

Human Rights Enforcement at the ICC:

An Interdisciplinary Proposal for a Multi-level Approach Based on Wendt and Habermas

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Abstract

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This paper examines the conditions that must be met in order for the International Criminal Court to develop a more robust structure for human rights enforcement. Drawing upon the proposal of Alexander Wendt and theories in the discipline of International Relations, as well as the proposal of Jürgen Habermas and insights from Philosophy and Political Theory, the author finds some common ground between these theories and disciplines and provides an interdisciplinary answer to the research question. The findings of the research suggests that the International Criminal Court could develop a more robust structure for enforcing human rights if; a) individuals have standing and full recognition to petition the court for investigation and case selections; b) limits are placed on State sovereignty; c) State membership on the U.N. Security Council is expanded and mechanisms are created to avoid a vetoing power by a single State, and d) procedures are created for a majority or super-majority vote in order to veto resolutions that come before the Security Council. The author further suggests that these measures could begin to address the struggle among States in the international system for mutual recognition and effective protection of human rights through the ICC.

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Dedication

I dedicate this research to the victims of human rights violations, and to all who strive for a stronger system of human rights enforcement

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INTRODUCTION

The horrors of World War II still encourage us to envision a strong enforcement system for international human rights (Lutz-Bachmann 2014, 54; Nascimento 2014, 97, 100; Held 2009, 536). This process started after 1945, when the *ad hoc* international military tribunals in Nuremberg and Tokyo (in conjunction with the Allied Control Council) developed new definitions for crimes against humanity that Nazi and Japanese officials committed during the war (Robertson 1999, 231-236). But apart from the articulation of legal definitions, and the trials of suspects in connection with crimes against humanity and genocide, these two tribunals became the blueprint for other tribunals set up to adjudicate cases of human rights violation that arose thereafter (Ishay 2008, 218). This trend of erecting tribunals to punish violations of human rights continued from 1945 until the summer of 1998, with the International Criminal Tribunal for the Former Yugoslavia (ICTY). This tribunal has been in operation for more than 20 years and continues to hear cases and appeals from crimes that originated in the Balkans in the early 1990's (Power 2007, 481-484), but it is expected to fulfill its mandate in late 2015.

The achievements of the tribunals, from Nuremberg to Yugoslavia, have been overshadowed by their failure to deter future violations to human rights, and by the slow pace with which the apprehension of suspects, trial proceedings, and enforcement processes are carried out. These problems are compounded by the temporary nature of the tribunals, and the narrow jurisdictional mandates they are given to try only the cases traced to the conflict for which they were established. If the creation of a tribunal did succeed in delivering justice, what then did it do to prevent the occurrence of future violations to human rights, and was it ever its function?

Under a series of Resolutions, such as SCR 1325 (2000) on women, peace and security; SCR 1612 (2005) on children and armed conflict; and SCR 1674 (2006) on the protection of civilians in

armed conflict, the U.N. Security Council is responsible for the enforcement of human rights instruments, and the promotion and preservation of world peace (Pratt 2013, 773-774; Mc Cormick 2013, S121, S124-S125; Bellamy 2008, 615). However, since its founding the Security Council has remained divided and deeply politicized; the national interests of its five permanent member States take center stage while humanitarian concerns languish and recede into the background.

In an attempt to establish a more robust legal system for international human rights, the U.N. General Assembly convened for a conference in Rome (the Rome conference) in the summer of 1998 to discuss the establishment of the first permanent international criminal court (Sikkink 2011, 119). The conference resulted in a treaty known as the Rome Statute with 120 countries voting to create the court and seven others opposing it on five separate grounds. Firstly, the Court's jurisdiction became a matter of controversy. Secondly, it was argued that the ability of the Court to initiate cases without Security Council approval provided the Court with too much judicial discretion; proponents of Security Council approval in the Court's case selection process sought to subject Court decisions to veto procedures. Thirdly, the Court was opposed on the grounds that it was not clear what would, or could, trigger a prosecution. Fourthly, some took issue with the precise definition, or lack thereof, of the core crimes that the Court would prosecute. Lastly, the principle of "complementarity," that would allow the National State to try an accused person, in order to avoid an I.C.C. indictment, presented the fifth problem for a broader consensus on the creation of the Court (Paris 2008, 249, 254-256). Two years later, the International Criminal Court (I.C.C.) began operations in 'The Hague' with full jurisdiction over the crime of genocide, war crimes, and crimes against humanity. Thus, it appeared that the I.C.C. would effectively navigate the obstacles that plagued the tribunal system on deterrence and enforcement matters, but in the 13 years since its founding, the court has only successfully tried a handful of cases and issued two dozen warrants (Feinstein, et al. 2009, 66-67).

Moreover, the court's jurisdiction is limited only to those States that have ratified the Rome Statute, allowing those States that have opposed or abstained from recognizing the court to remain unaccountable under international law (Sikkink 2011, 131). Although the I.C.C. operates independently of the U.N. it continues the practice of the tribunals in relying on the Security Council for the enforcement of its rulings (Feinstein, et al. 2009, 40-42), and out of the Council's five permanent member States, three States still refuse to recognize the court. Therefore, the non-binding character of the Court is extremely problematic, and this is by no means a new phenomenon. In fact, many of the human rights instruments such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights, remain non-binding on States.

From an enforcement perspective, then, serious concerns remain over whether a court that lacks recognition by a handful of States that have a seat on the U.N. Security Council can effectively rely upon those same States to enforce its rulings. Further, the court's inability to exercise its jurisdiction in a region where violations to human rights have occurred, curtails justice and serves to further weaken those individuals and groups it claims as its victims. It denies victims the opportunity to tell humanity of their suffering—which is often the only relief that a victim receives (Arden 1994, 253); even in a case where the court lacks the power to enforce its judgment against a powerful State, the stigmatizing effect of a finding of violations against such a State could result in significant political ramifications (Habermas 2006, 170). The Nuremberg trials, for example, transformed international politics by shifting the paradigm away from immunity for Heads of State who were accused of war crimes and crimes against humanity (Paris 2008, 174), and also preserved the stories of countless victims through the collection of statements used at trial as evidence.

The research that follows is concerned with this process and focuses on the topic of human rights enforcement at the I.C.C. Given the fact that the court has received broad international

recognition as the permanent international criminal court, and because of its relative independence from existing international institutions, the I.C.C. has tremendous potential for investigating, deterring, and prosecuting violations of human rights. The expansion of its jurisdiction and the creation of additional mechanisms in its process of investigations and case selections could provide the court with a stronger enforcement structure. Apart from these changes, however, other conditions must be met by States if additional measures by the court are to secure any prospect of efficacy (Lutz-Bachmann and Nascimento 2014, 69). The necessary conditions to be met by State actors will vary, but ultimately require voluntary restrictions on what some have argued are outmoded practices of territorial sovereignty (Lafont 2014, 69; Petersmann, 2012, 714-716, Habermas 2006, 119-124).

In light of the challenges faced by the Court in protecting the human rights of individuals against the illegitimate use of violence by their own States, the Court's reliance on States to enforce its rulings, and the non-binding character of the Rome Statue and other human rights instruments, I ask the following question: "*What conditions must be met in order to provide the International Criminal Court with more robust mechanisms for enforcing human rights?*" Four conditions suggest themselves as possible areas of research. They are: (a) Provide legal Standing to persons (individuals), the implications of which will impact the sovereign practices of States (b) Limit the territorial sovereignty of States on individuals; c) expand State membership on the U.N. Security Council, and d) make procedures that require a majority or super-majority vote in order to veto resolutions that come before the Security Council to avoid a vetoing power by a single State. I will explore (a) and (b) and make reference to (c) and (d) where appropriate.

Framework

I use an interdisciplinary framework to conduct my research on the question of: what conditions must be met in order to provide the International Criminal Court with more robust mechanisms of enforcement for human rights.

To provide an answer to the research question presented above, I will examine two different proposals. The first is Alexander Wendt's proposal for the creation of a world State; particularly his position that the emergence of a world state is inevitable to provide individuals and States with mutual recognition. Wendt has argued that Anarchy (and its effects) can be explained as a deficit in recognition (Wendt 2003, 517). If this is correct, the goal of an effective international human rights enforcement system is to provide individuals and States with full subjectivity under international law. At present, national sovereignty dominates our international and domestic policy culture, and this suggests that despite the unequal distribution of recognition between States, the recognition deficit for individuals under international law is of greater concern for the development of human rights. In short, it is hard to envision a robust enforcement system for human rights when the *individual* as the subject of human rights lacks standing and recognition.

With his emphasis on the struggle between individuals and States for mutual recognition, Wendt supplies the problem to be addressed by the I.C.C., namely, providing individuals with recognition under international human rights law, while Wendt's World State inevitability theory would create an on going conflict among States for recognition as they resist inclusion into a single world republic. This is problematic as a necessary condition providing the I.C.C. with more robust mechanisms for protecting human rights, because the Court will likely continue to require State participation in its enforcement scheme. However, Wendt's theory, particularly his constructivist approach to international politics, offers insight into the behavior of States, and is therefore useful for

envisioning a system where both individuals and States can secure mutual recognition (Wendt 1992, 398). Secondly, I explore the proposal of Jürgen Habermas on the establishment of a multi-level system for the protection of human rights and the promotion of world peace, because his model draws upon already existing international institutions, and is therefore useful in any attempt at bridging the gap between a theoretical solution to enforcing human rights, and the structures that must be functional in practice (Habermas 2006, 143, 162). Further, Habermas's proposal draws upon a Cosmopolitan philosophical tradition rooted in Kantian political philosophy (Habermas 2007, 331), but goes beyond Immanuel Kant by arguing against a State of States (a world State), and instead arguing that a world society without a world state could be realized through creating a strong civic solidarity among a world citizenry (Habermas 2008, 444, 450); His emphasis on a Cosmopolitan world society cannot be separated from the goal of furthering the agenda of international human rights.

Wendt's proposal is a departure from neo-realist assumptions in the discipline of International Relations about the nature of anarchy among States in international politics—*Anarchy is what states make of it* (Wendt 1992, 391-425). His overall argument suggests that States *construct* the social system they inhabit, and can reconstruct it all the same. His view that a world State is inevitable, then, can be interpreted to mean that the only rational choice left for States in securing mutual recognition of each other and their citizens is to establish a single world State.

Alternatively, Habermas views the creation of a world State as problematic. In his view, preserving the national State is crucial for extending legitimation to a supranational body or organization above the State. Historically, legitimation processes reached a functional level of maturity only with the creation of the Nation-State itself (Habermas 2008, 444-445, 452). Without the State, it is difficult for him to imagine a basis for a strong form of civic solidarity necessary to advance world peace and sustain a world society.

Both proposals argue that placing further limits on the territorial sovereignty of the State will be part of any solution towards securing world peace and guaranteeing stronger enforcement mechanisms for protecting human rights (Wendt 2003, 522; Habermas 2006, 133). Wendt's proposal would limit State sovereignty to such an extent that sovereign practices would take on a representational character. On the other hand, Habermas's proposal supports limiting State sovereignty while increasing State cooperation and interaction through the creation of regional organizations. As we will see, regional organizations play a central role in the establishment and maintenance of a civic solidarity that (although connected to) transcends the State and creates the environment in which the world citizen can emerge.

The two proposals I explore capture many of the ideas of other proposals on matters relating to human rights, state sovereignty, and the structure of international institutions. There are instances where Wendt's proposal appears to stand in contradiction to that of Habermas, but despite the fact that their conclusions seem hard to reconcile, there is enough common ground between them to provide an answer to the research question.

Structure of the Thesis

There are five separate chapters that make up the current research project, and each chapter varies in length and content. The first three chapters take a macro approach to the subject matter, while the last two chapters approach the proposals of Alexander Wendt and Jürgen Habermas from a micro perspective. Chapter 1: '*The International Criminal Court and Human Rights Enforcement*,' provides a historical overview of how the Court developed, some of the arguments for and against the Court's creation, as well as its current enforcement procedures. Chapter 2: '*Wendt and the Inevitability of a World State*,' introduces Wendt and his position on International Relations, and goes on to examine his proposal on the inevitability of a world State in some detail. Chapter 3: '*Habermas's Cosmopolitan Approach to Human Rights Enforcement*,' introduces his proposal for the creation of a multi-

level system as an alternative to the current international political structure. In this regard, Habermas is in search of two separate but interrelated outcomes. Firstly, his multi-level system envisions the emergence of *global players* at the transnational level that operate in conjunction with others States in regional organizations. These regional pacts look very much like the structure at the European Union. Secondly, Habermas wants to establish a cosmopolitan world society with his multi-level system; the creation of regional organization provides national citizens with a sort of dual citizenship or extended identity. Chapter 4 examines the disciplinary perspectives of Wendt and Habermas, while narrowing in on the contributions that have distinguished them in their areas of study. The purpose of this chapter is to provide the context in which each theorist develops their positions, and to extract from their insights conditions that must be met in order for the ICC to develop more robust mechanisms for enforcing human rights. In Chapter 5 I create common ground between Wendt's world State inevitability theory and Habermas' Multi-level system proposal to inform the conditions that must be met in order to provide the ICC with stronger mechanisms for enforcing human rights.

Chapter one begins by exploring the historical development of human rights after World War II, the tribunal system that emerged to enforce these rights, and some of the arguments for and against a permanent international criminal court. A brief history of the International Criminal Court follows—making a connection between the international military tribunals that preceded it, and placing the Court's enforcement practices in the context of previous enforcement schemes. The current enforcement practices of the Court are examined along side of arguments in favor of, and objections to, its authority. The chapter concludes by examining objections to recognizing the Court from United States and China, particularly in light of their permanent presence on the U.N. Security Council upon whom the Court relies for enforcement, and the extent of their grievances which capture (in one way or another) the objection of other States.

Chapter two introduces Alexander Wendt's world State proposal alongside a world federalist proposal. The first in-depth world State proposal was developed by Emery Reves in his book *Anatomy of Peace* in 1945. Considering the developments made in this period on issues related to human rights, I have provided the ideas of Emery Reves as a basis upon which one can evaluate and compare Wendt's views on the establishment of a world State. However, despite the fact that both Reves and Wendt have argued for a world State from historical evidence, Wendt's proposal explores five different Stages that anarchy could take on, and thereby argues for a world State as the only alternative to anarchy wherein mutual recognition can be realized. Given the event of globalization, developments in human rights, and the emergence of institutions unknown to Reves in 1945, I focus more on the proposal of Wendt theories on International Relations. It becomes clear that Wendt's world State inevitability theory is in many ways problematic as a necessary requirement for stronger human rights enforcement at the I.C.C., but that the strength of Wendt's proposal lies in identifying the force behind anarchy as "needs for recognition," so that through correctly identifying a system to achieve this end, international conflicts that threaten to result in violations to human rights can be addressed more effectively.

Chapter three begins by introducing the cosmopolitan vision of Immanuel Kant since Habermas's cosmopolitan position was inspired by this tradition. But although Habermas's own proposals draws upon a Kantian Cosmopolitanism and is connected to it in many respects, he conducts a revision of Kant's proposal for a voluntary league of States and criticizes Kant's aspirations for the creation of a State of States. Habermas describes Kant's proposal as a "surrogate" to a more preferred world State proposal that Kant never fully developed.

Chapter four relates the proposals of Wendt and Habermas to their disciplinary origins, while narrowing their views to common themes in their respective fields. The purpose of chapter four is to identify the positions of Habermas and Wendt on a narrower set of concerns that can allow for

interdisciplinary integration. Drawing upon common themes in both, I lay the ground for an interdisciplinary proposal that neither of the two proposals in this study offer when considered alone.

Chapter five is reserved for interdisciplinary integration, or of ‘finding common ground,’ as well as the place where the various pieces of my research will come full circle to answer the initial research question. Here, I show that Wendt and Habermas agree on several aspects, including further limits to State territorial sovereignty. This provides the first condition that must be met in order for the I.C.C. to develop a more robust enforcement system for human rights. Another condition is that the limiting agents for territorial sovereignty are ultimately individuals. States could address their own deficit in recognition by agreeing (and adhering) to human rights instruments, while the Court’s recognition of individuals through creating mechanisms in its investigation and case selection process will similarly have a limiting effect on State sovereignty. I further suggest that the Court’s recognition of every individual (possessing legal standing in the Court) could create a more equitable balance in recognition between States.

My Contribution

To my knowledge, no one has attempted to address the International Criminal Court’s enforcement practices on human rights by drawing upon the proposals of Alexander Wendt and Jürgen Habermas to develop an interdisciplinary approach inspired by both. Identifying the motive of State violations of individual human rights as recognition deficits that result from the structure of the international system is apparent in Wendt, while the role of the State in the protection of human rights, and the conditions of extending processes of legitimation to international institutions such as the I.C.C., is clear from the proposal of Habermas for a multi-level system. My own position supports further limits on the territorial sovereignty of the State, particularly its right to exercise

exclusive jurisdiction over its population, and acts of violence against its citizens. One way to address these problems is to increase individual recognition under international law. In short, I will argue that the conditions that must be met in order for the I.C.C. to develop more robust mechanisms for enforcing human rights include: (a) Providing legal Standing to individuals; (b) Limiting the territorial sovereignty of the State; c) expanding State membership on the U.N. Security Council, and d) creating procedures that require a majority or super-majority vote in order to veto resolutions that come before the Security Council to avoid a vetoing power by a single State.

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HUMAN RIGHTS AND INTERNATIONAL ENFORCEMENT: A LITERATURE REVIEW

A review of the literature on human rights leads to three distinct considerations. The first is the attempt to account for the emergence and development of human rights. The second is an outgrowth of the first, which explores the positive developments in international relations that allowed for the creation of the first permanent international criminal court. The third and final consideration extracted from the literature is the theoretical positions applied to the two considerations that precede it. From these theoretical positions two proposals have been selected to inform my answer to the research question. In what follows, I will briefly survey all three considerations before offering my own hybrid proposal, which unfolds as an analysis in the final section of this thesis.

A. Human Rights and International Justice

Hannah Arendt and Kenneth C. Randall trace the origins of the first international consensus on crimes beyond the State to the seventeenth century (Luban 2011, 11-12; Randall 1988, 791). Piracy on the high seas presented challenges for State trade and commerce interrupted by pirates operating outside of the reaches of sovereign powers. The high seas were considered a neutral space where no one State enjoyed exclusive right or privilege, yet, vessels bound for trading ports abroad were constantly under threat of being boarded and looted, while the safety of crew and ship was never guaranteed. In this climate, States developed a jurisdictional scheme designed to empower the State beyond its borders, giving it the right to try pirates found guilty of committing offenses against its vessels, regardless of whether or not the suspects were State nationals. They would become *hostis humani generis* (enemies of mankind) and therefore subject to the law and punishment of the capturing State (Arendt 1994, 261; Randall 1988, 791-796). This gave way to the concept and practice of Universal Jurisdiction (Randall 1988, 800).

David Luban argues that the extension of Universal Jurisdiction to include crimes other than piracy required conceptualizing offenses that similarly affected the community of States and their citizens (Luban 2011, 10-14), while Tod Lindberg and Lee Feinstein argue that World War I provided the possibility to conceive of crimes committed in war time, and to develop legal instruments to adjudicate an array of additional international crimes (Feinstein, et al. 2009, 19). For example, following World War I the Allies established the *Commission on the Responsibilities of the Authors of War and on Enforcement of Penalties* with the intention of trying German war criminals and Kaiser Wilhelm II for atrocities committed during the war (Feinstein, et al. 2009, 19-23). Thus, Lindberg and Feinstein have shown that although the political will to try the Kaiser after World War I proved too weak, it set a precedent that would challenge the practice of impunity for heads of State in times of war in the future (Feinstein, et al. 2009, 19). Mary Ann Glendon and M. Cherif Bassiouni confirm this assessment by showing that the atrocities of World War II provided sufficient political will to establish a broad consensus from States in recognizing universal rights for their citizens (Bassiouni 2011, 137; Glendon 2001, 191). In Glendon's view, it was only with the adoption of the Universal Declaration of Human Rights following World War II that a "common standard of achievement" was made among an interdependence of peoples, nations, and rights (Glendon 2001, 174, 191; Luban 2004, 89-90). However, the application of Universal Jurisdiction remained controversial, and continues to be contested today.

One example of the controversy that surrounded the application of Universal Jurisdiction can be found in Hannah Arendt's objection to the way it was applied in the Eichmann trial. Israel violated Argentina's sovereignty by kidnapping Eichmann, and defended its actions by claiming that it enjoyed Universal Jurisdiction. Arendt argued that the charges faced by the accused inadequately applied to the concept of *hostis humani generis*, and (by extension) called into question the ability of nation States to conduct fair and impartial international criminal trials. She says:

Yet even if Israel had kidnapped Eichmann solely because he was *hostis humani generis* and not because he was *hostis Judaeorum*, it would have been difficult to justify the legality of his arrest. The Pirate's exception to the territorial principle—which, in the absence of an international penal code, remains the only valid legal principle—is made not because he is the enemy of all, and hence can be judged by all, but because his crime is committed on the high seas, and the high seas are no man's land. The pirate, moreover, “in defiance of all law, acknowledging obedience to no flag whatsoever” is, by definition in business entirely for himself; he is an outlaw because he has chosen to put himself outside all organized communities, and it is for this reason that he has become “the enemy of all alike” (Arendt 1994, 261).

