The significance of borders : why representative government and the rule of law require Nation States

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CHAPTER FOUR

SUPRANATIONAL COURTS

4.1. *The International Criminal Court*

The International Criminal Court (ICC) is the first supranational tribunal with a permanent mandate, devoted to trying individuals, not states. As such, it has the power to start, upon state or Security Council request, or upon its own initiative, a procedure for the trial and conviction of individuals who are nationals *of* any of its member states, or that have committed acts *in* any of its member states.

Although the idea of a permanent international court which could try individuals and not states was already proposed in the 1930s,[1] and again in the 1940s and 1950s,[2] still 'in the early 1990s', as Michael Struett notes, 'the possibility of establishing a permanent ICC seemed remote and fanciful'.[3] After a few years of negotiations, however, a conference in Rome led to the Rome Statute on July 17th, 1998, in which it was agreed to establish the ICC as of July 1st, 2002.

It is widely assumed that the International Criminal Court is the natural successor of *ad hoc* war crimes tribunals, 'like that of Nuremberg'.[4] But the ICC, though superficially resembling the Nuremberg tribunal, is in many ways not comparable with it, and differs on crucial issues of sovereignty.[5] Not that even the Nuremberg trials themselves were uncontroversial at the time. Harlan Fiske Stone, the chief justice of the United States Supreme Court, 'who viewed the International Military Tribunal with great suspicion',[6] refused, as Jeremy Rabkin notes, 'to take part in a swearing-in ceremony for the US-appointed judges to the IMT'. He was said to have argued in private that the whole undertaking

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[1] The Council of the League of Nations approved the Convention for the creation of an International Criminal Court in 1937; see John Laughland, *A History of Political Trials. From Charles I to Saddam Hussein* (Oxford: Peter Lang, 2008) 112.

[2] Cf. M.J. Struett, *The politics of constructing the International Criminal Court. NGOs, discourse, and agency* (New York: Palgrave Macmillan, 2008) 49ff.

[3] Struett (2008) 68.

[4] As has been done by, amongst many others, Costas Douzinas, *The end of Human Rights* (Portland: Hart Publishing, 2000) 121 and further, Antonio Cassese, *International Law* (Oxford: University Press, 2001) 250, and Peter H. Kooijmans, *Internationaal Publiekrecht* (Deventer: Kluwer, 2000) 34.

[5] Comparable considerations apply to the Tokyo tribunals. See on this: Michael P. Scharf, 'The ICC's jurisdiction over the nationals of non-party states: a critique of the U.S. position', in: *Law & Contemporary Problems*, vol. 64, issue 1 (Winter 2001) 67-118, there 106; B.V.A. Röling, *The Tokyo trial and Beyond. Reflections of a peacemonger, edited and with an Introduction by Antonio Cassese* (London: Polity Press, 1993); Laughland (2008) 163ff: 'Politics as conspiracy: the Tokyo trials'.

[6] R.E. Conot, *Justice at Nuremberg* (New York: Harper & Row Publishers, 1983) 63.

was 'a high-grade lynching party'.[7] Winston Churchill was well-known for his opposition to the idea of an allied trial of Axis war criminals as well,[8] as were many others, such as the US Senator Robert Taft and US Supreme Court Justice William O. Douglas.

John F. Kennedy, the future President, noted: 'These conclusions [that the tribunal was based on *ex post facto* law and that its legitimacy was questionable] are shared, I believe, by a substantial number of American citizens today. And they were shared, at least privately, by a goodly number in 1946'.[9]

The main crime for which the Nazi-leaders were tried was not the holocaust nor even 'crimes against humanity'. Indeed, Telford Taylor confesses in his memoir that when he accepted his position as the United States Deputy Chief prosecutor at Nuremberg after the surrender of Germany, 'I remained ignorant of the mass extermination camps in Poland, and the full scope of the Holocaust did not dawn on me until several months later, at Nuremberg'.[10] The main aim of the tribunal was to try 'crimes against peace', and the 'crimes against humanity' were only actionable if understood in the context of waging an 'aggressive war'.[11] As the judges ruled:

