 'citizens plus.'³⁰ Specifically, in recognizing that Aboriginal Canadians *qua* Aboriginals are entitled to certain special rights in virtue of Aboriginals' distinct cultural traditions, as well as their prior occupancy of and control over much of the territory now comprising the Canadian state, there is a risk that securing these collective rights could involve undermining the basic individual rights of Aboriginal persons. For instance, if collective Aboriginal rights such as the inherent right to self-government are held to be non-derogable, even vis-à-vis basic *Charter* rights,³¹ then Aboriginal communities will be ensured of their collective Aboriginal rights, but at the cost of leaving the individuals who make up those various communities unable to assert against their Aboriginal governments certain fundamental individual rights that the *Charter* contemplates. In this way, legal recognition of Aboriginals as 'citizens plus' may require that they are simultaneously made 'citizens minus.'

I think this is a very compelling argument, but not one that takes its strength solely from a concern with citizenship. For instance, we should be and are concerned that unequal access to the *Charter's* protections undermines equal citizenship not just because enjoying the protection of the *Charter* is widely regarded as a central feature of what it is to be a Canadian,³² but because Aboriginal Canadians not having the same access as non-Aboriginal Canadians leaves the former at a comparative disadvantage. This offends our commitment to equality, because we view access to the *Charter* as a good and as such are rightly concerned that this good be distributed equally among all Canadians. However, if the *Charter* is a good, it is so in light of the fact that it protects fundamental individual rights from abuse at the hands of governmental authorities. As a result, the argument from equal citizenship ultimately relies for its force on the first argument we looked at about the value of the *Charter* as a means of vindicating basic human rights. Those who frame their arguments for the *Charter's* application to Aboriginal governments in terms of the demands of citizenship

²⁹ Where a government invokes section 33 of the *Charter*—the 'notwithstanding clause'—this will mean that certain provisions of the *Charter* will not apply exactly equally to all Canadians. One might seize on this fact to argue that exempting Aboriginal governments from *Charter* scrutiny cannot possibly offend a norm according to which the *Charter* applies equally to all Canadians, since such a norm does not exist. However, even putting aside the fact that invocations of s. 33 are very much the exception rather than the rule, the bare presence of the notwithstanding clause merely suggests that should the *Charter* be held to apply to a given Aboriginal government, that government, like the federal and provincial governments to which s. 33 explicitly refers, should have recourse to the section in cases where they feel its invocation is warranted—not that they (alone among the orders of Canadian government) should be totally immune from *Charter* scrutiny.

³⁰ Alan C Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State* (Vancouver: UBC Press, 2000) at 67–68 (Cairns takes his title from that of the so-called "Red Paper" of 1970, composed by Aboriginal Canadians in response to the federal government's notorious White Paper of 1969).

³¹ Some of the very limited judicial treatment of s. 25 might seem to suggest this. See generally *Campbell v British Columbia (Attorney General)*, 2000 BCSC 1123 at paras 153–158; *R v Kapp*, 2006 BCCA 277 (decision by Kirkpatrick JA at paras 117–153); *Kapp*, *supra* note 12 (decision by Bastarache J at paras 67–123). However, in the Supreme Court of Canada's decision in *Kapp*, an eight member majority of the Court conspicuously declined to adopt an interpretation of s. 25 of the *Charter* that would have this effect, preferring not to issue a definitive statement on the matter, and instead allowing the issues surrounding s. 25 to be resolved on a case-by-case basis (at paras 63–65). (That the Court exhibited such reticence, when they might have disposed of the case by holding s. 25 to be a 'complete shield' against *Charter* scrutiny, has been interpreted by some as strong evidence that it will be unwilling to countenance such an ousting of *Charter* review (see e.g. Milward, *supra* note 8, at 67).)

³² See e.g. The Right Honourable Beverley McLachlin, "Remarks of the Rights Honourable Beverley McLachlin, P.C. Chief Justice of Canada" (Canadian Rights and Freedoms: 20 years under the *Charter* delivered at Ottawa on 17 April 2002), online: <<https://www.scc-csc.ca/judges-juges/spe-dis/bm-2002-04-17-eng.aspx>>. See also MD, "Charter Fights", *The Economist* (7 July 2013), online: <<https://www.economist.com/americas-view/2014/07/07/charter-fights>> (when the federal government "asked Canadians to suggest the people and feats they want celebrated in 2017, the country's 150th birthday, Medicare, peacekeeping and the charter of rights and freedoms were the top three accomplishments. Pierre Trudeau, the former Liberal prime minister who brought in the *Charter*, was the most inspiring Canadian"). See also "The Canadian Charter of Rights and Freedom" online: *Canadian Human Rights Commission* <<https://www.chrc-ccdp.gc.ca/historical-perspective/en/timePortals/milestones/113mile.asp>> (according to the Canadian Human Rights Commission, "human rights became an intrinsic and irrevocable part of our Canadian identity" "with [the] signing [of the *Charter*]"). See further Lysiane Gagnon, "The *Charter* and Quebec" in Philip Bryden, Steven Davis & John Russell, eds, *Protecting Rights and Freedoms: Essays on the Charter's Place in Canada's Political, Legal, and Intellectual Life* (Toronto: University of Toronto Press, 2000) 45. Cf Nik Nanos, "Charter values don't equal Canadian values: strong support for same sex and property rights" (1 February 2013), online: Policy Options <<http://policyoptions.irpp.org/magazines/the-charter-25/charter-values-dont-equal-canadian-values-strong-support-for-same-sex-and-property-rights/>>.

should therefore be seen as appealing, ultimately, to the idea that all Canadians are entitled to have access to an effective mechanism for challenging governmental action that violates their basic rights.

C. *Taking Stock*

Having outlined the human rights argument and the equal citizenship argument, we should conclude that there is a strong *prima facie* case in favour of the *Charter's* application to inherent right Aboriginal governments. The *Charter*—while not universally beloved³³—is widely regarded not only as a central and unifying feature of Canadian identity, but also as having had a very salutary impact on ensuring that exercises of governmental power respect the basic rights of citizens.³⁴ The onus should therefore be on those who argue that this important rights-protecting mechanism should not be available to Aboriginal Canadians who wish to challenge the actions of their inherent right governments. We will turn now to an analysis of three such arguments.

III. Arguments against the Charter's Application

A. *The No Consent Argument*

One argument for why the *Charter* should not apply to inherent-right Aboriginal governments is that Canada's Aboriginal groups did not consent to the *Charter* in the first place. Kerry Wilkins, for instance, asserts that the Constitutional amendments of 1982 that included the *Charter* were “implemented without the consent, and despite the objections, of Canada's aboriginal peoples.”³⁵

However, even if it can fairly be said that Canada's Aboriginal peoples, taken *en bloc*, objected to the *Charter* at its inception, it is not clear that applying the *Charter* to the governments of these communities today is therefore illegitimate. Consider, for instance, the case of Quebec. Quebec's lack of consent to the *Charter* in 1982 is notorious. However, more than 35 years after ‘patriation’, few would claim that there is anything fundamentally unjust about the fact that the *Charter* applies to the Quebec government just as it does to the governments of the other provinces. An important reason for this, it would seem, is that there is a very clear commitment on the part of Quebecers and their government to just the sort of individual liberties the *Charter* protects. For example, support for the *Charter* today is actually higher in Quebec than anywhere else in Canada. According to the Centre for Research and Information on Canada, for instance, 88% of Canadians nationwide say the *Charter* is a ‘good thing for Canada’, and “72% say it adequately protects the rights of

³³ In particular, a perennial objection to bills of rights, such as the *Charter*, that authorize judicial review of legislation is that they are fundamentally anti-democratic. See e.g. Jeremy Waldron, *The Core of the Case against Judicial Review*, 115 Yale L.J. 1346 (2006); James Allan, *Democracy in Decline: Steps in the Wrong Direction* (Montreal: McGill-Queen's University Press 2014); FL Morton, “The *Charter* Revolution and the Court Party” (1992) 30:3 Osgoode Hall LJ 627.

³⁴ See e.g. Kate Sutherland, “The New Equality Paradigm: The Impact of *Charter* Equality Principles on Private Law Decisions”, in David Schneiderman & Kate Sutherland, eds, *Charting the Consequences: The Impact of Charter Rights on Canadian Law and Politics* (Toronto: University of Toronto Press, 1997) 245; Didi Herman, “The Good, the Bad, and the Smugly: Sexual Orientation and Perspectives on the *Charter*”, in David Schneiderman & Kate Sutherland, eds, *Charting the Consequences: The Impact of Charter Rights on Canadian Law and Politics* (Toronto: University of Toronto Press, 1997) 200; Peter Hogg and Allison Bushell, “The *Charter* Dialogue between Courts and Legislatures” (1997) 35:1 Osgoode Hall LJ 75.

³⁵ See Wilkins, *supra* note 6 at 77.

Canadians.”³⁶ That survey also finds that “[s]upport for the *Charter* is strong in all regions, running from a high of 91% in Quebec to a low of 86% in western Canada.”³⁷ Similarly, a survey conducted by SES Research on the occasion of the 25th anniversary of the *Charter* found that support for the proposition that the *Charter* was moving the country in the right direction was highest in Quebec.³⁸ Clear evidence of the shared philosophical commitment to individual liberties that obtains between Quebec and the rest of Canada is also found in the existence of Quebec’s own provincial *Charter*, which is largely of a piece with Canada’s.³⁹

In summary, the fact that the Quebec government initially objected to the *Charter* does not mean that the *Charter*’s present application in that province is unjust. We do not see the Quebec government’s being constrained by the *Charter* as unduly undermining Quebec’s collective autonomy, and a significant reason why we don’t see things that way is because Quebecers now do consent to the *Charter*’s application. So while requiring the Quebec government to abide by a *Charter* to which it did not initially consent might appear unjust on its face, this concern is mitigated by the fact that Canadians from every province, especially Quebec, appear to share a deep commitment to the liberal values the *Charter* enshrines.

So the no initial consent argument does not succeed on its own. However, precisely the sort of general commitment to the *Charter*’s protections that explains much of why the *Charter*’s application in Quebec today is not regarded as particularly contentious is what is alleged to be conspicuously absent in Aboriginal societies. If that is the case, then does this fact not render the *Charter*’s application to the governments of these communities illegitimate? This question leads us directly to the second argument against the *Charter*’s application that we will consider.

B. *The Alien Values Argument*

A second argument against applying the *Charter* to inherent-right governments has it that because the values and concepts that animate it are so alien to Aboriginal world views, striking down action by inherent-right governments for non-conformity with the *Charter* threatens to undermine the traditions and cultural practices of the relevant Aboriginal community. On this view, any benefits that might accrue from the *Charter*’s application in terms of the ability of individual Aboriginals to challenge human rights abuses by their inherent-right governments are outweighed by the attendant risks of (externally imposed) cultural degradation.

Before directly examining the claim that the *Charter*’s values are alien to Canada’s Aboriginal peoples, it is worth getting clear on the fact that the *Charter* did not emerge out of a cultural vacuum. Instead, the document was created by non-Aboriginal Canadians who inevitably drew on their own particular cultural values in shaping the *Charter*’s provisions. Thus the *Charter* does not represent a “view from nowhere.”⁴⁰ It is instead a view from Canada, for Canadians.⁴¹ Joseph Carens illustrates the point well when he writes that “[p]olitical and legal institutions are simultaneously cultural institutions in ways that are

³⁶ Andrew Parkin, “What is the *Canadian Charter of Rights and Freedoms*” Center for Research and Information Canada at York University, online: <<http://www.yorku.ca/lfooster/2012-13/MPPAL%206130/lectures/WhatistheCanadianCharterofRightsandFreedoms.html>>

³⁷ *Ibid.*

³⁸ Nanos, *supra* note 33.

³⁹ *Charter of human rights and freedoms*, CQLR c-12.

⁴⁰ This phrase is taken from Thomas Nagel’s book by the same name: *The View from Nowhere* (New York: Oxford University Press, 1986).

⁴¹ Whether it is properly regarded as being ‘for’ *all* Canadians—i.e., Aboriginal and non-Aboriginal alike—is one of the central questions this paper seeks to answer.

sometimes invisible to those who share the culture.”⁴² Consequently, the notion that the *Charter* could undermine the very (non-Aboriginal) social life of which it is a product is much less likely than the prospect that it might undermine the traditional practices of Aboriginal groups.⁴³ We do, then, have reason to worry that imposing a rights regime created within one cultural setting on another, distinct, cultural group may undercut the ability of the latter group to continue to live by their traditional practices. So we can’t short-circuit the ‘alien values’ argument by denying out of hand the possibility that the alleged foreignness of the *Charter*’s values will do violence to Aboriginal customs and traditions. We must turn, instead, to an evaluation of the argument’s premise that the liberal values enshrined by the *Charter* are indeed fundamentally alien to Aboriginal societies.

Essentially, there are two claims that are often made by those who emphasize the profound or intractable quality of the “epistemological problems”⁴⁴ thrown up by “gaps”⁴⁵ between Aboriginal and Western ways of knowing and of looking at the world. First, it is suggested that traditional Aboriginal societies did not embrace the value of personal autonomy generally, or individual rights more specifically, that animates both the *Charter* and so much of Western political thought. Secondly, it is argued that Canada’s Aboriginal peoples today cannot embrace the *Charter* itself (at least not without denying their unique indigenous identity), since it remains a foreign artifact of a very different cultural tradition.

In order to assess these claims, we should begin by dispelling a particularly unhelpful and widespread myth. The myth has it that whereas the wider Canadian society, and the *Charter* itself, is undergirded by a staunchly individualist worldview that valorises personal autonomy and the negative liberty secured by individual rights, Aboriginal societies are characterized by a thoroughgoing communitarian commitment to harmony and balance between all aspects of creation, and understand human freedom as involving a system of “reciprocal relations and mutual obligations based on the need to preserve the harmonious whole.”⁴⁶ On this view, modern notions of individual human rights, such as those protected by the *Charter*, would have been completely foreign to traditional Aboriginal societies. This much seems to follow, for instance, from the blunt assertion of Taiaiake Alfred that “the cultural ideal of respectful coexistence as a tolerant and harmony seeking first principle” that was embraced by the original peoples of Canada, is “[d]iametrically opposed to the possessive individualism” that typifies Canadian society and its Constitution.⁴⁷

But this is surely overstated. Without ignoring the very real differences in emphasis between Aboriginal and Western society when it comes to conceiving of the relationship between individual freedom and the collective good, we must reject the notion that the wider Canadian society and Aboriginal communities fit neatly into opposite sides of a binary that separates individualism from collectivism. Even Mary Ellen Turpel, for instance, (in the course of an article devoted to showing how Aboriginal societies manifest such a “different

⁴² Joseph H Carens, *Culture, Citizenship and Community*, (New York: Oxford University Press, 2000) at 189.

⁴³ I recognize that this discussion runs the risk of taking ‘non-Aboriginal Canada’ as a homogenous bloc, which it surely isn’t. There are, for example, marginalized non-Aboriginal communities that also may have cause to see the *Charter* as fitting uncomfortably with their group’s broader social life. My point, however, is that since Aboriginal Canadians had little input into the *Charter*’s creation, the document has something like a built-in sensitivity towards the wider (non-Aboriginal, predominately white, male, and perhaps Anglophone) culture of those who were seated at the drafting table, that does not extend in the same manner to Aboriginal cultures.

⁴⁴ Turpel, “Interpretive Monopolies”, *supra* note 20 at 24.

⁴⁵ *Ibid* at 13.

⁴⁶ Long and Chiste, *supra* note 20 at 97.

⁴⁷ Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (Oxford: Oxford University Press, 1999) xiv (emphasis added). See also Turpel, “Interpretive Monopolies”, *supra* note 20 (“[t]he collective or communal basis of Aboriginal life does not really, to my knowledge, have a parallel to individual rights: the conceptions of law are simply incommensurable” at 30).

human (collective) imagination”⁴⁸ from that animating liberal democracies that the *Charter’s* application to Aboriginal governments would be an injustice) admits that “[t]here is no polity that is purely individualistic or purely collectivist.”⁴⁹ Further, as she goes on to suggest, we should not view “‘society’ as an either-or,” in the sense that Aboriginal communities, if they place great emphasis on the social harmony of the group, must be entirely collectivist in orientation.⁵⁰

What is more, it would be a serious mistake to portray autonomy as alien to the pre-European contact peoples of Turtle Island. Taiaiake Alfred himself, for instance, contends that “the heart and soul of indigenous nations” consists in “a set of values that challenge the destructive and homogenizing force of Western liberalism and free market capitalism.”⁵¹ While this might seem to suggest that indigenous nations do not respect individual freedom, Alfred emphatically rejects that notion. He insists that these same indigenous values that challenge liberalism also simultaneously “honour the autonomy of individual conscience.”⁵²

Alfred’s view of the importance of individual autonomy in traditional Aboriginal societies is shared by other commentators. According to Menno Boldt and J. Anthony Long, for example, when pressed to list the “cultural traits and values shared by most Indian tribes,” one must include “the reaching of decisions by consensus, institutionalized sharing, [and] respect for personal autonomy....”⁵³ Moreover, they further assert, “[s]elf-direction (autonomy), an aristocratic prerogative in European society, was everyone’s right in Indian society.”⁵⁴ Indeed, many traditional Aboriginal tribes can be regarded as radically libertarian in outlook. Long and Chiste write, for example, that “[h]istorically, Plains Indians did not accept the idea that anyone could be given the right to govern others, except for limited periods of time and under restricted circumstances.”⁵⁵ As they also write, again in reference to the Plains Indian groups they studied:

A great deal of personal autonomy existed and was reflected in the exercise of authority as well as in collective decision-making. Individual autonomy, however, was not based on an atomistic view of human nature, but rather on a concept of human dignity stemming from the equality of status and interdependence of individuals within the cosmic order, as conceived by the Creator.⁵⁶

With all of this in mind, the emphasis on community harmony and a cohesive social life, common among pre-contact Aboriginal nations, can be seen as a necessity of survival in societies where sustenance often had to be painstakingly coaxed out of harsh physical environments. It was far from a flat rejection of the value of individual freedom.

We can conclude, then, that the ideal of personal autonomy that animates many of the *Charter’s* guarantees of rights and freedoms was far from alien to pre-contact Aboriginal

⁴⁸ Turpel, “*Canadian Charter of Rights and Freedoms*”, *supra* note 20 at 34.

⁴⁹ *Ibid* at 16.

⁵⁰ *Ibid*.

⁵¹ Alfred, *supra* note 47 at 60.

⁵² *Ibid*.

⁵³ Menno Boldt & J. Anthony Long, “Tribal Traditions and European-Western Political Ideologies: The Dilemma of Canada’s Native Indians” in Menno Boldt, J. Anthony Long, & Leroy Little Bear, eds, *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: Toronto University Press, 1985) 333 at 334.

⁵⁴ *Ibid* at 339.

⁵⁵ *Supra* note 20, at 99.

⁵⁶ *Ibid* at 98.

communities in what is now Canada. Admittedly, however, respect for the larger notion of individual autonomy is not the same as acceptance of the specific individual rights that find expression in the *Charter*. Recall, for instance, the passage from Long and Chiste quoted above, to the effect that notions of autonomy in Plains Indian tribes were premised on a commitment to a cosmic order characterized by a system of right relations among all its constituent parts, and especially by the equality and interdependence of persons. This quotation suggests that while the concept of personal autonomy was not alien to traditional Aboriginal societies, the *Charter's* language of individual rights might well have been foreign, since for Aboriginal communities autonomy was grounded not in the view of the individual as an atomistic free-chooser which is (rightly or wrongly) said to animate liberalism,⁵⁷ but rather in a conception of human dignity that presupposes the equality and interdependence of individuals.

Given this latter view of the importance of interdependence, the argument runs, insisting on one's individual rights as against other members of the community could be deeply divisive and may threaten the society's social fabric. According to Turpel, for instance, the very concept of rights is in fact in irresolvable tension with Aboriginal societies' understandings of social life.⁵⁸ This is so because Anglo-European political thought since Locke has located "the conceptual basis of rights analysis in notions of property and exclusive ownership" that were foreign to indigeneity.⁵⁹ Specifically, whereas Aboriginal societies' understandings of social life included the idea that autonomy was best secured by ensuring dignified, harmonious cooperation between the community's members, the European concept of rights carries with it "a highly individualistic and negative concept of social life based on the fear of attack on one's 'private' sphere."⁶⁰

Another critique along these lines has been levelled by Gordon Christie, who, in the course of attempting to "highlight [...] the cultural divide between Western theorists and the worlds of Aboriginal peoples", asserts that "a liberal vision underlies and animates the law, and ... while grounded in this vision, the law cannot protect the interests of Aboriginal peoples."⁶¹ As David Milward helpfully summarizes Christie's views, "the imposition of liberal legal structures amounts to oppression in that it fails to respect the collective autonomy of Aboriginal communities, [and] promotes the pursuit of individual self-interest at the expense of Aboriginal cultural values of responsibility."⁶²

The problem with this picture of *Charter* rights as militantly individualistic is that it—like the notion that Aboriginal societies are entirely collectivist in orientation—is quite hyperbolic. There are, for instance, many different theories of what it is to have a right. Some of these locate the foundation of rights in ideas of 'property and exclusive ownership', but others do not. It is misleading, therefore, to portray a commitment to individual rights as necessarily antithetical to collective projects and community wellbeing. In the western tradition, for instance, the two leading accounts of rights are the interest theory

⁵⁷ My own view is that the so-called 'communitarian critique' of liberalism misses the mark, since it is a mistake to regard liberals as necessarily presupposing such an atomistic view of the self. (For prominent examples of works by liberals who clearly appreciate the way in which individual autonomy depends upon and is asserted within a supportive social and cultural milieu, see Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Oxford University Press, 1996); Alan Patten, *Equal Recognition: The Moral Foundations of Minority Rights* (Princeton: Princeton University Press, 2014); Leslie Green, "What is Freedom For?" (2012) Oxford Legal Studies Research Paper No 77/2012.

⁵⁸ Turpel, "Interpretive Monopolies", *supra* note 20 at 509.

⁵⁹ *Ibid* at 14–15.

⁶⁰ *Ibid* at 15.

⁶¹ Christie, "Law, Theory and Aboriginal Peoples" (2003) 2 *Indigenous LJ* at 68.