Arendt's contention is not that Universal Jurisdiction should be abolished, rather, she questions the national character that State trials of international crimes take on, and argued that the appearance of justice may deliver closure, while doing little to correct or prevent the underlying injustice is banal.

With the articulation of the crime of Genocide and Crimes against Humanity, critics took aim at the procedural contours of, and the institutional agencies involved in, trying these crimes (Power 2007 491, 495-496). Firstly, the tribunal system was *ex post*—set up only after the fact (Bassiouni 1999, 8-9), and secondly, they were *ad hoc*—temporary (Bassiouni 2011, 191). If a tribunal did succeed at delivering marginal justice, then the absence of a permanent international Court to serve as a deterrent was missing (Paris 2008, 111, 119, 130; Power 2007, 479-480).

Kathryn Sikkink states that discussions to create a permanent international criminal Court began as World War II came to a close, but the Cold War hostilities between the United States and Russia disrupted progress, causing the International Law Commission to suspend further discussion on the creation of a permanent criminal court (Sikkink 2011, 115). Sikkink goes on to explain, along with Dezalay and Garth, that the end of Cold War hostilities was followed by renewed interest in international justice (Dezalay, et al. 2006, 233; Sikkink 2011, 115). The political climate of the early 1990s made it possible to revive the work of the International Law Commission. In 1994 the ILC

created a conservative draft for the creation of the International Criminal Court with board international support; the United States showed interest in the Court believing it would be useful in trying a Somali warlord in connection with a 1993 attack on UN peacekeepers, and the prosecution of Libyans suspected in downing the Pan Am Flight 103 over Lockerbie, Scotland (Sikkink 2011, 117). The United States, along with Russia, France, China and the United Kingdom, would later refuse to recognize the Court despite being permanent members on the UN Security Council (Sikkink 2011, 118).

B. The I.C.C.

Claude Welch argues that the establishment of the International Criminal Court in 2002 provided optimism for some within the human rights community (Welch, et al. 2011, 990), but Samantha Power explains that it raised doubt for others regarding the Court's enforcement abilities, and the effects that the Court's power might have on State sovereignty (Power 2007, 491-492). Sikkink explains that over 2,000 non-governmental organizations in conjunction with like-minded States built a global coalition that advocated for ratification of the Rome Statute (Sikkink 2011, 118). Supporters of the ICC convinced the UN to create two preparatory committees of which M. Cherif Bassiouni and Silvia Fernández chaired as Vice-Presidents (Sikkink 2011, 118). Their work in bringing together State representatives for meetings at the Siracusa Institute in Sicily, in addition to the work of hundreds of NGOs, produced a consensus on a comprehensive 128-article statute (Sikkink 2011, 118-119). On account of the work of a host of non-governmental organizations and like minded States, interest in a permanent international criminal court was again revived. Their success in establishing the Court reaffirmed the principles of many of the human rights instruments created after WWII, but went even further by making the most concerted effort to enforce these principles since. On this point, Sikkink writes:

In the end, the drafting of the ICC was the product of a transgovernmental network of Foreign Ministry lawyers from a core group of countries including Canada, Argentina, Sweden, Norway, and the Netherlands...The dramatic change in the draft text between 1994 and 1998 was largely due to the persuasive discursive power of NGOs and the like-minded States. They tipped the balance in favor of a strong and independent Court, and created such great momentum that they swept the majority of State parties along, neutralizing opposition from powerful States like the United States, China, and India, which “found their own preferences trumped by a coalition of smaller states” (Sikkink 2011, 119-120).

For all of the optimism that the creation of ICC provided for human rights advocates and State parties, it stirred up an equal measure of doubt and uncertainty for other State powers. Feinstein and Lindberg have argued that the Court’s rules regarding complementarity have caused concern among those States for which sovereignty is at issue (Feinstein, et al. 2009, 42-43). Rule 17 [1] (a) states that the Court will take a case only if a nation is “unwilling or unable genuinely to carry out the investigation or prosecution.” The fact that the Court’s Judges make the final decision in these matters strikes some as a substantial infringement of State sovereignty (Feinstein 2009, 42-43). Samantha Power states that both President Clinton and President Bush believed that the benefits of joining the Court would be diminished by the potential infringement of U.S. sovereignty (Power 2007, 491). Feinstein and Lindberg add that critics have also voiced their concern about the lack of oversight at the Court, and that military decision-making would be transferred from the State to the Prosecutor of the Court where military personnel would then be targeted or harassed (Feinstein, et al. 2009, 45-46).

Similarly, the Court has been the target of criticism by a host of African, Middle Eastern, and Far Eastern States after its founding. The bulk of this criticism accuses the Court of being a tool of domination employed by strong Western governments against weaker States. In an article written for the Guardian on May 23, 2012, David Smith provides the arguments used to support the claim that the International Criminal Court has shown bias in its case selection process. For example, as of

2012 the majority of cases tried by the Court have originated on the African continent. In the same article, however, the new Chief Prosecutor of the I.C.C. (Fatou Bensouda) responds to these criticisms by saying that what offends her most is how the influential and powerful leaders in these countries are spreading propaganda in order to portray themselves as the victims, when the reality is that their people have been victimized, and that the issue is not whether or not they are African victims, but if their human rights are (or have been) violated (Smith 2012). Hence, the sovereignty debate that plagued the Rome conference in the run up to the establishment of the I.C.C. continues, while the precise arguments against the Court is often a matter of the State's interest .

C. Theoretical Positions

Fear that restrictions on the use of military force would negatively impact State sovereignty is consistent with a Neo-Realist approach to international politics (Waltz 1979, 106-109), and adherence to sovereign practices among States sustains an environment of anarchy in the international arena. Kenneth Waltz argued that States exist, and interact with other States, in a system of anarchy. In such a system States are concerned about their placement in the balance of power, and therefore act in ways that maximize their interests. Waltz tells us that States are worried about a division of gains that may favor other States more than itself, and it is this fear that serves to limit cooperation among States in the international system (Waltz 1979, 106). This prompts States to strive for self-sufficiency, which checks attempts at greater interdependency and cooperation among them (Waltz 1979, 107). The only possibility of changing the structure of the international system is "...by changing the distribution of capabilities across units," or "...by imposing requirements where previously people had to decide for themselves" (Waltz 1979, 108). The problem is that, given the structural constraints of the international system, the rational behavior of States does not lead to the desired results, and "with each country constrained to take care of itself, no one can take care of the system" (Waltz 1979,109).

This self-help system thrives at the international level in a condition of anarchy, since there is an absence of formal authority to enforce rules or promulgate laws. But anarchy implies more than just the absence of government, or a central authority to enforce or create laws; it also implies chaos (Waltz 1979, 114). Each State, then, is concerned with acquiring the means to safeguard itself in a system whose volatility produces uncertainties about its survival. To this end, States strive to increase their capacities, and respond to the behavior of other States in the system as they too attempt to increase their own capabilities, and this gives way to balancing behaviors among States.

The balance of power theory attempts to account for the actions of States in the international system under certain conditions. Waltz explains that the balance of power theory begins with a few assumptions about States; they are: 1) that States are unitary actors who, at a minimum, seek their own preservation, and 2) at maximum strive for universal domination (Waltz 1979, 118). It has also been argued that, "...balances of power tend to form whether some or all States consciously aim to establish and maintain a balance..." (Waltz 1979, 119).

Responding to the position of Kenneth Waltz, Alexander Wendt argues that anarchy is what States make of it (Wendt 1992, 403), that States form identities that inform their interests (Wendt 1992, 194, 397-398), and apart from the fact that different forms of anarchy have arisen in the international system, anarchy can be understood as a mutual struggle for full recognition (Wendt 2003, 493-4).

Wendt's counter argument makes two claims about States. The first is that anarchy; although a variable of any State's decision-making process, is not as constraining as Waltz would have us believe (Wendt 1999, 397). In fact, a criticism of Waltz has been that his theory of anarchy fails to explain variation in outcomes produced as a result of anarchy (Wendt 1999, 98), and if State behavior in a system of anarchy prompts States to think about and strive for security, Waltz's theory still "...says nothing about States' relationship toward each other as they think about their

security...” (Wendt 1999, 100). The second claim is that international politics is socially constructed, which implies that different forms of anarchy could come to exist, and can therefore be tamed, while describing differing forms of anarchy as separate *cultures* suggests that varying modes of recognition exist in each of these logics of anarchy.

Explaining anarchy as struggles among individuals and States for mutual recognition, Wendt is able to identify five separate political formations in order to determine a stable end-state; only a world State is stable, and capable of providing individuals and States with full recognition (Wendt 2003, 528). Vaughn Shannon has argued that Wendt’s world State inevitability theory does not explain why States and individuals might decide to create the world State rather than an alternative political arrangement (Shannon 2005, 584). In other words, if the world State is truly a stable end-state, and (once arrived at) all enjoy full recognition, how could the world State regress to any of the previous stages through acts of anarchy and still continue to be desired as Wendt maintains? (Wendt 2003, 525).

Emery Reves developed a similar world State proposal in 1945, and like Wendt, Reves maintained that a world State is the only viable option for world peace. He observed that peace between groups in conflict was never possible without a sovereign power established over and above the clashing social units that integrated the warring parties into a higher sovereign arrangement (Reves 1945, 122). In addition, both Wendt and Reves base their findings on historical precedents that offer proof for the argument that: conflict will eventually become unbearable (Wendt 2003, 523), “...until finally, by the force of events, we shall arrive at a federal world government.” (Reves 1945, 291).

Jürgen Habermas has argued against the creation of a world State, and instead proposed the creation of a world society (Habermas 2006, 135-138). Kjartan Mikalsen provides two reasons for Habermas’s opposition to the creation of a world State. The first is: *the argument from civil solidarity*.

Habermas believes that a world State would result in the absence of a thick global identity to ground a strong civic solidarity, and in light of its non-exclusiveness, a World State would also fail to provide a basis of legitimacy on structural grounds (Mikalsen 2013, 309), he also doubts that a World State would be democratic in any meaningful sense (Mikalsen 2013, 309). The second is: *the asymmetry argument*. This argument is related to the social contract theorists, and therefore to the tradition of political theory. In both John Locke and Thomas Hobbes' state of nature, individuals created the State to protect themselves from the violence of others and to safeguard their property. Hobbes maintained that man is born in a natural state of 'a war of all against all,' and in order to protect themselves from the violence of each other they agreed to give up some of their freedom to a power greater than any one individual (Lutz-Bachmann 2014, 10); the idea was to create a power that would keep them all in awe (Hobbes 1987, 223-225). In John Locke's state of nature man is born free, but in his midst is the lazy, quarrelsome, and contentious. In an attempt to protect life, liberty and property government was instituted among men (Locke 2004, 330-331). Habermas wants to show that although the environment of man in the state of nature is described as anarchic, and the international political system too has been described just the same, that they are not symmetrical.

In the state of nature for man, government was created so that individual life, liberty, and property could be preserved, while the creation of a single government (a world State) to solve the problem of anarchy in the international system would consume the State altogether (Habermas 2006, 129-132). Further, Habermas argues that legitimation processes have historically matured only within the Nation-State (Habermas 2006, 140), and the State is where the bonds of solidarity are most concrete (Habermas 2006, 139). Extending these processes beyond the State requires the preservation of the State itself, that is, if a thick form of civic solidarity among a world citizenry is to take hold. Hence, Habermas opposes the creation of a world State on the grounds that far from satisfying the need for States to secure full recognition, the State would cease to exist, the

establishment of a world State would result in a thin form of recognition amongst its citizens, and such a State could not structurally guarantee the democratic character required to fuel a global popular sovereignty, and would therefore fail to be free in any meaning sense.

Habermas argues that a multi-level system of divided sovereignty could satisfy State and individual needs for recognition, preserve individual identity connected with the State, and create a civic solidarity that transcends the Nation-State (Habermas 2006, 135-139). Habermas maintains that globalization processes are becoming too complex for the State to cope with alone (Habermas 2006, 176). The transnationalization of trade, information, customs and fashion are proliferating beyond the State's ability to control these forces (Habermas 2006, 175).

Both Jürgen Habermas and Inge Kaul have argued for more international cooperation among States. Kaul has called for *smart sovereignty* in arguing that the old paradigm of State sovereignty that encouraged the maximization of State interests offers a false perception of independence. In policy fields characterized by their interdependence, Kaul believes that perceptions of independence undermine the State's policy sovereignty (The Governance Report, 2013). Habermas proposes a multi-level system with a supranational and transnational level alongside that of the Nation-State (Habermas 2006, 136). The transnational level is comprised of regional organizations—modeled after the European Union. These regional organizations would tackle issues unique to their geographical areas and address: environment concerns, security agreements, and monetary policy. Habermas envisions the emergence of a global public sphere through these additional layers of cross boarder interaction, where national citizens come to view themselves as citizens beyond their respective States.

Andreas Føllesdal has criticized Habermas and Jacques Derrida's conception of European identity, and the claim that the requisite common political identity necessary to ground civic solidarity requires unique characteristics from members of the political order to the exclusion of

outsiders (Føllesdal 2009, 78, 85). Føllesdal argues that Habermas's position on the need for a common European identity is based on the need for trust within majoritarian democratic institutions. Such an identity is often sought in historical experiences, traditions, and achievements (Føllesdal 2009, 85). Føllesdal goes on to point out that many of the values and norms from which Habermas appeals for European unification are in fact shared elsewhere (Føllesdal 2009, 86). The position of Føllesdal's is that "...human rights norms may well be part of—though not all of—a common political identity suited to build trust among members of a political order" (Føllesdal 2009, 88).

Responding to Føllesdal's accusation of Euro-centrism, Edward Demenchonok points out the goals of Habermas's cosmopolitan vision of creating a world society, which he argues is built upon a normative framework grounding in human rights and the constitutional State. He says:

...the constitutional state is supposed to ensure that different communities of belief can coexist peacefully on the basis of equal rights and mutual tolerance. These problems should be approached from the perspective of egalitarian universalism, which orients civic solidarity towards a solidarity among "others," universalistic constitutional principles and human rights. Mutual recognition implies that religious and secular citizens are willing to listen and learn from each other in public debates. The political virtue of treating each other civilly cannot be prescribed, but can only be learned (Demenchonok 2012, 349).

Demenchonok argues, then, that mutual recognition for Habermas is found in a free, open, and tolerant society of peoples of difference. Mutual respect and public dialog will prepare the soil in which civic solidarity will be planted and germinate.

D. Interdisciplinary Proposal: Multi-level Conditions for Human Rights Enforcement

My proposal includes elements of Wendt's world State inevitability theory and Habermas's multi-level system proposal. Their individual insights, as well as the common ground I create

between the two, make it possible to advance an alternative or hybrid proposal. Wendt provides the problem to be addressed by the I.C.C., which is the recognition deficit individuals face at the international level in human rights institutions. Individuals are the subjects of international human rights law, but currently possess little to no standing in the United Nations or International Criminal Court. I borrow his terminology regarding the logic of anarchy as: a struggle between individuals and States for mutual recognition. He shares with other theorists in International Relations the belief that anarchy is the absence of a central authority to make and enforce laws, but departs from many in maintaining that there are different cultures of anarchy. However, all of the five stages of anarchy in Wendt's proposal are unstable; anarchy could (are does) exist at every stage. So although Wendt correctly frames a language with which struggles for human rights can be explained, it is doubtful that the emergence of a world State would result in full recognition for individuals and States. If it is admitted that anarchy could thrive in any imaginable political arrangement, the question shifts from one of how to create an anarchy free political environment, to that of what conditions must be met in order to reduce the occurrence of anarchy and mitigate its affects.

Habermas's proposal provides an answer to the question of how States can reduce conflicts that emerge from anarchy. His multi-level system is a cooperative model that resembles the formula at the European Union, or those found in pacts or treaty organizations like NATO. However, Habermas provides important details regarding the conditions for increasing cooperation between States, and the constitutionalization of an international legal process that provides individuals and States with recognition and access to international institutions.

The multi-level system advanced by Habermas attempts to create a global constitution for a pluralistic world society, and this cosmopolitan project takes human rights as a normative framework for cooperation among States and for extending recognition to individuals. Some examples can be found in his proposal for restructuring the U.N. into a constitutional body, or

creating a separate chamber for the General Assembly to include representatives for world citizens. As it stands, both Habermas and Wendt agree that the current structure of the international system is too State centric, and that State sovereignty (as practiced today) is an obstacle for world peace and human rights. The difference is that Habermas argues that preserving the State is crucial for extending legitimation beyond the State. In addition, the national State has succeeded in creating strong bonds of civic solidarity, while Habermas believes these bonds will be broken and replaced by a weak form of solidarity if replaced by a single world State.

Together, the proposals of Wendt and Habermas are adequate for responding to the question posed by this research, because one provides a language to assess the overall problem, while the other provides a solution in the form of a cooperative model. I end up with a Wendtian description of the problem of human rights abuses as recognition deficits, and a Habermasian remedy for limiting State territorial sovereignty through a different cooperative arrangement among States. I explicitly add the individual as a subject under international law that has participatory power; this contribution is implicit in the writings of Alexander Wendt and Jürgen Habermas. Nevertheless, it receives little attention in their writings as a component of a greater enforcement structure for human rights. My research suggests that the following conditions must be met in order for the I.C.C. to develop more robust mechanisms for enforcing human rights:

- a) Provide mechanism for individuals to petition the Court, and participate in investigation and case selections.
- b) Expand the United Nations Security Council to include more than five permanent members.
- c) Require a super-majority vote in the Security Council in order to veto a resolution, and
- d) Place further limits on State sovereignty (which could include a mixture of voluntary measures, or result from the Court's rulemaking in (a) above or both).

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THE I.C.C. AND HUMAN RIGHTS ENFORCEMENT

The development of a human rights discourse itself became possible within the framework of the Universal Declaration of Human Rights (UDHR), and international agencies have been created to address the conflicts that call these rights into question. Since its drafting, the UDHR has had mixed results on enforcement, while the consequences posed by collective State inaction served only to animate and entrench the rights outlined in the UDHR (Weissbrodt 2001 : 24-28). The International Criminal Court, then, can be seen as an attempt at providing the UDHR with a system of judicially binding enforcement. The International Criminal Court (ICC) was established after more than 50 years of human rights advocacy on the part of States and non-governmental organizations (Power 2007: 492-3), and this advocacy expanded the human rights discourse in addition to drawing attention to its cause (Welch, et al. 2011: 928).

In connection with the creation of the International Criminal Court, many have argued that its establishment was necessary, while others are still skeptical over whether an international Court could be an effective instrument of human rights enforcement. Both lines of reasoning proliferate into more complex arguments around these two positions, and include multiple sovereignty arguments, or grievances made by periphery States against western countries that call into question the Court's impartiality. All of these arguments deserve careful consideration, which is out of scope here as the focus of this research is to discover the conditions that must be met in order to provide the ICC with more robust mechanisms for enforcing human rights. From this vantage point, addressing these arguments now are out of place, because the question I pose concedes that the Court can be more effective, the question still remains as to the actual conditions to be met in order to achieve this goal. The other line of argumentation is advanced by States that continue to refuse recognition of the Court, while arguments for the establishment of the Court have, in many ways, expired with its creation; the big concern is how the Court's authority affects the sovereignty of the

State. However, I will try to make the position of those who support the Court, as well as those who oppose it, clearer before moving on to discuss the creation of the International Criminal Court and its current enforcement practices of ‘crimes against humanity’, ‘war crimes’, and ‘genocide’.

Arguments for and against a permanent international Court

The Nuremberg and Tokyo tribunals that began after World War II were confronted with the problem of jurisdiction (Bassiouni 2011, 270-275). As the first international tribunal erected to try heads of State and government officials, no precedent existed that these tribunals could rely on in establishing the crimes for which Nazi war criminals would stand trial. As a result, the tribunals struggled to establish a jurisdictional basis over criminal acts that were underspecified or non-existent. The legal definitions, as well as the tribunals’ jurisdictional power, had to be created as suspects were in custody awaiting trial (Paris 2008, 171). Once confronted at trial with arguments challenging their jurisdiction (on the grounds that no domestic or international crime existed at the time of the acts in question), the Court relied upon arguments of Universal Jurisdiction (Bassiouni 2011, 273). The application of Universal Jurisdiction has been contested ever since, and has been applied in a number of different ways by State actors.