> With regard to crimes against humanity, there is no doubt whatever that political opponents were murdered in Germany before the war, and that many of them were kept in concentration camps in circumstances of great horror and cruelty. The policy of terror was certainly carried out on a vast scale, and in many cases was organised and systematic. The policy of persecution, repression and murder of civilians in Germany before the war of 1939, who were likely to be hostile to the Government, was most ruthlessly carried out. The persecution of Jews during the same period is established beyond all doubt.
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> To constitute crimes against humanity, the acts relied on before the outbreak of war must have been in execution of, or in connection with, any crime within the jurisdiction of the Tribunal. The Tribunal is of the opinion that revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with, any such crime. The Tribunal therefore cannot make a general declaration that the acts before 1939 were crimes against humanity within the meaning of the Charter, but from the beginning of the war in 1939 war crimes were committed on a vast scale, which were also crimes against humanity; and insofar as the inhumane acts charged in the Indictment, and committed after the beginning of the war, did not constitute

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[7] Jeremy A. Rabkin, 'Nuremberg Misremembered', in: *SAIS Review,* The Johns Hopkins University Press, Vol. 19 no. 2 (1999) 81-96, there 81-82.

[8] Cf. Laughland (2008) 113.

[9] John F. Kennedy, *Profiles in Courage* (New York: Harper & Row, 1963) 184, chapter 9.

[10] Telford Taylor, *The anatomy of the Nuremberg trials. A personal memoir* (New York: Alfred J. Knopf, 1992) xi.

[11] Cf. *Judgment of the International military tribunal for the trial of German major war criminals: The Law Relating to War Crimes and Crimes Against Humanity.* Available online at http://avalon.law.yale.edu/imt/judlawch.asp.

> war crimes, they were all committed in execution of, or in connection with, the aggressive war, and therefore constituted crimes against humanity.[12]

In contrast with the great resonance of the term 'crimes against humanity' today, the Nuremberg tribunal thus understood by them solely those crimes which were committed in the context of an aggressive war – and for that reason, the judges refused to assert jurisdiction over crimes committed before the outbreak of the war, September 1st, 1939. It is not surprising then to note, as Rabkin does, that 'not one of the twenty-four defendants was indicted solely for "crimes against humanity"'.[13]

Moreover, the Nuremberg tribunal was set up with explicit reference to the sovereign legislative power of Germany – executed, at the time, by the four major allied powers.[14] The charter of the Nuremberg tribunal – formally called International Military Tribunal (IMT) – explicitly stated that:

> The making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognised by the civilised world.[15]

For the same reason – that it was 'the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered' –, the accusations were not brought forward by an entity denoted as 'humanity' or 'the United Nations' – as was indeed proposed at a certain point[16] – against Nazi-Germany, but as:

> The United States of America, The French Republic, The United Kingdom of Great Britain and Northern Ireland, and The Union of Soviet Socialist Republics – against – Hermann Wilhelm Goering, Rudolf Hess, Joachim von Ribbentrop …(etc).[17]

Nor were any judges appointed from other allied or neutral countries:[18] only the US, France, the UK and the USSR conducted the trial. When in 1947 additional

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[12] *Judgment of the International military tribunal for the trial of German major war criminals: The Law Relating to War Crimes and Crimes Against Humanity.* Available online at http://avalon.law.yale.edu/imt/judlawch.asp.

[13] Rabkin (1999) 81-96, there 84.

[14] The promulgation of the International Military Tribunal Charter was 'the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered', Judgment, Official Documents of the Tribunal, Vol. 1, 171.

[15] 'The law of the Charter', in: *Judgment of the International military tribunal for the trial of German major war criminals: The law of the Charter*. Available online at http://avalon.law.yale.edu/imt/judlawch.asp.

[16] John Laughland, *Travesty. The trial of Slobodan Milosevic and the corruption of international justice* (Michigan: Pluto press, 2007) 60; Rabkin (1999) 81-96, there 87.

[17] Available online at http://avalon.law.yale.edu/imt/count.asp.

[18] Laughland (2007) 67.

alleged war criminals were tried in Nuremberg[19] – this time by the United States alone –, the judges, drawing on the Charter of the IMT and the jurisprudence of the original trial, further recalled that:

> On 5 June 1945 the Allied Powers announced that they 'hereby assume supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command, and any state, municipal or local government or authority'[20] (…)

And that:

> On 2 August 1945 at Berlin, President Truman, Generalissimo Stalin, and Prime Minister Attlee, as heads of the Allied Powers, entered into a written agreement setting forth the principles which were to govern Germany during the initial control period.