⁶² Milward, *supra* note 9 at 51.

and the will theory. On the will theory, “the function of a right is to give its holder control over another’s duty”,⁶³ in the sense that the right-holder is “a small scale sovereign”⁶⁴ with the power, for instance, to either grant or refuse permission for someone else to use their property in a certain way. On the interest theory, by contrast, rights protect the right-holders’ interests. If a person has a right to be provided with the necessities of life, say, that is because it is in her interest to receive them. What is important to note is that the interest theory is in considerably less tension than the will theory with the idea of a society’s communal life being a dense and delicate web of interdependence. And while there continues to be an energetic, if perhaps not particularly fruitful,⁶⁵ debate among will theorists and interest theorists, the interest theory appears to be more heavily subscribed to.

Those who would claim that the very notion of rights is incompatible with indigeneity are thus guilty of homogenizing the rich theoretical literature on rights, or of ignoring that literature altogether. In addition, they will have their work cut out for them when it comes to explaining away the widely accepted view that groups, and not just individual persons, can be and often are rights-holders. Further, there is widespread, albeit not universal, recognition today that individuals possess not only so-called ‘negative’ rights—such as freedom from various forms of governmental control or abuse—but ‘positive’ rights as well—such as entitlements to various social, cultural, and economic goods and the opportunity to participate in the social, cultural, and economic life of their communities. The picture of rights as inherently divisive weapons that individuals employ, consciously or unconsciously, to the detriment of social harmony is much harder to maintain once we allow into view such social, economic, and cultural rights.

In the end, the argument put forward by Turpel is doubly misleading. She invokes, as we saw, a Lockean view of rights as grounded in notions of private property in order to suggest that the rights the *Charter* protects are alien to Aboriginal Canadians today. Notice that Turpel is holding up for analysis a particular take on the basis of rights that was in vogue hundreds of years ago, but holds much less sway today. It may well be, for instance, that Locke’s views about rights to property would have been completely foreign to every pre-contact Aboriginal group in North America. But what clearly does not follow is that the conception of rights *that the Charter articulates today* is foreign to Canada’s Aboriginal communities *as we find them today*.

As it happens, furthermore, the bare notion of individual rights as against the larger community would not have been inconsistent “with Aboriginal societies’ understandings of social life” (to use Turpel’s words again) even in the pre-contact period. Certainly, some of the specific conceptions of the nature of rights that leading theorists in the liberal tradition have from time to time advanced would likely have been in “irresolvable tension” with these “understandings.” However, the central premise upon which the *Charter*’s rights protection regime is based—the notion that humans are autonomous agents, and that as a result of this fact they possess interests in having certain things or in being free to act in various ways which are sufficiently weighty that it is appropriate to demand that others respect those interests—would have been in no such tension.⁶⁶

⁶³ Leif Wenar, “Rights” in Edward N Nelta ed, *Stanford Encyclopedia of Philosophy* (Stanford: Metaphysics Lab Stanford University, 2015), online: <plato.stanford.edu/archives/fall2015/entries/rights/>.

⁶⁴ HLA Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Oxford: Oxford University Press, 1982) at 183.

⁶⁵ See Van Duffel, “The Nature of Rights Debate Rests on a Mistake” (2012) 93 *Phil Q* 104; Tim Hayward, “On Prepositional Duties” (2013) 123 *Ethics* 264.

⁶⁶ In all of this, of course, we must be careful not to regard pre-contact Aboriginal society as a monolithic whole. The many Aboriginal communities clearly differed from one another in countless ways. Taking all of them together, however, its true as a general matter that these communities would not have found alien the idea that individual human beings are autonomous and have interests that justify holding others under duties to act, or refrain from acting, in certain ways.

To summarize, we have found that, in general, traditional Aboriginal societies tended to be more collectivist in outlook than is the wider Canadian society today. But we also found that none of these pre-contact Aboriginal communities were wholly collectivist in orientation, to the exclusion of concern for individual freedom. In these traditional Aboriginal communities—as in both Aboriginal and non-Aboriginal communities today—individual autonomy was acknowledged and prized. It was not an alien value. Further, we found reason to believe that the notion that individuals are entitled, owing to their interests in personal autonomy, to be free from certain kinds of domination would not have been alien to traditional Aboriginal communities either, even if the extensive rights discourse that has built up around these notions in liberal democracies today would have been.

But even if we are wrong on that score—even if the idea of individual rights would have been completely foreign to the social understandings of traditional Aboriginal peoples—what does seem clear is that these notions of individual rights are not at all foreign to most of Canada's Aboriginal peoples *today*. Standing on one's legal rights and seeking their vindication in courts of law was clearly not a common feature of life in pre-contact Aboriginal communities. But it is not uncommon for members of modern-day Aboriginal communities to do exactly this. Further, when we are assessing whether the *Charter's* values are sufficiently foreign to certain Aboriginal communities such that the *Charter's* application to the governments of these communities would do violence to their way of life, we should take as the society under study not some long-ago version of the community. Rather, we should ask whether the *Charter's* values are really alien to the community as it stands before us—i.e., in the present-day. Evidence suggesting that notions of autonomy and individual rights would have been alien to many pre-contact Aboriginal communities—even if it existed—would be rather weak evidence that these ideals are foreign to contemporary Aboriginal communities. This is because Aboriginal societies, like all political communities, naturally and inevitably change over time—even absent the assimilationist pressures of colonialism. As David Milward asks rhetorically in his book-length search for a “culturally sensitive interpretation” of the *Charter*,⁶⁷ “[c]an any Aboriginal people (or any other society for that matter) confidently assert that their laws and practices have remained exactly the same throughout the ages?”⁶⁸

When we turn our lens to an examination of Aboriginal communities as we presently find them, we see strong evidence of a fairly widespread endorsement of both human rights in general and the *Charter* in particular. As Turpel conceded more than 25 years ago, in arguing against the propriety of applying the *Charter* to inherent-right governments she was “faced with the fact that rights discourse has been widely appropriated by Aboriginal peoples in struggles against the effects of colonialism.”⁶⁹ In the years since her article was published, instances of Aboriginals turning to the courts to protect their rights have, of course, continued apace.⁷⁰

⁶⁷ See Milward, *supra* note 8 at 62–77.

⁶⁸ *Ibid* at 59.

⁶⁹ Turpel, “Interpretive Monopolies”, *supra* note 20 at 10–11.

⁷⁰ These include, to mention just a few of the most consequential cases involving Aboriginal persons or peoples seeking to vindicate their Aboriginal rights, *R v Van der Peet*, [1996] 2 SCR 507 [*Van der Peet*]; *R v Gladstone*, [1996] 2 SCR 723 [*Gladstone*]; *Pamajewon*, *supra* note 13; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 [*Delgamuukw*]; *Sparrow*, *supra* note 17; *R v Marshall*, [1999] 3 SCR 456; *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511; *Tsilhqot'in Nation v British Columbia*, [2014] 2 SCR 257. Of particular relevance for our purposes is *McIvor v Canada (Registrar of Indian and Northern Affairs)*, [2009] BCCA 153 in which an Aboriginal woman successfully invoked the equality provision (s. 15) of the *Charter* to attack s. 6 of the Indian Act on the grounds that it violated gender equality. That section of the Act provided that Indian status under the Act was retained by Indian men who married ‘non-status Indian’ women, whereas status women who married non-status Indian men lost their status and became unable to pass that status down to their children.

Now, it is possible that, as Turpel alleges, Aboriginal Canadians may “appropriate this conceptual framework as the only (or last) resort without sharing or accepting the distinctly Western and liberal political vision of human rights concepts.”⁷¹ So we must be careful not to automatically assume that all Aboriginal individuals who invoke the *Charter* (for instance in an attempt to avoid conviction for a criminal offence) actually endorse the view of human beings as possessed of individual rights that the *Charter* manifests. But we don’t have to merely assume that Aboriginal Canadians embrace the *Charter*’s values. We can observe this from readily available data. According to Statistics Canada, for example, “Aboriginal people tended to have similar views on the leading Canadian national symbols, with no significant differences in the proportion of Aboriginal people and non-Aboriginal people who thought the *Charter*, flag and national anthem were very important to the Canadian identity.”⁷² The same survey found that “a strong appreciation of national symbols [including the *Charter*] was more common among Aboriginal people than non-Aboriginal people born in Canada.”⁷³ By 2001, legal scholar Bradford Morse noted, in his paper “20 Years Under the *Charter*: The Status of Aboriginal Peoples under the *Canadian Charter of Rights and Freedoms*,” that “the individual rights and liberties emphasized by the *Charter* are becoming more accepted and internalized by many Aboriginal people as the imposition of laws and policies by any government without their consent, including by their own governments, are being viewed as contrary to traditional values that stress individual freedom and consensus decision-making.”⁷⁴ The fact that “the Native Women’s Association of Canada has argued strenuously for the application of the *Charter* to Aboriginal jurisdictions”⁷⁵ is another prominent example of the internalization of individual rights norms by Aboriginal Canadians.⁷⁶

This evidence of Aboriginal Canadians’ familiarity with and acceptance of human rights norms and the *Charter* should be viewed against the backdrop of another salient fact. Without denying the real differences that do exist between indigenous and non-indigenous societies, it is true that Aboriginal groups today have an incentive to over-emphasize their cultural distinctness. Consider the following quotation from Taiaiake Alfred, a Mohawk: “[t]o be Native today is to be cultured.... But we cannot have just any culture; it has to be “traditional” culture.... Our very sovereignty... depends on it, as we must continually prove

⁷¹ Turpel, “Interpretive Monopolies”, *supra* note 20 at 33.

⁷² See Maire Sinha, “Canadian Identity, 2013” (1 October 2013) at 8, online (pdf): Statistics Canada <www150.statcan.gc.ca/n1/pub/89-652-x/89-652-x2015005-eng.htm>. (More than nine in ten Canadians surveyed believed the *Charter* and the flag were either very or somewhat important to national identity; 88% said this in respect of the anthem.)

⁷³ *Ibid.*

⁷⁴ See Bradford W Morse, “Twenty Years of *Charter* Protection: The Status of Indigenous Peoples Under the *Canadian Charter of Rights and Freedoms*” (2002) 21 Windsor YB Access Just 385 at 430.

⁷⁵ Dickson, *supra* note 20 at 149.

⁷⁶ As Monique Deveaux writes, although “[n]ative women were by no means unanimous in their call for formal constitutional protection of their individual equality rights by means of the *Charter*, and disagreement continues today,” “a significant number of native women went on record as supporting continued *Charter* protection for Aboriginal peoples precisely because they feared the erosion of women’s rights”—a concern, according to Deveaux, that was “reflected not only in the positions taken by NWAC and provincial native women’s groups, but also in the rejection (in the referendum vote) of the Charlottetown Accord by two thirds of native peoples on reserves” (*Conflicting Equalities? Cultural Group Rights and Sex Equality* 48 *Political Studies* 522, 532 (2000)). For further discussion of the *Charter*’s importance to securing the rights of Aboriginal women, see Nahanee, *supra* note 20 at 359; McIvor, *supra* note 20 at 77.

our difference in order to have our rights respected.”⁷⁷ Despite this largely judicially-created phenomenon, Long and Chiste conclude that a “transformation has occurred in governing processes and value systems within Indian societies.”⁷⁸ At present, Long and Chiste continue, “there appears to be a convergence of modern Indian values and those of Western liberalism around ... individual rights as personal entitlements and a paralleling belief in the equality of persons.”⁷⁹

1. A Less Alien Alternative?

The argument that the *Charter* must not apply to inherent-right governments because its values are too alien to those of Aboriginal communities must therefore be rejected. Those who remain opposed to the *Charter*’s application might change tack at this point, however. For instance, it might be argued that to the extent that individual rights serve to protect citizens of modern Western societies from abuse at the hands of their governments, in traditional Aboriginal communities the internal application of the community’s customary law and traditions served the same function. According to the study of Plains Indian communities by Long and Chiste, for instance, these communities’ customs “constituted a type of impersonal authority that served to protect individuals from arbitrary coercion by leaders, thereby protecting the status of individuals within the group,” and thus “served as a surrogate” for the individual rights regimes opted for by “contemporary democratic societies.”⁸⁰

It might be argued, then, that while the *Charter*’s human rights values are not alien to Aboriginal Canadians today, there nevertheless exists an alternative method for protecting Aboriginals from oppression at the hands of their inherent-right governments that is more in keeping with the various communities’ traditional values—indeed, one that is by definition consistent with and respectful of those values. This proposal suggests that we can secure all the benefits of human rights protection that the *Charter*’s application promises, without having to pay any of the costs. That is, we can prevent the violation of individual rights without having to worry about potential conflict between the *Charter*’s provisions and traditional practices, since it will be such traditional practices themselves that preclude the rights violations. In short, why resort to applying the *Charter* when the human rights of these Aboriginal Canadians could be adequately safeguarded simply by letting the inherent-right governments use their community’s internal customs and traditions to police themselves?

The proper response here is that we simply cannot trust inherent-right Aboriginal governments to self-regulate in this way. We can’t trust such Aboriginal governments to do so not because they are *Aboriginal* governments, of course, but because they are governments. According to David Milward, the case for “some form of formal rights protections” within Aboriginal societies is strong precisely because such formal protections

⁷⁷ *Supra* note 48 at 66. To be clear, this unhappy situation is not the fault of Canada’s Aboriginal communities, but rather is due to the Supreme Court of Canada’s unfortunate jurisprudence relating to Aboriginal rights since its seminal decision in *Van der Peet*, in which the Court found that Aboriginal rights are “rooted in the historical presence—the ancestry—of aboriginal peoples in North America” (*Van der Peet*, *supra* note 70 at para 32). See e.g. Wilkins, *supra* note 6 at 93–94 describing the state of the law post-*Van der Peet*.

[Aboriginal rights] exist to protect, in contemporary form, ‘the crucial elements of those pre-existing aboriginal societies’ [quoting from *Van der Peet*]. Contemporary practices, activities and relationships qualify as protected uses of aboriginal rights only where, and only because, they demonstrably keep faith with the customs, themes and traditions constitutive of those cultures before and apart from European influence.

⁷⁸ Turpel, “Canadian Charter of Rights and Freedoms”, *supra* note 20 at 111.

⁷⁹ *Ibid* at 112. Long and Chiste go on to add at 111 this endorsement of liberal norms by Aboriginal peoples has not supplanted all traditional Aboriginal values: “present-day First Nations are best characterized as unique mixtures of traditional Indian and Western liberal values and institutions.”

⁸⁰ *Ibid* at 99.

are “relevant to the needs and realities of *contemporary* Aboriginal communities.”⁸¹ For Milward, while relying on customs and traditions to prevent abuses of power may have been sufficient in the days before the arrival of Europeans, “Aboriginal peoples live in a far different world than the one they lived in prior to contact. It is a world that is marked by different technologies and different economics and, therefore, one that is thoroughly suffused with relationships of hierarchy and power.”⁸² Further, Milward is surely correct when he asserts that “[w]ith such relationships comes a greater potential for the abuse of power.”⁸³ As such, it seems totally naïve to offer an affirmative response to the rhetorical question he goes on to pose: “Is it a realistic hope that any people, Aboriginal or non-Aboriginal, can completely avoid the need for formal safeguards against governing power in today’s world?”⁸⁴

Now, it is not clear that it is only due to momentous changes in economic and governmental structures within Aboriginal communities that formal rights protection mechanisms are needed. Perhaps the picture painted by Long and Chiste is too rosy when extrapolated across all of the various pre-contact Aboriginal peoples. Surely some of these societies, at times, would have been marked by serious and enduring human rights violations. Perhaps some formalized practice of overseeing decision-making for conformity with human rights norms would have been salutary even in these pre-contact societies. In other words, it seems possible that the reach of the modern state and the shift to capitalist industrial economies are not necessary conditions that must be satisfied before formalized rights-protection mechanisms will be appropriate. It is at least arguable that we could lay out a list of (jointly) sufficient conditions that omit reference to the technological sophistication and governing structures typical of modern societies. Perhaps, for instance, it is appropriate for an independent body to scrutinize governmental decision-making for conformity with rights norms wherever we have reason to fear that those with decision-making power may advance their own interests—or those of their friends and family—at the expense of other members of the community; or where we believe some officials may be prejudiced against certain members of the community; or even where we recognize that officials will at times be tempted to prioritize diffuse gains in overall community well-being over the fair and just treatment of each member of the society.

This line of thinking is admittedly speculative and underdeveloped. The important point, however, is that most of the reasons for favouring judicial review in contemporary non-Aboriginal contexts apply with equal force in the context of inherent-right communities today. In other words, without having to isolate specific features of present-day Aboriginal communities that pre-contact Aboriginal societies lacked (and the having of which purportedly makes the *Charter’s* application appropriate), it is enough to simply notice that for those of us who believe that judicial review is on balance a good thing in the broader Canadian society, the realities (and temptations) of governing that we think gives rise to the need for such judicial review are also present in the context of contemporary Aboriginal communities.

Indeed, a number of commentators (both Aboriginal and non-Aboriginal) argue that modern Aboriginal governments, as compared to the federal government and the governments of the provinces, are *more* likely to perpetrate human rights abuses. According

⁸¹ Milward, *supra* note 8 at 60 (emphasis added).

⁸² *Ibid.* John Borrows makes a different, although related, point when he argues that Indigenous traditions can cease to be “uplifting, positive, and liberating forces” “when they are treated as timeless models of unchanging truth that require unwavering deference and unquestioning obedience” (*Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016) at i).

⁸³ Milward, *supra* note 8 at 61.

⁸⁴ *Ibid.*

to Roger Gibbins, for example, “the *Charter* takes on additional importance when we realize that individual rights and freedoms are likely to come under greater threat from Indian governments than they are from other governments in Canada.”⁸⁵ The reason for this, Gibbins clarifies, is due to “the size and homogeneity of Indian communities rather than [...] their ‘Indianness’ per se. Indian communities tend to be small and characterized by extensive family and kinship ties, and it is in just such communities that individual rights and freedoms are most vulnerable.”⁸⁶ Milward picks up on this theme, asserting that “contemporary Aboriginal communities are often characterized by strife between rival clans or families.”⁸⁷ He then explains how in such circumstances those who wield power may seek to legitimize their abuse of it by disingenuously claiming that in violating the rights of their members they are in fact only acting to preserve the community’s collective traditions: “If a family wrests the reins of power for itself, that family can set the ‘collective goals’ for the Aboriginal community at large. The pursuit of such ‘collective goals’ can end up leading to the benefit of the dominant family and to the neglect or even persecution of rival families.”⁸⁸

Ultimately, then, the claim that the *Charter* must not apply to inherent-right governments because we can reliably secure the same human rights-protecting benefits it offers via a less alien means is not compelling. We do not have good reason to be confident on this score. If, therefore, we accept that the *Charter* has salutary human rights-protecting effects, but still wish to argue that it should not apply to inherent-right governments, we will have to point to some countervailing downside that its application would have. We will turn our attention to this possibility by addressing what we might label the ‘sovereignty argument’ against the *Charter*’s application.

C. *The Sovereignty Argument*

The final argument against the *Charter*’s application to inherent-right communities that we will examine has it that were Aboriginal governments required to act within the bounds laid out by the *Charter*, this would unacceptably undermine Aboriginal sovereignty. What should we make of this claim?

Firstly, we should get clear on what we mean by the concept of sovereignty. Often, it appears that ‘sovereignty’ is used to refer to having complete and unqualified control over a given jurisdiction.⁸⁹ Other times, however, we clearly have no qualms in referring to a body as sovereign even though its powers are limited in various ways, as, for instance, when we speak of the Canadian federal government as exercising sovereignty, despite the obvious fact that in doing so it must comply with the *Charter* and with the Constitution’s division of powers between the federal and provincial governments. Further, it is clear that Canada’s Aboriginal peoples do not possess “external sovereignty,” in the sense of being sovereign states.⁹⁰ Rather, they are a part of the Canadian state and exercise their sovereignty within it.

⁸⁵ Roger Gibbins, “Citizenship, Political, and Intergovernmental Problems with Indian Self-Government” in J. Rick Ponting, ed, *Arduous Journey: Canadian Indians and Decolonization* (Toronto, Ont: McClelland and Stewart 2000) at 374.

⁸⁶ *Ibid* at 374–75.

⁸⁷ *Supra* note 8 at 52.

⁸⁸ *Ibid* at 53.

⁸⁹ See e.g. the canonical accounts of a ‘Sovereign’ in John Austin, *The Province of Jurisprudence Determined* (London: J Murray, 1832) and Thomas Hobbes’s *Leviathan* (1651).

⁹⁰ Nor, evidently, do many Aboriginal groups aspire to this status.

As the majority of the Supreme Court of Canada wrote in *Gladstone*: “distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community, over which the Crown is sovereign.”⁹¹ A similar sentiment is expressed by Binnie J. in his judgment (supported by Major J.) in the 2001 case of *Mitchell*, where, drawing on the notion of “shared” or “merged” sovereignty that had been advanced by the Royal Commission on Aboriginal Peoples, he wrote that “aboriginal and non-aboriginal Canadians together form a sovereign entity with a measure of common purpose and united effort.”⁹² Binnie J. explicitly found that assenting to this notion is necessary for “the principle of ‘merged sovereignty’ articulated by the Royal Commission on Aboriginal Peoples [...] to have any true meaning.”⁹³ Indeed, this ideal of “shared” or “merged” sovereignty, as opposed to external sovereignty, most aptly describes the sense in which Canada’s Aboriginal peoples are sovereign.⁹⁴

We should, then, echo the words of the Royal Commission on Aboriginal Peoples’ Final Report that “no sovereignty is absolute or exclusive in any federation.”⁹⁵ That is, while we can conceive of an absolute sovereign on the order of Thomas Hobbes’s Leviathan, for our purposes we should not understand a sovereign political community (*qua* sovereign) as being free to exercise public power in any way it sees fit. In a constitutional democracy like Canada, sovereignty must be exercised in accordance with certain fundamental norms, such as democracy and the rule of law.⁹⁶ We might wish to see these as *parameters* within which sovereignty is to be exercised in Canada, as opposed to *limitations* that curtail sovereignty.⁹⁷ At issue, then, is whether requiring inherent-right Aboriginal governments to comply with the *Charter* would be to unacceptably limit Aboriginal sovereignty, or merely to require that it be exercised within acceptable parameters.