Some have used the trial of Adolf Eichmann in arguing for a permanent international Court, and in problematizing State adjudication (and enforcement) of human rights violations (Arendt 1992: 14-15, 19-20; Roth 2005: 278). The Israeli government’s abduction, trial, and conviction of Eichmann (under Israel’s Nazis and Nazi Collaborators (Punishment) Act) raise at least three separate questions: a) the Israeli government’s kidnapping of Eichmann in the territory of Argentina raises the question of whether violations of human rights are a sufficient reason for a State to violate another State’s territorial sovereignty (Schabas 2013: 683; Arendt 1992: 239). There were no formal discussions between the government of Argentina and Israel over Eichmann’s extradition, or the legalities of the charges being brought against him. b) The Israeli government brought charges under

a law which did not exist during the time that the alleged crimes were said to have been committed by Eichmann, raising an ex post facto dilemma (Bassiouni 1999: 8-9), and c) the State of Israel did not exist at the time of the offenses under review (Schabas 2013: 683). In addition, it has been argued that the language used in the trial was overwhelmingly national in character (Arendt 1992: 6-8,244-245), and focused on the “Jewish people”. Apart from the fact that the formal language of the charges included: “Crimes against the Jewish people,” “Crimes against humanity,” and “War crimes, (Randall 1987-1988: 811)” these charges were based on Eichmann’s participation in the extermination of Jews only. The Court failed to charge Eichmann with crimes against other ethnic minorities, although the Court did make mention of massacres and assassinations against Gypsies and Czechs (Arendt 1992: 245).

These arguments converge on a few points, all of which are designed to offer support for why an international Court is preferred. The first is a) the national character that State trials of human rights violations could take on; possibly preventing these cases from being used as formidable precedents in human rights trials elsewhere, b) the potential for conflict among States over disputes regarding extradition of accused persons, and matters of territorial sovereignty should a State unilaterally arrest suspects in foreign countries without their cooperation and consent; the third argument is about the legal process itself: c) If people are to stand trial for crimes that were made criminal acts after the fact, the question surrounding future human rights legislation is one of its universal legitimacy (universal in the sense of State consensus) and consistency of application.

Alternatively, those skeptical about the effectiveness of an International Criminal Court have argued that: a) giving legal authority to an International Criminal Court that prosecutes human rights violations could negatively impact State sovereignty (Feinstein, et al. 2009: 45), b) that such a Court could serve as a means of domination for more powerful States against weaker States (Kim 2012:

262), c) that rulings from an international court could conflict with the constitutional requirements of a State, and d) that due process requirements would remain a sticking point for such an international court (Knittel 2012: 513).

Both opponents and supporters of empowering a permanent international court have concluded that its creation will impact State sovereignty. Those in favor of a permanent court claim that their opposition ignores the negative impact of a humanitarian crisis on State sovereignty, and the way in which an international court compliments State sovereignty by absolving the State of the burden to exercise jurisdiction over a collection of offenses. Alternatively, those opposed to the court are concerned with its freedom of action, the impact on troops in wartime, and the jurisdiction over the accused that the State could prosecute in military courts as opposed to an international court assuming the same jurisdiction. I will not attempt to exhaust the arguments (and counter arguments) offered for these two positions on State sovereignty here, as I am only interested in showing that this contention does exist.

Presently, I want to briefly entertain the argument that the Court may be used as a tool of domination for strong States against weaker States, for this argument challenges the idea that an international Court is better suited to try human rights violations due to the national character that State trials would embody. This line of reasoning is being challenged by the assertion that strong States could dominate the Court, and impose their will through a new and more organized legal framework. Another claim that has been leveled against the International Criminal Court is that the Court is particularly a western tool of domination, particularly against African States.

The Guardian newspaper published a response to these criticisms on May 23, 2012, by Fatou Bensouda who is the new chief prosecutor of the ICC. Bensouda is a Gambian lawyer, who has

studied law in various parts of Africa, including: Nigeria, Gambia, and Malta just off the African coast. She said:

With due respect, what offends me most when I hear criticisms about the so-called African bias is how quick we are to focus on the words and propaganda of a few powerful, influential individuals and to forget about the millions of anonymous people that suffer from these crimes ... because all the victims are African victims.

Indeed, the greatest affront to victims of these brutal and unimaginable crimes ... women and young girls raped, families brutalised, robbed of everything, entire communities terrorised and shattered ... is to see those powerful individuals responsible for their sufferings trying to portray themselves as the victims of a pro-western, anti-African Court (Smith 2012). "

However, it cannot be ignored that in the decade since the Courts creation it has focused much of its energies in places like the Democratic Republic of the Congo, Uganda, the Central African Republic, Darfur in Sudan, Kenya, Libya and the Ivory Coast (Feinstein 2009: 61). This suggests that the Court has not been impartial in its case selection process, but to definitively provide an answer to the question as to whether or not this offers proof of bias on the part of the Court would require further research. Nevertheless, there is evidence to suggest that the Court is vulnerable to the influence of more powerful military and economically stable countries. For example, emerging military powers are more susceptible to insurgencies where the potential for human rights violations to occur increase. In this climate, the Court might determine that the country is "unable or unwilling" to prosecute the accused, and exercise its jurisdiction, whereas stronger military powers can prevent an indictment through trying its own military personnel in secret military courts. If one adds considerations of the financial support particular States provide the ICC to continue operations, the problem is quickly compounded. Sufficed to say that the Court began trying cases in 2006, and has since used precedents in trials conducted by the International Criminal Tribunal for

the Former Yugoslavia, and the International Criminal Tribunal for Rwanda, which provides a link to the Court and the International Military Tribunals that preceded them.

HISTORICAL ORIGINS OF THE I.C.C.

International Tribunals

Micheline Ishay and Erna Paris consider the International Criminal Court to be the offspring of the Nuremberg International Military Tribunal (which tried Nazi war criminals in Nuremberg on November 20, 1945 and October 1, 1946), and the International Military Tribunal for the Far East (IMTFE) that convened in the spring of 1946 (Paris 2008, 171-172; Ishay 2008, 347). In fact, the trials conducted by these tribunals were the first of their kind, bringing together legal scholars and sovereign States to develop a legal framework for crimes that, previously, had no foundational existence.

Although the International Military Tribunal (IMT) is famous for trying the Nazis for crimes of genocide at Nuremberg, they also tried ‘Crimes Against Humanity’ (which included the acts of genocide) and ‘War Crimes.’ These crimes would later become part of the International Criminal Court’s subject matter jurisdiction. Article 5(c) of the charter for the International Military Tribunal for the Far East, and Article 6 (c) of the charter for the International Military Tribunal at Nuremberg articulate crimes against humanity, and were designed to establish the legal foundations for the charges to be brought against the accused, but more importantly, they aimed to establish the jurisdiction of the tribunals over these crimes. The Allied Control Council, which took control of Berlin after WWII and included the United States, Great Britain, Russia, and France, provided legal definitions for three crimes (Bassiouni 1999, 1), all of which were outlined by the independent tribunals, and whose language was similar if not identical (Bloxham 2013, 570). These crimes are contained in the Allied Control Council Law No. 10 as follows:

a) Crimes against Peace. Initiation of invasions of other countries and wars of aggression in violation of international laws and treaties, including, but not limited to, planning, preparation, initiation or waging a war of aggression, or a war in violation of international treaties, agreements, or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing (Sedgwick 2013: 481).

b) War Crimes. Atrocities or offences against persons or property, constituting violations of the laws or customs of war, including but not limited to, murder, ill treatment or deportation to slave labour or for any other purpose of civilian population from occupied territory, murder or ill treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity (Reynolds 2013: 98, 332, 520).

c) Crimes against Humanity. Atrocities and offences, including, but not limited to, murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated. . . . (Sadat: 2013: 2, 107, 337).

While the Allied Control Council, the IMT, and the IMTFE developed working definitions, and delivered prosecutions for the crimes outlined above, these efforts remained limited without wider international recognition. In an effort to garner support from the international community, covenants and resolutions were submitted to the United Nations' general assembly for ratification. On December 10, 1948, the Universal Declaration of Human Rights was adopted by a vote of 48 to 0, with 8 abstentions and 2 failing to appear for the vote. A day earlier the convention on the prevention and punishment of the crime of Genocide was adopted. According to the International Committee for the Red Cross (ICRC), one hundred and forty four out of one hundred and ninety

three States have either ratified or acceded to the *Convention on the Prevention and Punishment of the Crime of Genocide* to date (Red Cross 2014).

Yugoslavia and Rwanda

Many consider the International Military Tribunals for the former Yugoslavia and Rwanda to be the capstone in a series of moves that led to the establishment of the International Criminal Court. The tribunal erected in the former Yugoslavia, for example, was the first tribunal to be created by the United Nations since the Nuremburg tribunal and the first to be established in an ongoing conflict, although it was limited to holding the perpetrators of human rights violations in the Bosnian conflict responsible. Despite this, some saw the international consensus surrounding the conflict as evidence of something more permanent emerging.

Both the Rwanda and Yugoslavia tribunals were limited in duration, scope, and jurisdiction. They would last until the end of their terms, treat human rights violations, and try only those individuals believed to have had a role in their specific conflicts. For some, crimes against humanity could not wait for independent tribunals, set up only after the atrocities had been committed. Rather, a Court created to serve as a deterrent, an institution of international justice to address humanities most gruesome crimes, and one that would transcend national politics would be needed (Struett 2012, 83; Roth 2005, 22). The Genocide in (and the politics surrounding) Rwanda furthered this vein of reasoning.

Images of the slain in Rwanda were broadcasted alongside the staggering projection of roughly 800,000 dead in just three months (Olesen 2012, 374; Robertson 2000: 78). Yet, the international community was slow to respond to the genocide taking place in Rwanda, and with international involvement in Yugoslavia and Somalia there was no appetite on the part of the international

community to intervene. It was not long, however, before many began to view this inaction as one of the greatest failures of the U.N. and its members to protect the victims of the Rwandan genocide.

The beginning of the 1990's marked key developments that impacted the direction of international justice. The end of "Cold War" hostilities between the U.S. and Russia placed the U.S. in a precarious position in relation to human rights enforcement. On the one hand, the United States became recognized as the undisputed super power of the world; on the other hand, it was considered by many to be a leader whose position on international justice could be modeled or followed. Ultimately, the crisis in Rwanda and Yugoslavia elicited a response not seen since the Nuremberg and (to a lesser degree) Tokyo tribunals, and despite the difficulties of the Rwandan and Yugoslavian tribunals in trying human rights violations, the tribunals themselves would eventually receive unprecedented international support and recognition. This broad consensus laid the groundwork for the possibility of a permanent international Court that would: a) be established ahead of any international human rights crisis, b) operate in a somewhat complementary fashion to the national politics of any one State, and c) establish enforcement measures based upon precedents in other human rights trials to punish and deter human rights violations perpetrated by State agents. This function of the Court is a direct challenge to the tradition of impunity of governmental officials in international law.

With respect to a) and c) the Court has achieved considerable success, but there remains disagreement among States over the Court's precise role. Is the Court just a complementary instrument to national Courts (Sikkink 2011: 18-19)? Or was the Court designed to operate independent of the national legal system, relying only on the State to articulate in practice the contours of its own functions, such as: enforcement of its rulings, State ratification of its Statute, funding, etc.?

Those who have ratified the Statute found it comparable, in many ways, with their own State constitutions upon which the integrity of their legal systems was based (Paris 2008: 121). For the States that abstained from becoming signatures to the Rome Statute, the formulation of legal ‘Complementarity’ fell short of clarifying whether State ‘unwillingness or inability’ to prosecute suspects might result in the Court exercising its jurisdiction. Further, who would determine what constituted unwillingness or inability? And if a State determined that it was unwilling to prosecute a suspect for evidentiary reasons, might the Court then decide that it found the same evidence sufficient grounds for an indictment? It’s clear that many believed the Court to be moving in a direction that distinguished itself from national Courts and State politics, and that the legal formulation of ‘Complementarity’ was designed to shore up the establishment of the ICC with little attention paid to the national politics that might surround any given case. The concept of Complementarity, then, appears to have evolved into an apparatus that encourages State participation in the ICC, and one that develops, and strengthens, international law by forging State consensus. More importantly, Complementarity prompts States to examine their own policies, practices, and laws in an effort to provide the Court with international legitimacy. This is different from saying that the Court is an instrument of last resort (as even the Rome Statute has claimed), as labeling the Court *a last resort* gives the implication that States will continue to enjoy some special priority. However, in practice the Court benefits by encouraging State parties to interpret their own constitutions and laws in light of the Courts own emerging jurisdictional powers.

THE INTERNATIONAL CRIMINAL COURT AND THE ROME STATUTE

After years of discussion, the United Nations General Assembly convened a diplomatic conference in Rome (the Rome Conference) in the summer of 1998. More than 160 countries, and a host of independent observers, met to discuss the creation of a permanent international criminal

Court for the prosecution of the world's most serious offenses. After five weeks of talks, a broad consensus was reached which became known as the Rome Statute.

The Rome Statute formally created the International Criminal Court on July 17, 1998, but the ICC began operations almost two years later in July of 2002. There were 120 countries which ratified the Rome treaty, while only 60 countries were needed to create the Court. Despite the general agreement on the Court's new authority to persecute crimes of genocide, war crimes, crimes against humanity and the crime of aggression, there remained disagreement over issues of enforcement, the broad powers of the presidency of the Court, and the power of the prosecutor in conducting investigations in foreign territories.

At Present, the International Criminal Court relies upon the Assembly of State Parties (ASP), comprised of States who have agreed to the Rome Statute, and the United Nations Security Council for the enforcement of its rulings. Although member States cannot change, modify, or overrule a judgment from the Court once it has decided in a case, the current structure of the Court suggests that it must take into account the political ramifications of trying or deciding a case. For these reasons, the Court's enforcement practices have not yet reached their potential—they are, in many ways, ineffective.

The Dual Enforcement Scheme of the ICC

The Rome Statute of the International Criminal Court developed a two-pillar system to adjudicate cases of human rights violations, a) the judicial remedy represented by the Court, and b) the enforcement scheme carried out by State parties under significant judicial oversight from the Court (Martinus 2012, 945). Further, the ICC has two legal remedies to be enforced in any case, and although the President of the Court has enormous discretion in deciding on either remedy, or the

right combination of the two, State involvement is crucial to the enforcement of the Court's final decision. The dual legal remedies are: 1) a sentence, which usually entails a term of confinement, and 2) A fine, which might involve the liquidation of property such as land or homes, but may also include financial capital (Abtahi 2013: 3-4). The fine is designed to restore equitable living conditions to victims harmed directly by the offense, but the fine may also be punitive.

The Court may be unable to recover damages for individuals or groups, who are victims of human rights violations, due in part to a failure to recover assets from a State. In cases like this the Court has created a victim trust fund, "the Trust Fund," (Mégret 2010, 137) to assist in bringing some normalcy back to the people whose lives have been impacted by violations of their human rights.

Sentence Enforcement

After the Court has imposed a sentence, it turns to a list, "the list," of States from the Assembly of State Parties (ASP) among whom the Court selects where the accused will be confined (Abtahi 2013, 6-7). The President of the Court selects a State deemed suitable for the sentence to be served, and if the State chosen agrees to the arrangement, the prisoner will serve his/her sentence in that State's facilities. The President has a duty to notify, and then consider, any objections raised by the State in question once the Court has informed the State of its ruling, and intent, to transfer the prisoner to their care. The cost of housing the prisoner will be absorbed by the State, while the Court will pay the transportation, extradition, and subsistence costs.

The President may decide to change its designation of the State for confinement if it deems the conditions demanded by a State are unreasonable, or if it later determines the place of confinement poses concerns for the Court (i.e. direct monitoring of the enforcement of the sentence, safety of

the prisoner, etc.), and it may choose an alternative State to host the prisoner for the term of confinement.

In connection with bilateral agreements of enforcement between the Court and States, the President of the Court uses individual “Model Enforcement Agreements” (MEA) in some cases and the “Headquarters Agreement” in others (Abtahi 2013: 10). MEA’s are designed to facilitate the enforcement of sentences on the one hand, and to develop a system conducive to the domestic legal structures of individual States on the other. Any MEA must conform to the rules and Statutes of the Court, and in some cases model the practices established through the *ad hoc* international criminal tribunals which preceded it. The ‘Headquarters Agreement’ is the agreement between the ICC and the Netherlands (the host State). The agreement deals with the operation, personality, security, and impunity of the Court while conducting official business in the Netherlands. The agreement also says: “Whereas article 103, paragraph 4, of the Rome Statute provides that, if no state is designated under paragraph 1 of that article, sentences of imprisonment shall be served in a prison facility made available by the host state in accordance with the conditions set out in the headquarters agreement.”

Both the Court’s operations and enforcement of its rulings find support in the original document that brought the Court into existence (the Rome Statute). When matters of enforcement are considered, there are (more or less) four avenues by which a case properly comes before the Court for review. First, the United Nations Security Council may refer a case to the prosecutor of the ICC under Article 13 (b) of the Rome Statute acting under Chapter VII of the Charter of the United Nations. Second, a State party may refer a case to the Court under Article 14 (1). Third, “The Prosecutor of the Court may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court,” under Article 15(1), or in a fourth instance the Court may decide to direct the prosecutor to investigate a case, and ultimately issue a warrant if it decides the

case falls within its jurisdiction and rises to the level of a crime as outlined in Article 5 of the Statute (That is: Genocide, Crimes against Humanity, War Crimes, or Crimes of Aggression).

Jurisdiction

The definitions used by the ICC for crimes over which it exercises jurisdiction are contained in Articles 6-8 *bis* of the Rome Statute. Article 6 defines the crime of genocide as: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; or (e) Forcibly transferring children of the group to another group (Rome Statute 2013). Article 7 articulates crimes against humanity, and includes (but is not limited to): (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity. This category continues from (h)-(k), to section 2 (a)-(i), and section 3 (Rome Statute 2013).

Articles 8 and 8 *bis* contain the most exhaustive definitions among the four crimes under the Court's jurisdiction. For the sake of brevity, I will not itemize them here in detail. Rather, I will make mention of their general content and encourage others to read them in their entirety from the Rome Statute itself. Article 8 treats "War Crimes." Among those acts that are considered to be war crimes under Article 8 are: (i) Wilful killing; (ii) Torture or inhuman treatment, including biological experiments; (iii) Wilfully causing great suffering, or serious injury to body or health; (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power; (vi) Wilfully depriving a prisoner of war

or other protected person of the rights of fair and regular trial; (vii) Unlawful deportation or transfer or unlawful confinement; (viii) Taking of hostages, and more.

There was significant disagreement over the definition of “Aggression” among those States that voted to bring the ICC into existence. Despite this, there was at least a consensus reached over its definition at a conference held in Kampala, Uganda, in 2010, while the Court may not begin hearing cases of aggression until 2017. Among the definitions offered in Article 8 *bis* of the Rome Statute for the crime of aggression are the following: 1) For the purpose of this Statute, “crime of aggression” means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations. 2) For the purpose of paragraph 1, “act of aggression” means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations... (Rome Statute 2013)

This framing of aggression, then, could have implications for States responding to what they consider to be threats to their security, especially when the orders given to their troops in wartime might later be perceived as crimes of aggression under the Statute. The controversial nature of ‘aggression’ as defined above in part, and in the Rome Statute in full, has prevented an international consensus from emerging on how to enforce legislation that appears to go against long standing practices of sovereignty. I will not argue for or against the language defining ‘aggression’ in the Statute here. Nevertheless, the obstacles faced by the State in furthering the human rights agenda become clear when considering the disadvantages that a State could face when responding to threats, or attempting to neutralize perceived threats to its security and interests abroad.

State Involvement in the Rule Making Process

The procedures exercised by the Court in adjudicating cases were agreed to by the State parties themselves, and can be changed, modified, or extended by a two-thirds majority of the ASP. Once done, the Registry and the Chamber of the Presidency are notified of the change before the new rules go into effect. Article 51 (1) provides the statutory basis for State intervention in the rule making process. For example, 1) The Rules of Procedure and Evidence shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties, 2) Amendments to the Rules of Procedure and Evidence may be proposed by: (a) Any State Party; (b) The judges acting by an absolute majority; or (c) The Prosecutor. Such amendments shall enter into force upon adoption by a two-thirds majority of the members of the Assembly of States Parties...

The ability of State parties to pose changes to the procedural makeup of the Court appears to be designed to prompt State involvement in the Court, encourage State parties to familiarize themselves with existing rules, and encourages State parties to think critically about how these rules might complement or complicate their domestic systems of law. If a given rule does present challenges to the Assembly of State Parties, they have recourse to voting to modify the counters of the law to conform to equitable standards of application and interpretation.

Ex Post Facto Considerations

In an attempt to garner support for the Court and encourage State membership, the Rome Statute has said that States will not be subjected to charges prior to the Courts establishment. Article 24 of the Statute, under “Non-Retroactivity Ratione Personae,” prohibits the prosecution of individuals for crimes that were not in force before the establishment of the Court through and by the Rome Statute. The Statute provides: 1) No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute. 2) In the event of a change in the law

applicable to a given case prior to a final judgment, the law more favorable to the person being investigated, prosecuted or convicted shall apply.

OBJECTIONS TO THE ICC

Objections to the Courts authority, jurisdiction, and practices have been raised both before the Court began its work in the summer of 2002, and after successfully prosecuting a series of individuals suspected of committing crimes within the Court's subject matter jurisdiction. A series of State objections (or grievances) have been leveled against the Court. Some hinge on issues of sovereignty, others emphasize enforcement measures and defects in due process protections for defendants. To identify the reservations held by every State that has criticized the Court is not possible here. However, I will take up the objections made by the United States and China, because the grievances raised by these States have successfully captured the sentiments of other States who opposed membership to the Court. The degree to which they resemble one another has been, and continues to be, debated. In addition, both countries are members of the U.N. Security Council upon whom the Court periodically relies on in enforcement matters.