Quoting a number of 'modern scholars of high standing in the field of international law', the judges found that these scholars had agreed that

> the situation at the time of the unconditional surrender resulted in the transfer of sovereignty to the Allies.[21]

They furthermore asserted that 'by virtue of the situation at the time of unconditional surrender, the Allied Powers were provisionally in the exercise of supreme authority, valid and effective until such time as, by treaty or otherwise, Germany shall be permitted to exercise the full powers of sovereignty', and that 'We sit as a Tribunal drawing its sole power and jurisdiction from the will and command of the Four occupying Powers'.[22]

The tribunal went on to declare that '[the] universality and superiority of international law does not necessarily imply universality of its enforcement' and that 'within the territorial boundaries of a state (…) a violator of the rules of international law could be punished only by the authority of officials of that state. The law is universal, but such a state reserves unto itself the exclusive power within its boundaries to apply or withhold sanctions'.[23]

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[19] The defendants were Josef Altstoetter, Wilhelm von Ammon, Paul Barnickel, Hermann Cuhorst, Karl Engert, Guenther Joel, Herbert Klemm, Ernst Lautz, Wolfgang Mettgenberg, Guenther Nebelung, Rudolf Oeschey, Hans Petersen, Oswald Rothaug, Curt Rothenberger, Franz Schlegelberger, and Carl Westphal. The indictment is available online at http://www.mazal.org/archive/nmt/03/NMT03-T0001.htm.

[20] *Trials of war criminals before the Nuremberg Military Tribunal under Control Council Law No. 10*, Volume III, Case no. 3, 'The Justice Case', United States *against* Josef Altstoetter, *et al.* (Washington DC: U.S. Government Printing Office, 1951) 959: 'Under Source of authority of C.C. Law 10'. Available online at http://www.mazal.org/NMT-HOME.htm.

[21] *Trials of war criminals before the Nuremberg Military Tribunal under Control Council Law No. 10*, Volume III, Case no. 3, 'The Justice Case', United States *against* Josef Altstoetter, *et al.* (Washington DC: U.S. Government Printing Office, 1951) 962. Available online at http://www.mazal.org/NMT-HOME.htm.

[22] 'The Justice Case', 963-964.

[23] 'The Justice Case', 963-964.

The point was thus once again made that the power the Allied forces had assumed in Germany upon its unconditional surrender was 'a power which no international authority without consent could assume or exercise (…)'.[24] The contrast could not be greater with the Criminal Tribunal for the former Yugoslavia (ICTY) – which was based on the idea, as the first ruling of the ICTY Trial Chamber asserted, that 'the sovereign rights of States cannot and should not take precedence over the right of the international community to act appropriately as they [i.e., the crimes against humanity] affect the whole of mankind and shock the conscience of all nations of the world'.[25]

It is not surprising, therefore, that former Nuremberg prosecutor, Walter J. Rockler, has pleaded not only against the legality of the war in Kosovo but also against the legality of the Yugoslavia tribunal,[26] and lamented that

> As a primary source of international law, the judgment of the Nuremberg Tribunal in the 1945-1946 case of the major Nazi war criminals is plain and clear. Our leaders often invoke and praise that judgment, but obviously have not read it.[27]

Nor is it surprising that, for the most elementary reasons of self-interest, the Nuremberg tribunal was not set up as a universal court, trying whatever horrific deeds might have been committed in the name of any government or army whatsoever, but only those committed by Nazi-Germany; nor that it explicitly connected the crimes against humanity with crimes against the peace. The London agreement between the Allied forces, which gave birth to the Tribunal, was concluded two days after the 'Little Boy' nuclear bomb had been dropped on Hiroshima and a day before 'Fat Man' was dropped on Nagasaki – instantly killing an estimated 100 thousand civilians. The British and American air raids on German cities, moreover, had been examples of deeply questionable allied actions, and had cost an approximate total of 500 thousand civilian lives – far more than the German bombings of Britain had cost.[28]

Moreover, one of the main allied powers – the Soviet Union – had itself been Nazi-Germany's ally for several years, and had collaborated in waging an aggressive war, helping itself, as John Laughland puts it, 'to chunks of eastern

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[24] 'The Justice Case', 970-971.