One way, it would seem, in which Aboriginal sovereignty would be unduly limited is if the *Charter*’s application were to force Aboriginal communities to undergo profound cultural change. Certainly a community made to shed its culture and adopt another’s is a community whose status as sovereign is open to doubt. So if complying with the *Charter*’s provisions were to require Aboriginal peoples to turn their backs on their cultural traditions and remake themselves in the image of the more individualistic, rights-focused wider society, the requirement that they exercise self-government in accordance with the *Charter* would appear to be an unacceptable limit on, rather than merely a parameter of, their sovereignty.

Clearly, the line between a ‘limit’ and a ‘parameter’ will be a tough one to draw in many cases. However, it might be that while compliance with the rule of law, say, is an acceptable parameter within which Aboriginal self-government must be exercised, requiring compliance with the whole suite of contemporary liberal-democratic values—such as gender equality, religious freedom, freedom of expression, and the like—would be to diminish

⁹¹ *Gladstone*, *supra* note 70 at para 73.

⁹² *Mitchell v MNR*, [2001] 1 SCR 911 at para 129 [*Mitchell*].

⁹³ *Ibid.*

⁹⁴ To be sure, the notion that Aboriginal and Crown sovereignty have merged is not unanimously supported among all Aboriginal communities. But even among groups that broadly speaking do not accept the proposition that sovereignty has merged, this view is not monolithically held. Witness for example the recent Quebec superior court judgment in *Miller v Mohawk Council of Kahnawake* [2018] QCCS 1784, 293 ACWS (3d) 227, in which multiple Mohawk plaintiffs (successfully) sought declarations from the Quebec superior court that a Kahnawake Council law that stripped Kahnawake members of membership benefits if they married a non-Indigenous person violates the *Charter*’s s. 15 equality guarantees.

⁹⁵ Royal Commission: Restructuring the Relationship, *supra* note 6 at 310.

⁹⁶ Patrick Macklem, *supra* note 8 at 123, goes so far as to say that “the legitimacy of Canadian sovereignty rests on its capacity to co-exist with Aboriginal sovereignty.”

⁹⁷ For a distinction between limits and parameters in the context of the challenge of leading a good life, see Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge, Mass: Harvard University Press, 2000).

Aboriginal sovereignty. The difference here would be that while notions of the rule of law are immanent in Aboriginal legal traditions—and so exercising self-government within this parameter would not require any dramatic alterations to an Aboriginal community's cultural life—the more specific liberal values just mentioned may well come into conflict with cherished indigenous customs and practices, thus requiring the latter to be profoundly altered in order that they not fall afoul of the former. As John Tomasi controversially puts it, perhaps at least some Aboriginal groups, “accidents of geography to the contrary, are importantly *outside of liberalism*,”⁹⁸ in the sense that it would be “inappropriate” to expose these “aboriginal groups to the measures that would be required if we were to insist on treating them as full citizens of liberal society.”⁹⁹

For this ostensibly sovereignty-based argument against the *Charter's* application to succeed, however, it would have to be the case that Aboriginal groups are indeed ‘outside of liberalism,’ in the sense of not endorsing core liberal values. But this suggestion is just a slightly dressed-up version of the ‘alien values’ argument we rejected above. Because the underlying values of personal autonomy, equality, and human rights that animate liberalism generally and the *Charter* more specifically are broadly endorsed by contemporary Aboriginal communities, it is not the case that the *Charter's* application would necessarily require a profound re-ordering of the collective life of Aboriginal societies. We must, therefore, reject the argument that the *Charter's* application to inherent-right governments would violate Aboriginal sovereignty by requiring such drastic cultural change.

Perhaps, however, the *Charter's* application would violate Aboriginal sovereignty in a more straightforward sense—i.e., by making the exercise of Aboriginal self-government beholden to a bill of rights that, while not ‘foreign’ in the sense of advancing values alien to contemporary Aboriginal peoples, is at least of rather foreign providence, in that it was not created by and for the Aboriginal communities upon which it is imposed. At this point, it will be helpful, in order to get clearer on what a violation of Aboriginal sovereignty might look like at law, to refer to the Supreme Court of Canada's jurisprudence on the question of when it is permissible to limit constitutionally guaranteed Aboriginal rights.

Aboriginal rights are expressly “recognized and affirmed” by s. 35 of Canada's *Constitution Act, 1982*. While the text of that provision provides no indication as to whether, or how, such Aboriginal rights could permissibly be limited by the federal or provincial governments, the view that s. 35 rights are absolute and subject to no limitation has been emphatically rejected by the Supreme Court. In the important 1990 Supreme Court decision in *Sparrow*, the Court laid out what has become known as the ‘*Sparrow* test’ for determining whether a given limitation of a s. 35 right—including, importantly for our purposes, the inherent right to self-government which is understood to be encompassed by s. 35—is justified. The first step of the justification test involves ascertaining whether the restriction on the Aboriginal right seeks to achieve a valid legislative objective. The second and final step requires determining whether the legislative objective has been pursued in a manner that upholds “the honour of the Crown,” in the sense of discharging its “responsibility to act in a fiduciary capacity with respect to aboriginal peoples.”¹⁰⁰

In laying out the “*Sparrow* test”, the Supreme Court of Canada held that “federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal

⁹⁸ John Tomasi, “Kymlicka, Liberalism, and Respect for Cultural Minorities” (1995) 105:3 *Ethics* 580 at 600 (emphasis in original).

⁹⁹ *Ibid.*

¹⁰⁰ *Sparrow*, *supra* note 17 at paras 58–59 (Q1).

rights.”¹⁰¹ In the *Van der Peet* decision in 1996, a seven-member majority of the Supreme Court of Canada held that the underlying purpose of s. 35(1) is to effect a reconciliation between Crown sovereignty on the one hand and the prior occupation of Canada by Aboriginal peoples —“the fact that Aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures”—on the other.¹⁰² In this way, and returning to our earlier inquiry, federal or provincial legislation will, according to Canadian law, unduly undermine a s. 35 right (such as the inherent right of self-government) where the legislation would limit that right in a way that is inconsistent with achieving the sort of reconciliation the Supreme Court of Canada has said that s. 35 ultimately aims at.

As will be discussed below, it is quite doubtful that the *Sparrow* test would apply, as a matter of law, in cases where the action of an inherent-right government is struck down for non-conformity with the *Charter*. However, I believe that turning to the logic of the *Sparrow* test is helpful in trying to determine whether the *Charter*’s application to inherent-right governments would unduly undermine the sovereignty of the latter. Taking the central question that animates the *Sparrow* test and applying it in the context of the *Charter*’s application to inherent-right governments leads us to query whether the *Charter*’s application would be consistent with the effort to achieve a reconciliation of Crown and Aboriginal sovereignty.¹⁰³ We should not, in other words, address the question of whether the *Charter*’s application to Aboriginal governments violates the sovereignty of the latter *in isolation*. Rather, we must also inquire into what effect ruling out the *Charter*’s application would have on the sovereignty of the Crown. There is thus something of a balancing act to be performed; neither Crown sovereignty nor Aboriginal sovereignty is absolute, and both may need to be constrained in certain ways in order to harmoniously co-exist with the other.

How are we to go about striking the balance that reconciliation requires? If Aboriginal and Crown sovereignty are taken as absolute, then the two things are flatly *irreconcilable*: for either sovereignty to be worthy of the name it would not be susceptible to limitation by the other. However, as mentioned above, we should not understand sovereignty in this absolutist sense. Instead, we should regard the Crown and Aboriginal peoples as possessing shared, or merged, sovereignty. At the same time, while it makes sense to speak of shared sovereignty, there does appear to be a zero-sum quality to sovereignty. The sovereignty of the Crown does not cease just because Aboriginal nations also exercise sovereignty within Canada. However, the fact that Aboriginal nations exercise sovereignty—at least within their respective jurisdictions, and in respect of certain fields of governance—means that the Crown exercises less sovereignty than it otherwise would. Where two or more groups exercise sovereignty in a particular political community—putting aside the possibility of discovering new territories or opening up new legislative fields—an increase in one party’s sovereignty will mean a decrease in the other’s.¹⁰⁴

This zero-sum quality is important for the following reason. The Canadian *Charter* is the product of the Crown exercising its sovereign authority to lay down laws of constitutional status. To say that it should not to apply to all orders of government within the boundaries of the Canadian state can, therefore, reasonably be seen as advocating for a limit on Crown sovereignty. That is, to limit the range of governments to which the *Charter*

¹⁰¹ *Ibid* at para 62 (QL).

¹⁰² *Van der Peet*, *supra* note 70 at para 31.

¹⁰³ Shortly below, we will question whether these respective sovereignties are in fact what we should understand s. 35 as seeking to reconcile.

¹⁰⁴ To be clear, what I am claiming is that sovereignty admits of degrees. That is, where a body fails to possess a threshold level of legitimate law-making authority, then that body is not sovereign. But it is also true that law-making bodies will vary in how far above that threshold they fall, with those far above the threshold exercising more sovereignty than those just barely above it.

applies, given that it is the product of an exercise of Crown sovereignty, is *ipso facto* to limit Crown sovereignty itself. At the same time, however, to apply the *Charter* to inherent-right governments and thereby constrain the way in which these governments can exercise their sovereignty is to limit that sovereignty. The question is thus: what would best achieve a reconciliation of Aboriginal and Crown sovereignty—requiring inherent-right governments to operate in accordance with the *Charter*, or allowing them to exercise self-government free from the *Charter*'s constraints?

On the whole, I believe that such reconciliation would be best achieved by allowing inherent-right governments to operate free from *Charter* scrutiny. That the Canadian *Charter*—again, a product of the exercise of Crown sovereignty—should apply in inherent-right communities and thereby continuously restrict the way in which those communities' governments can exercise their constitutional right to self-government would be a far greater and more direct limitation on Aboriginal sovereignty than would be the impairment of Crown sovereignty were the *Charter* deemed inapplicable to inherent-right governments. If our objective is to reconcile these two sovereignties, and if regardless of whether we accept or reject the *Charter*'s application to inherent-right governments we will have to abide some curtailment of either Crown or Aboriginal sovereignty, then we should simply choose the lesser evil, so to speak. That is, if Option 1 would limit Aboriginal sovereignty quite significantly and Crown sovereignty not at all, and Option 2 would limit Crown sovereignty rather marginally and Aboriginal sovereignty not at all, we should show favouritism to neither Crown nor Aboriginal sovereignty per se, and should instead select Option 2 on the grounds that the limitation on sovereignty (of either sort) that we will thereby bring about is less than that which would be brought about were we to choose the other option.

It might be argued, however, that having the *Charter* apply to inherent-right governments actually represents a more natural equilibrium point, from the point of view of a concern for an equitable reconciliation of Aboriginal and Crown sovereignty. For instance, it might be pointed out that the *Charter* already constrains the exercise of Crown sovereignty, by requiring that federal and provincial government legislation accord with the *Charter*'s rights and freedoms in order to be legally valid. On this view, since the *Charter* already limits Crown sovereignty, it is right and proper, and fully in keeping with a two-way process of reconciliation, for it to likewise constrain the exercise of Aboriginal sovereignty. The flaw in this line of thinking, however, is that the *Charter* is itself an exercise of Crown, and not Aboriginal, sovereignty. Thus, while Crown sovereignty is in a real sense limited by the *Charter*, this limitation is a *self-imposed* one. The same could obviously not be said of the limitation on Aboriginal sovereignty that the *Charter*'s application to inherent-right governments would occasion.

Alternatively, it might be noted that at present Crown sovereignty is constrained by the need to respect those Aboriginal rights guaranteed by the Constitution (whose impairment is held to be justified only where the *Sparrow* test is met). Further, we can observe that the legal test for whether an Aboriginal right is made out—the *Van der Peet* test, named after the Supreme Court of Canada decision in which it was first articulated—focuses on whether the activity that an Aboriginal group is claiming a right to engage in is an “element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right,”¹⁰⁵ and requires that “the practices, customs and traditions which constitute aboriginal rights are those which have continuity with the practices, customs and traditions that existed prior to contact.”¹⁰⁶ Since we can see the particular culture of any given pre-contact society as a function of the way in which it chose

¹⁰⁵ *Van der Peet*, *supra* note 70 at para 46.

¹⁰⁶ *Ibid* at para 59.

to exercise its sovereignty, it does not seem too much of a stretch to say that Crown sovereignty is already, to an extent, constrained by the exercise of Aboriginal sovereignty.¹⁰⁷ That is, Crown sovereignty, under the *Sparrow* test, may only be exercised in ways consistent with respect for Aboriginal rights, and these rights are in turn ascertained (pursuant to the *Van der Peet* test) with reference to how Aboriginal sovereignty was exercised. These facts might, therefore, be marshalled to support the following conclusion: requiring Aboriginal sovereignty to be exercised in a manner consistent with Crown sovereignty, which is what the *Charter's* application to inherent-right communities would amount to, is demanded by simple reciprocity.

This argument must be rejected, however. Not only, as mentioned above, would requiring inherent-right governments to exercise their sovereignty only in accordance with the *Charter* be a far greater limitation on Aboriginal sovereignty than is demanding that the Crown not exercise its sovereignty in ways that violate the special rights of Aboriginal peoples, but there is already the right sort of reciprocity in place. For instance, it is true that Aboriginal rights are understood under Canadian law as entitlements held by Aboriginals (both individual Aboriginals and Aboriginal collectives), in virtue of their being Aboriginal.¹⁰⁸ We would have the appropriate analogue, then, of the way in which Crown sovereignty is constrained by the special rights of Aboriginal peoples *qua* Aboriginals, if it were the case that Aboriginal sovereignty is similarly constrained by special rights held by the Crown *qua* Crown. And that is in fact the case. Specifically, Aboriginal sovereignty cannot be exercised in a manner inconsistent with the Crown's *sui generis* 'right' to exercise what are known as "Crown prerogatives" (or "royal prerogatives"). No Aboriginal nation, for example, can declare that Canada is at war, or deny a particular person a Canadian passport. With this in mind, we must conclude again that exempting inherent-right governments from the requirement to operate in compliance with the *Charter* would be consistent with an equitable, two-way attempt to achieve a reconciliation of Crown sovereignty and Aboriginal sovereignty.¹⁰⁹

IV. Rethinking Reconciliation

Above, we considered whether the application of the *Charter* to inherent-right governments is appropriate in light of an understanding that the Aboriginal right of self-government enshrined by s. 35(1) aims to reconcile Aboriginal sovereignty with the

¹⁰⁷ This is what Paul LAH Chartrand, "Reconciling Indigenous Peoples' Sovereignty and State Sovereignty" (23 July 2018), online (pdf): Australian Institute of Aboriginal and Torres Strait Islander Studies <aiatsis.gov.au/sites/default/files/products/discussion_paper/chartrandp-dp26-reconciling-indigenous-peoples-sovereignty-state-sovereignty_0.pdf> seems to have in mind when he writes at 16 that "the political action of Aboriginal peoples matters in law and politics. The political action mattered historically, and thereby the interests of Aboriginal peoples crystallized into rights recognisable and enforceable within the Canadian and Australian legal systems." That is, 'political' decisions by Aboriginal peoples today, about how or whether to keep up and regulate an activity with pre-contact roots integral to the group's distinctive culture, will "inform the dynamic evolution of the law of the constitution of Canada" (at 12).

¹⁰⁸ See *Van der Peet*, *supra* note 70 at para 19: "Although equal in importance and significance to the rights enshrined in the *Charter*, aboriginal rights must be viewed differently from *Charter* rights because they are rights held only by aboriginal members of Canadian society. They arise from the fact that aboriginal people are *aboriginal*." (Emphasis in original.) See also Brian Slattery, "Understanding Aboriginal Rights" (1987) 66:4 Can Bar Rev 727 at 776; Michael Asch & Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on R. v. Sparrow" (1991) 29:2 Alta L Rev 498 at 498–502.

¹⁰⁹ Glen Coulthard has written passionately to warn that attempts at 'reconciliation' and securing 'recognition' of Indigenous difference are wrongheaded as they actually do violence to indigeneity, and involve an ultimately degrading process of seeking appreciation from the perpetrators of colonialism (See Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014)). To be clear, I am insisting that reconciliation must be a genuinely mutual, two-way process, involving a search for a way forward that is conducted jointly by parties that already appreciate and respect the other party, as evidenced by recognition on the part of both parties that there exist significant cultural and even epistemological differences between them that are not to be eliminated, but rather bridged in a spirit of acceptance.

sovereignty of the Crown. This view of what it is that s. 35(1) seeks to reconcile is open to question, however. A look at the Supreme Court of Canada case law, for instance, reveals that there has been considerable evolution on this issue.¹¹⁰ In the *Sparrow* decision of 1990 that we have already mentioned, the Court writes that “federal power must be reconciled with federal duty.”¹¹¹ Aboriginal sovereignty per se does not factor in at all under this formulation, and Aboriginal rights generally are only relevant to the reconciliation process in so far as the Crown is under a ‘federal duty’ to respect them.¹¹² This unsatisfactory conception of reconciliation was revised in the 1996 *Van der Peet* decision, in which the Court stated that s. 35(1) aims for the “reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.”¹¹³ The Court’s judgment in *Gladstone*, also handed down in 1996, offered a more expansive view of reconciliation. In that case, Lamer C.J.’s judgment for the majority, although it also spoke of “the reconciliation of aboriginal societies with the broader political community of which they are part,”¹¹⁴ stated that what s. 35(1) seeks to reconcile is “the existence of distinctive aboriginal societies prior to the arrival of Europeans in North America with the assertion of Crown sovereignty over that territory.”¹¹⁵ According to one commentator, in so doing, “the Gladstone Court sli[d] into” an understanding of reconciliation as “what might be termed ‘social reconciliation’.”¹¹⁶

The emphasis on a wide-ranging ‘social reconciliation’ of Aboriginal prior occupation and the assertion of Crown sovereignty might seem to be in keeping with a clear-eyed view of the pervasive disharmony between the Crown and Aboriginal nations. However, the aptness of the descriptor ‘social reconciliation’ really lies in the extent to which the *Gladstone* articulation of reconciliation opened the door to a very wide range of social policies being regarded as potentially capable of overriding Aboriginal rights. For example, the Court in *Gladstone* held that Aboriginal rights needed to be weighed against “objectives such as the pursuit of economic and regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-aboriginal groups,”¹¹⁷ as well as environmental conservation.¹¹⁸ Moreover, the Court made clear, “[i]n the right circumstances, such objectives are in the interest of all Canadians and, more importantly, the reconciliation of aboriginal societies with the rest of Canadian society may well depend on their successful attainment.”¹¹⁹

¹¹⁰ As Dwight Newman observes, “there is actually a set of conceptions, in the plural, of ‘reconciliation’ being applied in case law on section 35” (Newman, “Reconciliation: Legal Conception(s) and Faces of Justice,” in John D Whyte & Saskatchewan Institute of Public Policy, *Moving Toward Justice: Legal Traditions and Aboriginal Justice* (Saskatoon: Purich Publications, 2008) at 80).

¹¹¹ *Sparrow*, *supra* note 17 at para 62 (QL).

¹¹² The minority judgment of Major and Binnie JJ. in *Mitchell*, *supra* note 92 at para 129, however, suggests that what is to be reconciled is Crown sovereignty and Aboriginal rights. That judgment also asserts, however, that “the purpose of s. 35(1)” is “the reconciliation of the interests of aboriginal peoples with Canadian sovereignty” (para 164; emphasis added), while at the same time describing “reconciliation of aboriginal peoples with Canadian sovereignty” as “the purpose that lies at the heart of s. 35(1)” (para 74).

¹¹³ *Van der Peet*, *supra* note 70 at para 31.

¹¹⁴ *Gladstone*, *supra* note 70 at para 73.

¹¹⁵ *Ibid*. This is in fact in line with what was said at para 43 of the majority decision in *Van der Peet*, *supra* note 71 at para 43: “prior occupation is [to be] reconciled with the assertion of Crown sovereignty over Canadian territory.” Similar language can be found in *R v Adams*, [1996] 3 SCR 101, 138 DLR (4th) 657 at para 57, and *Delgamuukw*, *supra* note 70 at para 81, and again in *Manitoba Metis Federation Inc v Canada (Attorney General)*, [2013] 1 SCR 623, 355 DLR (4th) 577 at para 66. On the divergent understandings of reconciliation advanced by Lamer C.J. and McLachlin J. (as she then was) in the *Sparrow*, *Van der Peet*, and *Gladstone* decisions, see Kent McNeil, “Reconciliation and the Supreme Court: The Opposing Views of Chief Justices Lamer and McLachlin” (2003) 2:1 Indigenous L.J. 1 [McNeil].

¹¹⁶ Rarihokwats, “Reconciliation: Resolving Conflict Between Two Absolute but Opposing Rights: Indigenous Nation ‘Sovereignty’ vs. Crown ‘Sovereignty’” (23 July 2018), online: <www.academia.edu/21858174/Reconciliation_Indigenous_Nation_Sovereignty_v_Crown_Sovereignty>.

¹¹⁷ *Gladstone*, *supra* note 71 at para 75.

¹¹⁸ *Ibid* at paras 55–69.

¹¹⁹ *Ibid* at para 75 (emphasis in original).

With a greater willingness in legal and governmental circles to accept that a right of Aboriginal self-government is encompassed by s. 35, the conception of reconciliation animating the Supreme Court's s. 35 jurisprudence began to place greater emphasis on Aboriginal sovereignty. The fact that distinctive communities of Aboriginal peoples occupied what is now Canada long before contact with Europeans shows that these Aboriginal communities were at the time sovereign over their lands. Further, in very many cases this sovereignty was not yielded up to the Crown, either by treaty or conquest. In the result, Aboriginal sovereignty remains something that has to be reckoned with today.¹²⁰ The strongest iteration of this view by the Supreme Court of Canada probably came in the *Haida Nation* case of 2004, in which the Court found that "[t]reaties serve to reconcile pre-existing Aboriginal sovereignty with *assumed* Crown sovereignty."¹²¹ That case also cited *Van der Peet*, however, for the proposition that we should aim for "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown."¹²² The divergence in these two quotations reveals that the *Haida* decision vacillates on the issue of what to reconcile. Is it pre-existing Aboriginal sovereignty and asserted Crown sovereignty, or merely the pre-existence of Aboriginal peoples and actual Crown sovereignty? The former Dean of the University of New Brunswick's law school, Ian Peach, places emphasis on the former formulation, describing it as a "statement [...] that it is pre-existing Indigenous sovereignty that is to be reconciled with assumed Crown sovereignty."¹²³

Further divergent statements about what exactly is to be reconciled in order to achieve the promise of s. 35(1) can also be found in other Supreme Court decisions. In the 2001 *Mitchell* decision, for instance, the Court speaks of reconciling "the interests of aboriginal peoples with Canadian sovereignty,"¹²⁴ and asserts that "the objective of reconciliation of aboriginal peoples with Canadian sovereignty [...], as established by the *Van der Peet* trilogy, is the purpose that lies at the heart of s. 35(1)."¹²⁵ In *Taku River*, in language very similar to that used in *Haida Nation*, the Court identifies the purpose of s. 35(1) as "facilitat[ing] the ultimate reconciliation of prior Aboriginal occupation with *de facto* Crown sovereignty."¹²⁶ The very first sentence of the 2005 *Mikisew* decision, written by Binnie J. on behalf of a unanimous bench, boldly states that "[t]he fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions."¹²⁷ A helpful way to understand what's going on in the Supreme Court of Canada's various descriptions of the reconciliation that s. 35(1) strives to advance might be to look to the words of British Columbia Supreme Court Justice D.H. Vickers, who explained in the course of his judgment in *Tsilhqot'in Nation v British Columbia*¹²⁸ (from which an appeal was later heard by the

¹²⁰ For an extended argument that such a reckoning with Aboriginal sovereignty is a necessary in order to make reconciliation, grounded in notions of equality and shared sovereignty, possible, see Felix Hoehn, *Reconciling Sovereignties, Aboriginal Nations and Canada* (Saskatoon: Native Law Centre, 2012).