The United States

Lee Feinstein and Tod Lindberg have provided six separate arguments that U.S. policy makers have used to oppose the ICC. They are: 1) the Court's assertion of Jurisdiction over some nationals of non-party States; 2) the prosecutor's ability to initiate cases on his own; 3) the lack of external oversight by, or accountability to, the international community; 4) deficiencies in due process protections afforded to defendants; 5) technical problems, such as: inability of States to lodge reservations with the treaty and defects in the opt-in opt-out provisions; 6) the text of the treaty is part of a growing international bureaucracy that erodes U.S. sovereignty and undermines U.S. freedom of action (Feinstein, et al. 2009: 32). Number 1 above is believed to be challenging U.S.

authority over its citizens by providing the Court authority to intervene on matters of human rights, while number 5 prevents States from determining what is potentially harmful to its interests and opting out on these grounds. Number 6 claims that the collection of State agreements will erode U.S. sovereignty by limiting its own freedom to determine how to respond to incidents occurring internationally where the U.S. might be impacted.

As pointed out elsewhere, the argument that State sovereignty is negatively impacted by the ICC's authority and jurisdiction over human rights violations ignores the impact that States, violating human rights, have on the decision-making options (or sovereignty) of other State actors in the international system. For example, the recent crisis in Syria has resulted in an influx of refugees into neighboring countries, which not only required these States to allocate more resources to boarder control, but also included medical aid, shelter arrangements, and subsistence measures.

While it can be argued that the Court's authority has the potential to negatively affect State sovereignty, attention must also be given to how an inadequate system of human rights enforcement could (and often does) have the same negative affect on State sovereignty. The range of options available to States neighboring violator States, their allies, and treaty partners, is limited by human rights violations, and this can be said to impact sovereignty decisions to a grater degree than an international agency whose policies States are continuing to shape. For example, refugees fleeing the violence of their State to a neighboring State often force a response that might entail the reallocation of military personnel and costly humanitarian assistance. Having to potentially absorb hundreds of thousands of refugees and integrate these displaced people into the society could also require additional domestic policy; the financial and social costs of which could take decades to fully understand.

In connection with the authority of the Court to intervene in matters of U.S. domestic law, it is worth pointing out that the Court will only find that a case is admissible if the State is "unable or

unwilling” to prosecute the case. Article 17 (1) (a) of the Rome Statute says: “Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.” The State, then, is given priority in trying cases that fall within its territory, but if the State lacks the juridical apparatus, the institutional framework, or the political will to bring an individual or group of individuals to justice for crimes against humanity, then the Court may take possession of the case and exercise its jurisdiction.

What is clear is that the Rome Statute has prompted discussions on the use of American power abroad. Throughout the historical development of human rights legislation, the U.S. was a leader in international justice, and maintained an unparalleled position in using its power to prosecute heads of State and the military generals of foreign countries when they violated international law and human rights. The International Criminal Tribunals of the Former Yugoslavia and Rwanda are more recent examples, while the Nuremburg International Military Tribunals are perhaps the most remembered. What is noteworthy here is that generals were made to stand trial for genocide and crimes against humanity in almost every international military tribunal since, and the U.S. was instrumental in advocating for the establishment of these tribunals. Feinstein and Lindberg show that to U.S. policy makers, this power seemed threatened by the implementation of the Rome Statute. In addition, the U.S. has voiced concerns over how the Court may interpret ‘use of force’ (or humanitarian intervention of peace keepers which are often military personnel), and if their military personnel could be subjected to these same crimes against humanity (Feinstein, et al. 2009, 40). An example of this is provided in the massacre of 16 Afghani’s by the U.S. Army Staff Sergeant Robert Bales. Bales left his outpost and went on a shooting rampage in two Afghani villages killing

16 men, women, and children. Although tried in a U.S. military Court and given life in prison (Johnson 2013), such crimes could fall under the ICC's jurisdiction for "War Crimes."

China

Similarly, China has refused to sign the Rome Statute for many of the same reasons that are given by the United States, although reasons 3 and 5 below have not (to my knowledge) been part of America's core grievances.

Writing about human rights enforcement as it pertains to the U.S. and Asia, Alexander Dukalskis and Robert C. Johansen have provided five reasons why the Chinese government has abstained from signing onto the Court. They are: 1) The ICC has jurisdiction that is not based solely on the principle of voluntary State acceptance. In the Chinese view, this violates the principle of State sovereignty. Moreover, the principle of Complementarity, as now formulated, is unacceptable to China because it grants the ICC the authority to judge whether a country's judicial institutions are able and willing to investigate and prosecute the accused, thereby activating (or de-activating) Complementarity provisions to restrain the ICC from pursuing a case. (2) The ICC may prosecute violations of the rules of war not only in international war, but also in internal armed conflicts. China does not want any international investigations of armed conflict within its borders. (3) The ICC may prosecute some crimes, such as crimes against humanity, even though they do not occur in war. Chinese officials argue that such crimes fall outside of international criminal law. (4) China opposes allowing the ICC to consider crimes of aggression—a consideration that may someday be possible following the approval of State parties to a definition of aggression. The Chinese believe that a role for the ICC in that specific domain would diminish the power of the UN Security Council in handling aggression. (5) The powers of the independent prosecutor may enable the ICC to undertake politically motivated proceedings (Dukalskis, et al. 2013: 586-587).

Apart from the jurisdictional matters (i.e. whether the Court may exercise jurisdiction only in war-time or just in armed conflicts, or in what instances the Court might deem a country unable or unwilling to prosecute human rights violations, etc.), most of the concerns of the Chinese government mainly revolve around conflicts over State sovereignty. In number four above, the Chinese government raised concerns over the Court's jurisdiction of crimes of aggression. Here, it was said that granting the Court such power would impede the work of the U.N. whose task it is to deter aggression. It should not go unmentioned that the U.N. Security Council has been criticized for its failure to increase the number of members sitting on the council, which has remained at 5 since the U.N. began its work nearly 70 years ago. These members have the power to veto any course of action by the U.N. if one of its permanent members finds the proposed action to be excessive. The problem has been that the Security Council remains deeply politicized, with each member State exercising its veto power to protect State interests. Erna Paris argues that the dysfunctional character of the Security Council prompted a collection of like-minded States to look elsewhere for a more equitable system of human rights enforcement (Paris 2008, 251-252). Their decision to vote for the creation of a permanent International Criminal Court embodied some of this frustration, and represented an attempt to provide the movement for international justice with an impartial arbiter.

Remarks

Proposals have been offered for providing the Universal Declaration of Human Rights with a stronger structure of enforcement, and the International Criminal Court is perhaps the most concerted effort toward establishing such a system to date. Despite this, there remains disagreement over the precise combination of guidelines that States will be required to adhere to. As the first international Court to receive a broad consensus from States, the I.C.C. provides promising expectations for the future of international human rights enforcement. And though serious concerns

remain over whether the Court can conduct its work in a fair and impartial way, addressing this concern remains one of the Court's biggest challenges. For it to be a viable human rights enforcement agency, the I.C.C. must remove doubt over whether it can successfully rein in the excesses of the powerful States whose actions push the boundaries of State security and human rights protections.

While the State has (historically) committed some of the greatest human rights abuses and could, conceivably, threaten populations on an unimaginable scale in the future, the State (ironically) must be party to a future guarantee of human rights protection; though, such a guarantee presupposes a system of enforcement that punishes and discourages human rights violations. For this reason, considering a formidable enforcement system of human rights through the I.C.C. is practical, and is in keeping with the direction that enforcement systems for the Universal Declaration of Human Rights has taken.

Given the territorial State's history of (and potential for) violating human rights, an effective system of enforcement is most important at the international level, for the enforcement system of the ICC developed out of the atrocities perpetrated by: a) warring States, and b) the illegitimate use of State violence against citizens, minorities, and ethnic populations. This enforcement system (although imperfect) was achieved by placing limits on the sovereignty of the State, suggesting that further improvements on human rights enforcement will require additional limits on State sovereignty. However, while the precise limitations necessary to accomplish an effective system of enforcement for human rights remains unclear, the foregoing does offer two types of proposals, a) further limitations on State sovereignty, b) a framework for interstate cooperation, c) an enforcement system, and d) mechanisms for individual participation and recognition under international law.

The atrocities committed during, and insecurity following, World Wars I and II helped change the contours of international politics. For the first time in history the territorial State began to recognize a system of human rights, but disagreement remains over whether State sovereignty should trump human rights, or if the State's autonomy would be significantly compromised by participation in international agencies such as the ICC. The fact that States would retain a monopoly on the legitimate use of violence in their territories makes it the most promising candidate for protecting human rights, and given the fact that some States are stronger than others and that we now live in a world of collective security, some States are more suited for the role of enforcer than others. Nevertheless, collective security has failed thus far in preventing illegitimate uses of violence that result in human right violations. While the State is an important part of the solution, it is also an obstacle. In light of the forgoing, my position is that: a) limiting State sovereignty would provide the ICC with a more complete system for enforcing human rights b) any system for enforcing human rights will remain incomplete if mechanisms for individual participation are not guaranteed c) the current structure of the United Nations Security Council must be restructured, and d) two proposals provide a sufficient blueprint for realizing all three.

The two proposals I explore are: a) Alexander Wendt's world State inevitability theory, and b) Habermas' multi-level system. Wendt's proposal examines different stages of anarchy, all of which are unstable except the world State that satisfies individual and State needs for full recognition. Wendt draws upon historical developments to show that the international system has a *telos*, which is a stable end-state wherein States and individuals achieve full subjectivity. Habermas proposes limiting State sovereignty through a multi-level system of further divided sovereignty, wherein individuals have standing as subjects under a global constitution. His approach preserves the sovereign State while creating a supranational and transnational level above it. These two proposals stand at two extremes. One involves preserving the territorial State while limiting its sovereignty and

the other envisions the creation of a single sovereign authority that threatens contemporary practices of State sovereignty. Both proposals contain: a) further limitations on State sovereignty b) a framework for interstate cooperation c) an enforcement system, and d) mechanisms for individual participation and recognition under international law. From these competing proposals an answer can be given as to what an effective enforcement system would look like—a hybrid alternative drawing upon their insights as following:

- a) Provide mechanism for individuals to petition the Court, and participate in investigation and case selections.
- b) Expand the United Nations Security Council to include more than five permanent members.
- c) Require a super-majority vote in the Security Council in order to veto a resolution, and
- d) Place further limits on State sovereignty (which could include a mixture of voluntary measures, or result from the Court's rulemaking in (a) above or both).

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WENDT AND THE INEVITABILITY OF A WORLD STATE

Overview

Alexander Wendt is an International Relations theorist whose writings have contributed to the ongoing debate in his discipline regarding the behavior of States in international politics. Wendt analyzes and challenges the assumptions of Neo-Realists like Kenneth Waltz, while his theory of the “social construction of international politics”, his belief that “anarchy is what states make of it,” and his position that a “world State is inevitable” has contributed to the discourse on State sovereignty in contemporary IR scholarship.

Many first took notice of Alexander Wendt with the publication of his article “Anarchy is what states make of it: The Social Construction of Power Politics” in 1992. The title of his article is a direct challenge to key assumptions held by Kenneth Waltz and other Neo-Realists concerning anarchy, and State behavior based on theories of *balances of power*. There are many issues over which Wendt criticizes Waltz, but it is the notion of an international self-help system (which Waltz argued was a product of anarchy) that allows Wendt to question the origins of the international system and its structure as a whole.

Wendt’s article alludes to two overarching claims about States. The first is that anarchy (although a variable of any State’s decision-making process) is not as constraining as Waltz would have us believe (Wendt 1999, 397). In fact, a criticism of Waltz has been that his theory of anarchy fails to explain variation in outcomes produced as a result of anarchy (Ibid, 98), and that if State behavior (in an anarchic system) prompts them to think about and strive for security it still “...says nothing about States’ relationship toward each other as they think about their security...” (Ibid, 100). In his book *Social Theory of International Politics*, Wendt argues that there are different logics of anarchy, but it is in his article “Why a World State is Inevitable,” that Wendt makes the claim that the international system is teleological in nature. This suggests that the anarchic structure and constructivist character

of the international system is more constraining than we were led to believe in his earlier writings, although Wendt attempts to offer them as a complementary whole.

In what follows I will examine what Wendt believes to be the task of a constructivist approach to international politics, his position on anarchy in the international system, and his theory on the inevitability of a world State. Wendt's position on world Statehood raises questions of *recognition*, *end-states* (goals of a system), and *attractors* in a five step process he believes will culminate in a world State. Despite Wendt's commitment to the inevitability of a world State, I will show that his proposal contains inconsistencies regarding the nature of the *inevitability* of world Statehood. Describing the international system of States as a social system that is susceptible to change, and locating historical practices that give rise to different cultures of anarchy is arguable novel in Wendt, while the idea of a world State has been traced back to Immanuel Kant in 1795 (Habermas 2006, 129), and the first full-fledged federalist proposal to Emery Reves in 1945. I discuss Kant's ideas on world Statehood in chapter 3, and those of Reves below in order to elucidate the tradition in which Wendt's own ideas can be better understood.

The Anatomy of Peace

The end of WWII marked the beginning of a new approach to human rights and international politics. The United Nations was established in 1945, the Nuremberg International Military Tribunal was created the same year, and the international community was still recovering from the wounds of war. But apart from State-centric solutions to war through the creation of international organizations, others began to offer proposals that questioned the stability of a peace brokered and maintained by the sovereign State. Emery Reves' book, *Anatomy of Peace*, was a powerful counter-proposal to the emerging security consensus among great powers in the beginning of the post World War II era, and in it Reves provides a genealogy of political systems and their eventual collapse. Subsequent to the fall of the Roman Empire there emerged Feudalism as a political system that

peasants assented to out of security needs (Reves 1945, 105). The feudal system was premised on seven features that mirror the modern relationship between the nation State and their citizens: 1) The Vassal-lord relationship, 2) Loyalty and mutual obligation, protection, and service, 3) the binding together of all of the ranks of each separate feudal social unit, 4) Financial sovereignty of the feudal lord, with the power to tax his subjects and in some cases to coin money, 5) the judicial sovereignty of the feudal lord, as his Courts were the public Courts, and revenue from all fines went to him, 6) the military sovereignty of the feudal lord, as all subjects on the lands of the lord owed him military service, and were obligated to take up arms whenever he called upon them. The feudal landlord was also the commander of the troops composed of his subjects, and 7) each feudal lord had his symbol, emblem, flag, etc., to which all subjects living on his lands owed obeisance and allegiance (Reves 1945, 106-107).

Although the feudal system in Europe provided a framework of protection through legal rights between the feudal lords and their subjects, the relationship between the feudal lords themselves were unregulated apart from friendships, kinship ties, and pledges or agreements. This anarchic environment led some feudal lords to take up arms against others to protect their sovereignty, their lands, and their influence (Reves 1945, 108). However, before long the subjects began to realize that the contracts, agreements, and allegiance they assented to for their security actually caused more war and insecurity. This led to the collapse of the feudal system as a whole and the emergence of the Monarchy and the Monarch who could impose a superior legal order (Reves 1945, 109).

This trend of emerging political formations, which eclipsed outmoded systems, continued up to the establishment of the modern (democratic) sovereign State, made possible through ideas of “the nation” (Ibid, 112). Reves identified patterns in the development of new forms of political organization, but maintained that they have, and will continue to, all lead to war or the threat of war. From this vantage point, Reves made two observations about war: 1) Wars between groups of men

forming social units always take place when these units—tribes, dynasties, churches, cities, nations—exercise sovereign power. 2) Wars between these social units cease the moment sovereign power is transformed to a larger or higher unit. From these two observations Reves deduced a social law that explains every war occurring in history: “*War takes place whenever and wherever non-integrated social units of equal sovereignty come into contact*” (Ibid, 121).

The solution of the “Anatomy of Peace” is the creation of a world State, and such a world State must be established by gradual stages of human development. This development includes realizing the benefits of forming a higher political order where sovereignty evaporates and escapes the fate of the observations and law mentioned above. The problem articulated by Reves was that “...we are living in an era of absolute political feudalism in which the Nation-States have assumed exactly the same roles as were assumed by the feudal barons a thousand years ago” (Ibid, 113), and the solution is to limit State sovereignty until such time as it can be transcended. Reves wrote that, “Peace between fighting groups of men was never possible and wars succeeded one another until some sovereignty, some sovereign source of law, some sovereign power was set up over and above the clashing social units, integrating the warring units into a higher sovereignty” (Ibid, 122). This suggests only international integration through limiting State sovereignty instead of a world State, but Reves maintained that “There can be no question that once the process of inter-national integration starts, its attraction will be so great that more and more nations will join until finally, by the force of events, we shall arrive at a federal world government” (Reves 1945, 291).

The hope of making progress on the creation of a world State was overshadowed after Reves by the Cold War that followed WWII, and was furthered by the Neo-Realist scholarship of Kenneth N. Waltz and John Mearsheimer which has gripped the thinking of policy makers, political theorists, and international lawyers until quite recently. However, Alexander Wendt not only reinvigorated interest in International Relations theory, but revived the debate on whether a world State might be

an adequate proposal to reduce the incident of war through eradicating the State's territorial sovereignty as we know it, and serve as a model for protecting the rights of individual persons and groups which will fall under its umbrella.

Why a World State is Inevitable

In his article, 'Why a World State is Inevitable,' Alexander Wendt argues "...that the struggle for recognition between states will have the same outcome as that between individuals, collective identity formation and eventually a (world) state" (Wendt 2003, 493). What Wendt means by *struggle* is actually *conflict* among States. It has already been said that Wendt views the State as a cooperative body (Wendt 1999, 197) capable of constructing multiple identities (Wendt 1992, 398) that form the basis of its interests (Wendt 1994, 385). But the mutual capacity of States and individuals to form identities is furthered by Wendt to include their shared desire for recognition (Wendt 2003, 493-4).

Wendt holds the belief that *conflict* is a developmental mechanism in the international system—a position also held by Kant and Hegel. Kant held that conflict had the tendency to create republican States, but not a collective identity. Instead, States would retain their sovereignty and egoist positions. Hegel, on the other hand, believed that the effects of the struggle for recognition serve to transform egotist identity into a collective identity and, ultimately, a State. However, Hegel's view is limited to the struggle for recognition among individuals, and although he recognized that States, too, seek recognition, he viewed the State as a self-sufficient totality whose struggle for recognition falls short of producing supranational solidarity (Wendt 2003, 493). Wendt's position is that conflict, over recognition, will have the same effects on States that it has had for individuals, and just as the State formed over conflicting individuals and groups, a world State is the *telos* of States in a conflict ridden international system.

The teleological character of the international system is an important feature of Wendt's argument for world State inevitability. He says, "Teleological explanations explain by reference to an

end or purpose toward which a system is directed” and take the form of: Y is the final cause of X if X happens in order to realize Y (Ibid, 496). Although disagreement over how teleological explanations should be defined is unresolved, Wendt reduces this disagreement to concerns over two main questions; 1) Whether non-intentional or only intentional processes can be teleological, and 2) Whether teleological explanation is backward—or forward looking. On this point, Wendt says, “...my argument about world State formation has both intentional and non-intentional elements, and although it is forward-looking this does not preclude a role for backward-looking accounts” (Ibid, 496). In fact, Wendt draws upon both to make his case for a world State, and attempts to show that such a condition is the end-state of the anarchic international system.

End-Directedness & Final Causation

Alexander Wendt makes use of Self-organization theory, which refers to end-states as *attractors*. Attractors in Self-organization theory are of four distinct types: 1) fixed point (corresponding to equilibrium in economics), 2) periodic, 3) quasi-periodic, and 4) chaotic. An example of a fixed point attractor would be Kenneth Waltz’ position that anarchy tends towards balances of power between and among States (Waltz 1979, 119), and Wendt’s claim of world State inevitability (Ibid, 501). In connection with this, Wendt argues that:

A common way to think about the explanatory role of end-states is that events at the micro-level are selected by a system in relation to its future states...Imagine trying to explain the development of an organism without a conception of what it will look like as an adult—clearly something would be missing from such an account. With end-states added to the picture, we get an understanding of how a system governs not just the reproduction but also the becoming of its parts” (Wendt, 2003 501).

Essentially, the international system is developing toward a world State as an end-state whose attraction is intensified as the result of instability and conflict (Ibid, 502). Wendt offers this end-state development as a product of five different stages, any of which could be compromised, sending the

international system into regression before eventually transitioning to the next stage. Despite this, the system as a whole will eventually arrive at its ‘global attractor’—a world State. Before moving on to the five stages in Wendt’s proposal for world State emergence, a comment is in order about individual and State agency.