[25] Quoted by Laughland (2007) 63-64. Laughland gives the following reference (footnote 19): '*Prosecutor v. Dusko Tadic*, Trial chamber decision on the defence motion on jurisdiction, 10 August 1995, paragraph 42; this passage was quoted and reaffirmed by the Appeals Chamber in its own decision in *Tadic* on the defence motion for interlocutory appeal on jurisdiction on 2 october 1995, at paragraph 59'.

[26] Laughland (2007) 68.

[27] Walter J. Rockler, 'War crimes applies to U.S. too', in: *Chicago Tribune,* 23 May 1999.

[28] J. Friedrich, *Der Brand. Deutschland im Bombenkrieg 1940-1945* (München: Propyläen Verlag, 2002). Cf. Telford Taylor, *The anatomy of the Nuremberg trials. A personal memoir* (New York: Alfred J. Knopf, 1992) 326; Laughland, *A history of political trials. From Charles I to Saddam Hussein* (Oxford: Peter Lang, 2008) 117.

Poland, the Baltic states and Bessarabia under the terms of the secret protocol of the Molotov-Ribbentrop Pact signed on 23 August 1939'.[29] Laughland claims that the Nazis even 'provided their Bolshevik allies with huge quantities of fuel, food and war materiel for the purposes of conquering and occupying eastern Poland.'[30] After the Red Army's advance into Germany, it is certain that the Soviet soldiers looted for days on end and mass-raped the female population – clearly a war crime of tremendous proportions.[31] And so for all these reasons, the charter plainly stated that a tribunal would be set up

> for the Prosecution and Punishment of the major war criminals of the European axis[32]

– and not for any others.

In order, however, to prevent the defense of *tu quoque* (to which Hermann Goering nevertheless resorted), the 'charges against the Germans for having launched air attacks on British cities were removed: Goering, head of the Luftwaffe, was not indicted for this.'[33] As prosecutor Telford Taylor remembers: 'The great city air raids of the war – Hamburg, Berlin, Dresden, Tokyo, Hiroshima, and Nagasaki – had been conducted by Britain and the United States, which made it most unlikely that the prosecution would make a big thing out of the Germans' earlier raids which, destructive as they were, paled by comparison'. Taylor concludes that it is therefore 'not surprising that Goering's responsibility for the German attacks (…) played no part in the Tribunal's judgment'.[34]

The tribunals in the countries occupied by Nazi-Germany, meanwhile, had extraordinary jurisdiction, usually installed under a special post-war law – but in each case by the national government. These tribunals specifically dealt with crimes committed by the national collaborators under the German occupation.[35]

In contrast, the ICC has been set up without a specific war to condemn or a specific regime to judge. This implies great difficulties, and in any case makes the ICC a very different institution from the Nuremberg tribunal.[36] The legitimacy of the ICC should not be judged by the legitimacy of the Nuremberg trials;[37] the ICC is fundamentally different from the Nuremberg tribunal, and

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[29] Laughland (2007) 60-61.

[30] *Ibidem*.

[31] Cf. Antony Beevor, *Berlin. The Downfall 1945* (London: Viking Penguin, 2002); Antony Beever, 'They raped every German female from eight to 80', in: *The Guardian* (1 May 2002), available online at http://www.guardian.co.uk/books/2002/may/01/news.features11.

[32] Nuremberg Trial Proceedings Vol. 1, London Agreement of August 8th 1945.

[33] Laughland (2007) 61.

[34] Taylor (1992) 326.

[35] Cf. Laughland (2008) 77ff.

[36] Cf. Michael Lief, H. Mitchell Caldwell, and Benjamin Bycel, *Ladies and Gentlemen of the Jury: Greatest arguments in Modern Law* (New York: Simon & Schuster, 1998).

[37] Cf. Chantal Delsol, *Unjust justice, against the tyranny of international law* (Delaware: ISI Books, 2008) 52-53, who voices the same view but from a different perspective: 'Thus, Nuremberg

it should be considered on its own account. What follows is an examination of its supranational capacities.