¹²¹ *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511 at para 20 (emphasis added).

¹²² *Ibid* at para 17.

¹²³ Peach, *supra* note 13 at 1.

¹²⁴ Mitchell, *supra* note 93 at para 164.

¹²⁵ *Ibid* at para 74.

¹²⁶ *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, [2004] 3 SCR 550 at para 42. As Mark D. Walters has noted recently, "[w]hat the Supreme Court of Canada really meant by the idea that

Aboriginal sovereignty is *de jure* and Crown sovereignty is *de facto* must await further analysis" ("Looking for a Knot in the Bulrush": Reflections on Law, Sovereignty, and Aboriginal Rights" in Patrick Macklem and Douglas Sanderson, eds, *From Recognition to Reconciliation: Essays on the Constitutional Entrenchment of Aboriginal and Treaty Rights* (Toronto: University of Toronto Press, 2016) 62.

¹²⁷ *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, [2005] 3 SCR 388 at para 1.

¹²⁸ *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700 Vickers J.

Supreme Court of Canada) that the conception of reconciliation propounded by Lamer C.J. in *Van der Peet* “re-interpreted the *Sparrow* theory of reconciliation (a means to reconcile constitutional recognition of Aboriginal rights with federal legislative power) as a means to work out the appropriate place of Aboriginal people within the Canadian state.”¹²⁹

So which view of reconciliation should we take? What precisely ought we to see as being in need of reconciliation? As a first step towards answering these questions, it will be helpful to develop a better understanding of what the concept of reconciliation entails. On this subject, legal scholar Mark Walters suggests that reconciliation involves “finding within, or bringing to, a situation of discordance a sense of harmony.”¹³⁰ He argues that we can understand reconciliation in three different senses: reconciliation as resignation (in the sense of “accepting or being resigned to a certain state of affairs that is unwelcome but beyond [one’s] control,”¹³¹ reconciliation as consistency (for example rendering inconsistent entries in a financial accounting book consistent) and reconciliation as relationship (for example the “reconciliation of spouses after a period of separation”¹³²). For Walters, reconciliation as relationship, “unlike the other two forms of reconciliation, is always, to a certain extent, two-sided or reciprocal.”¹³³ It “invariably... involves sincere acts of mutual respect, tolerance, and goodwill that serve to heal rifts and create the foundations for a harmonious relationship.”¹³⁴

When it comes to reconciling Crown sovereignty and Aboriginal sovereignty, what we should be aiming for is reconciliation as relationship. For our purposes, this is clearly the most normatively attractive of the three species of reconciliation.¹³⁵ That is, the reconciliation we are aiming to effect is very much reconciliation between partners in a relationship. We are trying to reconcile two sovereign communities united together in a single state, rather than two apparently discrepant entries in an accounting book. Similarly, the aim is not to have Aboriginal Canadians merely resign themselves to the denial of Aboriginal sovereignty and the violations of Aboriginals’ human rights that occurred in the past, but to establish a basis upon which the Canadian state and its Aboriginal peoples can move forward together in conditions of justice and mutual respect. In short, we should strive to achieve reconciliation as relationship and should aim, along the way, at reconciliation as resignation or as consistency only insofar as these latter two species of reconciliation help us to achieve reconciliation of the former sort.¹³⁶

¹²⁹ *Ibid* at para 1345 and 1358.

¹³⁰ Mark D Walters, “The Jurisprudence of Reconciliation: Aboriginal Rights in Canada” in Will Kymlicka and Bashir Bashir, eds, *The Politics of Reconciliation in Multicultural Societies* (New York: Oxford University Press, 2008) 167.

¹³¹ *Ibid*.

¹³² *Ibid*.

¹³³ *Ibid* at 168.

¹³⁴ *Ibid*.

¹³⁵ It is, however, open to question whether this is the sort of reconciliation that is actually closest in spirit to the vision of a reconciled Canada that the Supreme Court invokes in its s. 35 jurisprudence. See e.g. Walters’s view that the Supreme Court of Canada’s jurisprudence on reconciliation invokes a conception of reconciliation as consistency, albeit while “manifest[ing] some evidence of reconciliation as relationship as a normative principle” (*ibid* at 180), and his contention (*ibid* at 181) that the Supreme Court employed a conception of reconciliation as consistency in *Marshall*, *supra* note 70; *R v Bernard*, [2005] 2 SCR 220. See also Newman, *supra* note 110 at 80.

¹³⁶ Of course, much and indeed most of the work required to achieve a reconciliation of the relationship between the Canadian state and its Aboriginal peoples will take place outside of the legal system. McNeil, for instance, (*supra* note 115 at 23) reads the decision of McLachlin J. (as she then was) in *Van der Peet* as showing that she was “adamant that the way to reconciliation is through the consensual treaty process.”

Ultimately, the reconciliation process, as Walters, *supra* note 127, at 175 notes, should be one of “re-establishing relationships of trust, honour, respect, and tolerance between vastly different peoples at all levels, from individuals to local communities to governments.”

Having sharpened our understanding of the general concept of reconciliation, we can return to our earlier question: what precisely should we see s. 35 as aiming to reconcile? I believe that, as Vickers J. suggests, what we should wish to accomplish, and what we should regard as the underlying objective of s. 35(1), is nothing less than “work[ing] out the appropriate place of Aboriginal people within the Canadian state.”¹³⁷ That is, we should strive to reconcile Aboriginal peoples writ large (and not merely the sovereignty that is a feature of Aboriginal nations) with the Canadian state writ large (and not merely the fact of Crown sovereignty that is a feature of the Canadian state).

Why should we aim for reconciliation of this sort, as opposed to, say, the reconciliation of Aboriginal sovereignty and Crown sovereignty, or the reconciliation of Aboriginal peoples and non-Aboriginal peoples? The reason that it is preferable to regard s. 35(1) as striving for reconciliation between Aboriginal peoples and the Canadian state, as opposed to reconciling two apparently competing sovereignties, is that achieving the former sort of reconciliation affords a firmer basis for an enduring and inclusive Canadian identity that is shared by and reflective of Canada’s Aboriginal and non-Aboriginal communities. Merely reconciling Aboriginal and Crown sovereignty, for instance, does little, in itself, to ensure that Aboriginal peoples and the Crown can work together in common cause.¹³⁸ It seems correct, for example, to regard Canadian sovereignty as at present perfectly ‘reconciled’ with German sovereignty, and yet what clearly distinguishes the relationship between the Canadian and German states on the one hand, and that between the Canadian state and its Aboriginal peoples on the other, is that Canada’s Aboriginal nations are not external sovereigns but rather part of the Canadian state itself.

Similarly, it is preferable to regard s. 35(1) as striving for a reconciliation between Aboriginal peoples and the Canadian state, as opposed to reconciling Canada’s Aboriginal peoples with its non-Aboriginal peoples (as suggested in *Mikisew*), because the latter directive fails to sufficiently acknowledge the way in which Aboriginal and non-Aboriginal peoples, while culturally distinct in important ways, at the same time also comprise one people and one political community.¹³⁹ What is required, then, is to reconcile the state of Canada with a long marginalized and disrespected segment of its populace. We should strive to achieve a reconciliation between Canada’s Aboriginal peoples and a Canadian state that, despite simultaneously demanding their loyalty and obedience, has historically oppressed those peoples.

A. *Is the Charter’s Application Consistent with an Expansive View of Reconciliation?*

As we saw, the *Charter’s* application to inherent-right governments would amount to a limitation on the s. 35 right of Aboriginal self-government. We should ask, however, whether the *Charter’s* application to such governments is nevertheless consistent with the reconciliation objective animating s. 35(1), once that reconciliation is conceived of as a reconciliation between the Canadian state and its Aboriginal peoples. I believe the answer to this question is yes. If our concern were merely to achieve a balanced reconciliation of Aboriginal and Crown sovereignty, we should conclude that inherent-right governments should be free to exercise self-government without being subject to *Charter* scrutiny, whereas the federal and provincial governments, and Aboriginal governments exercising delegated

¹³⁷ *Tsilhqot’in Nation*, *supra* note 128, at para 1345 (drawing on the words of Gordon Christie, “Aboriginality and Normativity: Judicial Justification of Recent Developments in Aboriginal Law” (2002) 17 Can J L & Soc 41 at 69–70).

¹³⁸ As Binnie J. wrote in *Mitchell*, *supra* note 93 at para 133, “The constitutional objective is reconciliation not mutual isolation.”

¹³⁹ This idea of partnership *is* caught by the Lamer formulation of reconciliation of “aboriginal societies with the broader political community of which they are part.” (My talk of ‘the Canadian state’ and its central ‘institutions’ can be regarded as simply a further elaboration of what Lamer C.J. referred to as the Canadian ‘political community’.)

powers, or exercising self-government pursuant to a negotiated agreement explicitly providing for the *Charter's* application, should be subject to the *Charter*. However, when it comes to the goal of reconciling Aboriginal peoples with the Canadian state, the *Charter's* application to inherent-right governments would on the whole advance rather than undermine that objective.

The main reason for this is because of the simple fact that the *Charter* is a central feature of the fundamental architecture of the Canadian state. It is not only legally entrenched in the Constitution but is also, as noted above, now firmly entrenched in the minds of most Canadians as a central part of what it means to be Canadian. The *Charter* today pervades legal and political decision-making; its provisions are top of mind among policy-makers and legislative drafters. It is used to interrogate huge swathes of Canadian law. Further, its *values* have, by a kind of osmosis that goes beyond the direct application of the *Charter's* text by courts, and even beyond the pre-emptive shaping of legislation at the drafting stage in order to avoid the courts striking down portions of the law for non-conformity with the *Charter*, impacted Canadian society and politics in myriad ways.¹⁴⁰ It would be strange, therefore, to claim that the Constitution's guarantee of Aboriginal rights in s. 35 should be interpreted in such a way as to advance a reconciliation of Aboriginal peoples and the Canadian state, and then claim that we needn't strive for a reconciliation of Aboriginal self-government and a key part of the basic law—i.e., the Constitution—that lays out the fundamental structure of that very state.¹⁴¹

It is highly instructive to note, furthermore, that s. 35 of the *Constitution Act, 1982* does not contain a limitations clause similar to the *Charter's* s. 1. A logically plausible interpretation of s. 35, therefore, would be that the Aboriginal rights that the section 'recognizes and affirms' are absolute and not subject to any limitations. Of course, the Supreme Court decided otherwise when it essentially read in a limitations clause in the course of articulating the *Sparrow* test. Given that the Court in *Sparrow* decided to go beyond the text of s. 35 and hold the Aboriginal rights contemplated therein to be subject to limitation in order to achieve 'valid legislative objectives', we can expect that it will find—and, in the name of consistency, it should find—that the s. 35 right of self-government is also subject to limitation in order to protect the fundamental rights and freedoms the *Charter* enumerates.¹⁴²

V. Section 1 and a Flexible Application of the Charter

We have found, then, that it is appropriate, and consistent with the objective of reconciling Aboriginal peoples and the Canadian state of which they are a part, for the *Charter* to apply to inherent-right governments. An important part of the process of applying the *Charter* in real-world cases is of course the s. 1 inquiry. That is, where some action by an inherent-right government is alleged to violate a *Charter* right, the Aboriginal government will be provided an opportunity (pursuant to s. 1 of the *Charter*) to prove to a

¹⁴⁰ One example of this is the way in which Canadian administrative law doctrine requires administrative action to comport with "*Charter* values" (*Doré v Barreau du Québec*, [2012] 1 SCR 395).

¹⁴¹ It is important to note that I am not claiming that wherever an Aboriginal right is exercised in such a way as to violate a *Charter* right, the *Charter* right must always be vindicated and the Aboriginal right limited. It is possible, for instance, that the objective of reconciliation might recommend that a treaty right, say, should prevail even where its exercise has led to a violation of a *Charter* right.

¹⁴² While the Supreme Court of Canada has not yet been called upon to do so, the Court has gone out of its way *not* to read s. 25 of the *Charter* as straightforwardly ousting *Charter* review of those s. 35 Aboriginal rights also contemplated by s. 25 (see *Kapp*, *supra* note 13). Further, as observed above, all of the noises emanating from the Supreme Court of Canada on the question of how to interpret s. 25 appear to be "in favour of the *Charter's* having some application to Aboriginal governments" (Milward, *supra* note 9, at 66).

reviewing court that the action in question amounts to a reasonable limit on the relevant *Charter* right. Even so, we might harbour a lingering sense that the *Charter's* application in inherent-right communities could do cultural violence to these societies.

At this point, it would be helpful to get clear on exactly which rights, if enforced against particular Aboriginal governments, will cause social disruption, and what the scope of such disruption is likely to be. Critics of the *Charter's* application disappoint on this score.¹⁴³ However, there are a few specific *Charter* provisions that are identified in the literature as being especially problematic, and these do suggest that applying the *Charter* to inherent-right governments in the same way that it is applied to other levels of government could cause special hardship for Aboriginal communities. For instance, Kerry Wilkins gives the examples of s. 6 and s. 11(d) of the *Charter*. Section 11(d) guarantees the right of all Canadians to an independent and impartial adjudication of their case if charged with an offence. Section 6, according to Wilkins, “could give to any Canadian citizen or permanent resident the constitutional right to take up residency and work at any time in any inherent-right community, subject only to general community rules and reasonable residency requirements.”¹⁴⁴ Wilkins argues, however, that if inherent-right governments were required to act in accordance with s. 6, the result could be the exposure of Aboriginal “communities’ unique and fragile traditions to still further pressures from the mainstream cultures that most new residents would bring with them when they took up residence.”¹⁴⁵ As for the guarantees of independence and impartiality in s. 11(d), Wilkins admits that these are “absolutely essential” “[w]ithin the mainstream system,”¹⁴⁶ but warns that they could have disastrous consequences for Aboriginal dispute resolution. Specifically, Wilkins notes that “[f]rom the standpoint of traditional aboriginal justice,” the very attribute of detached independence given so much weight by the mainstream justice system, “would disqualify someone from making any useful or authoritative contribution to the task” of conflict resolution.¹⁴⁷ Since traditional Aboriginal notions of discipline and dispute resolution conceive of wrongdoing as incidents of community disharmony, and thus are often seen to *require* that community elders involved in resolving disputes be personally acquainted with “the histories and personal circumstances”¹⁴⁸ of all involved, to insist instead that adjudicators within these communities be entirely independent of the parties “would very probably undermine and transform the entire basis of internal community discipline.”¹⁴⁹

We might label the larger argument being made here, in line with Patrick Macklem’s summary of it, as the “rigid analytic grid” argument. According to Macklem:

...the *Charter* does pose a risk to the continued vitality of indigenous difference. The *Charter* enables litigants to constitutionally interrogate the rich complexity of Aboriginal societies according to a rigid analytic grid of individual right and state

¹⁴³ But see Russell, *supra* note 20 (itemizes for consideration section 3 of the *Charter* and its application to “clan mother elections”, as well as the *Charter's* “double jeopardy clause” and its “insulat[ing] an individual from having to speak on his or her behalf in court” at 183).

¹⁴⁴ *Supra* note 6 at 85. (As it happens, this appears to be a misreading of s. 6(2) of the *Charter*, which grants to every Canadian citizen and permanent resident the right “to move to and take up residence *in any province*” (emphasis added). The section on its face says nothing about Canadians possessing a right to take up residence in particular communities within the provinces).

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid* at 92.

¹⁴⁷ *Ibid* at 93.

¹⁴⁸ *Ibid* at 91.

¹⁴⁹ *Ibid* at 93.

obligation. It authorizes judicial reorganization of Aboriginal societies according to non-Aboriginal values.¹⁵⁰

I believe that the rigid analytic grid argument, properly understood, does have considerable force, since applying the *Charter* to Aboriginal governments in exactly the same way that it is enforced against the governments of Canada and the provinces could indeed require Aboriginal communities to significantly alter their traditional practices and customs in order to accord with *Charter* jurisprudence regarding how basic liberties should be protected.

What reason might we have for such a fear, in light of all we said above about Aboriginal peoples today embracing ideals of personal autonomy and, according to a preponderance of available evidence, generally embracing the *Charter* itself? The correct response here is to distinguish between a commitment to personal autonomy and the *Charter's* values, on the one hand, and a commitment to the entire litany of rights set out by the *Charter*, and the surrounding jurisprudence over the precise contours of these rights, on the other. Simply put, the *Charter* is not just an autonomy-securing document. The specific formulation of rights contained in the *Charter* is not the one true articulation of a commitment to individual autonomy and basic human rights; the latter does not lead ineluctably to the former. As Joseph Carens observes, for example, “[t]he *Charter* is not something that directly translates abstract individual rights into social realities. It is not applied liberalism, pure and simple [...]”¹⁵¹

Claiming that there is a ‘rigidity’ to the *Charter* (and how it is applied to the federal and provincial governments) allows us to see that imposing it on Aboriginal governments in exactly the same way it is currently applied to the other levels of government can be problematic. However, it is important not to take this concern with the *Charter* as a rigid analytic grid too far. As an argument that the *Charter* should not apply at all to inherent-right governments, for instance, it has much in common with the alien values argument we explored in great detail above. To the extent that Macklem’s assertion might be used to suggest that the entire conceptual framework of individual rights is foreign to Aboriginal societies, we will proceed on the grounds that this claim was successfully refuted above. The rigid analytic grid argument should therefore not be seen as proving that the *Charter* can have *no application* to inherent-right governments without destroying Aboriginal difference. For all the reasons already canvassed, that is not the proper conclusion to draw. A sensible middle-ground is to argue that the *Charter* should be *flexibly* applied to inherent-right Aboriginal governments.

Precisely how, then, should s. 1 be applied so as to, in the language of David Milward, “realize a culturally sensitive interpretation” of the *Charter*?¹⁵² Might it not even be optimistic to the point of naiveté to believe that Canadian courts—being institutions deliberately constructed so as to mirror European courts, and staffed overwhelmingly by non-Aboriginal judges—could apply the reasonable limits test in such a way as to give adequate weight to the cultural practices and beliefs that animate the relevant Aboriginal government’s impugned action?

Clearly, when it comes to navigating an appropriate path between the *Charter's* human rights protections and the Aboriginal sovereignty that forms the basis of the

¹⁵⁰ *Supra* note 8 at 195.

¹⁵¹ *Supra* note 43 at 192.

¹⁵² *Supra* note 9 at 62–77.

Constitution's guarantee of the Aboriginal right of self-government, the s. 1 analysis—an analysis of whether governmental action found to impair a *Charter* right or freedom nevertheless constitutes a reasonable limit on that right or freedom pursuant to the so-called *Oakes* test that was formulated for this purpose by the Supreme Court of Canada in 1986 in *R v Oakes*—is essentially where the rubber meets the road. And admittedly, the argument that reconciliation is best advanced by applying the *Charter* to Aboriginal governments places a considerable amount of faith in the ability of the s. 1 inquiry to navigate this slippery terrain. That faith, however, is not misplaced. The main reason this is so is because the *Oakes* test already mandates a contextual inquiry into the circumstances in which, and reasons for which, the impugned governmental action was taken.¹⁵³ This is precisely what is required in order to ensure that courts pay due regard to the values and traditions that inherent-right governments may seek to advance by way of action that limits *Charter* rights.

For example, under the first prong of the *Oakes* test, courts must begin their analysis of whether a limitation on a *Charter* right is “demonstrably justified in a free and democratic society”¹⁵⁴ by asking whether the objective behind the governmental action is “pressing and substantial.”¹⁵⁵ This stage of the *Oakes* test allows for a contextual inquiry not only into the specific intentions animating the relevant Aboriginal government, but also into the specific community at issue. Section 1, which contemplates some limits on *Charter* rights as being reasonable in a free and democratic society, should thus not be read as referring only to the wider, *non-Aboriginal* free and democratic society. Rather, in determining whether some Aboriginal government's action, which has limited a *Charter* right, is ‘pressing and substantial’, we should have regard to the beliefs and cultural practices that characterize the particular community in question. We should ask whether the objective is a pressing and substantial one for the leaders of a community that instantiates those beliefs and those practices and which is at the same time a part of the larger Canadian political community. In this way, the inquiry into whether a given limitation of a *Charter* right is ‘demonstrably justified in a free and democratic society’ will take as its subject of analysis an appropriately particular, contextualized ‘free and democratic society’.

What this means, in practice, is that we should be open to the possibility that a measure taken by a given inherent-right government, and which imposes a limit on *Charter* right, may rightly be held to be a reasonable limit on that right, whereas were the federal or a provincial government to implement the same measure, it would thereby unreasonably limit the relevant *Charter* right.¹⁵⁶ The reason that we should accept this state of affairs, of course, is due to the fact that prevailing community beliefs and practices will vary depending upon which community within Canada we have in mind. This being the case, and in light of the fact that a particular community's norms and traditions are relevant to the question of whether the objective behind some act of the community's government is pressing and substantial, it follows that a governmental action that would be an unjustified violation of a *Charter* right in the context of one community may amount to a reasonable limit on that right if taken in a different community. In short, the courts must accept, when applying the

¹⁵³ The contextual nature of the inquiry is evident, for instance, in the famous Quebec sign law case of *Ford v Quebec (Attorney General)*, [1988] 2 SCR 712 at para 73, where the Court found that in light of the special circumstances of Quebec, “the aim of the language policy underlying the *Charter of the French Language*”, namely, “the defence and enhancement of the status of the French language in Quebec,” was “a serious and legitimate one.”