State & Individual Agency

Some have pointed out that the move from a sovereign State to a world authority would entail diminishing individual (and State) agency (Shannon 2005, 582). For example, Vaughn Shannon has argued that, “If states have a choice, Wendt must concede that such states may choose not to create a World state” (Ibid, 582). For Shannon, the introduction of contingency, agency, and choice violate the notion of inevitability and instead produce indeterminacy. Moreover, not only does Shannon problematize Wendt’s account of agency, but questions world State emergence if it is left to the agency of either individuals or States. He writes,

Those most suffering and pained by anarchy and non-recognition are those least capable of forcing systemic change; those most capable of pushing a world State in terms of power have the least incentive to forfeit sovereignty, influence and autonomy (Shannon 2005, 583).

Shannon’s argument is thus twofold: 1) The creation of a world State would end individual and State agency, or at least significantly weaken it, and 2) even if we rely on individual or State agency in bringing about a world State, a paradox arises, which is: A) Individuals that would benefit the most from such a WS are themselves too weak to bring it about, and B) If the most powerful States are the most capable of bringing about a world State, it seems that they have no incentive to forfeit their sovereignty in order to realize this goal. Ultimately, Shannon maintains that agency in Wendt’s proposal for a world State is necessary, but neglected. He writes,

There is enough agency to allow his conception to unfold plausibly, but not enough agency to allow actors to choose other plausible features (Ibid, 584).

At this point, it is important to explore how Wendt conceives of agency. Wendt weaves the struggle for recognition into considerations of agency, arguing that a world State, although inevitable, would be brought about by intentional agents. The *individual* will desire for the establishment of a world State because the agency of the *person* will be recognized to a higher degree. Wendt writes,

...if the desire for recognition is about being accepted as different, the effect of mutual recognition is to constitute collective identity or solidarity...When recognition is reciprocal, therefore, two Selves in effect become one, a 'We' or collective identity" (Wendt 2003, 512).

The point is that non-recognition severely limits individual and State agency; therefore, through increasing recognition in the form of a world State we can, in fact, increase agency. Despite this approach, Wendt relies more on the world State's character to guarantee a greater role for individual agency (Wendt 2003, 530). That his proposal involves intentional actors in five steps of development towards a world State says very little about agency after its establishment. He says,

...like States today, a completed world State would be an intentional actor. Such an actor could not intend its own creation (that would be backward causation), but it seems counter intuitive to think that prior to its emergence there would be no intentionality at all at the system level, until it suddenly appears fully formed in a world State. Instead, it seems more plausible to suggest that the process of world State formation involves a progressive 'amplification' of intentionality from individuals and groups to the global level...as the system matures it acquires more and more, enabling it increasingly to participate as an agent in its own development. While necessarily imposing boundaries on the agency of its members, it is only in this way that they can fully realize their own subjectivity (Ibid, 530).

In sum, agency and recognition of individual subjectivity, as well as the intentionality inherent in both remain incomplete in light of the teleological logic of anarchy. This logic of anarchy suggests that the stage in which we encounter no authority higher than the sovereign State is highly unstable,

and that the ultimate form of stability is one in which the full recognition of individuality is achieved through a world State (Wendt 2003, 523).

Wendt's Reply to Shannon

In response to Shannon's critique, Wendt begins by defining 'agency,' and also accusing Shannon of failing to do so (Wendt 2005, 590). In this regard, Wendt distinguishes between the active and passive sense of agency; an active agent can act on its own behalf, or, in a passive sense act as an agent of something else. Wendt takes up the former and deals directly with 'autonomous agency.' Further, there is a metaphysical and empirical sense in which one could examine the topic of agency, each producing different inquiries. Metaphysical agency operates in a causally closed physical universe, prompting questions such as whether reasons are causes, whether there is free will, whether agency is prior to structure, and or whether collectives can have agency. On the other hand, empirical questions of agency pertain to what Wendt calls "degrees of freedom human beings have in concrete social systems" (Wendt 2005, 590), such as whether actors have much choice in a situation, and if not, why. Wendt will set metaphysical questions aside and deal with empirical questions of agency.

Wendt's approach to agency captures the notion of a goal-directed or purposive-action process on the part of an actor. For him, intention is a crucial, and even necessary, element of the interpretation of agency "because without it we would be infinitely agentic...which seems to degrade the value of the concept" (Wendt 2005, 591). In this regard, Wendt found the idea of infinite agency, marked by long-term consequences of an action, absurd (Ibid, 591).

Though the question may then arise as to whether or not nearly all actions are agency if most human action is intentional, Wendt held that not all intentional action constitutes agency as such, but only actions that intentionally challenge existing structures by means of reinterpretation, resistance, transformation, and the like (Ibid, 591). While an intention to alter structure is a necessary

qualification for agency, Wendt held that intention alone is not sufficient, adding *power* to intention to change structure. He argues that agency as power depends on the ability to realize our goals, and that agency in this context can only be assessed after the completion of the action, as “agency as power can only be judged ex post, after the completion of the intention” (Ibid, 592).

Wendt argues that world State emergence is not only a process of constituting a new structure, but also involves a new agency. He admits that teleology necessarily limits individual agency both as intention and power, but maintains that in doing so higher forms of agency are made possible. Wendt then transitions from individual agency to that of collective agency where individuals draw upon the source of personal agency as members of the group. Here, Wendt sees a role for a global recognition of collective agents who enjoy forms of agency unavailable in a pre-world State environment (Wendt 2005, 593). Thus, to have agency one must act with intention, the action must be (more or less) successful in the sense of actualizing the goal of the intended action, and must also contain elements of power (Wendt 2005, 593).

Five Stage Process towards the Realization of a World State

The struggle for power is the bottom-up part of Wendt’s proposal, but it is the top-down process that involves world State formation in five stages of recognition dealing with the territorial State (Wendt 2003, 516). The first four stages are what Wendt calls ‘distinct cultures of anarchy,’ and although each culture imposes constraints on interaction of the system’s parts, it provides subjectivity and freedom at the global level (Ibid, 517). There are two ways in which these constraints produce heightened struggles for recognition; 1) By making it possible to seek recognition through violence, and 2) By generating improved military technology that makes such violence increasingly unpleasant (Ibid). As a result, new stages with more elaborate boundary conditions would emerge that create further instabilities, thus requiring further resolution that leads to the next transitional stage.

Stage 1: The system of States

This stage is one of complete non-recognition (Wendt 2003, 517), and it has three separate boundary conditions; 1) multiple interacting States; 2) the absence of any mechanism to enforce cooperation among these States, and 3) a mutual belief that they are enemies. Due to the absence of recognition there would be no collective identity, and even the State would lack genuine subjectivity. However, “Insofar as States share an awareness that they are in a Hobbesian system it will constitute a culture, but this culture and its implicit collective identity will be repressed (Wendt 2003, 518; Wendt 1999, 278). This stage is considered unstable due to its failure to meet the need for recognition, and it will eventually move towards a different attractor.

Stage 2: The Society of States

The instability of the Hobbesian culture leads to a society of States, where States recognize the sovereignty of other States but do not recognize their citizens' rights (Wendt 2003, 519). Here, there exists some solidarity among States, and although there is no recognition of another State's citizens, the citizens within their respective States enjoy some level of security. Further, in this stage the desire for conquest is replaced by legitimate war to expand territory or other State interests.

This stage produces two sources of instability: 1) even though the State's existence would not be threatened, war would still be a costly endeavor. This will prompt States to increase their military capacities which will lead to even more destructive wars in the future (Ibid); and 2) the lives of the State's citizens are still threatened by war. Wendt believes that this will cause the citizens of the State to place pressure on their leaders who will, in turn, use force as a tool of diplomacy. At this stage, the individual's struggle for recognition also begins, and as individual recognition is both internal

and external at this stage, the mediation of State boundaries would begin to break down (Wendt 2003, 519).

Stage 3: World Society

At this stage, the immediate problem of war is addressed by creating a universal pluralistic security community (Wendt 2003, 520). The hallmark of this stage is that it adds the requirement of non-violent, dispute resolution to the boundary conditions of the system. Further, mutual recognition is now extended to individuals as well as to States. Despite this, this stage is also considered unstable due to the lack of collective security against aggression (Ibid, 520), as it still allows for the emergence of new political orders borne through revolution or regime change, and these new orders may reject non-violence and act aggressively towards members of the system.

Although he does not believe that either option is available at this stage, Wendt treats this problem in two ways: 1) by centralized coercion, and 2) decentralized enforcement by a collective security system. The first option is unavailable because States, at this stage, still retain their sovereignty. The second is untenable because a security community can exist while States might still be indifferent to the fate of other States. In other words, a security community “It imposes no requirement of mutual aid” (Ibid, 521). It is here that Wendt raises the possibility of the system reverting back to previous stages, but argues that the system has good reasons to continue to develop to the next stage, as “Once the system reaches the stage of World society...the desire to reproduce it will induce it to develop even further” (Ibid).

The problem with stage three, then, is that it only provides for a partial form of recognition that is negative in scope (non-violence), but must also include positive aspects (mutual aid) to be effective (Ibid).

Stage 4: Collective Security

In the collective security stage an extra boundary condition is acquired that now requires adherence to non-violent dispute resolution. This extra condition is an expectation of States to defend each other against threats and aggression. At this stage, the system has reached a sort of 'Kantian Culture' of collective security or friendship (Wendt 2003, 521). He points out that at this stage, "Actors have a well-developed sense of collective identity with respect to security, such that each sustains its difference by identifying with the fate of the whole" (Ibid, 521). But Wendt is quick to remind us that "...a universal collective security system is not a world state" (Ibid, 522), and the collective security stage suffers from its own flaws. Since collective security is a consensus based system that allows States to retain their sovereignty, the State still has the right to secede and arm itself for aggressive purposes. Even the proposal of voluntary disarmament provides no assurance that the State will not arm itself at some point in the future, suggesting that the collective security stage would not be a stable end-state.

Wendt thus realizes that an explanation for why the system as a whole would progress rather than regress to a previous stage is needed. One reason is the collective memory of anarchy prior to security (Ibid, 523) such as the collective memory of the experiences of World Wars I and II, which has been an important source of subsequent European integrations. Further, increased interdependence is deepening collective identity at the systems level, and with the growth of transnational publicity, global memories, such as the terrorist attacks in the US on September 11, are becoming possible for the first time. Wendt maintains that further global memories in the future could serve the ends of universal integration. He says, "Further painful memories in the future—a regional nuclear war?—could therefore be a source of universal integration... these memories would constrain the system's degeneration, making a move back toward anarchy less attractive than a move

forward to a world state” (Wendt 2003, 523). What is missing from this account, however, is how collective memory contains the transformative power to move the system to another stage, while the same collective memory is unable to prevent the tragedy of conflict which now calls the collective security stage into question.

Another factor that encourages a progression to a more secure stage is the fact that States have formed a deep enough collective identity for mutual defense, even when a certain State is not itself under threat (Ibid, 523), suggesting that States recognize obligations to one another and each other’s citizens. This leads to securing the recognition of States and citizens through a Constitutionalization of recognized rights that find their enforcement in law. On this account “Genuine recognition means that the recognized has a right to recognition, and the self therefore has a duty to the Other. Genuine recognition is about obligation, not charity. Only when acting on behalf of the Other has become an enforceable obligation is recognition secure” (Ibid, 523).

Wendt then addresses the question of what incentives the Great Powers would have to transition to the final stage of a world State through recognition. In this regard, he believes that the answer is cessation of security concerns, such as those posed by weaker powers engaging in arms races and demands for recognition, and the loss of their own power, as “the ability of Great Powers to insulate themselves from global demands for recognition will erode, making it more and more difficult to sustain a system in which their [own] power and privileges are not tied to an enforceable rule of law” (Ibid, 524). At this juncture, then, if there is a choice between a world of growing threats through the refusal to fully recognize *Others*, or one in which the desire for recognition is satisfied, Wendt holds that the choice of Great Powers would clearly be one of recognition, thus leading to the creation of a world State (Wendt 2003, 525).

Stage 5: The World State

At the world State stage, territorial sovereignty is transferred to the global level and individual recognition will cease to be mediated by the old boundaries of the State. States transitioning into a world State do so as subjects of recognition, but afterward their sovereignty is subsumed by the world State; though Wendt does maintain that they continue to retain some of their individuality, which he calls *particularism in universalism* (Ibid, 525). However, it is unclear how the State, stripped of its sovereignty, can retain its identity. Nevertheless, Wendt is concerned about the freedom to unilaterally wage war that is a corollary of the idea of sovereignty today, stating that “Individuals and States alike will have lost the negative freedom to engage in unilateral violence, but gain the positive freedom of fully recognized subjectivity. The system will have become itself an individual” (Ibid, 525).

It is clear that Wendt believes a world State to be stable, or at least the more stable of systems than the previously mentioned five stages. Despite its stability, however, Wendt admits it will still be susceptible to shocks, and depending upon the severity of the shock it could even collapse. Wendt thus anticipates three objections to his proposal that he responds to. The first expresses the Kantian concern that a world State would be despotic, and Wendt sees this as a possibility only if it meets the criterion of being a Weberian State premised on the legitimate use of force. Such a world State would, in fact, be an empire (Ibid, 526). Instead, a Weberian and Hegelian State would be needed to ensure enforcement and equality in practices of recognition. What may become a problem, due to the scope of the world State’s operations and maintenance, is what Wendt calls a democratic deficit, as “The most obvious threat is a ‘democratic deficit.’ The Sheer scale of a world State and the corresponding dilution of voice for its members would create a huge distance between them and the

state” (Wendt 2003, 526). Another potential threat is nationalism, but Wendt views nationalism as a type of struggle for recognition (Ibid).

A world State also faces challenges for realizing its identity at the stage of its creation. States have other States (as individuals have other individuals) who form their identity in relation to this *Other* as either a member of a group, or as a group opposite of their own. The question then becomes: how will the world State form an identity absent an *Other* in relation to itself? Wendt answers this question in two ways. First, he holds that “Recognition presupposes an axis of differentiation between potential subjects” (Ibid, 527), suggesting that the individuals and groups as its parts would recognize a world State, and it would likewise recognize and constitute them. As parts of the whole, these individuals and groups are mutually constitutive, but they are not identical. Second, to compensate for the absence of spatial differentiation, this gap can be bridged through a temporal differentiation between its present and its past where “history becomes the Other in terms of which the global Self is defined...and a functional equivalent to recognition can be achieved by an act of temporal self differentiation” (Ibid).

Lastly, the creation of a world State would end the struggle for recognition mediated through war (Ibid, 528). Disruption would no longer be seen as an act of war, but instead constitute a crime or criminal act. In Wendt’s world State, disruption would be fairly common due to the systems relative openness, “But once a world State has emerged those struggles will be domesticated by law, and so for purposes of State formation will be no longer important” (Wendt 2003, 528).

Remarks

The organizing principle of Wendt’s world State inevitability theory is the teleological aspect of anarchy. Fueled by State and individual struggles for recognition, the international system is

channeled towards the end-state of a world authority that transcends national borders, and satisfies the needs of both State and individual identity. The world State is the best of five possible systems that have existed in the past, and in light of globalization processes some of the stages of international development have become altogether outmoded.

A world State is inevitable in the sense that actors find the conditions under which they live unbearable, and collectively decide to submit their autonomy and sovereignty to an authority that will supply them with full recognition. In this regard, Wendt's idea of systemic change is driven by individual and State agency, as the inevitability of a world State hinges on a historical moment in which humanity finds no other alternative to its creation.

What remains unclear, however, is the State's precise motive for deciding to join the world State, especially when this entails the loss of its territorial sovereignty. The State's identity is connected to its ability to maintain its *self* as a separate system, and Wendt's proposal says little about how the State would retain an identity if it is stripped of its sovereignty. Further, Wendt assumes that all States will desire to transcend a condition of anarchy for recognition and safety, but what of those States that deem the loss of their sovereignty as the death of their State? If the State survives as an actor, after being subsumed by a world authority, there remains the question of how, or what a State identity would look like after the State's Statehood is gone. Like other States, a world State would create the conditions necessary to maintain its survival, and it is likely that challenges to the system will be suppressed at all costs. The problem with the creation of a world State, then, is that it may turn out to be everything its framers were trying to avoid. Indeed, the only difference between it and a collection of States is that once it is established, there will be no apparent entity strong enough to stop it should that prove necessary.

Lastly, Wendt tells us that the creation of a world State will entail the initial loss of individual freedom, but that in the long run individuals will enjoy a greater measure of recognition. It is not clear what the initial loss of freedom would look like, nor what additional recognition beyond safety would entail. It is conceivable that if the ruling party, class, race, or ideology fails to provide a high level of social equality to individuals, the system will experience perpetual shocks, and could even reach the point Wendt warns us of—the collapse of the system. In this case, the creation of a world State will not have removed the source of anarchy, and could even block future attempts at the creation of another world State, especially if Wendt is right about the transformative power of collective memory. The collective memory of the failure of a world State would serve to inhibit future attempts at establishing it again.

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HABERMAS' COSMOPOLITAN APPROACH TO HUMAN RIGHTS ENFORCEMENT

Overview

The proposal of Jürgen Habermas on human rights enforcement draws upon the Kantian tradition of a *pacific federation* of States and offers a conceptual revision of many of its main tenants. Immanuel Kant's essay on *Perpetual Peace* (cir. 1795) argued for a voluntary league of States that could extend notions of *community* beyond the Nation-State, and produce a global constitution adequate enough to secure world peace (Reiss 2002, 106).

Habermas argues that although the “cosmopolitan condition” today, particularly in light of globalization processes, is different from what was originally envisioned by Kant, his model provides a template for creating global organizations with enough sanctioning power to enforce human rights. Understanding Habermas' multi-level system proposal for human rights enforcement, then, requires us to also consider Kant's own brand of cosmopolitanism, attempts made toward its implementation, and a preview of its shortcomings (Mikalsen 2013, 303).

Immanuel Kant and the Goal of Perpetual Peace

It is widely known that Kant developed a philosophical sketch for a perpetual peace among States, and a framework for interstate conflict resolution through a league of voluntary State participants. What is perhaps less known is that Kant believed that *reason* demanded an eventual State of States or world federation (Kleingeld 2004, 304; Habermas 2006, 121). A State of States should itself be established by the consent of the sovereign State—something unlikely to happen without a strong cosmopolitan consciousness.

The league of States, in the Kantian design, emphasizes republican constitutionalism. For Kant, the republican model says important things about the nature of the State itself, and offers the best hope for the realization of a federation of peaceful States who themselves promote peace. Further, in this model, States adhering to republican constitutions have developed considerably from an

anarchic state of nature (e.g. a war of all against all) to forming a functioning civil society that draws its legitimate existence from the consent of its citizens. Law, at the domestic level, is a combination of moral compulsion and physical coercion, but both rely on interpretations of a constitution that finds its strength in the will of the people. At the international level, States encounter other States in a similar state of nature where anarchy exists in the absence of the types of laws, or constitutions, created in a domestic setting. So, just as the people of a nation (in the state of nature) collectively decide to band together to form a government to protect them from the violence of each other, States must find their security best protected by the creation of a State of States. The emergence of a State of States is desirable, but improbable without the sort of interaction that individuals at the domestic level possessed in their state of nature. The proposals in *Perpetual Peace*, then, were designed to create a federation of States that might cooperate in the furtherance of interstate dialogue and diplomacy, and hopefully develop in the direction of a world federation.

Worried about the emergence of a single despotic State of nations, and the dangers of advancing justifications for States to force other States into a single world federation (Habermas 2006, 124), Kant refrained from formally advancing it as a proposal, preferring instead to say that it was desirable (Kleingeld 2004, 320). In fact, he seems to have held the view that a league of States might come to form a State of States through a process of cooperation and interaction similar to the process unfolding at the national level. Hence, Kant offers the weaker of two possible systems, while believing a world federation to be the key to securing *Perpetual Peace*.

Since the publication of Kant's essay on *Perpetual Peace* there has surfaced two organizations that can claim to have been inspired by his work. The first is the League of Nations established in 1919, following the atrocities resulting from WWI, and the second is the United Nations created in the aftermath of WWII (Habermas 2007, 331). Strictly speaking, both depart from Kant's vision of a

pacific federation, although each has good grounds in arguing that they have derived from the Kantian tradition. For example, Kant was adamant about the non-violent character of the association of States in his federation, while both the League and the U.N. charters contain language of force. Despite this, league membership was voluntary, treaties were publicized, all States had voting power, and its articles contained minority clauses to protect State citizens in times of conflict. Similarly, the U.N. has drafted a series of Conventions that are open for State ratification, and has non-binding documents, declarations, and charters whose membership is voluntary. The U.N. departs from Kant's proposal in the creation of the Security Council tasked with monitoring State aggression and maintaining world peace, while the council has only five permanent members, all of whom are considered military powers today. The Security Council's ability to use force (or other forms of intervention) is too coercive for Kant's model.

Failures of the Kantian Model

Habermas calls Kant's league proposal a "surrogate" of a State of nations (Habermas 2006, 106, 143), and maintains that a voluntary league is not sufficient to establish a system of binding international law (Mikalsen 2013, 303). He credits Kant for correctly framing the transition from thinking about international law as "State-centered," to thinking of international law as "cosmopolitan law," but argues that Kant failed to articulate this transition in sufficiently abstract terms (Habermas 2006, 126-127).