Currently, the Court has 116 member states;[38] though this may seem a very large number, many of the states that have decided not to ratify the Rome Statute are important ones, for example, the United States, Russia, China, India, Pakistan, Turkey, and Iran. Many other countries that are likely to be involved in serious armed conflicts in the near future have also decided not to join the ICC, such as Iraq, Kazakhstan, Syria, Saudi Arabia, Egypt, Lebanon, Algeria, Israel, Morocco, Zimbabwe, Somalia, Sudan, North Korea and South Korea.[39]

That is not surprising. The ICC's supranational powers are vast, and it is uncertain what direction its rulings will take, even though formally the Court has jurisdiction over 'the severest crimes of international concern' only.[40] As article 5 of the Rome Statute reads:

> 1. The Jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole.

It continues:

> The court has jurisdiction in accordance with this Statute with respect to the following crimes:
> (a) The crime of genocide;
> (b) Crimes against humanity;
> (c) War crimes;
> (d) The crime of aggression.

Note that 'crimes against humanity' have now become independent of the 'crime of aggression' (while the two had been connected at the Nuremberg tribunal). Moreover, paragraph 2 of article 5 decrees that the Court would not exercise jurisdiction over the 'crime of aggression', until it would have been 'properly defined' at a later stage. An attempt to do so was undertaken at the Review Conference held in Kampala, Uganda, in 2010, but it was also decided there that the jurisdiction of the ICC over the 'crime of aggression' should have to be reviewed once again after 2017.[41] Not that the other three crimes, (a), (b), and

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represents a unique instance in which all the requisite circumstances for an unprecedented trial came together, including an unwritten law that condemned those who had followed a written law. The trial was made possible only by an act of conscience and by the remorse of an entire culture. (…) It seems to me, then, that if Nuremberg was justified by the remorse that a culture felt when confronted with its own development, the European tribunal that recently judged the massacres of Rwanda cannot claim the same legitimacy. In the absence of its own conscientious remorse, we see here a sanction applied from the outside to a people who do not understand it'.

[38] That is, as of June, 2011.

[39] http://www.icc-cpi.int/Menus/ASP/states+parties/.

[40] Article 5 of the Rome Statute.

[41] The resolution was adopted on June 11th, 2010. Available online at http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf.

(c) are that 'properly defined' either. Articles 6, 7, and 8 attempt to provide more precise definitions, but hardly succeed.

When article 7 (defining 'crimes against humanity') for example declares that 'torture' is punishable, it leaves the judges with the task of defining what counts as such. Although it is true that the terms used in these articles were mostly borrowed from treaties already in force (such as the Convention against torture, and the Geneva Conventions), their interpretation remains disputable. Paragraph 2 of article 7 tries to present a guideline for the notions presented in this article (such as 'torture'), but does not make it much clearer:

> (…) (e) 'Torture' means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused [i.e., the accused before the ICC]; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;

What exactly is 'severe pain or suffering, whether physical or mental'? What is the reach of the 'lawful sanctions' that can exonerate the accused? Or take article 8 (defining 'war crimes'). It says that

> war crimes means:
> (…)
> (iii) Willfully 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;
> (vii) Unlawful deportation or transfer or unlawful confinement;

Here again, the meaning of terms such as 'willfully causing', 'great suffering', 'serious injury', 'extensive destruction', 'not justified by military necessity', 'unlawful deportation' is certainly not self-evident and needs interpretation. But what is even more worrying is that some – if not most – of these deplorable actions are probably unavoidable by any of the parties involved in an armed conflict (the problem of 'collateral damage'[42]).

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[42] The prosecutor of the ICC, Luis Moreno-Ocampo, has commented on this problem in statement made on 9 February, 2006. 'Under international humanitarian law and the Rome Statute, the death of civilians during an armed conflict, no matter how grave and regrettable, does not in itself constitute a war crime. International humanitarian law and the Rome Statute permit belligerents to carry out proportionate attacks against military objectives, even when it is known that some civilian deaths or injuries will occur.' Moreno-Ocampo goes on: 'A crime occurs if there is an intentional attack directed against civilians (principle of distinction) (Article 8(2)(b)(i)) or an attack is launched on a military objective in the knowledge that the incidental civilian injuries would be clearly excessive in relation to the anticipated military advantage (principle of proportionality) (Article 8(2)(b)(iv).' Obviously, this only transposes the question to defining 'intentional attack', 'clearly excessive' and 'anticipated military advantage'. Available online at http://www2.icc-cpi.int/NR/rdonlyres/F596D08D-D810-43A2-99BB-B899B9C5BCD2/277422/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf.