¹⁵⁴ *Canadian Charter*, *supra* note 11 at s 1 (“[t]he Canadian *Charter* of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”).

¹⁵⁵ *R v Oakes*, [1986] 1 SCR 103 at para 69.

¹⁵⁶ Compare Wilkins, *supra* note 6, at 107: “[b]ecause the rights guaranteed in the *Charter* are not designed to make allowance for aboriginal difference, it may well seem appropriate for courts to be more generous than usual when inherent-right communities are the ones engaged in the justification exercise.”

Oakes test, that the proper safeguarding of *Charter* rights can occur in different ways in different cultural contexts.

It is important to keep in mind, however, that if our goal is to eventually achieve a full reconciliation of Aboriginal peoples and the Canadian state of which they are part, we cannot simply regard any and all measures taken by inherent-right governments that aim to continue a community practice as thereby aiming at a pressing and substantial objective. The reason for this is that it is quite possible to imagine an established cultural practice within an Aboriginal community that is in irresolvable tension with certain rights guaranteed by the *Charter*. Further, just as ‘maintaining our traditions’ cannot be taken, per se, as a pressing and substantial objective for the purposes of the *Oakes* test, neither can ‘exercising Aboriginal self-government.’ That is, while any measure implemented by an inherent-right government could sensibly be characterized as an exercise of Aboriginal self-government, we must resist any temptation we might feel to regard all such measures as therefore necessarily animated by a ‘pressing and substantial’ objective. To do otherwise would not be in keeping with the goal of reconciliation, nor would it be in keeping with decades of established case law, which has consistently held that for the purposes of the *Oakes* test the objective of governmental action must be narrowly defined.¹⁵⁷

Ultimately, then, what this sort of flexible s. 1 analysis is committed to is the view that, while there are some fundamental human rights that prevail across Aboriginal and non-Aboriginal Canadian societies,¹⁵⁸ these rights may, again, legitimately find different expression within different cultural contexts.¹⁵⁹ A culturally deferential s. 1 inquiry not only treats this as a real possibility, it also aims to promote a form of dialogue between Aboriginal governments and the non-Aboriginal dominated judiciary.¹⁶⁰ Specifically, it supports a greater understanding of Aboriginal cultural values by mainstream courts, since it encourages Aboriginal governments and other members of the community to explain why,

¹⁵⁷ *R v KRJ*, [2016] 1 SCR 906 at para 63; *Sauvé v Canada (Chief Electoral Officer)*, [2002] 3 SCR 519 at para 22; see also *Tetreault-Gadoury v Canada (Employment and Immigration Commission)*, [1991] 2 SCR 22.

¹⁵⁸ To be clear, for the conclusion that the entirety of the *Charter* ought to apply to self-governing inherent right Aboriginal governments to be sound, it is not required that the rights enshrined in the *Charter* reflect only interests that are universally held by all human beings. (My own view is that the vast majority, at least, of the *Charter*’s protections do reflect universal basic interests.) We can confine the inquiry, instead, to whether the *Charter*’s rights are in any event compatible with the interests of Canada’s Aboriginal peoples. And even if we take the specific *Charter* right that is most arguably incompatible with the cultural values of some of Canada’s Indigenous peoples—s. 11(d)’s guarantee of the “right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal”—we still find, I believe, that the underlying interest that this right serves to protect is indeed shared by Aboriginal and non-Aboriginal Canadians alike (and, I would argue, by all peoples everywhere). Specifically, given s. 11(d)’s evident purpose of ensuring a fair hearing, courts should not regard its use of the word ‘independent’ as categorically forbidding anyone who is well acquainted with an accused from determining what dispute resolution steps ought to be taken in their case. We can and should, instead, regard an ‘independent’ tribunal for the purposes of s. 11(d) as one that is not beholden to, or subject to the control or undue influence of, a party to the dispute. Once we have settled on this interpretation, two facts become clearer to us: firstly, that s. 11(d) ultimately reflects a universal human interest; and, secondly, that the right enshrined in s. 11(d) may legitimately find different expression in different cultural contexts. For instance, in the non-Aboriginal context—which, let us assume, lacks the traditions of harmony-restoring dispute resolution procedures partaken of by individuals generally well-acquainted with one another, such as are alive and well in many Aboriginal communities in Canada—ensuring that there is not even an appearance of favouritism or undue influence may well require the sort of independence prized by the non-Aboriginal Canadian legal system—i.e., dispassionate unfamiliarity. But mandating that tribunals be independent according to this latter conception of independence may well not be necessary to support—and could conceivably even undermine—the objective of securing fairness in dispute resolution settings within a given Aboriginal community.

¹⁵⁹ As legal scholar Jeremy Webber puts it with respect to rights more generally, “the same abstract right may legitimately, when instantiated within different legal traditions, take different forms, just as, for example, substantially the same commitment to private property is, in the common- and civil-law traditions, translated into quite different legal concepts” (Jeremy Webber, *Reimagining Canada: Language, Culture, Community, and the Canadian Constitution* (Kingston: McGill-Queen’s University Press, 1994) at 249).

¹⁶⁰ It is possible, although I think ultimately incorrect, to read s. 25 as mandating a culturally deferential interpretation of the *Charter*’s provisions wherever these regulate Aboriginal government action. See Royal Commission: Restructuring the Relationship, *supra* note 6 (“[u]nder section 25, the *Charter* must be interpreted flexibly to account for the distinctive philosophies, traditions and cultural practices of Aboriginal peoples” at 160); See also Hogg and Turpel, *supra* note 7 (“[s]ection 25 allows an Aboriginal government to design programs and laws which are different, for legitimate cultural reasons, and have these reasons considered as relevant should such differences invite judicial review under the *Charter*” at 215).

in light of the particular cultural circumstances of the group, certain *Charter* rights ought to be realized in a manner that differs from the way in which these rights are realized in the wider community.

Importantly, this culturally-sensitive *Oakes* test does not embrace moral relativism. It does not suggest that the individual rights that should be observed by Aboriginal governments are whatever rights their members wish to see observed, for instance. Rather, the question of whether a right-impairing policy amounts to a reasonable limit on that right depends in part on the importance of the objective it seeks to advance. Since the importance of a collective goal is at least partly a function of the values and traditions of the relevant collectivity, the same right-limiting policy might amount to a reasonable limit in one political community and an unreasonable limit in another. Thus, in affirming that some legal rights—such as, perhaps, the right that one's case be heard by a stranger (or near stranger)—are only essential to protect individual freedom in certain settings, we opt for a morally objectivist position. Indeed, to assume that anything labelled a 'right' is necessarily of great value in all times and all places, without looking carefully at whether that right is itself merely the product of one time and place, is to take the path of moral absolutism.

Conclusion

The question of whether the *Charter* should apply to constrain the actions of inherent-right Aboriginal governments is a difficult one. For reasons of space, we have largely had to put aside arguments to the effect that specific provisions of the *Charter* (such as s. 11(d) in particular) make demands that are simply inappropriate in the context of many Aboriginal communities. We have likewise been unable to take up the claim that the nature of Aboriginal customs means that they will inevitably confound the *Charter's* section 1 analysis.¹⁶¹ Even if we assume, as I believe, that these objections are superable, to claim that the *Charter* ought to restrain Aboriginal governments exercising the inherent right of self-government exposes one to the accusation that one has failed to adequately respect that collective right, and has thereby not properly reckoned with the reality of Aboriginal sovereignty. Moreover, the rejoinder that the collective right of self-government is not absolute and must be exercised in accordance with the rights and freedoms guaranteed in the *Charter* is likely to elicit, from those opposed to the *Charter's* automatic application¹⁶² to these governments, the charge that one is countenancing a kind of cultural imperialism, in which the collectivist and harmony-seeking traditions of Aboriginal groups can find legitimate governmental expression only insofar as they are cognizable within, and acceptable to, a legal system steeped in the hostile individual rights paradigm of liberalism.

Fortunately, as Patrick Macklem has observed, the *Charter* “presents numerous interpretive opportunities to minimize the potentially corrosive effects that litigation might have on Aboriginal forms of social organization, and to maximize the protection it affords

¹⁶¹ The concern here being that it is unfairly onerous to require an Aboriginal community to identify the objective animating a potentially ancient custom, and then prove that it is “pressing and substantial” by the lights of 21st Century Canadian courts. (See e.g. Wilkins, *supra* note 6, at 104.)

¹⁶² To be clear, while I think the *Charter* should apply automatically to Aboriginal governments—i.e., even in the absence of a self-government agreement under which the parties agree on the *Charter's* application to the relevant Aboriginal government—nothing said above is meant to suggest that there is no value in having the *Charter's* application to the Aboriginal government agreed upon by all parties. Quite the contrary. I think it is clear that formal agreements on this issue are all to the good. See also Hogg, *supra* note 8 (“[T]he details of the extent of a First Nation's powers of self-government, and the paramountcy rules that would govern the application of federal or provincial (or territorial) law to aboriginal lands and people, are of course much better embodied in self-government agreements (with the status of treaties) between aboriginal nations and governments. These agreements can deal comprehensively with all the issues of governance, and supply enough clarity to keep the issues out of the courts” at §28-27).

to less powerful members of Aboriginal societies.”¹⁶³ Taking advantage of such opportunities offers the promise of protecting the basic human rights of individual Aboriginal Canadians, while showing due respect for indigenous difference and the inherent right of Aboriginal self-government. Further, the *Charter*’s application to inherent-right governments would help to advance the objective of reconciliation that animates the Constitution’s recognition of Aboriginal rights in s. 35.

To be clear, and to reiterate what has been said above, applying the *Charter* to inherent-right governments would constitute a limitation on Aboriginal sovereignty and on the inherent right of self-government contemplated by s. 35. There is, therefore, a real sense in which we have a clash of rights whenever the exercise of the inherent right of self-government unreasonably limits a *Charter* right. The correct response is, firstly, to acknowledge that we face a dilemma. We should be committed to the view that limitations on *Charter* rights stand in need of justification, and at the same time should also insist that limitations on Aboriginal rights likewise demand justification. Thus where we find, even after employing a culturally sensitive s. 1 analysis, that some particular exercise of the inherent right of Aboriginal self-government gives rise to an unreasonable limit on a *Charter* right, we will have to determine whether it should nevertheless be permitted as the exercise of an Aboriginal right, or forbidden as a violation of the relevant *Charter* right. In doing so, it is appropriate that we have regard to the objectives of the relevant Aboriginal right¹⁶⁴ and the relevant *Charter* right.¹⁶⁵ The Supreme Court of Canada has told us that the overarching objective of s. 35’s recognition of Aboriginal rights is reconciliation, and we have found that the sort of reconciliation s. 35 should be understood as aspiring to is reconciliation as relationship—namely, a relationship in which Canada’s Aboriginal peoples are reconciled with the Canadian state of which they form an integral part. Requiring the right of Aboriginal self-government to be exercised in accordance with the Canadian Constitution would further that goal; allowing the right to be exercised irrespective of the requirements of the *Charter* would frustrate it. It is therefore right and proper that the *Charter* apply to inherent-right governments.

This is emphatically not to say, of course, that the *Charter*’s application is a *sufficient* condition of the kind of reconciliation s. 35 seeks. It seems clear, in fact, that it is much more crucial to pursue reconciliation via other, broadly political means, such as negotiating self-government agreements, reforming (or perhaps even repealing) the *Indian Act*, fully adopting and implementing the United Nations Declaration on the Rights of Indigenous Peoples,¹⁶⁶ and generally improving the social conditions in which Aboriginal Canadians live on- and off-reserve.¹⁶⁷ Furthermore, if we take a long-term view, the *Charter*’s application to inherent-right governments is probably not even a *necessary* condition of reconciliation. For instance, it may well be desirable, from the point of view of reconciling Aboriginal peoples and the Canadian state of which they are part, for Canada to one day move to a regime in

¹⁶³ Macklem, *supra* note 8 at 195.

¹⁶⁴ See *Sparrow*, *supra* note 17 (“[t]he nature of s. 35(1) itself suggests that it be construed in a purposive way” at para 56).

¹⁶⁵ See *Hunter v Southam*, [1984] 2 SCR 145 on the need for the *Charter* to be given a broad, purposive interpretation.

¹⁶⁶ This is item 43 of the Truth and Reconciliation Committee of Canada’s *Calls to Action* (Truth and Reconciliation Commission of Canada: Calls to Action (Winnipeg: Truth and Reconciliation Commission of Canada, 2015)). It is worth noting that the text of UNDRIP, in laying out the right of indigenous peoples, by no means precludes subjecting Aboriginal self-government to *Charter* review. On the contrary, it shows a clear appreciation for the way in which indigenous rights might be exercised in ways that are in tension with other rights, and countenances limitations on those indigenous rights in such circumstances. Article 46(2), for example, states that: “In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.”

¹⁶⁷ See Royal Commission: Restructuring the Relationship, *supra* note 6 at 950.

which, rather than the Canadian *Charter*, a Charter (or Charters) of rights drafted by Aboriginal communities themselves—and possibly interpreted and applied by special courts comprising judges largely or exclusively of Aboriginal descent—constrain the actions of inherent-right governments. At the present time, however, taking Canada, its legal and constitutional order, and its Aboriginal peoples as we actually find them, applying the *Charter of Rights and Freedoms* to such governments would advance rather than impede the reconciliation that s. 35 compels us to seek.

Annex I

INFORMED CONSENT FOR NON-MEDICAL RESEARCH

Paper on Critiques to Human Rights Legal Activism: THE INDUSTRY OF ADVOCACY

You are invited to participate in a research study conducted by VALENTINA MONTTOYA (SJD Candidate Harvard Law School) and JUAN SEBASTIAN RODRIGUEZ (LL.M by Research McGill University, Faculty of Law), because you are a legal activist fighting for social justice and human rights. Your participation is voluntary. You should read the information below, and ask questions about anything you do not understand, before deciding whether to participate. Please take as much time as you need to read the consent form. You may also decide to discuss participation with your family or friends. If you decide to participate, you will be asked to sign this form. You will be given a copy of this form.

TIME INVOLVEMENT

Your participation will take approximately 15 minutes.

PURPOSE OF THE STUDY

The study aims at understanding the current problems of human rights legal activism at the international and domestic level from a critical perspective to assess what can be done to improve this legal practice.

STUDY PROCEDURES

If you volunteer to participate in this study, you will be asked to respond to a short semi-structured interview based on your experience as a human rights legal activist. The interview will be conducted in Spanish or English, according to your desire, by one of the authors of this paper. We will conduct the interview either in person or through Skype, after setting up an appointment that is more convenient for you.

The interview will include open questions regarding obstacles you have found in legal activism, your response to those obstacles, your decision to become a legal activism, particular examples of problems you have encountered on your professional life as a legal activist and what you think could be solve them. The interview will be audio-recorded if you allow so.

POTENTIAL RISKS AND DISCOMFORTS

There is the risk that someone identifies where you work, but in order to avoid this, your personal information and the name of your employer organization will remain anonymous.

POTENTIAL BENEFITS TO PARTICIPANTS AND/OR TO SOCIETY

There are no anticipated direct benefits for you. As this is a research study, the benefits are contingent upon the results. Society will benefit from this research as we will provide insight on the current problems in activism and discuss possible solutions that different human rights organizations and activists can implement to face some of the obstacles.

CONFIDENTIALITY

We will keep your records for this study confidential as far as permitted by law. However, if we are required to do so by law, we will disclose confidential information about you. The members of the research team may access the data.

The data will be stored in a digital version in the personal files of the researchers who will be the only ones having access to the interviews. **You have the right to review the audio-recordings or transcripts. The audio-recordings will not be used for educational purposes or for any other purposes apart from this paper. Your name and organization will be held anonymous.**

The data will be kept for three years following the date of the interview. When the results of the research are published or discussed in conferences, no identifiable information will be used.

PARTICIPATION AND WITHDRAWAL

Your participation is voluntary. Your refusal to participate will involve no penalty or loss of benefits to which you are otherwise entitled. You may withdraw your consent at any time and discontinue participation without penalty. The alternative is not to participate. You have the right to refuse to answer particular questions. The results of this research study may be presented at scientific or professional meetings or published in scientific journals. You are not waiving any legal claims, rights or remedies because of your participation in this research study.

CONTACT INFORMATION

If you have any questions, concerns or complaints about this research, its procedures, risks and benefits, please feel free to contact Juan Sebastian Rodriguez, Principal Researcher, juan.rodriguezalarcon@mail.mcgill.ca; and Valentina Montoya, Principal Researcher, vmontoyarobledo@sjd.law.harvard.edu.

SIGNATURE OF RESEARCH PARTICIPANT

I have read the information provided above. I have been given a chance to ask questions. My questions have been answered to my satisfaction, and I agree to participate in this study. I have been given a copy of this form.

AUDIO

☐ *I agree to be audio-recorded*

___Yes ___No

IDENTITY

☐ *I give consent for my identity to be revealed in written materials resulting from this study:*

___Yes ___No

Name of Participant

Signature of Participant

Date

SIGNATURE OF INVESTIGATOR

I have explained the research to the participant and answered all of his/her questions. I believe that he/she understands the information described in this document and freely consents to participate.

Name of Person Obtaining Consent

Signature of Person Obtaining Consent

Date

Annex II

Anonymous interview to U.S. 2L student

Interviewer: Juan Sebastián Rodríguez

Paper on Critiques to Human Rights Legal Activism: THE INDUSTRY OF ADVOCACY INTERVIEW/CUESTIONARIO DE ENTREVISTA

Review and sign inform consent form previous to the interview/Revisar y firmar el
formulario de consentimiento informado antes de realizar la entrevista

1. Why did you decide to become a human rights legal activist? (personal history: what and where did you study, what motivated you)/ ¿Porque decidió convertirse en activista legal de derechos humanos? (Historia personal: ¿qué y dónde estudio? ¿qué lo motivó?)
 - She grew up in Western Massachusetts, liberal place, parents are anthropologist.
 - In High School, she lived in Buenos Aires and was very familiar with human rights violations in Argentina.
 - She was very involved with human rights activism.
 - She went to a top tier U.S. private college. School is co-ed and it is a progressive college.
 - Law was a way to make change and that's why she decided to go law school.
 - She could travel to Latin America extensively when she was younger.
 - She spent 3 summers in Mexico and her grandparents lived in Costa Rica. She was very close to political movements in Latin America.
 - Her parents are both academics and both went to grad school. Her Mom is a Mexican-American. She wanted to connect back with Latin America and that's why she decided to become a public interest lawyer. Her Dad travelled the world and became interested in international relations.
2. How long have you been working as a human rights legal activist? / ¿Cuánto tiempo lleva trabajando como activista legal de derechos humanos?
 - She started working as a human rights activist at the age of 16.
3. Can you describe the kind of organizations where you have worked as a human rights legal activist? (kind of organization, kind of job you have done (including internships and volunteer experiences), size of organization, is it national or international, what is a normal day of work for you, how big is your team, what area do you specialize in)/ ¿Puede describir el tipo de organizaciones en las cuales ha trabajado Como activista legal en derechos humanos? (tipo de organización, tipo de trabajo que realiza o ha realizado, tamaño de la organización, si es nacional o internacional, como es un día normal de trabajo para usted, cual es el tamaño de su equipo, en que área se especializa).
 - Internationally: international nonprofit based in New York.
 - U.S. advocacy: small non-profits, she worked in housing. They work in family law. General legal clinic. Paralegal paid.
 - She interned at domestic nonprofit, it was a 5-people organization. Their funding came from wealthier donors and organizations such as a private foundation. They relied a lot on foreign trained lawyers that came to volunteer, as well as local volunteers. It was a volunteer job. Translation, reports, grants. Unpaid internship. She did this under a government fellowship.

- Elite academic institutions provide funding to do internships and fellowships. However, people need to get there to access these programs. This means students need to have high GPAS, AP classes, afford SAT classes, and get to a good school. It's a cycle, and it's all about economic privileges.
 - She speaks 3 languages.
 - Her dream job is a global non-profit organization.
4. What expectations did you have about social justice when you decided to go to law school?/ ¿Qué expectativas tenía sobre la justicia social cuando decidió estudiar Derecho?
- She had a romantic notion of what it meant to be an activist for social justice.
 - She never considered working in a law firm.
 - She knows it would be more practical to work in social justice.
 - She received a merit based full-tuition scholarship from a top tier U.S. law school which gave her the financial freedom she needed to do what she wants.
 - Perhaps when she has a family money might become a concern but now that she doesn't have financial responsibility she can pursue what she likes.
 - Her school portrays as the school that is educating the next generation of public interest lawyers, many of them come with those expectations but once they start working, they have huge loans, so the most practical decision is to work in law firm that offer very attractive salaries.
 - In most of the cases the path of becoming a lawyer means you'll have to fit in the practical path to survive it. Even if people are interested in human rights but have different kinds of experiences, job descriptions often require specific experiences that lawyers with corporate or transactional backgrounds won't have, which might discourage them from applying to these jobs. Even if they might be interest.
 - Students that go to top schools are privilege in many ways. They are very smart, and that could come because of their position of privilege or because they are inherently smart. Great GPAs, great LSAT scores, good indicators, hardworking people, competitive.
 - Often only top law schools offer human rights programs in the U.S.. At her law school there are many clinical courses.
 - She is not entirely certain whether she would like to practice international human rights law because she doesn't feel if she is really going to make the most difference through this channel.
5. What expectations did you have when you started working as a human rights legal activist?/ ¿Qué expectativas tenía cuando empezó a trabajar como activista legal de derechos humanos?
6. Where those expectations fulfilled? Explain/ ¿Fueron sus expectativas iniciales cumplidas? Explique.
7. What obstacles have you encountered as a human rights legal activist? (financial, type of job, supervision, organizational, bureaucratic)/ ¿Que obstáculos ha enfrentado en su carrera como activista legal de derechos humano? (financieros, tipo de trabajo, supervisión, organizacional, burocracia).
- Funding is the biggest challenge. On one side because of the problem that was described above, but also because often organizations don't have the funding to hire entry-level positions, jobs are very few, and are extremely competitive so you must do human rights for forever if you want to get these kinds of jobs/fellowships.
 - Many people don't have the resources to do that.