In his article, "Kant and Habermas on International Law," Kjartan Mikalsen provides three objections that Habermas raises against the idea of a league of States. The first involves promoting the rule of law internationally in the form of a voluntary federation. Habermas believes that Kant cannot have legal obligation in mind when the notion of voluntary implies moral obligation instead and that while a voluntary league remains dependant on the good will of its members alone, it

cannot count as a legal arrangement. In order to be considered a legal arrangement it must contain all of the characteristics that a political constitution possesses. Second, Habermas attacks Kant's defense of State sovereignty made by his insistence on non-intervention. In this regard, Habermas objects to a league of States whose sovereignty is considered inviolable because it conflicts with Kant's own theory of the priority of each person's right to freedom in accordance with universal laws. If this right to freedom is the purpose of perpetual peace, then Kant must not allow, also, room for the autonomy of citizens to be preempted by the sovereignty of their States. The third objection challenges the adequacy of State centered approaches to political theory in light of new and rapidly changing modes of globalization. Here, he objects here for two reasons: 1) political practices that adhere to the framework of independent State actors, and whose external affairs are managed exclusively on an intergovernmental basis, might have trouble adequately coping with challenges that have an essentially transnational character, such as poverty, infectious disease, environmental degradation, the proliferation of weapons of mass destruction, organized crime, transnational terrorism, and so on; 2) Habermas is concerned with the internal democratic order of States whose ability to manage interactions within their own borders are challenged by the increase, and intensification, of the cross-border exchanges mention in no. 1 above (Mikalsen 2013, 306-307).

In Habermas' overall assessment, then, there are relevant challenges for the type of league proposed by Kant that cannot be overcome by a simple reinterpretation of the contours of the league proposal; rather, it must be reconceptualized to fit contemporary conditions. Habermas' multi-level system is an attempt to do just that. His goal is not to deconstruct Kant's vision for purposes of critique and criticism, but to build on his insights and perhaps offer some missing pieces to a puzzle that, to him, seemed incomplete. He says, "We can still take our cue from Kant's idea of a cosmopolitan condition if we simply construe it in sufficiently abstract terms. I wish to show first

of all why I consider the Kantian alternative between a world republic and a league of nations to be incomplete (Habermas 2007, 331).”

Habermas’ Alternative to a World Republic

Two overarching ideas figure prominently in Habermas’ writings on human rights enforcement and his proposal for achieving a democratic world society; the first is the *post-national constellation*, and the second is a *cosmopolitan world society*. It should be clear, however, that Habermas is opposed to a *world federation*, or a single State that merges all sovereign States into a single world authority (or a State of States), as there is a difference between advocating for a *world society* and advocating for a *world State*. The former envisions a cosmopolitan society that transcends national borders to include the citizens of all nations, thus creating a type of world citizenship, while the latter would amount to the creation of a globally integrated political, social, economic, civil, and legal order. It should be noted that there have been different proposals offered on world Statehood that do not always agree on what such a world State would look like, or how it might function in practice. In light of this, I will assume that these proposals share the belief that *World State* means a single political world authority, and that (by extension) such a State would be a sole sovereign power.

In sum, a cosmopolitan society is a feature of the post-national constellation, and apart from articulating a system for its emergence and realization, Habermas believes that the process towards a global domestic politics is already underway. The old arrangement that provided the sovereign State with its ability to assert its dominance in the public sphere is eroding before an emerging global order. Habermas says, “Nation-States can no longer secure the boundaries of their own territories, the vital necessities of their populations, and the material preconditions for the reproduction of their societies by their own efforts (Habermas 2006, 176).” This phenomenon of increased global interdependence poses a challenge to the State, but provides the opportunity for the emergence of global domestic politics.

Moreover, there are other things affected by these developments, such as “the every day experience of growing interdependencies in an increasingly complex global society (that)...alters the self-image of Nation-States and their citizens” (Habermas 2006, 177). The identities of Actors begin to shift with the changes in new experiences, and roles assume new ends to strive for and achieve, such as participation or membership in a larger political community. With participation in a larger political community comes new forms of solidarity, and Habermas sees this as an opportunity for the emergence of a cosmopolitan world society that finds a “...growing need for regulation and fair policies at the transnational level (i.e. the intermediate level between Nation-States and the world organization) ...Realistically speaking, we can only envisage a politically constituted world society as a multi-level system that would remain incomplete without this intermediate level (Habermas 2006, 178-179).”

Habermas’ Multi-level System

The multi-level system developed by Habermas contains a hierarchy of institutions that operate in different capacities and with very specific goals (Mikalsen 2013, 308). These institutions represent parts of an otherwise differentiated structure, but together may form a cosmopolitan order or world society.

- Supranational Level

At the supranational level there is a single executive institution, or a “supranational power above competing states” that is responsible for securing world peace and protecting human rights. (Habermas 2006, 132). In this regard, Habermas sees a reformed United Nations as that viable executive authority, and one with enough sanctioning power to secure world peace and oversight of human rights protections (Kleingeld 2004, 320). Under Habermas’ reforms, many of the current organs within the U.N. would remain intact, but be reorganized in ways that maximize the effectiveness of their executive authority. For example, many have argued that the vetoing power of

the Security Council has delayed urgent intervention in times of human rights crisis. Habermas agrees, and supports limiting this veto power as an attempt to divorce political consideration of State interests from the business of promoting world peace and protection human rights (Habermas 2006, 163-164).

Additionally, Habermas is in favor of maintaining the General Assembly, but proposes modifying its function while limiting the scope of its role. The General Assembly, then, would consist of two separate chambers (following David Held), and have a body of States in one, and a body of Representatives for *world citizens* in the other (Habermas 2008, 449). Further, the General Assembly (acting as a world parliament) is limited to the interpretation and elaboration of the U.N. Charter. The United Nations as the executive authority would be tasked with the enforcement of established law that would take precedence over policy-making and legislating, and this would give weight to its characterization as a supranational agent acting on delegated powers (Kleingeld 2004, 308).

Habermas advocates for the U.N. strengthening its core institutions, but with the goal of separating from them so as to form an independent existence from the executive. On this point he says, “The pending reform of the U.N. must therefore not only focus on strengthening core institutions, but at the same time aim to detach that core from the shell of its special organizations (Habermas 2007, 335).”

- Transnational Level

At the Transnational level, Habermas envisions the creation of regional or continental regimes that possess sufficient representative power to negotiate for large territories. The regional regimes create effective *global players* who might treat issues such as global energy, environmental, financial, and economic policies. The model that Habermas has in mind is a European Union style transnational organization. In this model, the regional organization is able to craft their policies in a

way that addresses the unique concerns of regional States, and would be able to form changing coalitions, negotiate binding compromises, and create checks and balances among State parties (Habermas 2007, 336). With an effective U.N. security regime in place, Habermas believes that even the most powerful *global players* would be prevented from resulting to war as a legitimate means of reaching a solution. Further, the growing interdependencies of the global economy and an emerging world society overtax the national bonds of legitimacy (Kaul 2001, 591-592). In response, Habermas proposes the creation of regional regimes that provides its citizens with an identity beyond their respective States, where such individuals come to conceive of regional agreements as a plan for or against the organizations interests, and, by extension, the interests of its citizens.

The transnational level, then, is seen as a negotiation forum of States that collectively form a continental union, one where the regional organizations acquire a foreign policy of their own and, at the same time, develop an identity that transcends the Nation-State. States and individuals become (more or less) members of the European Union, African Union, and so on. These new forms of identity and regional citizenship create new forms of solidarity. The extension of the feeling of a post-national solidarity furthers the cosmopolitan condition that would establish the world society envisioned by Habermas.

- National Level

As previously stated, the challenges posed to the Nation-State by globalization processes call for new approaches to governance, and suggests that although the State might retain a prominent role in a reformed global politics, the Nation-State will undergo a transformation that limits its territorial sovereignty, subjects it to oversight of its treatment of its citizens, and limits its use of military force to resolve international disputes.

At first glance, it may appear as if States gain little ground in Habermas' multi-level system. However, the outline offered relies upon a strong State apparatus that redefines, instead of

diminishes, State sovereignty and power. In a word, the State-centric approach has become unsustainable and, in Habermas' view, the Nation-State is in a sort of *legitimation crisis*. His proposal, though, would not only extend legitimacy to the State in the form of new participatory roles for national government, but extend participation to non-governmental organizations and citizens (Held 2009, 541-542). Further, the Nation-State is being shaped by emerging economic, political, and military agreements, and although such agreements have been around for some time, they are becoming more common place. Also, the effective partitioning of mandates (differentiated throughout the levels of the multi-level system) ensures that no one State is burdened with the expenditure of energy and resources by engaging in matters beyond its regional or national concerns.

The national State also serves as a model for the types of “backing from the kinds of democratic processes of opinion-and will-formation that can only be fully institutionalized within constitutional States, regardless of how complex federal States on a continental scale may become. This weak form of constitutionalism beyond the Nation-State remains reliant on continual provisions of legitimacy from within State-centered systems (Habermas 2006, 141).” With this, the perseverance of the Nation-State in Habermas' model is necessary if the supranational and transnational levels are to enjoy any measure of legitimacy. Indeed, for the realization of a legitimate and operational multi-level system to take hold, a Constitutionalization of its legal personality must be fully enshrined, and the inspiration for the realization of such a far-reaching constitutional project will itself have been an outgrowth of the national constitution of the State.

Constitutionalization of International Law

As pointed out, the E.U. is a tangible model for what Habermas has in mind when he discusses global players, an effective transnational level, and a continental or regional organization. What qualifies the E.U. as a possible blueprint is the Lisbon treaty of 2009 upon which it now rests. In fact, it would not be inaccurate to describe the Lisbon treaty as the architecture of a constitution for

Europe, or its European Union member States. Thus, the E.U., as a transnational model, requires further consideration if we are to appreciate Habermas' vision of duplicating it across different regional territories. First, the E.U. is credited for preventing the outbreak of war within Europe, which is significant considering that both World Wars were initially European conflicts. It is also said that the successful (some would dispute the word *success*) post WWII monetary integration of close to 30 sovereign States was a brilliant move on the part of political leaders across Europe, and one that required them to look for a solution to the wars so seemingly common place in Europe. Second, in 2009 the Lisbon treaty established what might be considered a regional (democratic) domestic politics (Sprungk 2013, 547-549) that could further serve the purpose of guiding a larger global domestic political system. For example, the treaty established a Presidency, a foreign minister (called the "high representative") (Tsebelis 2013, 1084), change the voter rule of unanimity to that of requiring a double majority, and made the Charter of Fundamental Rights (the Union's bill of rights) legally binding.

In his book, "The European Crisis: A response," Habermas articulates the processes of the development of the constitutionalization of the State, and the legal bureaucracy associated with it. There, he explains that law and politics have been viewed as two sides of a single coin that goes as far back as the idea of the State. It has served (in the past) as the means for organizing authoritarian forms of government, and was an indispensable form of legitimacy for ruling dynasties. Laws, and judicial powers enjoyed by the king, were derived from a sacred lineage from or divine link to, the mythical gods, and then from the appeal to religious or natural law. Before the legitimacy of authority could become "legally institutionalized consent of those subjected to authority," (Habermas 2012, 8). However, political authority had to be secularized and law had to be positivised. Habermas goes on to say that, "Only with this development could that democratic juridification of the exercise of political authority which is relevant in the present context begin" (Habermas 2012, 8).

The process of juridification not only goes beyond developing a rationalization, but also has the added effect of a sort of civilizing force when it divests the authoritarian character and transforms the character of the *political*. The old arrangement eventually evaporated within the domestic sphere first, particularly with the constitutional revolutions of the eighteenth century, giving us instead the constitutional State where private citizens became democratic national citizens. This rejected the notion of *internal enemies*, replacing it instead with the notion of *criminals*. Thus, it is easy to envision a similar process among State actors in the international system, especially when all domestic opposition to the State has been suppressed through criminalization (Habermas 2012, 7-9).

With the League of Nations and the United Nations there was an emphasis placed upon the passivity of State actors, or a goal of creating dispute resolution processes to curb the anarchic tendencies at the international level, that, historically led to war. Habermas believes that by dint of the cooperative nature that international law has taken (through the prohibition of State violence) it will not only create the conditions for creating new supranational procedures, taming economic forces, and the facilitation of the emergence of vital international institutions, but that it could lead to a broader reaching cosmopolitanism, and perhaps provide a global constitution for a world society (Habermas 2012, 9-11).

A World State vs. A World Society

It has been argued that Habermas' multi-level system is more in line with a world State than he is willing to admit. In my view, however, Habermas' proposal aims to accomplish something different than a world State altogether, which he defines as "global governance without a global State." The confusion between a multi-level system and a world State may be due to the goals that the cosmopolitan society is expected to achieve.

A world State would entail the consolidation of political authority, social society, and economic markets into a single government, which would negatively impact culture and identity. It would also

entail stripping States of their sovereignty as they merge with the new global State, thus curtailing the rights of the State citizen and posing challenges to long-standing practices of freedom and liberty. Further, a State of States is not a solution because it could conceivably present the same danger that initially led to its creation, such as the cessation of interstate conflict leading to war, and State violence against human rights. Notwithstanding the problem of organized violence, such a State of States could also prove too hard to tame should it decide to violate human rights, and would leave no one capable of protecting such rights due to the sweeping power vested in it.

Alternatively, a world society that thrives under the system proposed by Habermas leaves the State's internal, popular sovereignty intact, and alters its external sovereignty only to the extent that it provides a stronger framework for protecting human rights. At the transnational level, global players are asked to create regional organizations tasked with formulating policies to deal with challenges that are exclusively their own. At the supranational level stands an executive adhering to a global constitution and providing oversight that extends to its own specific area of concern. Further, with the creation of a second chamber for world citizen representatives within the General Assembly of the U.N., along with their combined role of interpreting and legislating on strictures laid out in the U.N. charter, Habermas provides legal standing to world citizens at the highest levels, and gives his model a blueprint for garnering legitimacy. Lastly, Habermas' multi-level system aims to create dual citizenship in a bid to realize a cosmopolitan world society—the citizen of each respective nation would remain, but the birth of the global (or World) citizen would accompany it.

Criticisms of Habermas

Andreas Føllesdal has criticized Habermas for the emphasis he places on European identity. Føllesdal takes issue with the claim that the common political identity necessary to ground a strong form of civic solidarity requires unique characteristics from members of the political order to the exclusion of outsiders (Føllesdal 2009, 78, 85).

Føllesdal further argues that: Habermas's position on the need for a common European identity based on the need for trust within majoritarian democratic institutions is likewise Eurocentric. According to Føllesdal, Habermas supplies such an identity in common historical experiences, traditions, and achievements (Føllesdal 2009, 85), but Føllesdal points out that many of the values and norms from which Habermas appeals for European unification are in fact shared elsewhere (Føllesdal 2009, 86). Føllesdal's own position is that "...human rights norms may well be part of—though not all of—a common political identity suited to build trust among members of a political order" (Føllesdal 2009, 88).

Responding to Føllesdal's accusation of Euro-centrism, Edward Demenchonok argues that Habermas's cosmopolitan vision of creating a world society is built upon a normative framework grounded in human rights and constitutional States. He says:

...the constitutional state is supposed to ensure that different communities of belief can coexist peacefully on the basis of equal rights and mutual tolerance. These problems should be approached from the perspective of egalitarian universalism, which orients civic solidarity towards a solidarity among "others," universalistic constitutional principles and human rights. Mutual recognition implies that religious and secular citizens are willing to listen and learn from each other in public debates. The political virtue of treating each other civilly cannot be prescribed, but can only be learned (Demenchonok 2012, 349).

In addition, Demenchonok argues that mutual recognition for Habermas is found in a free, open, and tolerant society of peoples of difference. In such an environment, mutual respect and public dialog will foster a strong civic solidarity within and beyond the State. Responding to Føllesdal, then, Demenchonok can be understood to be implying that even in a shared historical experience like World War II, the Jewish people lay claim to an identity that the French people cannot, although both were impacted by the same world conflict. Their meanings and experiences are different, even if both share in the same transformative historical event.

Remarks

Habermas' multi-level system provides an alternative to a world State by offering a vision of a world society instead. The effective collaboration between the national, transnational, and supranational levels within it create the ideal conditions for the enforcement of human rights, a cosmopolitan consciousness, and State adherence to a global constitution. It creates a global citizenry, while respecting the national citizenship that human persons might already possess, and provides both with legal standing before international law.

In sum, Habermas and Kant share the goal of creating a cosmopolitan society and a global constitution to reduce the likelihood of war among States, and to strengthen human rights enforcement without necessarily resorting to the idea of a global State, but Habermas goes further than Kant with the inclusion of religious and cultural differences, and by supplying a more detailed function of the different levels (and institutions) within his multilevel system. In addition, Habermas' framework does not hold out the implicit expectation for the emergence of a system the creation of which poses challenges to the project itself, but instead proposes a redistribution of power, roles, and functions in a system that includes existing institutions that would be reformed or further developed.

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INTERDISCIPLINARY CONDITIONS FOR HR ENFORCEMENT AT THE ICC

Alexander Wendt and Jürgen Habermas view the territorial sovereignty of the State as an obstacle for human rights enforcement (Wendt 2003, 522; Habermas 2006, 133), but disagreement over the precise combination of safeguards (for individual persons) necessary to address the shortfall of enforcement mechanisms remains. In addition, the two proposals call for additional limits on State sovereignty (Wendt 2003, 524; Habermas 2006, 135), and problematize the current structure for human rights enforcement as too State-centric (Wendt 2003, 516).

The difficulty faced by an interdisciplinary approach to the problem of human rights enforcement is navigating the disciplinary terminology of relevant proposals. Despite this, finding common ground between Wendt and Habermas is possible because, a) both are in agreement on the overall problem, and b) both propose similar solutions to it. Their conclusions differ in the extent to which they attempt to address their own concerns on the severity of the same problem. My own view is that the International Relations (IR) approach of Alexander Wendt, and Habermas' emphasis on Philosophy, Political Science, and International Law, complement one another in answering the question of *what conditions must be met in order to provide the International Criminal Court with more robust mechanisms for enforcing human rights.*

Wendt and International Relations

Wendt's world State inevitability theory suggests that territorial sovereignty poses the biggest challenge to individual and State struggles for recognition. He supports limiting State sovereignty to the extent that the territorial State ceases to be defined by borders and territory; he is less clear on what the State's identity might look like after being subsumed by a World State. In addition, Wendt fails to elaborate the ways in which individual subjectivity would be increased through a World State, and many questions remain over whether his World State would be effective if it fails to consolidate coercive force under its authority, and leaves this task to a third party, or the very States that it was

created to replace. Furthermore, the vulnerability of Wendt's World State suggests that mutual recognition, though more complete, might still experience significant inequality. If the World State's emergence satisfies all of the conditions for State and Individual needs of recognition, and if the emergence of such a State is premised on transcending the anarchy which is the product of incomplete recognition in the first place, then regression to any of the previous stages of anarchy calls the World State (as a viable solution) into question.

Apart from the arguments for or against World Statehood, Wendt provides some useful concepts to be extracted for interdisciplinary integration; they are:

- Individual and State struggles for recognition and security
- Socially constructed meanings among States and individuals
- Identity Formation, and
- Collective Memory

Anarchy—A feature of IR Theory

The concept of *anarchy* among States in the international system is a fundamental theme in the discipline of IR. Anarchy is understood as: the absence of a common authority to make and enforce rules, or the absence of government (Waltz 1979, 102; Sjoberg 2012, 6). Prior to Wendt, the assumption was that anarchy served as a necessary constraint on actors in international politics.

Wendt is in general agreement with most IR scholars regarding the belief that Anarchy is a feature of the international system, but makes a departure in arguing that anarchy can be destructive or constructive, and that anarchy is not static; rather, anarchy fluctuates with the changing conditions and practices of States.

In connection with the conditional effects of anarchy, Wendt says, "Let us assume that processes of identity- and interest-formation have created a world in which States do not recognize rights to territory or existence—a war of all against all. In this world, anarchy has a "realist" meaning

for State action: be insecure and concerned with relative power. Anarchy has this meaning only in virtue of collective, insecurity-producing practices...” (Wendt 1992, 410). Here, Wendt is suggesting that anarchy can produce conflictual or cooperative relations among States depending on shared meanings among them (Ibid, 399).

Constructivism and Identity

Wendt extends Constructivism to International Relations, and thereby raises the possibility of transforming the international system from that of a conditional anarchy, to one of greater stability through identity and interest formation. Wendt explains that “A fundamental principle of constructivist social theory is that people act toward objects, including other actors, on the basis of the meanings that the objects have for them” (Wendt 1992, 396-7). The extent to which international politics is socially constructed depends on the meanings that an action (or context) has to the State or actor in the system. Wendt says, “It is collective meanings that constitute the structures which organize our actions” (Ibid, 397), and “Actors acquire identities...by participating in such collective meanings” (Ibid, 397). Just as individuals have many identities connected to their roles in society (e.g. Son, father, brother, manager, teacher, etc.), States have many identities as well. A State, for example, may be thought of as leader of the free world, sovereign, imperial power, etc, and without a socially constructed set of meanings, identity formation is impossible. On this view, identities are the basis of interests and “actors do not have a portfolio of interests that they carry around independent of social context” (Wendt 1992, 398). But if Anarchy is: a) conditional b) cooperative or conflictual, and c) a product of the social construction of States through identity and interest formation, an explanation accounting for the emergence and continuation of anarchy must be furnished. This explanation is provided in Wendt’s theory that Individuals and States struggle for recognition, which includes the desire for: a) identity construction b) identity maintenance, and c) security.