Sub (v) of the above mentioned article 8.2, sums up the acts that could lead to prosecution. It includes:

> Attacking or bombarding, by whatever means (…), buildings which are undefended and which are not military objectives;

A plausible reading of this article could suggest that NATO was guilty of 'war crimes' when bombing Serbia's civil infrastructure in the spring of 1999, or that the United States were guilty of 'war crimes' when striking a pharmaceutical factory in Sudan on February 20th, 1998 in retaliation for the bombings of American embassies in Kenya and Tanzania which killed 224 people (of which twelve American nationals) and injured 5,000 others.[43] The factory, Sudan's primary source of pharmaceuticals, covering the majority of the Sudanese market, was claimed to have been instrumental in the production of chemical weapons, but evidence of this has never been made public. The German ambassador to Sudan between 1996 and 2000, Werner Daum, estimated that the attack probably caused tens of thousands of civilian deaths.[44] Yet both the Clinton and the second Bush administrations have refused to offer apologies to the Sudanese government, and it is not unthinkable that the ICC would have been interested in asserting jurisdiction (had the United States, of course, been a member). The President of Sudan even called for 'the international prosecution of the US officials behind the airstrike'.[45]

In such a case, the United States might then be asked to prove that the factory was rightfully thought to be a military objective (the burden of proof lying clearly on the side of the defendant in this case[46]). The Pentagon would have to present its sources, which would be evaluated by the Prosecutor under the superintendence

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[43] Cf. Michael P. Scharf, 'The ICC's jurisdiction over the nationals of non-party states: a critique of the US position', in: *Law & Contemporary Problems*, vol. 64, issue 1 (Winter 2001) 67-118.

[44] Werner Daum, 'Universalism and the West. An agenda for understanding', in: *Harvard International Review*, vol 23 (2) (Summer 2001) 19-23.

[45] Scharf (Winter 2001) 67-118.

[46] Cf. the 1927 *Lotus Case* of the Permanent Court of International Justice (PCIJ), which is often referred to in international law discourses as having set a 'precedent' (even though the Court at the time was divided by six judges in favor and six against, and the President of the Court had to decide the case, and indeed even though the very concept of 'precedent' itself is questionable in classical international law). In this case, however, it was held that when a state seeks to withhold jurisdiction from another state, the burden of proof is on the state claiming that such jurisdiction is indeed lacking; not on the state asserting jurisdiction. This principle has been used in later years to expand the scope of international law, as jurisdiction was assmed to exist, as Michael Scharf noteds, 'unless it can be shown that this violates a prohibitive rule of international law'. He continues: 'So long as states have a legitimate interest in establishing such an arrangement, the question is not whether international law or precedent exists permitting an ICC with this type of jurisdictional reach (…), but rather whether any international legal rule exists that would prohibit it'. Case of S. Lotus (France v. Turkey), 1927 P.C.I.J. (ser. A) No. 10. Cf. Michael P. Scharf, 'The ICC's jurisdiction over the nationals of non-party states: a critique of the U.S. position', in: *Law & Contemporary Problems*, vol. 64, issue 1 (Winter 2001) 67-118, there 72-74.

of the world press and the secret services of other states. Even though the Court may decide that certain evidence be presented or witnesses be heard behind closed doors, this is a situation that no great power would ever accept.

It was also agreed that the ICC will amend (and possibly extend) the list of crimes under its jurisdiction.[47] This happened for instance at the review conference in Uganda in 2010 (as mentioned above). Some states desire to add terrorism and drug trafficking to the list of crimes covered; so far, the member states have been unable to agree on a definition of terrorism and it was decided not to include drug trafficking as this might overwhelm the Court's limited resources. India lobbied to have the use of nuclear weapons and other weapons of mass destruction (WMD's) included as war crimes, but did not succeed in this (and did not join the ICC).[48]

These, then, are the first important observations concerning the ICC that undermine the claims to political impartiality or the non-political nature of the court: the vagueness of the crimes that fall within its jurisdiction, the fact that those crimes are surely next to unavoidable in any military dispute, and the great consequences for national security that producing evidence could entail.