- At smaller non-profits, these don't have the organizational capacity to train lawyers. They just need free labor force and often throw interns into a project, even though they might not know what they're doing.
- The Global NGO are very well-funded. Her experience at a Global NGO is that they have an organized program where she has a detailed work plan of products she feels confident enough to handle. The capacity of the organization in terms of human resources is big enough so that each person has a specific and detailed oriented job at the organization.

8. How do you think those obstacles could be overcome?/ ¿Cómo sobrepasaría esos obstáculos?

- Lack of funding.
- No time or resources to train people.
- She hasn't come across with people that work in this field but are more interested in themselves or their own achievements. Because it's a competitive field she thinks it's hard to find people that act that kind of way or that are making, relatively, little money. They won't do that unless they believe on what they're doing.
- As an undergrad, when she worked with a professor she had a good mentoring experience. She was very well known and very well connected, she went to the embassy and the president of the country, but she also went to the community and shared spaces with the community. She felt exposed by working alongside with the communities, she felt the professor had a connection with this community.
- At her school there are many small seminars on different social justice issues. She has found that at these spaces there are high-level conversations that never involve the voices of the communities.
- She saw that, she is a member of the Bickel and & Brewer Latino Institute for Human Rights, there was a conference on the latino children, when they were planning the conversation they were looking for fancy key note speakers. Thus, she organized a panel about undocumented youth. 6 undocumented adolescents came to NYU to speak about their own experiences, age 16 to 22. She was surprised because she volunteered at smaller organization who was deeply interesting in empowering communities and teaching legal and community tools to make law more accessible. But she wasn't allowed to do this at the school. Law doesn't allow you to engage with communities. Is more of a top down approach and paternalistic approach?
- International human rights are a replica of that model. A model that looks more like colonialism, people use benevolent tools to replicate structures of power.

9. To what extent do you consider the work you has a real impact on the human rights of the communities/groups you work on?/ ¿Hasta qué punto considera cuál es el impacto que tiene su trabajo sobre los derechos humanos de las comunidades/grupos que defiende?

- She has the privilege to pick the type of legal work she does.
- If she decides to work in legal aid she can have more access to communities. Or if she does international law, that sounds more of a colonialist approach to addressing social justice issues.
- When she decided to intern for a global nonprofit she was concerned that was what her job was going to be about. Not engaging with people or not caring and thinking carefully about the communities the organization is advocating for.
- As an intern, she has only been seated at an office. But she wishes that lawyers at international NGOs and international organizations would work with partner organizations, not just thinking about impact litigation but also thinking about advocacy

strategies and communication strategies. We can always do that kind of thing more. We should work on creating more relationships with people on the ground.

- Often there is a misconnection between organizations doing advocacy work that do fact-finding reports, send lawyers to awful places, gather the information they need and then come back and write fact-finding reports that allows to tell the world how awful the place is but without having some sort of social responsibility for those communities. Are they building connections? She would like to work in a place where she has access to build those relationships, although she recognizes that model would conflict with the idea of impact litigation.
 - When there's people trying to create systemic change is hard to care about your individual client. It is inevitable. You use the client. You use their perfect case and then you go and work from the top. Is hard to judge that dynamic, there will always be pros and cons.
 - Law as a field automatically reproduces patriarchal logics.
10. What is your relationship with those communities?/ ¿Cuál considera es la relación con esas comunidades?
 11. What is the thing you enjoy the most about your work?/ ¿Qué es lo que más disfruta de su trabajo?
 12. What is the thing that you like the least about your work?/ ¿Qué es lo que menos disfruta de su trabajo?
- She has done grassroots organizing and provide direct services.
 - To start learning about impact litigation you need to understand about individual stories. There's a gap between both.
 - Some questions remain unresolved: Is the point of impact litigation to try to educate people on the ground? Not really.
 - Do we need all types of strategies to do impact litigation?
 - Do the clients care about not being involve but feel their case can create an impact? Those are unresolved questions.

Annex III

Anonymous interview to lawyer at U.S. international NGO

Interviewer: Juan Sebastián Rodríguez

Paper on Critiques to Human Rights Legal Activism: THE INDUSTRY OF ADVOCACY INTERVIEW/CUESTIONARIO DE ENTREVISTA

Review and sign inform consent form previous to the interview/Revisar y firmar el
formulario de consentimiento informado antes de realizar la entrevista

1. Why did you decide to become a human rights legal activist? (personal history: what and where did you study, what motivated you)/ ¿Porque decidió convertirse en activista legal de derechos humanos? (Historia personal: ¿qué y dónde estudio? ¿qué lo motivó?)
 - She was initially interested in international human rights law, but she didn't know.
 - Before law school she worked at a social service drafting press releases, she also worked in a theatre company and she was interested in the social work related to that.
 - She wanted to make change on the issues that were important for her.
 - Then she decided to go to Law School, she choose the school because they have a strong program on international human rights law.
 - She then was part of a team of access to mental health services in a country of the global south. She spent a summer in a country in the global south working for domestic NGOs.
 - While she was there she got interested in a new project. Native lawyers cannot access to justice because there's barriers to become lawyer. She started interview people for that. The U.S was exporting their legal model which was not applicable in that country of the global south. A government development agency was giving trainings to people, so they could participate at the courts. But the program was flawed, as they lack the local knowledge, starting by the fact in that country didn't even have law schools at the time.
 - When she was an undergrad she didn't know if she wanted to become a lawyer.
 - Her dad was a lawyer but she studied theater at college. She used to draft scripts. She was a paralegal once so she was interested. But it took a while for her to find out that this was what she wanted.
2. How long have you been working as a human rights legal activist? / ¿Cuánto tiempo lleva trabajando como activista legal de derechos humanos?
3. Can you describe the kind of organizations where you have worked as a human rights legal activist? (kind of organization, kind of job you have done (including internships and volunteer experiences), size of organization, is it national or international, what is a normal day of work for you, how big is your team, what area do you specialize in)/ ¿Puede describir el tipo de organizaciones en las cuales ha trabajado Como activista legal en derechos humanos? (tipo de organización, tipo de trabajo que realiza o ha realizado, tamaño de la organización, si es nacional o internacional, como es un día normal de trabajo para usted, cual es el tamaño de su equipo, en que área se especializa).
 - At a small domestic NGO, the funding comes from international aid.
 - At a Human Rights Clinic, they have many fellows. She was the only person doing domestic work at the time because of the nature.
 - Before coming to work for a Global NGO, she started working on sexual rights because she did a small project on birth control. Right now, if someone wants to work at a global NGO, the impression is that the path is that U.S. non-profits want lawyers with law firm experience. She has found that the legal market wants somebody that has been trained by a

firm. It's just her perception. Commitment to the cause from day 1 is not important as the credentials and legal experience a person has.

- Is it just global NGOs? Maybe, maybe not. There are very few jobs at non-profits and payment is not great. Some people don't have the option to take a lower payment job as they get their law degrees and have to pay their debts. Philanthropy doesn't really offer many options. As a result, working in a non-profit becomes a privilege. If you have a family, probably might not be able to afford working in a non-profit. There's many factors that determine who do this kind of work, in this case, this type of work is reserved to the most privileged ones.
4. What expectations did you have about social justice when you decided to go to law school?/ ¿Qué expectativas tenía sobre la justicia social cuando decidió estudiar Derecho?
 - As an undergrad she didn't had any expectations. She didn't really question if she could contribute to the world. Perhaps because her career at the time was not aiming that.
 - It became as a late idea when she became angry about injustice. It was reinforced by the political context in the U.S. after the Bush administration. Her direct experience with low income children. She realized her privileges and then decided to do something. Now that she is a lawyer she wants to continue doing this.
 5. What expectations did you have when you started working as a human rights legal activist?/ ¿Qué expectativas tenía cuando empezó a trabajar como activista legal de derechos humanos?
 6. Were those expectations fulfilled? Explain/ ¿Fueron sus expectativas iniciales cumplidas? Explique.
 - She doesn't think that she can see change.
 - She feels like her job is a positive contribution but at the end of the day she hasn't feel like she has been changing the status quo. It's a tough reality.
 - Only institutions have the money to make the change. The more established the institution is the more likely they are to make this change. She had to create her own opportunities to do that.
 - She writes academic articles and she thinks that's her contribution.
 7. What obstacles have you encountered as a human rights legal activist? (financial, type of job, supervision, organizational, bureaucratic)/ ¿Que obstáculos ha enfrentado en su carrera como activista legal de derechos humano? (financieros, tipo de trabajo, supervisión, organizacional, burocracia).
 - In the Global South country that she worked at was frustrating to see that people were ok that American lawyers were working with corrupt bar associations. Spending money on trial competitions in English for people in a country that didn't even had law schools. It was a system that legitimize the bar association. People were okay with it. IT was better that the U.S. shouldn't have been there. That is a fascinating example how the economy is sustained by the NGO business. It's nice for ex-pats, it's cheap and people get exciting jobs with fairly good salaries. People move there but they don't really contribute to the problem, however people don't question these dynamics.
 - At a global NGO, is a different story. These are big hierarchical organizations. They have development offices that allows them to get a lot of funding for their work.
 8. How do you think those obstacles could be overcome?/ ¿Cómo sobrepasaría esos obstáculos?

- We have to be more open to internal debate and intra-movement debate.
 - Conservatives work like that and we don't.
 - On the left, we want not to show a united front voice. It's hard to disagree between each other. It's not well-seen to have diverse opinions within the left. We have different agendas. We want to respond quickly to problems. We don't think strategically.
 - Lawyers need to do more to train non-lawyers so they can demand their rights and feel ownership of their rights.
 - Lawyers are not super specials and thinking that way it reproduces hierarchical structures and creates harm. Services are not affordable. Lawyers could be training non-lawyers to advance access to justice.
 - Community voices have to be included in the litigation. She feels in her job that she has no interaction with the people. But because her role is different. It's tough for these impact litigation lawyers to be connected to what is going on the ground.
9. To what extent do you consider the work you have a real impact on the human rights of the communities/groups you work on?/ ¿Hasta qué punto considera cuál es el impacto que tiene su trabajo sobre los derechos humanos de las comunidades/grupos que defiende?
 10. What is your relationship with those communities?/ ¿Cuál considera es la relación con esas comunidades?
 11. What is the thing you enjoy the most about your work?/ ¿Qué es lo que más disfruta de su trabajo?
 12. What is the thing that you like the least about your work?/ ¿Qué es lo que menos disfruta de su trabajo?
- Different people do different things. Not everyone should be radical. Some people transform organizations. Some people create their own. Some people adapt to an organization. Starting by your own is risky unless you have connections and donors.
 - Change often don't come from existing institutions. We need to find ways to bring new institutions to do new kinds of work.

Annex IV

Anonymous interview to lawyer at national NGO

Skype

Date: June 16, 2016

Interviewer: Valentina Montoya

Paper on Critiques to Human Rights Legal Activism: THE INDUSTRY OF ADVOCACY INTERVIEW/CUESTIONARIO DE ENTREVISTA

Review and sign inform consent form previous to the interview/Revisar y firmar el
formulario de consentimiento informado antes de realizar la entrevista

1. ¿Porque decidió convertirse en activista legal de derechos humanos? (Historia personal: ¿qué y dónde estudio? ¿qué lo motivó?)

- Me metí y me metieron
- Me interesaba lo público y lo social
- Empecé a trabajar con él (académico y activista) al principio de la carrera como monitora, empezó a hacer community management en think tank
- Me parece interesante unir la investigación y el litigio estratégico
- En el colegio me interesaba la educación pero no estaba definida. También me interesaba la filosofía
- En una clase aparecieron nuevas preguntas y retos académicos
- Retador porque tengo papás economistas pero por ejemplo trabajo con derecho a la salud lo cual es un reto intelectual
- Clínica de DDHH: interesante pero difícil modelo. Rotar proyectos pero no hay continuidad ni impacto. Pero dependía del proyecto. Se acabó por el modelo. No había un profesor todo el tiempo. Muy descentralizado. No llevaba casos
- Abogada de interés público
- Siente distancia con DDHH porque cree que en temas de políticas públicas los argumentos de principio son muy complejos y no tienen en cuenta la parte logística
- Se está reconciliando con los derechos humanos

2. ¿Cuánto tiempo lleva trabajando como activista legal de derechos humanos?

- año y medio en think tank y clínica DDHH
- Temas: política económica, DDHH, y derecho constitucional (paradoja)

3. ¿Puede describir el tipo de organizaciones en las cuales ha trabajado Como activista legal en derechos humanos? (tipo de organización, tipo de trabajo que realiza o ha realizado, tamaño de la organización, si es nacional o internacional, como es un día normal de trabajo para usted, cual es el tamaño de su equipo, en que área se especializa).

THINK TANK

- Organización de investigación jurídica y DDHH
- Incidencia externa: litigio estratégico y asesoría al Estado
- Muchos temas: organización del estado, cultura jurídica, justicia transicional, étnico, ambiental
- Idea: Investigación e intervención
- Tiene más o menos treinta investigadores, y 5 pasantes o investigadores especializados
- Es una de las más grandes en Colombia

- área internacional: conexiones sur-sur. Ex: Ghana, y organizaciones en el sureste asiático
- Nuevos investigadores de otros países
- Día de trabajo en Justicia Ambiental. Proyecto andando, línea nueva. Incidencia. Catapultar nombre de think tank. Intervención ante corte. Demanda, paralelamente investigación. Trabaja en proyectos por la mañana y se reúne con jefe. Reuniones con la comunidad sobretodo en Bogotá. Hablan mucho por skype
- PROBLEMA: financiadores son internacionales y ahora existe cláusula según la cual la organización no puede hacer lobby político por exención tributaria. Es muy reciente. Dificultad para diferenciar lobby político e interés público. Frena el trabajo con comunidades
- También trabaja en litigio estratégico, pero sobretodo en el equipo con un investigador y su jefe

Clínica DDHH:

- 6 Estudiantes: 3 por semestre.
 - 1 persona de planta y un coordinador
 - Cada estudiante tiene un proyecto y un supervisor (usualmente un profesor de la universidad)
 - No hay un espacio para reuniones constantes, sino seminario una vez al mes
 - Perdió mucho cuando profesor se volvió internacional (se desconcentró)
 - Por no llevar casos lo sacaron de consultorio jurídico
4. ¿Qué expectativas tenía sobre la justicia social cuando decidió estudiar Derecho?
- Ética y geografía. Estudió derecho por accidente
 - Intuición de justicia social
5. ¿Qué expectativas tenía cuando empezó a trabajar como activista legal de derechos humanos?
- Expectativas personales:
 - Expectativas externas: poder ayudarle a la gente a que las cosas funcionen mejor
 - Muy difícil
 - Se ha estrellado con el hecho de que todo es a muy largo plazo. Todo es mínimo a 5 años
 - Viene de la universidad donde todo es por semestre
 - Se radican 600 y salen 2
 - Es bonito el feedback: que te llame la gente de la comunidad a agradecerte
 - Reto intelectual todos los días: “me gusta el tipo de problemas con los que trato”
 - En firma el trabajo era poco retador
 - Problema: mucho del trabajo parte de principios pero ella es muy pragmática. Aunque defienda una causa le parece importante ver qué es posible y lógico. Hay que complejizar el debate. Miedo a ser light.
 - Contradicción: el petróleo es malo pero todos llegan en carro
 - “Soy hiper realista”
 - Típico del abogado: diferenciar el caso concreto de la política pública ideal Ex: consultas populares de proyectos mineros: bloquear la minería tienen efectos negativos pero no puede decirle a la comunidad.
 - “Veo gente en THINK TANK que es más responsable y súper realista”
 - Interesante
 - Significativo: ayudarle a la gente y tener más impacto
6. ¿Fueron sus expectativas iniciales cumplidas? Explique.

- Expectativas no se cumplieron pero sí se transformaron. Ahondado en preguntas interesantes. Todos los días salen cosas nuevas. Variedad
 - No tenía tantas expectativas antes de empezar
7. ¿Que obstáculos ha enfrentado en su carrera como activista legal de derechos humano? (financieros, tipo de trabajo, supervisión, organizacional, burocracia).
- Antes trabajó en firma porque sus amigos lo hacían. Era como parte de lo que se esperaba, como “el bautizo”. Le gustó. Trabajaba en litigio de insolvencia. Pero horas largas
 - Primer proyecto en THINK TANK fue aburrido: revisar bibliografía sin saber para qué servía eso
 - Obstáculo: lobby
- a. Socialmente: financieramente da miedo. En Firma había career path claro. En DDHH no hay career path. A nivel social: “eso no es lo que esperábamos de ti”, “¿de qué vas a vivir?”
- b. duda interior: refuerza inseguridad. Viene de un trasfondo social y educativo de élite. Es muy posible que si la comunidad tuviera menores expectativas sería más fácil
- c. Hay tres cabezas que revisan, ya no 1. Pero los jefes son súper estrellas tratando de coger coyuntura y entonces se demoran 10 días en volver. No es tan grave para los chiquitos pero sí es duro para los medianos. Muy centralizado para ser tan grande (think tank)
8. ¿Cómo sobrepasaría esos obstáculos?
- a. Financiero: tener más trabajo paralelos porque el trabajo es más flexible
- b. Mostrarse segura y contenta frente a inseguridad. Contar sobre el trabajo. No mostrarse débil. Dependiendo del interlocutor uno dice o no que es abogado de DDHH porque frente a la comunidad son buenos, frente a la familia no. La palabra DDHH es bien recibida dependiendo del contexto.
- “Prefiero decir que soy investigadora o abogada de derecho de interés público”
- c. Más autonomía de investigadores de área: adoptar esquema de firma organizacional
- delegación de responsabilidades
9. ¿Hasta qué punto considera cuál es el impacto que tiene su trabajo sobre los derechos humanos de las comunidades/grupos que defiende?
- Ningún impacto en las comunidades. Pero base teórica y jurídica que defiende la causa y que puede servir para después. Buen sustento y bases.
10. ¿Cuál considera es la relación con esas comunidades?
- Buena relación pero problema con el lobby.
11. ¿Qué es lo que más disfruta de su trabajo?
- Todos los días es un reto académico nuevo
12. ¿Qué es lo que menos disfruta de su trabajo?
- Muy poco inmediato el resultado pero el trabajo sí es para ya

Annex V

Anonymous interview with lawyer at grassroots NGO and others

Skype

Date: August 6, 2015

Interviewer: Valentina Montoya

Paper on Critiques to Human Rights Legal Activism: THE INDUSTRY OF ADVOCACY INTERVIEW/CUESTIONARIO DE ENTREVISTA

Review and sign inform consent form previous to the interview/Revisar y firmar el
formulario de consentimiento informado antes de realizar la entrevista

1. ¿Porque decidió convertirse en activista legal de derechos humanos? (Historia personal: ¿qué y dónde estudio?¿qué lo motivó?)

En la Universidad no sabes ni eres consciente

- estaba interesada en el feminismo
- asistente de investigación en ONG de mujeres
- tenía 5 años de experiencia y era difícil echar para atrás
- inclinada por los derechos humanos y el derecho constitucional
- casi se sale de la Universidad porque el derecho civil y otros eran muy aburridos (eje jurídico en su universidad)
- 2 perfiles de abogados:
 1. Salvar al mundo- humanista
 2. Reproducción del estatus social y económico

2. ¿Cuánto tiempo lleva trabajando como activista legal de derechos humanos?

- lleva entre 14 y 15 años. “Ya no quiero más pero es difícil echar para atrás”

3. ¿Puede describir el tipo de organizaciones en las cuales ha trabajado Como activista legal en derechos humanos? (tipo de organización, tipo de trabajo que realiza o ha realizado, tamaño de la organización, si es nacional o internacional, como es un día normal de trabajo para usted, cual es el tamaño de su equipo, en que área se especializa).

Frustrante

- lógica de la cooperación internacional
- priorizar agendas
- movimiento de mujeres
- violencia sexual y feminicidios causan afectación psicosocial

Derechos de las mujeres

- En ONG de mujeres trabajó 6 meses y luego 8 años
- En otra ONG de salud: 4 años

Libertad de prensa

- ONGs nacionales relevantes y referente internacional

Red Nacional de mujeres

- Trabajo en redes y en mesas
- Nudos entre redes de mujeres y organizaciones mixtas

- Gueto: solo organizaciones de la Red

4. ¿Qué expectativas tenía sobre la justicia social cuando decidió estudiar Derecho?
¿Qué expectativas tenía cuando empezó a trabajar como activista legal de derechos humanos?

Todas las expectativas inicialmente.

- En ONG en salud:
- litigio en derecho de familia y violencia intrafamiliar: al principio se sentía ponderosa con el derecho pero con la práctica se distanció del litigio porque en 2006 trabajó en interdicción en casos de esterilizaciones forzadas. En un caso, a una mujer la violaron antes de que terminara. 3 días después de la sentencia de aborto. La pelea fue muy frustrante para que lograra el aborto
- casos de alimentos: la mujer se murió en el proceso
- En una ONG nacional: investigación sobre argumento de sistematicidad.
 - El poder del proceso: acompañamiento psicosocial es muy importante (si tiene impacto pero está desencantada del litigio)
 - Mujeres desplazadas en ciudad: una era ladrona de carros
 - Una mujer en su adolescencia había estado casada con un guerrillero pero nunca dijo
 - La familia de una mujer había sido amenazada: no siguió requisitos de medidas de protección
 - Amenazas y panfletos AUTO 0092 (infiltrados)
 - Inicialmente esperanzas pero se fue distanciando

6. ¿Fueron sus expectativas iniciales cumplidas? Explique.

No por desencanto pero llevo 7 años de investigación. Problema del movimiento de mujeres: inasistencia en sistematicidad pero en el camino va a sacar información y luego vuelve a la capital a hacer informes internacionales.

- dilema ético: ¿tienen derecho a remover el silencio?
- las víctimas esperan algo a cambio y ella no está en posición de retribuirlo
- cómo se definen las agendas cuando cooperación internacional pone el dinero: todo para violencia sexual en el conflicto armado (no dinero para reinsertados del grupo subversivo)
- “Te vas para una reunión de paz”
- Crisis de ONGS porque ahora el país es de renta media, y ha disminuido el dinero entonces cambia la lógica de todo. No se respetaron los procesos
- Muchas organizaciones a punto de morir siguieron con el dinero del Estado pero están cooptadas (dilema ético)

7. ¿Que obstáculos ha enfrentado en su carrera como activista legal de derechos humano? (financieros, tipo de trabajo, supervisión, organizacional, burocracia).