On identity construction, maintenance, and security (which includes States as corporate actors), Wendt argues that,

Recognition is a social act that invests difference with a particular meaning: another actor (“the Other”) is constituted as a subject with a legitimate social standing in relation to the Self. This standing implies an acceptance by the Self of normative constraints on how the Other may be treated, and an obligation to give reasons if they must be violated... there is more to the desire for recognition than simply physical security, for it is through recognition by the Other that one is constituted as a Self in the first place (Wendt 2003, 511).

The need for recognition satisfies a component of identity formation and maintenance that will remain incomplete in a system of anarchy. For this reason, Wendt views anarchy as the force in the international system that (inevitably) leads towards a World State that will satisfy the need for recognition of all human persons and every Nation-State.

World State

Wendt leaves the precise contours of his vision for a World State underspecified. He leaves open the question of enforcement, and even suggests that State armies might still be operative. This contradicts the proposal for a World State that limits the State’s sovereignty on decisions to unilaterally engage in war, which is something that would remain a possibility if the question of militarization goes unaddressed. For example, Wendt says, “...the logic of anarchy transforms structures of recognition and identity from a territorial basis, giving us a *Weberian* world state...” (Wendt 2003, 517), and “A non-*Weberian* approach, especially if it relaxes the monopoly of force requirement, could suggest that a world State is already here (the UN?) or just around the corner...” A world State that satisfies the requirements for recognizing individuals and States must consolidate a monopoly on the legitimate use of force globally, that is, if it is to be *Weberian*. But on the use of force Wendt seems to suggest that,

...subsidiarity could be the operative principle [and] it would not require a single U.N. army. As long as a structure exists that can command and enforce a collective response to threats, a World State could be compatible with the existence of national armies, to which enforcement operations might be sub-contracted...it would not even require a world 'government,' if by this we mean a unitary body with one leader whose decisions are final. As long as binding choices can be made, decision-making in a world State could involve broad deliberation in a 'strong' public sphere rather than command by one person (Wendt 2003, 506).

The only requirements, then, for world Statehood in Wendt's formulation are a) a common power b) legitimacy c) territorial sovereignty, and d) agency. He even suggests that the E.U. is close to meeting these requirements, and if it were to be globalized, the E.U. would be a world State (Wendt 2003, 506).

Additional challenges posed by Wendt's World State proposal include: a) the World States vulnerability. The World State in Wendt's formulation is susceptible to collapse, in which case Wendt argues that the international system will regress to previous stages until eventual returning to the World State stage, and b) collective memory for the motivation among Individuals and States for creating the world State to begin with. Both Individuals and States, remembering the previous state of anarchy, would be motivated towards the creation of a World State (Wendt 2003, 523). What remains unclear is how collective memory would fail to prevent the re-emergence of the World State after its collapse.

Collective Memory

The collective memory of human rights abuses, perpetrated in conflicts such as: World War II, Yugoslavia, Rwanda, Darfur, and Syria have served as motivational, educational, and prescriptive instruments in the development of human rights legislation and enforcement regimes. Collective Memory has played an important part in creating a shared normative framework. Mass media and other globalization processes have ensured that human suffering has an outlet to the world, and

particularly to (what Habermas and Wendt would call) “the global public sphere”. If Wendt is right about collective memory (Wendt 2003, 523) and processes of identity formation through heightened global interaction, then human rights could gain more traction from a sustained public discourse on individual rights during times of war or conflict, and go beyond the territorial sovereignty of the State altogether.

Findings

Alexander Wendt’s proposal for a World State is not a viable solution to the problems posed by an inadequate system of human rights enforcement, because such a State would only supply a thin form of recognition to individuals, and divest the State of its territorial sovereignty. This raises the question as to how the State’s own recognition could be increased by a world State. Further, Wendt fails to provide important details regarding the power structures that would inhere in a world State. For example, it isn’t clear whether States would be sub-contracted for military endeavors, or if the world State would assume total military superiority. If Wendt allows the former, it is difficult to envision an anarchy free international system, if he proposes the later, it is impossible to guarantee that a world State would avoid authoritarian or totalitarian modes of governance that have threatened human rights in the past. However, his proposal is essential in identifying the overall problem that must be addressed by the ICC in order for it to establish a more robust structure for human rights enforcement. Collective Memory is already assumed by raising the enforcement question to begin with, but without a practice that increases individual recognition in the processes of international agencies, such as the ICC, we end up only with moral rights (weak rights); and without increasing individual recognition in international law (strong rights) an adequate system of human rights enforcement will remain incomplete.

Philosophy and Political Theory in Jürgen Habermas

Jürgen Habermas' multi-level system is a proposal for establishing a cosmopolitan world society that finds its normative framework in international human rights. His multi-level system addresses problems that are common to individuals and States, and challenges the current practices of international agencies on the enforcement of human rights. Addressing individuals and States together, over concerns of human rights, supports the belief that improving practices of human rights enforcement will involve a political solution reached through their mutual participation. The transnational level in Habermas' proposal calls for the creation of regional regimes based on the model formulated by the European Union, thus grounds his vision in a concrete model that has achieved a strong sense of solidarity and citizenship among many living within the Euro Zone, thereby making the appeal for replicating it more attractive.

In addition, Habermas envisions the emergence of a *global public sphere* with enough transformative power to form a *global domestic politics*. Globalization processes already pose challenges for State-centric approaches to transnational problems, and the increasing interconnectedness of trade and commerce, communication, and technology is reshaping political landscapes. Moreover, human rights are a global phenomenon that could form the basis of a Constitutionalization of international law, which would require the establishment of a supranational organization. In fact, Habermas specifically mentions the U.N. as the agency which could best fulfill the role of monitoring State compliance with constitutional provisions, while the general assembly could be divided into two separate chambers. The first chamber in the General Assembly would be comprised of States, and the second would be made up of the Representatives of world (global) citizens, and together it would function as a world parliament.

James Gordon Finlayson has identified five major research programs of Jürgen Habermas which spans over forty years of scholarship (Finlayson 2005, 139-142). His program on political theory

attempts to answer the following questions: *How is a well-ordered political system possible, and what makes laws, policies, and political decisions legitimate?* The multi-level system of Habermas answers these questions in different ways with an aim to further human rights and world peace. For this reason, I assume that Habermas' proposal draws upon the discipline of Political Science, while also infusing elements of International Law in emphasizing a need for restructuring national and international political systems, and making an appeal for reconceptualizing international law to include individuals from the *global public sphere*. With this short overview, the disciplinary insights to be extracted from Habermas' proposal for interdisciplinary integration can be summarized as follows:

- Multi-level system
- Civil solidarity, and
- International law

Multi-Level Political System

Habermas' multi-level system would create two additional layers of political architecture alongside of the existing national system (Habermas 2006, 135-136). These additions have implications for States and Individuals under international law. At the supranational level a reformed world organization would promote peace and protect human rights without acquiring the character of a State or World State, thus leaving the Nation-State's sovereignty intact (Habermas 2006, 136). However, the sovereignty of the State would be limited through a global constitution which would serve as a normative framework for intrastate cooperation on human rights (Habermas 2006, 139). In addition, the supranational organization's role would be monitoring States for compliance with the global constitution's provision, while the General Assembly would serve as a legislative body and function as a world parliament (Habermas 2008, 449; Mikalsen 2013, 308).

What is interesting about Habermas' vision for a reformed General Assembly is that it is split into two separate chambers. The first chamber is one of State parties, and the second would be a

chamber of Representatives for world citizens. If these Representatives were to be elected to this body in regional or national elections, it is easy to see how a *global domestic politics* could form. Further, many proposals for reforming the United Nations, establishing a world State, or creating a stronger human rights enforcement regime emphasize a greater role for individuals, while Habermas' proposal places the individual on par with the State at the supranational level in the legislative, decision-making, and drafting processes. This suggests that, to him, not only are individuals underserved by international law, but that full subjectivity under international law should place the individual's rights alongside that of the State's sovereignty (or rights).

The transnational level would create a global domestic politics through the creation of regional organizations that address economic, security, and environmental concerns unique to their geographical regions. The European Union is a good example of a model that integrates economic, security, and environmental policy for some 28 sovereign member States. Habermas' use of the phrase, *global domestic politics* implies a role for national citizens, in their State's decision-making, in transnational negotiation processes. This process creates an extended identity for national citizens, as well as their respective States; they acquire a global citizenship in addition to their national identities, and begin to develop the cosmopolitan condition advocated by Habermas. He says,

In the case of transnational negotiations between continental regimes, the need for legitimation may be met through a connection with the democratic infrastructure of their respective member States, assuming that the negotiation systems themselves ensure a fair balance of powers. At this level, major players are more likely to fulfill expectations of fairness and cooperation the more they have learned to view themselves at the supranational level as members of a global community—and are so perceived by their own national constituencies from which they must derive their legitimation (Habermas 2006, 142).

Here, Habermas is suggesting that legitimation processes of democratic-will-formation among individual citizens could have transformative power beyond the State, and even shape or direct its foreign policy. This would increase individual participation and recognition in the international

system, as well as foster a cosmopolitan condition robust enough to establish bonds of solidarity among individuals for a world society.

Civic solidarity

The multi-level system of Habermas is described as a conceptual alternative to Kant's surrogate proposal to a World State, but Habermas goes on to offer two main reasons for why a World State is not a solution for stronger enforcement practices for human rights and world Peace. The first is *the argument from civil solidarity*, and the second is *the asymmetry argument*. These critiques go beyond a revision of Kant in the sense that Habermas' critique could be extended, and applied, to more recent proposals for establishing a World State (Wendt 2003, 502; Reves 1945, 291).

In "Kant and Habermas on International Law," Kjartan Koch Mikalsen provides two general arguments for why Habermas rejects a World State. The first is described as: *the argument from civil solidarity*. Habermas doubts the possibility that a World State would be democratic in any meaningful sense (Mikalsen 2013, 309). Here, the biggest obstacle is believed to be the absence of a thick global identity to ground a strong civic solidarity. In light of its non-exclusiveness, a World State would fail to provide a basis of legitimacy on structural grounds (Mikalsen 2013, 309). Robert Fine and Will Smith object to this argument by pointing out that even if knowledge about actual democratic practices provides good grounds to doubt the feasibility of a world State, this doesn't mean that it is altogether [conceptually] impossible (Fine R; Smith, W. 2003, 486; Mikalsen 2013, 310); Mikalsen, however, believes that this reply misses the point. The claim of Habermas "...concerns the pragmatic presuppositions for democratic practice, and refers to a conflict between the idea of a world republic and the ethos of democratic citizenship—that is, the performative aspect of being a citizen [...] At issue [...] is the need for a common "we"-perspective that can motivate special obligations towards fellow citizens who nevertheless remain strangers and political adversaries" (Mikalsen 2013, 310) "brackets mine".

Habermas emphasizes an active *civic solidarity* that finds its realization in a collective identity. This distinguishes a strong solidarity from the more negative or reactive form of solidarity considered to be weak. In an inferior form of solidarity, humanity is united through

...common responses of indignation and outrage when confronted with grave violations of human rights and acts of aggression, as well as of sympathy for those who suffer due to natural and humanitarian disasters. On the basis of the latter, an all-inclusive world-organization could be empowered to pursue goals like human rights protections, and international peace and security. For the pursuit of political goals and projects beyond this, the social bonds among world citizens are too weak (Habermas specifically has redistribution policies in mind). Globally, a thicker context of common value orientations that enable citizens to see themselves as one community engaged in the joint practice of self-legislation is absent (Mikalsen 2013, 310).

Hence, the institutionalization of practices for creating, generalizing, and coordinating interests on a global scale cannot crystallize within the organizational structure of a world State due to its inability to form a thick, civil solidarity (Habermas 2008, 445).

International Law

The second reason offered by Habermas for opposing a world State is found in *the asymmetry argument*. The goal of this argument is to undermine the claim that in order to establish a binding system of international law, a world State is conceptually necessary (Mikalsen 2013, 310).

It has already been mentioned that Kant preferred the emergence of a world State, although he proposed a league of voluntary States as a *surrogate* instead. Kant looked at the anarchic nature of international relations among States, and concluded that States were in the same condition as individuals in their state of nature (i.e. war of all against all, brutish, short, and violent). The establishment of the State was the solution to the dilemma that confronted individuals in their State of nature, which suggested that a similar solution might be found for a hostile international system of States in the creation of a World State. Habermas calls this: *The misleading analogy of the state of nature*

(Habermas 2006, 130). For Habermas, there are important differences between the national and international legal orders. States have developed an internal legal order and enjoy a normative framework that must be considered when attempting to formulate a model for international law. On this point, Habermas explains that,

In contrast to individuals in the state of nature, citizens of competing States already enjoy a status that guarantees them rights and liberties [however restricted]. This disanalogy is rooted in the fact that citizens of any State have already undergone a long process of political formation and socialization. They possess the political good of legally secured freedoms which they would jeopardize if they were to accept restrictions on the sovereign power of the State which guarantees this legal condition (Habermas 2006, 129).

Habermas believes that the curriculum that States and their citizens must undergo, to transition from classical international law to a cosmopolitan condition, is “*complementary* rather than *analogous* to the curriculum in which citizens of constitutional States have already graduated in the course of the juridification of an initially unconstrained State power” (Habermas 2006, 130) “italics mine”. The challenges of binding State power by law externally are different from binding State power by law internally (Mikalsen 2013, 312), and given the fact that States control the legitimate use of violence in their respective territories, the State must have a role in extending this legitimacy to a politically constituted international community (Mikalsen 2013, 312-313).

Findings

Jürgen Habermas’ proposal for restructuring the international system through a multi-level approach aims to address the problem of human rights enforcement and anarchy among States (Habermas 2006, 136; Habermas 2006, 129). In his opinion, this requires reforming the United Nations by equipping it with the ability to function as a supranational organization that could effectively enforce a global constitution over a society of global citizens and States; he repeatedly

stresses that his multi-level system is an alternative to a world State solution. The current arrangement of the Security Council, with all of its veto rules, prevents an effective system of human rights enforcement and world peace from emerging, and individuals (who are the subjects of human rights) are excluded from recognition under international law. Expanding the Security Council and democratizing the veto will begin to address the inequality among States in international law (Habermas 2006, 147; 169-170; 173). Therefore, Habermas has argued that a political solution must include both individual and State actors if it is to meet the challenges of an increasingly interconnected world.

Habermas' multi-level system preserves popular sovereignty through limiting territorial; something that may seem like more of a paradox than a solution. However, given the fact that States lack the coping mechanisms to respond to processes that challenge outmoded practices connected to the territorial State, Habermas's proposal can be viewed as an attempt to preserve the territorial State through reconceptualizing its limits, and in turn maintaining those aspects which are the sources of legitimacy, solidarity, and identity necessary for the emergence of a cosmopolitan world society.

Combining Wendt's world State inevitability theory with Habermas' Multi-level system proposal supplies the conditions that must be met in order to provide the ICC with more robust mechanisms for enforcing human rights. However, these conditions alone fail to show their transformative power through their application in practice. What must still be shown, then, is how each theory can be used to provide an answer to the research question, while also exploring the possible outcomes that these changes are expected to have on existing international institutions and structures. In the next chapter I will analyze the findings from the proposals of Wendt and Habermas, and through integrating their insights arrive at the conditions that must be met in order for the ICC to create

stronger mechanisms for enforcing human rights.

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MULTILEVEL INTEGRATION AS A CONDITION FOR HR ENFORCEMENT THROUGH THE ICC

The question that has guided this research can now be answered combining the disciplinary insights of Alexander Wendt and Jürgen Habermas. Their views on a) individual and State struggles for recognition, b) the need for mutual cooperation of individuals and States, as well as c) the instrumentality of collective memory, provide a starting point for finding common ground between the two theorists in order to develop a solution to world peace and human rights enforcement. There exist some useful parallels between Habermas' multi-level system and Wendt's five stages of anarchy and State development.

The Question, Answer and Objection

Q: *What conditions must be met in order to provide the International Criminal Court with more robust mechanisms for enforcing human rights?*

A: *The International Criminal Court's enforcement system for human rights can be improved through limiting State territorial sovereignty by creating procedures for victims to participate in its referral process for investigations and case selections.*

Objection:

In light of Alexander Wendt's theory that States and Individuals are engaged in a mutual struggle for recognition, which creates and sustains anarchy, *wouldn't limiting State sovereignty to provide greater protection for human rights solve only the recognition deficit for individuals, leaving State struggles for recognition unresolved, and thereby threatening the solution to improve individual recognition altogether?*

The Need for Recognition

Alexander Wendt and Jürgen Habermas view the international system of States as anarchic in nature (Habermas 2012, 338; Habermas 2006, 129; Wendt 2003, 517), but their prescriptions for

world peace, and a stronger system for enforcing human rights seem to point in opposite directions. The terminology both use to describe the problem of instability suggests that their proposals have little in common. A deeper examination of their actual positions reveals otherwise.

Wendt reduces *anarchy* to struggles among individuals and States for mutual recognition and security (Wendt 2003, 510-511). These struggles will continue until full recognition is satisfied by a system guaranteeing equality for individuals and States. Similarly, Habermas maintains that a multi-level system could guarantee equal representation for States and individuals and provide the foundations for a cosmopolitan world society (Habermas 2006, 139-143). A cosmopolitan condition requires a thick form of solidarity that transcends the territorial borders of the State, creating a sense of *we* (instead of *us*) among a world citizenry. Both view territorial sovereignty as an obstacle to world peace and progress for individual recognition, and both propose systems that might limit State territorial sovereignty and increase individual rights.

Moreover, conflict among States produce the conditions under which human rights may be violated, and these conflicts reveal that although the State enjoys an almost exclusive position under international law today, inequality among States (the absence of mutual recognition between States) remains a problem. Therefore, Wendt and Habermas address State struggles for recognition as complementary to solving the shortfall in individual human rights, and propose solutions that involve their mutual cooperation.

Alexander Wendt treats three separate issues relating to struggles for recognition, and Habermas addresses the same when discussing his multi-level system and vision for a cosmopolitan world society. Firstly, there is the individual desire for recognition and its relationship to collective identity or solidarity (Wendt 2003, 510-512; Habermas 2006, 143,177). Secondly, there is the instability of asymmetrical recognition (Wendt 2003, 512-516; Habermas 163, 165, 176, 178), and thirdly, there are levels on which the struggle for recognition is played out in world politics (Wendt 2003, 516-528;

Habermas 2006, 136). In Habermas' writings, the three levels that make up his multi-level system correspond roughly to the five stages of anarchy and State development in Wendt's proposal. In the next section I will discuss two of these levels, and treat the structural portions of their proposals separately.

Recognition and collective identity

Wendt explains that his argument on individual and State desire for recognition is structural, and to assume any movement within a structural theory requires the discovery of a goal-seeking element (Wendt 2003, 510). Accordingly, mutual recognition is the goal of his proposal for increasing individual and State agency, and prohibiting expressions of State sovereignty that allow armed conflicts and war to occur. Recognition may be affirmed or denied, but when affirmed by an actor the *Other* is "...constituted as a subject with a legitimate social standing in relation to the Self. This standing implies an acceptance by the Self of normative constraints on how the Other may be treated, and an obligation to give reasons if they must be violated" (Wendt 2003, 511). Further, it is only through recognition that people can acquire and maintain a distinct identity; their desire for recognition, then, is a desire for recognition of their difference (Wendt 2003, 511). Wendt groups recognition into thick and thin forms, and explains that thin recognition entails an acknowledgement as an independent subject within a community of law, and that "To be acknowledged in this way is to have the juridical status of a sovereign person rather than an extension of someone else (like a child or slave), and thus to be a legitimate locus of needs, rights, and agency..." (Wendt 2003, 511).

In contrast to thin recognition, thick recognition is about being recognized for what makes one unique or special (Wendt 2003, 511); thick recognition is open-ended in ways that thin recognition is not. Hence, virtue, success, and power, to name a few, are never-ending pursuits. The desire for recognition, then, is about being accepted as different, while mutual recognition implies two or more people, groups, or States, and is, therefore, a collective enterprise that turns on considerations of

solidarity and collective identity. Indeed, Wendt explains that, “The starting point for this claim is that by recognizing the status of the Other and accepting the normative constraints on the Self which that implies, one is making the Other part of the Self—she is no longer purely ‘Other.’ When recognition is reciprocal, therefore, two selves in effect become one, a ‘We’ or collective identity...” (Wendt 2003, 512). Wendt’s proposal for a world State is about establishing mutual recognition between individuals and States, and among States. Without achieving this level of reciprocity, mutual recognition cannot be realized because “...two (or more) actors cannot recognize each other as different without recognizing that, at some level, they are also the same” (Wendt 2003 512).