A further question concerning the ICC is not *what* it will prosecute, but *who*. The ICC has discretionary powers in deciding who should be prosecuted, as article 15 denotes:

> 1. The Prosecutor may initiate investigations *proprio motu* [i.e. on its own initiative] on the basis of information on crimes within the jurisdiction of the Court.
> (…)
> 3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation (…). Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.
> 4. If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation (…).

Article 16, then, enables the Security Council to defer an investigation or prosecution for a period of 12 months with the possibility of renewal. To do so would however require a majority in the Security Council (9 out of 15 votes), and requires that none of the permanent five Security Council members (i.e. the United States, the United Kingdom, France, the Russian Federation, and China) use its veto power.

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[47] Cf. articles 121 and 123 of the Rome Statute.

[48] Geert-Jan Knoops is one of the many who criticize the fact that 'the use of poisoned arrows' is a war crime under the ICC, but the use of nuclear weapons is not: Geert-Jan Knoops, *Blufpoker. De duistere wereld van het international recht* (Amsterdam: Uitgeverij Balans, 2011) 104.

The prosecutor of the ICC is elected by the Assembly of States for a nine-year term. As is often the case with such international appointments, they serve political interests and are subject to diplomatic rather than professional considerations. The current prosecutor, the Argentine Luis Moreno-Ocampo, was elected, typically unopposed, in 2003. Moreno-Ocampo has a long record of legal experience in trying state officials and in extradition cases. He has also been involved in some alleged scandals, amongst others an alleged rape-case on the afternoon of March 29th, 2005 in Cape Town.[49] The whistleblower, Christian Palme, who submitted the complaint to the President of the ICC, Philippe Kirsch at the time, was fired by Moreno-Ocampo after a panel of three judges dismissed the complaint on the ground of lack of evidence, but on July 9th, 2008, the International Labor Organization (the Administrative Tribunal of which has jurisdiction over labor disputes of several international organizations including the ICC), ruled that Palme had had good reason to bring the case to the attention of the ICC, that Moreno-Ocampo was not justified in discharging him, and Palme was awarded damages.[50]

The way this incident was hushed up, even if the allegations were entirely false, is typical of the problems that a supranational organization finds itself in: its top functionaries not being subject to the kind of power-balancing framework a national state provides for its appointments, elections often being political ones, and a shared international standard of decent behavior not existing. The personal character of top-functionaries that would be relevant in national circumstances is not usually investigated due to political nomination.

The pre-trial chamber, which has to consider if there is a 'reasonable basis' to proceed with an investigation, consists of six judges but is divided into groups of three judges deciding by majority vote. Thus only two judges need vote in favor of an investigation for it to proceed. Currently (as of spring 2011), the judges at the pre-trial chamber are:

Sylvia Steiner (Brazil)
Hans-Peter Kaul (Germany)
Ekaterina Trendafilova (Bulgaria)
Sanji Mmasenono Monageng (Botswana)
Cuno Tarfusser (Italy)
Silvia Fernández de Gurmendi (Argentina)

[49] Moreno-Ocampo allegedly took the car keys of a South African journalist who had conducted an interview with him, and did not give them back unless she agreed to come to his room in the Lord Charles Hotel and have sex with him. The scheduled meeting with the journalist was removed from his agenda after the incident, thus suggesting nothing had ever happened.

[50] *Palme v. ICC, International Labor Organization*, Judgment No. 2757, 105th session.

Deciding on whether an investigation will proceed is thus in their hands. In the hands of Sylvia Steiner from Brazil, Hans-Peter Kaul from Germany, Ekaterina Trendafilova from Bulgaria, Sanji Mmasenono Monageng from Botswana, Cuno Tarfusser from Italy, and Silvia Fernández de Gurmendi from Argentina. The supranational structure makes it particularly difficult to know who these people are. It is a question supranationalists evade by focusing on the technical, perceived non-political nature of the procedures and rules.[51]

But the same problems apply with regards to the other judges of the ICC. Currently 18 in total (but the number is not fixed[52]), they are elected for a nine year period by the Assembly of States. They should be nationals of an ICC member state, and no two judges may be nationals of the same state.[53] Further, 'the states parties shall', according to article 36, paragraph 8 (a):

> In the selection of judges, take into account the need, within the membership of the Court, for:
> (i) The representation of the principal legal systems of the world;
> (ii) Equitable geographical representation; and
> (iii) A fair representation of female and male judges.