- Psicosocial: devastador: porque en ONG aguantas mucho voltaje y quemados laboralmente
- Económico: “Yo no trabajo por plata” PERO su papá se quebró y eso la hizo cuestionarse. Renunció a ONG local por plata también

8. ¿Cómo sobrepasaría esos obstáculos?

Personas que se han salido están pensando cómo pasarse a la academia o al Estado

- Dilema ético: no le dan relevancia interna. Hablar de fuentes indirectas (cambio de metodología)

9. ¿Hasta qué punto considera cuál es el impacto que tiene su trabajo sobre los derechos humanos de las comunidades/grupos que defiende?

- Atención psicosocial a la víctima
- Afectación de víctimas cuando cuentan
- Lógicas asistencialistas

Ex: talleres en ciudad intermedia con el Gobierno. Participación política. Muchas víctimas sin interés en liderazgo. El 40% dijeron mentiras diciendo que eran de un municipio lejano cuando vivían en la ciudad. Pidieron que el Estado les reconociera un día de trabajo (lógica perversa instalada por el Estado, cooperación internacional y organización)- llenar la lista de asistencia

- Proceso de liderazgo de víctimas que han dado el paso
- Bueno el grupo de autoayuda: empoderamiento para proceso judicial y acompañamiento psicosocial y en sus familias

10. ¿Cuál considera es la relación con esas comunidades?

- Mantiene una relación con personas de atrás desde litigio en ONG local
- Pero organización todavía cercanía con mujeres (afectos instalados)

11. ¿Qué es lo que más disfruta de su trabajo?

El lado humanista: temas humanos

- Se logran objetivos. Ex: articulación con la policía (ganancias)

12. ¿Qué es lo que menos disfruta de su trabajo?

- Problemas psicosocial y temas muy fuertes
- Burocracias del Estado (en el distrito)
- Muchos proyectos no son sostenibles ex: escuelas de paz
- Económico (personal)
- No existe tradición filantrópica en América Latina: Importante tener una sección de comunicaciones
- Periodo de transición

Annex VI

Anonymous interview with lawyer at international court

Skype

Date: July 31, 2015

Interviewer: Valentina Montoya

Paper on Critiques to Human Rights Legal Activism: THE INDUSTRY OF ADVOCACY INTERVIEW/CUESTIONARIO DE ENTREVISTA

Review and sign inform consent form previous to the interview/Revisar y firmar el
formulario de consentimiento informado antes de realizar la entrevista

1. ¿Porque decidió convertirse en activista legal de derechos humanos? (Historia personal: ¿qué y dónde estudio? ¿qué lo motivó?)
 - Empezó a trabajar en una ONG en el tercer año de la universidad
 - En la universidad hacía moot courts en DDHH
 - En la universidad no tenían clases de DDHH
 - Profesora llevó a una mujer que trabajaba con una organización internacional en país africano y ella pensó: “qué bonito trabajo” además de aportarle a sociedad y ser intelectualmente retador
 - Universidad religiosa que inculca el sentido social
 - En introducción al derecho vio DDHH
 - La ONG se había formado por evento político en su país. Ahí trabajaban las víctimas. Sentía que era útil
2. ¿Cuánto tiempo lleva trabajando como activista legal de derechos humanos?
 - 10 años, empezó en 2005 siendo pasante
3. ¿Puede describir el tipo de organizaciones en las cuales ha trabajado Como activista legal en derechos humanos? (tipo de organización, tipo de trabajo que realiza o ha realizado, tamaño de la organización, si es nacional o internacional, como es un día normal de trabajo para usted, cual es el tamaño de su equipo, en que área se especializa).

ONG Local (país del sur global)

- Trabajan psicólogos, abogados, periodistas. (11 personas, máximo 16)
- Atención psicosocial (familiares de víctimas del evento político)
- Cuidar fosas comunes: menos organizado y menos académico
- Personas trabajan ahí porque la vida las puso
- Siente que el trabajo es más cercano
- Su duelo era hacer activismo: “Yo sé lo que se siente”
- Ella es especialista en el sistema interamericano
- Personas se abren más por empatía
- Era la organización más cercana a la comunidad en la que ha trabajado, aunque las víctimas no estaban en la capital

ONG INTERNACIONAL (Oficina norte global)

- Es una ONG internacional que trabaja en varios países (CIJ)- norte y sur global
- Mucho más organizada
- Más académica: publicaciones sobre poder judicial

- No hacen litigio sino que lo acompañan
- No llevan casos
- Oficina en norte Global tenía 20 personas (internacional porque diferentes secciones y por región geográfica)
- Tenía un área encargada de recoger financiación (más organizado y con plata)

FIRMA DE ABOGADOS EN ÁREA DE DDHH

- Uno de los socios era el presidente de órgano interamericano de DDHH
- Unos casos pro-bono y otros pagados
- Asesoraba ONGs sobre cómo llevar casos
- Millonarios con casos de DDHH
- Tipo de víctima influye en el trabajo ex: víctima millonaria pagan por tu parte técnica más que ofrecer un servicio social: “Esa gente no dice gracias” vs. En otros casos te buscan porque pueden ayudar (no consejo legal)

ONG INTERNACIONAL

- Tarea: buscar casos nuevos
- Hay menos acompañamiento a las víctimas en las grandes que en las chiquitas
- “Yo voy, agarro el caso y me voy”
- Una de las clientes afirmo: “Me sentía abandonada”- más de las ONGs grandes porque su línea es más legal que de acompañamiento

CORTE INTERNACIONAL

- Activismo judicial: no lo lee objetivamente. Tiene una perspectiva pro-víctima. Eso es mal visto PERO el sistema internacional fue creado para las víctimas
- Aunque hay grados, hay abogados hiper formalistas (repiten criterios) vs. Activistas (avanzan criterios)
- Está pensando en el activismo
- 22 abogados, 7 jueces y 10 administrativos más o menos

4. ¿Qué expectativas tenía sobre la justicia social cuando decidió estudiar Derecho?

- Familia católica por lo cual tenía marcada la idea de justicia social por servicio a la sociedad
- Mi papá me decía “la abogada de los pobres”
- No se imaginaba ser “la abogada en tacones”
- Pensó en ser jueza como su tía, porque imparte justicia

5. ¿Qué expectativas tenía cuando empezó a trabajar como activista legal de derechos humanos?

- Activista: ayudar a la gente en ese momento
- Cuando llegó a capital del país sentía que había crecido en una burbuja, y quería conocer lo que pasaba en su país
- Tenía curiosidad
- Lo que estudió podía ayudar a la gente
- Aunque fuera chiquito el impacto sí lo tenía
- Venía con una idea restringida del impacto
- Se conformaba con lo chiquito
- Sabía que la ONG tenía expectativas bajas porque “En este país no hay justicia”
- ONG veía a Corte como a un dios que entendía el sufrimiento humano. Pero se ha dado cuenta que no es así y que hay gente en la corte que no esta comprometida con la causa
- Mucha gente en DDHH que lo ve como un trabajo pero no hace parte de lo que siente

6. ¿Fueron sus expectativas iniciales cumplidas? Explique.

- No se sintió defraudada por el trabajo, sino defraudada porque esperaba más de las organizaciones o de las personas específicas
 - Apropiación de temas es un problema del activismo. Porque muchas organizaciones no comparten.
 - Si lo que a uno lo mueve es ayudar a la gente entonces ¿Porqué apropiación de temas?
 - Ego de saber más que de ayudar a la gente
 - Pelear por ser los únicos o los que más llevan casos que no benefician a las víctimas

7. ¿Que obstáculos ha enfrentado en su carrera como activista legal de derechos humano? (financieros, tipo de trabajo, supervisión, organizacional, burocracia).

- Ser mujer (no cuando es una organización de mujeres) y joven (intelectualmente puedes pero no confían en ti)
- Mal pagado en ONGs nacionales. Por ejemplo en su país 1/4 de sus amigos están en firmas
- ONGs sin áreas financieras no son sostenibles
- ONGs que se identifican con una sola persona son un problema porque entonces todo el poder lo tiene una sola persona. Personas dentro de la organización se apropian de su hijo sin pensar que es un proyecto común
- Es malo porque el que pone la cara limita la capacidad de refrescar el ambiente y mejorar políticas
- La mamá de los hijos impone su criterio

8. ¿Cómo sobrepasaría esos obstáculos?

- No tener a una persona toda la vida: el cambio oxigena. Deberían limitar periodos
- Cambiar al personal y a la cabeza
- Cuando seas director ver las capacidades de los jóvenes
- Experiencia para entender que uno tiene que ser mejor jefe
- En ONGs pequeñas no hay evaluación de accountability por lo cual es más difícil medir éxito y trabajo

9. ¿Hasta qué punto considera cuál es el impacto que tiene su trabajo sobre los derechos humanos de las comunidades/grupos que defiende?

- Ex: Hubo problemas pero el caso llegó a la Corte y para la persona ser escuchada por personas importantes fue la forma en la que se sintió reparada (darle voz)
- Ex: ONG internacional: En uno de los casos en los que trabajo hubo violencia psicológica. Eso no es algo del caso específico pero traerlo en los argumentos puede mejorar la vida de más víctimas más allá del caso
- Relación más cercana con las víctimas que con ONGs aumentan el impacto

10. ¿Cuál considera es la relación con esas comunidades?

- Le gustaría tener una relación más cercana con las víctimas
- Le causa tristeza y frustración por no poder ayudarles más
- Uno debería ser más distante: no ha podido serlo nunca. (lograr el equilibrio sería lo ideal)

11. ¿Qué es lo que más disfruta de su trabajo?

- Crear argumentos que lleven a la protección

- En ONGs crear algo que pueda ayudar.
- Adrenalina, reto intelectual y ayudar a alguien
- Corte: reto más intelectual porque el caso ya está
- Todo lo sustantivo en DDHH
- “Chévere ser consultora porque nadie me impone una línea de pensamiento”

12. ¿Qué es lo que menos disfruta de su trabajo?

- Lo que menos le gustan son los problemas institucionales ex: ser joven y ser mujer
- En algunas ONGs no puedes pensar diferente
- La Corte es un lugar muy estático

Annex VII

Anonymous interview to lawyer at international human rights body

Interviewer: Juan Sebastián Rodríguez

Paper on Critiques to Human Rights Legal Activism: THE INDUSTRY OF ADVOCACY INTERVIEW/CUESTIONARIO DE ENTREVISTA

Review and sign inform consent form previous to the interview/Revisar y firmar el
formulario de consentimiento informado antes de realizar la entrevista

1. Why did you decide to become a human rights legal activist? (personal history: what and where did you study, what motivated you)/ ¿Porque decidió convertirse en activista legal de derechos humanos? (Historia personal: ¿qué y dónde estudio? ¿qué lo motivó?)
 - Quería estudiar ciencia política, sin embargo, decidió estudiar derecho por que habían más oportunidades.
 - Le gustaba los temas de justicia. En 4to semestre salió del closet, se unió al círculo LGBT de la universidad.
 - Las críticas contra el matrimonio gay la motivaron a pensar de forma crítica. Luego ella se acercó a personas trans por un tema personal. Hizo una pasantía en ONG local donde todo era asuntos gays, pero ella se dio cuenta que el activismo legal no era necesariamente efectivo como le habían explicado en la universidad, mientras que el discurso trans podía ser interpretado de 2 formas
 - Que no hay acceso al derecho y por tanto no lo ve como una herramienta y no cree en él. Las redes de apoyo por otro lado son más efectivos. Son más efectivas las redes de apoyo que ir a la policía para acceder a mecanismos de protección. No legitima el poder del estado, si no es alternativo a él. Es contrario a lo jerárquico.
 - En ese proceso entró a una clínica de derechos humanos, y en proyecto con organizaciones trans.
 - El derecho es importante, pero es solo una herramienta. Es excluyente. Reproduce opresión como la policía y las cárceles. La vida de los pobres y las personas trans son una fuente de violencia. La pregunta es cómo utilizar el derecho sin reproducir esquemas de opresión.
2. How long have you been working as a human rights legal activist? / ¿Cuánto tiempo lleva trabajando como activista legal de derechos humanos?
3. Can you describe the kind of organizations where you have worked as a human rights legal activist? (kind of organization, kind of job you have done (including internships and volunteer experiences), size of organization, is it national or international, what is a normal day of work for you, how big is your team, what area do you specialize in)/ ¿Puede describir el tipo de organizaciones en las cuales ha trabajado Como activista legal en derechos humanos? (tipo de organización, tipo de trabajo que realiza o ha realizado, tamaño de la organización, si es nacional o internacional, como es un día normal de trabajo para usted, cual es el tamaño de su equipo, en que área se especializa).
 - En el Círculo LGBT eran estudiantes voluntarios. Dinámicas capitalistas, todo lo que hiciera tenía que ser estético para hacerlo sostenible. Era inestable. Había tres personas empujando todo.
 - La clínica de derechos humanos solo trabajaba en temas de discapacidad. Pero le parecía aburrido. Tampoco quería seguir trabajando en temas gays. Quería trabajar en temas trans. Era el espacio de introducir a la academia de su país un tema que estaba invisibilizado. Le

enseñó a canalizar sus ideas radicales en mecanismos profesionales tales como intervenciones a las cortes, paneles, artículos académicos. Aprendió a lidiar con las jerarquías.

- No puede ser un discurso radical, sino adaptarla a un lenguaje de derechos y élite. No se sabe si es mejor, se siente que miente, y ponerle en lenguaje de poder va a ayudar a la vida. – la alternativa crítica es que a los activistas legales les falta hablar con la gente, no hacerlo condescendiente, no reproducir privilegios, ser más radical, generar redes de apoyo, trabajar desde el arte y la intervención.
 - Históricamente el activismo legal a pordebajado otra clase de activismos como arte, comunidades de base, movilización social, estrategias de protección basadas en la comunidad.
 - Hay que reconocer que el derecho no los es todo.
4. What expectations did you have about social justice when you decided to go to law school?/ ¿Qué expectativas tenía sobre la justicia social cuando decidió estudiar Derecho?
- Antes creía en la justicia social. Después no. Cada vez tiene más dudas del derecho como herramienta eficaz. La pregunta si el derecho es o no válido para la comunidad trans y que otro mecanismo existe.
 - Reforma legal no es justicia social.
 - Sentirse como hablar de temas que no sienten que no son importantes para otra gente. El derecho puede hacer algo en materia de pobreza.
5. What expectations did you have when you started working as a human rights legal activist?/ ¿Qué expectativas tenía cuando empezó a trabajar como activista legal de derechos humanos?
- Reconocimiento legal.
6. Where those expectations fulfilled? Explain/ ¿Fueron sus expectativas iniciales cumplidas? Explique.
- No
7. What obstacles have you encountered as a human rights legal activist? (financial, type of job, supervision, organizational, bureaucratic)/ ¿Que obstáculos ha enfrentado en su carrera como activista legal de derechos humano? (financieros, tipo de trabajo, supervisión, organizacional, burocracia).
- Reconocimiento de su situación privilegiada que le han permitido llegar a espacios que otros no están.
 - El conoce más transfobia en las esferas más altas. La trans junto con la diplomacia es desgastante por qué se debe adaptar a los esquemas. Son escalafones para hacer lo que hace. No puede ser tan radical.
 - Los organismos de derechos humanos internacionales no ven la radicalización como una opción. No debe haber rabia y sonriente. Pero él puede decir que no tiene rabia y sabe canalizar eso porque no ha comido mierda como si lo ha hecho una prostituta.
 - Los baños siguen discriminando a las personas trans. Entre más sube es menos accesible. Y es así porque nunca han tenido contacto con esas personas si no que deben ajustarse a la caridad porque lo ven como algo de buen corazón. Ahí hay discriminación.
 - Cambios sociales y prejuicios en esos niveles es necesario. Nunca adaptarse al status quo. Hay que cuestionar.

- Discapacidad y trans es peor. No saben cómo tratarlos. No están y nunca han estado en esos espacios entonces no saben qué hacer.
8. How do you think those obstacles could be overcome?/ ¿Cómo sobrepasaría esos obstáculos?
9. To what extent do you consider the work you have a real impact on the human rights of the communities/groups you work on?/ ¿Hasta qué punto considera cuál es el impacto que tiene su trabajo sobre los derechos humanos de las comunidades/grupos que defiende?
- En la comunidad trans. 2 momentos.
 - Activista de base: la lucha trans es comunitaria. Todo parte en la comunidad, si hay violencia del estado, hay una auto protección de la comunidad. Ese es el motor. El derecho no sirve.
 - Organismo internacional de derechos humanos: le dio aún más privilegios. Hay efectos simbólicos. Tecnificaron su trabajo. Dejó de ser la burla y legitimizó su lucha política. Le da un discurso de esperanza a lo que hace.
 - Hay un desgaste en la medida que no hay una red de apoyo. Da poder a la gente. Lo que ella dice está bien. No la cuestionan. Un incentivo perverso. Ella está en ese espacio porque es trans. No basta con tener buenas intenciones. Tiene un efecto doble. Poner su discurso en temas de poder.
10. What is your relationship with those communities?/ ¿Cuál considera es la relación con esas comunidades?
- Directa. Es su red de apoyo. No la tiene actualmente.
11. What is the thing you enjoy the most about your work?/ ¿Qué es lo que más disfruta de su trabajo?
- La gente que llega al organismo internacional nunca tiene contacto con población de base. Es gente altamente calificada. En país del sur global hay más organizaciones donde hay activistas que son dedicadas, que le dan su vida al derecho. En una escuela de derecho top no se siente que les importa, pero es más como son la voz de los que no tienen voto.
 - Ella dice que no sabe si se hubiera ganado la beca, sino hasta que habló públicamente de que tomo hormonas. En términos de poder
12. What is the thing that you like the least about your work?/ ¿Qué es lo que menos disfruta de su trabajo?
- El trabajo soñado es trabar con comunidades de base y ver resultados concretos. Pero quiere que paguen bien. Quiere montar su propia organización. Contacto directo con la gente. Como asistencia legal personal.

Annex VIII

Anonymous interview with lawyer

Skype

Date: April 20, 2017

Interviewer: Valentina Montoya

Paper on Critiques to Human Rights Legal Activism: THE INDUSTRY OF ADVOCACY INTERVIEW/CUESTIONARIO DE ENTREVISTA

Review and sign inform consent form previous to the interview/Revisar y firmar el
formulario de consentimiento informado antes de realizar la entrevista

1. ¿Porque decidió convertirse en activista legal de derechos humanos? (Historia personal: ¿qué y dónde estudio? ¿qué lo motivó?)
 - Estudió derecho en una universidad privada en país del sur global: quería trabajar por la gente y con la gente
 - En la facultad tuvo dudas especialmente porque ciertas materias no estaban alineadas con sus objetivos pero continuó
 - Consiguió primera práctica con el Estado, pero los funcionarios no estaban tan interesados en el interés público
 - Entró al sector privado a una firma pequeña a litigio, en la que tuvo buenos jefes. Sentía que los casos estaban desconectados de la realidad del país. Se sentía en el lugar equivocado.
 - Intentó buscar trabajo en derecho de interés público pero no sabía cómo aplicar (esas herramientas no se las dieron en la universidad)
 - Descubrió que en las firmas grandes podía hacer pro-bono. Se fue a una firma grande y coordinó pro-bono por un año. Allí se sintió muy satisfecho en un caso en el que pudo alinearse con los intereses de un cliente pobre. Sintió que estaba haciendo algo por los demás, fuera de la burbuja.
 - Se fue a otra firma grande con una práctica pro-bono más fuerte . Trabajó en un caso a favor del Estado contra una compañía que estaba dejando de pagar dinero al Estado. Tuvo por primera vez un conflicto ético porque le pidieron a la firma hacer un concepto a favor de una petrolera y en contra de unas comunidades. Descubrió que ahí “uno no se da cuenta de la parte tan importante que es de ese sistema opresor”.
 - Hizo trabajo de derechos humanos por su cuenta, primero haciendo investigación de maestría sobre responsabilidad civil a favor de víctimas. Se empezó a conectar con clase sobre responsabilidad social empresarial
 - En su LL.M en EEUU oficialmente se fue para el área de DDHH
2. ¿Cuánto tiempo lleva trabajando como activista legal de derechos humanos?
 - 10 años desde que empezó a estudiar el tema y 4 años desde que empezó a trabajar concretamente como abogado de DDHH
3. ¿Puede describir el tipo de organizaciones en las cuales ha trabajado Como activista legal en derechos humanos? (tipo de organización, tipo de trabajo que realiza o ha realizado, tamaño de la organización, si es nacional o internacional, como es un día normal de trabajo para usted, cual es el tamaño de su equipo, en que área se especializa).

ONG internacional en país del sur global

- ONG internacional
- Oficina regional tenía 10 personas
- Enfocada en minas, víctimas y que el Estado cumpla obligaciones internacionales
- No tenía abogados y lo contrataron inicialmente para un concepto legal

Clínica de DDHH de universidad en EEUU

- 5 profesores con 5 estudiantes cada uno. Aproximadamente 30 personas
- trabajan en DDHH, DIH, y DPI.
- Era estudiante

ONG internacional en derecho ambiental

- ONG Internacional
- Amicus contra petrolera
- Teoría de cambio: the power of law and the power of people
- Apoyan a los defensores de la tierra incluyendo los derechos de las personas y del medio ambiente. No es antropocéntrico
- Oficina en Washington tenía 20 abogados. También en países del sur global. En total aproximadamente 50 personas
- ONG: el liderazgo estaba en Washington
- No era sólo derecho sino también educación
- Siguió como consultor externo

Tribunal de derecho penal internacional

- 200 personas aprox. La mitad de país del sur global y la mitad internacionales a través de la ONU
- Trabajan casos de genocidio, desaparición forzada
- Abogados, trabajadores sociales y administrativos

Programa de derechos humanos y clínica de DDHH universidad EEUU

- 20 personas
- Enfoque internacional
- Temas: empresas y derechos humanos, comunidades, DIH, DDHH en cortes de EEUU

4. ¿Qué expectativas tenía sobre la justicia social cuando decidió estudiar Derecho?

- Derecho como herramienta de cambio

5. ¿Qué expectativas tenía cuando empezó a trabajar como activista legal de derechos humanos?

- Ayudar a las personas que se encuentran al otro lado de la balanza de poder (consciente de la desigualdad en el poder)

6. ¿Fueron sus expectativas iniciales cumplidas? Explique.