In order for mutual recognition to flourish it must be domesticated and centralized under the authority of the State, that is, the World State. On this point Wendt says, “...what matters to world State formation is only that the struggle for thick recognition be ‘domesticated’ over time—in the sense of accepting non-violence and the authority of the state-whatever its particular objectives might be” (Wendt 2003, 512). Despite this explanation, the question of whether an alternative political formation might be able to achieve mutual recognition (according to the meaning assigned by Wendt) still remains.

If the goal of Wendt’s proposal is to develop a system for the realization of mutual recognition between individuals and States, what is missing is the basis for the normative framework he says is necessary for constraining individual and State behavior. In Wendt’s view, the challenge posed for the world State is to domesticate its practices in ways that increase recognition and domestic legitimacy for the world State. This is where the proposal of Jürgen Habermas intervenes to suggest a) a normative framework, b) important insights on domesticating global politics, and c) civic solidarity, all of which intersect and reinforce each other in Habermas’s multi-level system.

On the subject of individual recognition, Habermas employs the language of *civic solidarity*, which implies both the existence of individual and group identity formation, and mutual recognition

among and across groups and individuals (Habermas 2008, 450). This satisfies the distinction made by Wendt between recognition and mutual recognition. The term *solidarity* suggests that there exists convergent ideas, beliefs, norms, or values that bond two or more groups (or persons) together; *purpose* too is implied in the term, but solidarity also contains an element of difference in its meaning. Civic solidarity, then, requires a normative framework which binds people together, although they remain complete strangers with different political, cultural, and religious identities (Habermas 2012, 345-346).

The democratic Nation-State has proved instrumental in taming domesticated violence and conflict through the Constitutionalization of a body of norms (Habermas 2007, 338). These norms form the foundations upon which national solidarity has, historically, been built, and though the processes that account for legitimation, recognition, and solidarity within the State are imperfect, they are a starting point for proposals of forming civic solidarity beyond the State. In conceptualizing a civic solidarity beyond the State, then, Habermas supports preserving the legitimation processes, found at the State level, as a strategy for extending legitimation to a supranational level above it. He says,

Halfway democratic procedures of legitimation have until now been institutionalized only at the level of the Nation-State; they demand a form of civic solidarity that cannot be extended at will beyond the borders of the Nation-State. For this reason alone, constitutions of the liberal type recommend themselves for political communities beyond States or continental regimes such as the E.U.” (Habermas 2006, 139).

Moreover, he adds:

...this interrelation between the rule of law and democracy would necessarily be dissolved if supranational constitutions were completely severed from the channels of democratic legitimation which are institutionalized within the constitutional States. Hence, liberal constitutions beyond the State, if they

are to be anything more than a hegemonic façade, must remain tied at least indirectly to processes of legitimation within constitutional States (Habermas 2006, 140).

Therefore, the Nation-State becomes the basis of extending legitimation and civic solidarity beyond the State, and remains connected to it as a feature of a cosmopolitan world society.

Interestingly, in Habermas's multi-level system the Nation-State gains in recognition among other States, while individuals gain in recognition under international law through further restrictions on State territorial sovereignty (Habermas 2008, 450). These restrictions are achieved by granting an additional international legal status to the *citizen* of the Nation-State, and through the State's recognition of this new status cooperation proliferates, as do the mechanisms for the pursuit of State interests (Habermas 2008, 450). What makes this undertaking viable is a normative framework whose principles extend beyond State borders, which could be monitored by a supranational organization, and eventually constitutionalized under international law. Habermas suggests that the U.N. Charter might serve as a blueprint for such a global constitution (Habermas 2006, 158-160), and that through reforming the U.N. and particularizing its function as a world parliament, States (regardless of their military or economic power) would be held to equal standards for the enforcement of human rights and world peace. Human rights, then, provide a normative foundation for constitutionalizing international law and addressing the deficit in mutual recognition between States and individuals.

The establishment of a global, multi-level system will not leave domestic politics unaffected. In fact, domestic politics will be enhanced by the addition of a supranational and transnational level that draws upon the democratic-will formation of national populations; popular sovereignty will increase within the State, and thrust the State into new supranational and transnational spaces. Regional unions within the multi-level system create additional layers of political engagement and extend the public sphere beyond the borders of the State, and citizens of the Nation-State acquire a

new identity and become dual citizens with an interest in regional and global politics. Furthermore, Habermas envisions a role for individuals in State negotiations and agreements, while member States weigh and consider the views of their constituencies in their policy making (Habermas 2012, 347).

The foregoing can be summarized by emphasizing that a) Alexander Wendt and Jürgen Habermas agree that the individual's struggle for recognition can only be addressed through further limits on State territorial sovereignty; b) a supranational authority (Whether a multi-level system for Habermas, or a world State for Wendt) requires a normative framework strong enough to create bonds of solidarity and fraternity across cultural, religious, and political divides; c) this normative framework is provided by human rights; and d) the Nation-State will play an important role in securing individual human rights and maintaining world peace.

Asymmetrical Recognition

Asymmetrical recognition is unreciprocated recognition. If the desire for recognition is about receiving recognition from the *Other*, then it is conceivable that recognition can be given without being received (Wendt 2003, 512). Even where partial recognition is present, a hierarchy of asymmetrical recognition may exist. At the extreme end of the spectrum, this type of recognition is completely unreciprocated, while more subtle forms of asymmetrical recognition appear to satisfy mutual recognition, but produce inequality. An example of this is captured in the difference between the peasant and nobleman, where the peasant enjoys some subjectivity but not as much as a noble (Wendt 2003, 513). Wendt argues that all such hierarchies have one thing in common: "...one actor satisfies its desire for recognition by denying full recognition to another (Wendt 2003, 513).

A State or environment wherein asymmetrical recognition thrives is an unstable end-state. The recognition of some individuals or groups produces a struggle for full recognition among other, unrecognized or under-recognized groups, and "...once their desire for recognition is activated into resistance stability will be costly to maintain" (Wendt 2003, 513). In addition, asymmetrical forms of

recognition tend towards coercion and restrictions on freedoms since “One can only be free if recognized as such, and that recognition is only valuable if it is freely given” (Wendt 2003, 514). Drawing on ideas taken from Hegel, Wendt questions whether the subjectivity of individuals is truly fulfilled in asymmetrical recognition, and using the master-slave relationship he explains that “...the failure to recognize the slave calls the master’s own subjectivity into question. Recognition is only valuable if it comes from someone perceived as having worth or dignity, and since the slave is not his recognition of the master is ultimately ‘worthless’ (Wendt 2003, 513).

Habermas supports a symmetrical form of recognition for establishing a world society as a cosmopolitan condition requires recognizing oneself and others as equals despite their difference, diversity, or national origin. He says, “...the inclusion of all persons in a cosmopolitan political order would demand not only that everyone should be accorded political and civic rights but in addition that the ‘fair value’ of these rights should be guaranteed” (Habermas 2008, 450). Hence, asymmetrical recognition presents challenges for a system of shared political values due, in part, to the inequality that underlies its foundations.

When the foregoing is considered, it should be clear that Wendt and Habermas are advocating for a symmetrical form of recognition. Their agreement suggests that a) asymmetrical recognition is part of the problem for human rights and world peace, and b) only symmetrical recognition can (in the long run) produce the civic solidarity necessary to establish a world society, and generate the processes required to achieve a balance between State sovereignty and human rights.

Multi-Level Structures

Jürgen Habermas’s multi-level system and Alexander Wendt’s five stages of anarchy and political development have two themes in common; a) limiting State territorial sovereignty is part of any solution for increasing individual recognition, and b) a solution to State struggles for recognition in

the international system must also be addressed to develop a strong enforcement system for human rights. My question addresses the former while suggesting steps for solving the latter.

- Alexander Wendt's Five Stages of Anarchy

Alexander Wendt's explanation for *why a world state is inevitable* rests on empirical evidence (Wendt 2003, 503, 526). The bulk of the empirical evidence for Wendt's position is historical in nature, and can therefore be contested as one among many possible interpretations on the influence of historical events for the development of political and identity formation. Despite his assertion that "What follows is a conceptual rather than historical argument, in the sense that the proposed stages refer less to a necessary temporal sequence than to logical problems of recognition that must be solved for a world State to emerge" (Wendt 2003, 517), Wendt actually orders his stages in a linear fashion, suggesting that every successive stage was a graduation from historical periods that were outmoded and inadequate to address the challenges posed by changing struggles for recognition among States and individuals (Wendt 2003, 517-530). Each stage represents a historical moment of development, and captures characteristics that might aid in the discovery of how far the system has traversed toward the creation of a world State, "but that does not preclude the possibility of skipping stages or solving several problems at once" (Wendt 2003, 517). Consequently, the criticism leveled against Wendt's world State proposal by Shannon (Shannon 2005, 582-584), which questioned why a world State might be chosen instead of an alternative political formation to address the same concerns over deficits of recognition, has merit.

Further, Wendt conflates the terms "mutual recognition" with "full recognition" while arguing that the world State (as an end-state) is the best and most stable of the five stages he identifies. But the question remains over how a world State that satisfies "mutual recognition" could be susceptible to an anarchy that may cause it to regress to any of the previous four stages, especially if the realization of mutual recognition truly means an *end* to anarchy. We have reviewed the difference

between the proposals of Emery Reves and Alexander Wendt, both of whom have argued from historical evidence that a world State is the best alternative to an otherwise anarchic system (Wendt 2003, 503, 523; Reves 1945, 113, 122). The difference is that Wendt claims that the international system is teleological (has a purpose), and that a world State is therefore inevitable. Reves suggests a greater measure of *agency* for States and individuals in the creation of a world State, while both Wendt and Reves emphasize the collective memory of humanity in developing an ethos and solidarity that could aid in establishing it.

Pending further clarification on the contours of Wendt's world State proposal, I will avoid passing a decisive judgment on the viability of its establishment. That said, the points found in his proposal, particularly in the five stages of anarchy, are relevant for informing how the ICC might limit State territorial sovereignty in order to provide a more robust structure for enforcing human rights. I want to emphasize two points, however, before moving on. Firstly, my question seeks to discover a solution to an inadequate process for protecting human rights, and asks how the *current* structure for enforcing human rights at the ICC can be improved. The initial question, then, attempts to use existing institutions to a) formulate a stronger human rights enforcement regime, b) (and as suggested by the two proposals) limit State territorial sovereignty, and perhaps c) create more recognition among States as a result. Secondly, even in Wendt's fifth stage of development (the world State stage) there are noticeable tensions for securing individual and State recognition, and it is nearly impossible to conceive of the State retaining any noticeably significant identity after being subsumed by a world State. If a thick form of solidarity is required to secure a stronger system for the protection of individual human rights, and if the bonds of solidarity have, historically, been sufficiently refined only within the territorial State, then the continued existence of the State is necessary for any solution to individual deficits in recognition to be secured through internationally recognized legal rights.

Accordingly, three of Wendt's five stages of anarchy and political development are relevant to the initial research question. In stage two (the society of States) individual struggles for recognition appear alongside those of the State at the system level (Wendt 2003, 519), at stage three (a world society) a cosmopolitan or world society has formed that Wendt says consists of prohibitions on going to war, and the thickening of solidarity that extends positive freedoms to both individuals and States (Wendt 2003, 520). Stage four (collective security) is what Wendt calls a *Kantian culture* of collective security or friendship (Wendt 2003, 521). Here, the concern is that although individuals and States are expected to practice non-violent dispute resolution on the principle of "all for one, and one for all," the State still retains sovereignty, and their participation is still premised on consent (Wendt 2003, 522).

Wendt's overall account suggests that a) prior to *stage two* individuals were unrecognized, b) at *stage three* individuals began to gain some recognition, and c) at *stage four* the problem of territorial sovereignty, and non-binding agreements on war and conflict intervention prevents full recognition of the *individual* from being achieved. Thus, territorial sovereignty presents challenges for increasing individual recognition, and that further limits on State sovereignty can provide the ICC with a more effective structure for enforcing human rights.

-Jürgen Habermas

Habermas' proposal consists of three separate (but interconnected) political tiers (Habermas 2008, 445-448; Habermas 2006, 135-136). The supranational and transnational levels are designed to increase individual standing and participation in international agencies, with the goal of actualizing full recognition for individuals under international law. At the national level, establishing a global domestic politics promotes civic solidarity and new forms of governance within, and beyond, the State (Habermas 2007, 333; Habermas 2008, 450). To be sure, Habermas draws upon existing institutions and political entities to inform his vision of establishing a world society. However, he

makes explicit his belief that the current practices that allow for an unequal distribution of recognition among States, and mutual recognition between States and individuals, is lacking. This tension, therefore, cannot be resolved without reconceptualizing the role of the individual at all three levels (national, transnational, and supranational) (Habermas 2012, 347; Habermas 2006, 141, 162). I will discuss the supranational level below, and discuss the transnational and national levels briefly in my response to the objection posed at the beginning of this section.

In connection with the establishment of a supranational organization, Habermas supports restructuring the U.N. to fulfill its role of promoting world peace and the protection of human rights. The Security Council would remain the enforcement organ of the U.N., but undergo policy and structural changes. As mentioned earlier, the United Nations Security Council currently has five permanent member States who enjoy vetoing power; a single veto of any one of its members would suffice in disrupting an initiative or intervention. The International Criminal Court, too, relies upon the Council for the enforcement of its rulings, while many of the State members themselves remain non-signatories to the Rome Statute that created the Court. Hence, the I.C.C. relies upon the Security Council to enforce its rulings, while many of the enforcing States have failed to formally recognize the Court.

Changing the current vetoing procedures on the Security Council (some examples might be requiring a super majority vote for a veto, and creating mechanisms to increase State membership) could provide a more robust structure for the promotion and preservation of world peace, and the protection of international human rights (Habermas 2006, 171). In short, addressing the problem of increasing State membership in the Security Council, and limiting the vetoing power of the Security Council members, provides a framework for addressing State struggles for recognition, and offers a more consistent and effective enforcement apparatus for human rights.

Habermas' reform agenda for the U.N. includes a) bringing the Security Council into harmony with the current geopolitical landscape, while pursuing the goal of strengthening its capacity for action, and the equal representation of all States; b) operate independently of national interests when deciding to further a resolution or agenda. This requires new rules that set forth procedures authorizing the Security Council to intervene; c) Further develop the codification of international human rights law. On this point, Habermas highlights the importance of the International Criminal Court in mentioning that "The International Court of Justice has now been augmented by the International Criminal Court [though the latter has not yet won broad recognition]. The adjudicative practice of such a Court will promote the requisite definition and codification of the loosely defined crimes laid down in international law" (Habermas 2006, 173-174); d) develop a more robust form of legitimation from a well-informed global public opinion. Habermas specifically mentions non-governmental organizations with observer status, although the *individual* can also wield a transformative power through collective public opinion; and e) restrict the functions of the U.N. to that of securing world peace and human rights on a global scale (Habermas 2006, 173-174).

Two things stand out from Habermas' reform proposal outlined above, particularly c) the codification of international law, and d) global public opinion. In his book, *The Divided West*, he argues that "...international law is no longer merely a law for states" (Habermas 2006, 164). If international law has developed to include a *subject* other than the State, then Habermas has individuals as subjects under international law in mind. In fact, global public opinion, too, implies individual standing under international law—something that has developed in earnest since the Nuremburg trials following the atrocities of World War II. At present, many of the human rights documents remain non-binding (Habermas 2012, 336), and individuals lack standing in international human rights agencies. Habermas supports increasing individual participation in international human rights agencies, asserting that this move is necessary to transcend State centered law and arrive at a

more cosmopolitan based law. He says, “The U.N. High Commission for Human Rights is authorized to exert diplomatic pressure on the governments involved if need be. It also investigates petitions by individual citizens against violations of human rights by their own governments. Although it has no major practical effects at present, this institution of complaints by individuals is important in principle because it accords individual citizens recognition as immediate subjects of international law” (Habermas 2006, 162-163). Extending to any individual the right to petition the Court would increase individual recognition under international human rights law at the highest judicial level (the ICC), but curtail, to a degree, the State’s authority over its own citizens.

Answer to the Objection

A paradox surfaces with the claim that increasing individual recognition under international law limits State sovereignty over individuals within its territorial jurisdiction, but in turn increases individual recognition among States. On the one hand, the State will be subjected to procedures that recognize individual petitions against it put before the International criminal Court. On the other hand, the resulting subordination of every State to international standards of human rights enforcement will have an equalizing effect amongst the various States.

If Wendt is right in arguing that anarchy has developed through negotiated practices among States, leading to less chaotic forms of anarchy (from a Hobbesian culture of anarchy to a Kantian one)(Wendt 1999, 259-279; Wendt 1999, 297-308), then it is plausible that a renegotiation of sovereign practices could result in mutual recognition. The fact that some sovereign States stand to give more than they receive suggests that the current deficit in recognition among States is tied to the deference afforded to the few at the expense of the whole.

Further, it has been argued by both Wendt and Habermas that the cost to human life that resulted from both World Wars contributed to a new approach to the struggle for world peace and human rights (Wendt 2003, 523; Habermas 2012, 338; Habermas 2007, 331; Habermas 2006,

147,158-9). These periods saw the emergence of international agencies whose sole purpose was to protect human rights, but also generated a level of intrastate conflict resolution that could prevent future large scale war. The evidence shows that had either conflict ended differently, some States may not have retained their territorial sovereign. For example, prior to World War II Germany annexed Austria, and during the war occupied France, parts of Africa, and Poland.

The international system could further develop without requiring a world State if sovereignty is tamed to the extent that every State in the system is held to (more or less) equal standards on human rights. This requires further limits on State territorial sovereignty, but States have, historically, relinquished some of their territorial sovereign power to preserve such sovereignty as a whole. Moreover, stronger enforcement mechanisms for violations to human rights and world peace will only come through reconceptualizing the current practices of the territorial sovereign State. Habermas' assertion that globalization processes are posing challenges to the sovereign State, so that it can no longer cope with by itself, means that additional layers of cooperation amongst States is vital for their continued existence (Habermas 2006, 176). This argument is similar to Inge Kaul's position on '*smart sovereignty*' over global public goods, and transnational cooperation among States (Petersmann, 2012, 714-716).

Conclusion: Individual Recognition, Limits to State Sovereignty, and Expansion of the UN

Alexander Wendt and Jürgen Habermas agree that the overall problem of human rights enforcement can be described as a struggle between individuals and States for mutual recognition. Moreover, they affirm that limiting State territorial sovereignty could provide a basis to address the recognition deficit for individuals and States. However, the disagreement over the extent to which State territorial sovereignty should be limited for Wendt and Habermas remains. Nevertheless, their proposals suggest that, "*The International Criminal Court's enforcement system for human rights can be improved through limiting State territorial sovereignty by creating procedures for victims to participate in its referral process for*

investigations and case selections.” This condition begins to address one of the main concerns of Wendt by increasing individual recognition, and redefines the limits of State territorial sovereignty necessary to create the multi-level system proposed by Habermas.

As we have seen, there is a huge deficit in recognition for individuals under international law, while the current system for enforcing human rights is overwhelmingly State-centric. Although a recognition deficit still exists between States, increasing individual participation in international agencies, such as the International Criminal Court, could solve two persistent but interconnected problems. Firstly, through creating mechanisms for individuals to petition the ICC for investigations and case selections, the Court would place additional limits on State sovereignty in relation to its national citizens. Even non-member States would be affected through petitions initiated by its citizens, thus creating a stigmatizing effect that is likely to produce compliance outcomes. Secondly, by infusing procedures in international law that give every individual equal standing, elements of inequality among States will be brought in line with an enforcement system that holds every State accountable on human rights.

Additional research is needed to determine how the International Criminal Court can establish procedures that involve individuals in initiating investigations and case selections, and, more importantly, how the ICC will enforce these changes through the *current* international organizations of enforcement. At the moment, the ICC lacks its own law enforcement personnel, which suggests that it will continue to require State participation to enforce its rulings. The U.N. Security Council was created to promote world peace and protect human rights, but has a mixed track record of success; in this regard, Habermas points directly to the veto rules that allow for State inaction for political reasons. Therefore, increasing individual participation on human rights must be accompanied by structural and procedural changes to organizations tasked with enforcement. Further research should identify proposals made for developing a more adequate enforcement

apparatus such as, making changes to the vetoing rules, and requiring a majority vote for a veto to remove this obstacle. Moreover, the Security Council should be expanded to include other States, and this could further improve reforms to the vetoing rules and increase intervention at a time when human rights are most vulnerable.

In short, providing an answer to the question of “what conditions must be met in order to provide the International Criminal Court with more robust mechanisms for human rights enforcement,” can be done by integrating the proposals of Alexander Wendt and Jürgen Habermas. Their insights lead me to conclude that: *the International Criminal Court’s enforcement system for human rights can be improved by limiting State territorial sovereignty over individuals, expanding the recognition of individuals beyond the limits of national States, creating procedures for individual victims of human rights violations to bring cases against States to the ICC, allowing victims to participate in the ICC referral process for investigations and case selections, expanding State membership on the U.N. Security Council, and creating mechanisms that require a majority or super-majority vote in order to veto resolutions brought before the Security Council.* This is a multilevel answer to my research question that I arrived at by combining the different levels proposed by Wendt and Habermas, and satisfying these conditions would provide the International Criminal Court with more robust mechanisms for enforcing human rights.

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