- Reconoce que el proceso es muy difícil. No verá cumplida nunca en la vida la transformación estructural
- Sí siente que ayuda a personas o grupos individuales: es un proceso en el cual llevar un caso a una corte puede motivar a otras personas a buscar el cambio
- No es ciego a las críticas: en el mejor de los casos, ante las cortes de EEUU por ejemplo, van a ganar dinero pero no a transformar. Tienen victoria a través de la esperanza
- Sentimiento de justicia da esperanza para el cambio

7. ¿Que obstáculos ha enfrentado en su carrera como activista legal de derechos humano? (financieros, tipo de trabajo, supervisión, organizacional, burocracia).

- Cambia mucho tener entrenamiento a no tenerlo

1. Barreras de entrada:

- muy competido para entrar
- muy difícil conseguir algo pago sin calificaciones
- dificultad mayor para las personas del sur global por el idioma y porque hay una presunción de que las universidades del norte global son mejores
- En Tribunal internacional por ejemplo él tenía 29 y entraba con niños de 21
- Toca voluntariarse. Tuvo que hacer 3 pasantías antes de encontrar algo pago.

2. Nepotismo: contratar al amigo de un amigo o por palanca. Puede haber poca transparencia sobretodo en ONGs más pequeñas

3. Financiero: Si uno se compara con un abogado de firma es muy difícil. Internamente tuvo que dejar de hacerlo

8. ¿Cómo sobrepasaría esos obstáculos?

- Darse cuenta que la presunción de que son mejores los del norte global están ahí y no dejarse engañar. Fortalecer la seguridad
- Ayudar a que otros entren y se sientan seguros
- Tratar de romper con consciencia
- Financiero: lo que uno necesita es poder vivir bien para uno
- Hay que oponerse directamente al nepotismo. Apoyar más transparencia

9. ¿Hasta qué punto considera cuál es el impacto que tiene su trabajo sobre los derechos humanos de las comunidades/grupos que defiende?

- Esperanza. Fomentar una idea de justicia
- Se mete y se da cuenta que uno hace poco
- Darles ley para que haya justicia
- Peligro de caer en la trampa de buscar la victoria para uno como abogado y no para las comunidades

10. ¿Cuál considera es la relación con esas comunidades?

- Lo ideal es que haya una comunicación de doble vía con las comunidades. Es muy difícil que una misma persona lleve la parte legal y también la comunicación. Se pueden repartir las funciones

11. ¿Qué es lo que más disfruta de su trabajo?

- La búsqueda de la justicia y replantearse cada día qué es justicia y qué es victoria
- Recordar que la victoria no es para sí mismo sino por el interés público

12. ¿Qué es lo que menos disfruta de su trabajo?

- La poca seguridad laboral a largo plazo

Annex IX

Anonymous interview with lawyer

In person

Date: April 21, 2017

Interviewer: Valentina Montoya

Paper on Critiques to Human Rights Legal Activism: THE INDUSTRY OF ADVOCACY INTERVIEW/CUESTIONARIO DE ENTREVISTA

Review and sign inform consent form previous to the interview/Revisar y firmar el
formulario de consentimiento informado antes de realizar la entrevista

1. ¿Por qué decidió convertirse en activista legal de derechos humanos? (Historia personal: ¿qué y dónde estudió? ¿qué lo motivó?)
 - Activista de DDHH antes que activista legal
 - Historias familiares: abuelo refugiado de la guerra civil en España. Motivos y dificultades para irse. Abuela también migró a EEUU. Dificultades de inmigración
 - 3 experiencias familiares: abuelos tuvieron hijo que se murió, con síndrome de down.
 - Dificultades familiares y creencias en su familia sobre los temas que sus abuelos y padres consideraban importantes
 - Idea familiar de crear un mundo mejor
 - Primeros temas en los que trabajó: migración forzada y derechos de personas con discapacidad. Empezó a trabajar desde secundaria con ONGs
 - Oportunidad de pasantía de 1 mes en secundaria: ONG de derechos humanos para refugiados: momento clave en formación personal. Lo disfrutaba aunque era difícil escuchar historias de la gente. Conocer cómo lo habían superado. Se inspiró mucho.
 - Pregrado: oportunidades. Beca- difícil entrar en DDHH porque no te pagan por las pasantías. Beca para estudiar gratuito. Veranos para ir a otros países y conocer movimientos de derechos humanos en otros países. Trabajó con comunidades migrantes en Carolina del Norte. En Argentina con migrantes y refugiados, luego hizo investigación de tesis en esa misma área. Pasar tiempo en Argentina fue importante para el desarrollo como activista. Entiende derechos humanos, en parte, como posibilidad de intercambiar con personas de otros países para crear un mundo más justo. También trabajó en Francia y Suiza. Allí descubrió que le interesaba lo que hacían los abogados. Al principio pensaba que quería ser trabajadora social pero se encontraba con los límites del sistema. Muchas veces querían hacer más programas pero no tenían la plata para hacerlo. Los cambios que se necesitaban eran mucho más grandes. Ayudaba a la gente en el momento concreto (respuestas inmediatas) pero quería poder luchar para crear cambios más estructurales. Ahí empezó a pensar en el Derecho. Nunca había pensado en ser abogada. No le gustaba argumentar. Después del pregrado hizo 1 año en país del sur global y entró a trabajar a una organización de abogadas para trabajar por los derechos de las mujeres y los niños. Le gustó y por eso decidió estudiar derecho.
2. ¿Cuánto tiempo lleva trabajando como activista legal de derechos humanos?
 - Como activista legal: 3 años desde que entró al law school
3. ¿Puede describir el tipo de organizaciones en las cuales ha trabajado Como activista legal en derechos humanos? (tipo de organización, tipo de trabajo que realiza o ha realizado,

tamaño de la organización, si es nacional o internacional, como es un día normal de trabajo para usted, cual es el tamaño de su equipo, en que área se especializa).

Org. De país del sur global

- Asociación local que hace parte de federación internacional. Era la sede de la federación cuando ella trabajó ahí
- Trabajaba en nacional e internacional
- Organización pequeña. Mayoría son voluntarias. Staff pagado: 3 personas
- Investigación: hacer concientización sobre derechos humanos en argentina y el mundo
- Acompañan algunos casos en argentina ex: amicus. Apoyo al movimiento de mujeres
- Temas: derechos reproductivos, violencia de género, abuso infantil

Think tank

- Justicia transicional
- 40 personas

ONG ambiental

- 9 personas. 8 mujeres y 1 hombre.
- Acompañan a comunidades afectadas por proyectos de desarrollo a gran escala
- Litigio + informes
- Local

Clínica de derechos humanos de Universidad

- Proyecto sobre derechos humanos de personas presas por terrorismo
- Contra impunidad de personas en gobierno de EEUU que autorizaron la tortura
- Partners con ONGs nacionales y otras clínicas
- Responsabilidad de empresas en país del sur global
- Contra ex funcionario muy importante de país del sur global por graves violaciones de derechos humanos. Partner de buffet de abogados pro-bono y abogadas por su propia cuenta

4. ¿Qué expectativas tenía sobre la justicia social cuando decidió estudiar Derecho?

- Derecho como herramienta para usar dentro de movimientos sociales
- Derecho como fuerza que también actuaba para oprimir a la gente porque siempre encontraba límites de políticas públicas
- Veía derecho como herramienta pero pensaba que no iba a tener mucho en común con la gente que estudiaba acá

5. ¿Qué expectativas tenía cuando empezó a trabajar como activista legal de derechos humanos?

- Esperaba hacer cambios más estructurales

6. ¿Fueron sus expectativas iniciales cumplidas? Explique.

- Difícil decir todavía
- La facultad superó las expectativas. Sacó muy buena experiencia y colegas para trabajar juntas
- Todavía cuestiona el derecho. Sigue siendo una herramienta. No debería ser el centro del movimiento social. Estar en Law School ha reforzado esta creencia. El poder está en las comunidades y en las gentes. Rol como abogada para ayudar o facilitar este poder.

7. ¿Que obstáculos ha enfrentado en su carrera como activista legal de derechos humano? (financieros, tipo de trabajo, supervisión, organizacional, burocracia).

- Tema financiero en EEUU y en el mundo es enorme
- Beca para financiarse y ganar experiencia
- No podía vivir y hacer pasantías sin pago
- Salir con préstamo del law school. Pero la facultad tiene este programa para ayudar a pagar préstamo (es mejor porque cubre más y es más flexible)- escuelas de gobierno y medicina para trabajo en zonas rurales también. Facultad de derecho es particularmente grande porque es 3 años, es muy caro y porque cuando sales la diferencia salarial entre firma y ONG es muy grande.
- A veces la cultura del trabajo, depende de la organización, no es saludable porque personas trabajan demasiado, si quieres salir en el tiempo libre piensan que no estás tan comprometido con el tema
- Algunas oficinas tratan de superar una cultura así. Difícil para mantener la salud mental- depresión y ansiedad. Manejar esto no es fácil. Humor negro
- Casos muy difíciles- psicólogo y Buenos supervisores

8. ¿Cómo sobrepasaría esos obstáculos?

- Encontrar maneras y áreas de trabajo para que haya becas para que más personas puedan ganar experiencia
- En países en Latinoamérica tenían mucha dificultad para trabajar en derechos humanos: varios trabajos o no poder hacer pasantías
- Pasantías pagadas o becas
- Pledge in advance: 10 años de tu vida a servicio público tener una matrícula más baja. Ahora es como que la facultad te da la beca después. Para quienes tienen obligaciones familiares sería bueno que dieran la plata antes para que toda la deuda no venga después.
- Dentro de las organizaciones: cómo mejorar el clima de trabajo y tenían un programa con otra ONG para tener asistencia psicológica gratuita. Fondo para que los empleados pudieran tener 1 hora de lo que quisieran a la semana. Para entrar en el habito.
- Rn la primera ONG- psicólogos. Tenían una aproximación diferente al trabajo porque estaban mucho más conscientes del trauma. No chequear tu mail. No es posible en todo ámbito, pero aprender la mentalidad de otras profesiones que toman más en serio el impacto del trauma de quienes trabajan con DDHH
- Ayuda que supervisores den ejemplo sobre tomarse tiempo por fuera

9. ¿Hasta qué punto considera cuál es el impacto que tiene su trabajo sobre los derechos humanos de las comunidades/grupos que defiende?

- En caso con de violaciones de DDHH en país del sur global, la gente sabe del caso y cree en el caso. Sienten poder porque han podido enfrentar a oficiales públicos de esta manera. Personas no involucradas conocen el caso. Caso tan mediático que puede haber cambiado la manera (otros casos internos también) porque ven diferente el derecho: se pueden enfrentar a los poderosos. Fundamental porque el caso surge de un movimiento social muy fuerte. Los abogados toman en cuenta lo que la comunidad quiere. ONG hicieron trabajo de selección y estrategia con la comunidad. Se sienten comunicadas con el caso
- Caso de terrorismo: difícil creer que tenían impacto en la vida de las personas. Alguien tiene que hacer el trabajo pero el sistema está tan cerrado y es tan técnico porque tienen que tener lenguaje de seguridad nacional, y sino no te prestan atención.
- Ganaron juicio- cambia la manera en que la minería iba a entrar al país

10. ¿Cuál considera es la relación con esas comunidades?

- Terrorismo: solo con abogados de las personas y ellos tampoco tenían mucho acceso
- Responsabilidad corporativa: deberían haber empezado desde el principio con más enfoque en la comunidad. Muy importante que la práctica de participación de la gente y que el abogado transfiera el poder sea algo desde el inicio. Cambios en la misma práctica más allá del resultado. Trabajo tradicional de DDHH es mucho más jerárquico y el abogado decide todo. Pide participación solo en momentos claves pero no involucrados en la estrategia.
- Otros campos como antropología y sociología: participatory action. Nosotros ya tenemos el elemento de acción y como abogados a veces no lo usamos tanto

11. ¿Qué es lo que más disfruta de su trabajo?

- Interactuar con la gente. Cuando hace entrevistas y reuniones.
- Hacer estrategia y tratar de pensar en los límites: cual es el objetivo más radical que queremos y como enmarcar eso (sin que la gente se de cuenta). Meta más transformativa. Muy difícil pero muy interesante
- Aprender: organizaciones de base en pueblo de país del sur global- uno aprende tanto. Por eso me frustra un poco lo paternalista del trabajo que hacemos porque muchos movimientos sociales están muy al tanto de los métodos y las estrategias y nos enseñan mucho cuando compartimos con ellos. Nos traen los mapas- y nosotros pensando que les íbamos a enseñar cartografía social.

12. ¿Qué es lo que menos disfruta de su trabajo?

- no le gusta cuadrar demandas o necesidades de la gente en lenguaje jurídico
- no me gusta limitar la experiencia de la gente en lenguaje jurídico
- no me gusta la carga emocional
- no me gusta esto de sentir que no tengo tiempo suficiente.

Annex X

Anonymous interview with a private firm lawyer

Entrevista BY

Date: April 24, 2017

Interviewer: Sebastian Rodriguez

Paper on Critiques to Human Rights Legal Activism: THE INDUSTRY OF ADVOCACY INTERVIEW/CUESTIONARIO DE ENTREVISTA

Review and sign inform consent form previous to the interview

1. Why did you decide to become a lawyer? (personal history: what and where did you study, what motivated you?)
 - a. I decided to become a lawyer because I enjoy advocacy and arguing. I also enjoy the intellectual aspects of lawyering, including drawing on aspects of logic, philosophy and politics.
 - b. There is also an aspect about wanting to change the world. But as a lawyer there is limited scope for that, as you generally have to work within the legal paradigms that currently exist. Beyond that, it would be political campaigning, which can benefit immensely from lawyer skills and is thus very valuable, but is not, strictly speaking, being a lawyer.
 - c. I studied French, International Relations and Law in Australia at undergraduate level, before taking at top tier university in the UK.
2. How long have you been working as a lawyer?
 - a. On and off since 2009. I clerked 2009-2010, then worked as a graduate lawyer 2011-2012, then took a Masters year in 2012-2013, then have continued working as a lawyer 2013 to current. All up I have spent around 5.5 years working as a lawyer in private practice, not including my clerking and student years.
3. Can you describe the kind of organizations where you have worked as a human rights lawyer? (kind of organization, kind of job you have done (including internships and volunteer experiences), size of organization, is it national or international, what is a normal day of work for you, how big is your team, what area do you specialize)
 - a. I have worked for a range of organisations as part of my pro bono work in private practice.
 - b. The main organisations include:
 - i. Legal advice and advocacy clinics for disadvantaged people with a range of legal issues such as debt problems, housing problems etc.
 - ii. Representing people who have been refused disability benefits before tribunals.
 - iii. Representing larger human rights organisations as interested parties in the domestic courts, international tribunals, and treaty bodies.
4. What expectations did you have about social justice when you decided to go to law school?
 - a. I had every expectation of wanting to change the world.
5. What expectations did you have when you started working as a pro bono human rights lawyer?
 - a. Once I started working as a lawyer, I understood the limitations within which I was working. For example, in legal advice clinics, many individuals simply did not have viable claims. Many were just unable to cope with the system. It is the

- lawyer's role to help facilitate engagement within that system, but if the system does not work then it is difficult to work within it, as a lawyer.
- b. In an international human rights field, the main challenge I feel that I have faced is that it operates at the intersection of politics and law. So while we may well achieve a whole range of legal objectives, whether that translates into political reality is a different question. Sometimes, legal progress can be counter-productive in the political sphere, so it is important to choose which fights to fight.
6. Where those expectations fulfilled? Explain
- a. My expectations of human rights work during law school were not fulfilled. The line between legal and political advocacy was not readily apparent to me at that time.
7. What obstacles have you encountered as a human rights lawyer? (financial, type of job, supervision, organizational, bureaucratic)
- a. Financial – while I work in private practice principally, I am able to dedicate some time to pro bono human rights work. However, it is not possible to dedicate myself to human rights work full time. If I were to become a human rights lawyer full time, it would have to be outside of private practice and into a world that is badly funded and with very limited resources. That is a serious obstacle.
8. Does your university offer any kind of financial support for students interesting in pursuing careers in human rights or public interest law?
- a. Yes, there are plenty of scholarships and internships available. However, while it is not difficult to pursue these opportunities, it is the long-term issue of having a sustainable career in human rights that is well funded and well paid relative to private practice that is a key disincentive.
9. How do you think those obstacles could be overcome?
- a. Better government funding of legal aid and human rights organisations. These organisations are important to maintain the principle of the rule of law (since they facilitate access to justice), but also serve an important function as gatekeeper, providing preliminary analysis and thereby allowing unmeritorious cases to be selected out.
10. To what extent do you consider the work you have a real impact on the human rights of the communities/groups you work on?
- a. Some do, some don't. It is difficult to say and assess, as my involvement has been relatively ad hoc.
11. What is your relationship with those communities?
- a. Limited.
12. What is the thing you enjoy the most about your work?
- a. Intellectual engagement and advocacy.
13. What is the thing that you like the least about your work?
- a. Can be tedious and quite hard going.
14. Given the political context and the vast amount of resources concentrated among powerful actors, from your perspective as a private sector lawyer, do you think law firms are doing enough to support human rights across the world? What else could they do?
- a. They can always do more. Lawyers are in the privileged position of being able to facilitate access to justice. There are many not particularly glamorous cases at the coalface that would benefit from more attention, even if it is not particularly newsworthy.
15. How do you think law firms and other private actors can scale their social value (externally and within their companies)?
- a. Yes and they should. However, the key question is how to balance that against the financials.

16. Do you think the human rights field should diversify the range of stakeholders involved and include the private sector?
- a. Yes, the private sector is key. In a capitalist system, it is the private sector that has money, and is not bound by public sector funding issues. However, the private sector also acts pursuant to the profit motive. That motive is not as absolute as it once was. The human rights field should certainly take advantage of that broadening of motives.
17. What kind of guidelines should philanthropists follow to invest in impactful organizations and human rights leading attorneys?
- a. They should invest in accordance with the impact that is or can be made.

Annex XI

Anonymous interview with lawyer at international organization

Interview NS

In person

Date: May 20, 2017

Interviewer: Sebastian Rodriguez

Paper on Critiques to Human Rights Legal Activism: THE INDUSTRY OF ADVOCACY INTERVIEW/CUESTIONARIO DE ENTREVISTA

Review and sign inform consent form previous to the interview

1. Why did you decide to become a lawyer? (personal history: what and where did you study, what motivated you?)
 - Always interested in human rights.
 - a. Interested in respect of values she strongly believes.
 - b. Undergrad thesis: States ratification and compliance with human rights norms.
 - c. She discovered early in her life an interest for human rights. However, she always had a passion for entertainment as well.
 - d. Law school: She wanted to practice either entertainment law or human rights law. At the time of graduation, and opportunity at an international organization arise. The law school did job placements at the international organization.
 - e. Strong interest to do social change.
2. How long have you been working as a lawyer?
 - 6 years.
3. Can you describe the kind of organizations where you have worked as a human rights lawyer? (kind of organization, kind of job you have done (including internships and volunteer experiences), size of organization, is it national or international, what is a normal day of work for you, how big is your team, what area do you specialize)
 - Always wanted to practice international law. The school already had contacts with the international organization. That's how she landed at her previous role. Once a person is an intern at an international organization, there are network opportunities that allow them to stay.
 - a. INTERNATIONAL ORGANIZATION:
 - i. Supervisor was the top in their field.
 - ii. She was a good manager.
 - iii. She felt profound admiration for her boss. Her boss was always professional and could connect with her employees at a personal level as well.
 - iv. Respect and diversity were the strongest values that shaped her work culture.
 - v. Her team consisted in 4 staff members. All of them were traditional lawyers. The work its more oriented towards public relations, diplomacy and providing technical assistance to governments, rather than law itself.
 - vi. Work topics: Sex work, LGBTI, drug users. Those were the key populations.
 - vii. She felt everyone in her team was passionate and committed. Everyone care about their work. However, she acknowledged there are also a great number of bureaucrats.

b. INTERNATIONAL ORGANIZATION AGENCY:

- i. Her colleagues, some of them were privileged and well-connected, and some had worked their way up. School representation at the UN is not necessarily 'elite'. Its more about the connections that you have. Some people might have attended Oxford, but that's not the general rule. The rule is that everyone is highly educated.
4. What expectations did you have about social justice when you decided to go to law school?
- She didn't feel she wanted to be a lawyer.
 - Romantic notion of justice. She felt an international organization was the principal agent for social change. It was her dream job. She later realized human rights wasn't the most suitable channel to achieve change.
5. What obstacles have you encountered as a human rights lawyer? (financial, type of job, supervision, organizational, bureaucratic)

No.

a. Why?

- i. Substance of work. How it works is that you get a request by a government, then the 'experts' will issue recommendations, and the government don't take any of the input they have made. Laws don't get implemented, and there's a lack of control.
- ii. There's a strong gap between theory and practice. Human rights is a field that theoretically idealize the world. However, is an industry that doesn't work in implementation or law enforcement. In many of the cases HR represent exotic principles, primarily from the west, that people don't understand in several countries with different cultural values.
- iii. Bureaucracy: Once you're trapped in the system, you stop becoming a HR expert, instead you become an international organization expert – which means you understand how to navigate the internal politics and processes.

INTERNATIONAL ORGANIZATION: It was a system issue. There are visionaries and strategists. However, as they get trapped in a diplomatic system where they can't raise their voices and concerns, they become bureaucrats with lack of decision making but interested in their work.

- b. In many of the cases, it's easy to see how an international organization is not meritocratic. An international organization recruits people for political reasons.
- c. It has a strong global culture.

From the day to day: no.

- d. However, the 'norm building' work has its own potential that it's hard to see its immediate effect.
 - i. Human rights it's about its potential. It's about hopes that one day will decision-makers take and grasp them.
 - ii. Litigation has concrete goals for the petitioners, however it doesn't necessarily guarantee it goes beyond the case itself.
 - iii. One way is not necessarily better than the other, each option has its own role. However human rights need more collaboration, accountability mechanisms, effectiveness, resources.

6. What is your relationship with those communities?

- Interaction with 'civil society' at global forums in Global north Headquarters.
- Global NGO: fact-finding and media work. They amplify voices.

7. How do you think those obstacles could be overcome?

- Interact to people at the country level. Support regions in their work at global spaces. Work in change that has an effect at the national level. That's what makes her feel more passionate about her work.

8. What is the thing that you like the least about your work?

- Internal politics. Those are everywhere, have the nature of the politics can substantially be different at different places/work cultures.