Now, these principles for selecting judges are certainly based on questionable philosophical principles. For does 'the representation of the principal legal systems in the world' not imply that there should be a number of judges representing countries that accept Sharia law? And does 'equitable geographical representation' and 'fair representation of female and male judges' provide the legal basis for a policy of affirmative action? Those are certainly worrying considerations.

And if we think of the procedures that surround appointments of judges in national situations – at least when it comes to the appointment of senior judges –, such as approval by a representative council (for instance in the United States after profound personal and professional investigations and several hearings and interviews by the Senate[54]), we should not take for granted that these appointed ICC-judges are necessarily competent to be the arbiters of military conflicts all over the world. Nor is it self-evident that these judges, put forward by the member states of the ICC, will fulfill their jobs without personal or political agendas: this is even more so, while many member states of the ICC are not

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[51] Cf. on the often misty and political selection of international judges: Ruth Mackenzie, Kate Maleson, Penny Martin and Philippe Sands, *Selecting International Judges. Principle, Process and Politics* (Oxford: Oxford University Press, 2010).

[52] Rome Statute, article 36.

[53] Rome Statute, article 36. This contrasts with how judges function in national circumstances, where nominations are usually for life in order to safeguard their independence. Cf. Cliteur, P., 'De onafhankelijkheid van de rechterlijke macht: acht vormen', in: J.P. Loof (ed.), *Onafhankelijkheid en onpartijdigheid. De randvoorwaarden voor het bestuur en beheer van de rechterlijke macht* (Leiden: Stichting NJCM-boekerij 36, 1999) 9-31.

[54] Cf. Bork (1990) 287ff.

only high on corruption lists[55] but have a history of decades of dictatorial or totalitarian administration.

Apart from starting procedures on its own initiative, the ICC can also begin an investigation at the request of a member state.[56] This option follows from articles 13 and 14 of the Rome Statue. Article 12, paragraph 2 (a) adds that 'the jurisdiction of the Court (…) can also be exercised if the state *on the territory of which* the conduct in question occurred (…) is a member of the ICC'.

This means that the court can very well claim jurisdiction over nationals of a non-ICC member state if those nationals (e.g. soldiers) have committed acts that the ICC believes to fall under any of the 'crimes' it has jurisdiction over. Countries that have chosen not to recognize the ICC may in this way be submitted to its jurisdiction anyway. This has motivated the United States to set up bilateral immunity agreements with other countries, and even to pass the *American Service Members Protection Act* as an amendment to the National Defense Authorization Act in August 2002.[57] This document is also known as the 'Hague Invasion Act', because it authorizes the President to use 'all means necessary and appropriate to bring about the release of any US or allied personnel being detained or imprisoned by, on behalf of, or at the request of the International Criminal Court'.[58]

The third and final way for the ICC of asserting jurisdiction is an even more remarkable instance of supranationalism, and follows from article 13 (b) of the Rome Statute, reading:

> The court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statue if (…) a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations;

The Security Council of the United Nations can thus assign jurisdiction to the ICC if it deems so necessary, even if the alleged 'crimes' have not been perpetrated by an ICC member state nor even have been committed on the territory

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[55] See for example the yearly statistics on corruption produced by *nationmaster*, available online at http://www.nationmaster.com/graph/gov_cor-government-corruption.

[56] One example of this was in 2006, when Uganda requested the ICC to prosecute members of the Lord's Resistance Army, an insurgency that had been active in the northern regions of Uganda for over twenty years.

[57] Available online at http://www.state.gov/t/pm/rls/othr/misc/23425.htm.

[58] Cf. John R. Bolton, 'The risks and weaknesses of the International Criminal Court from America's perspective', in: *Law and Contemporary Problems,* vol. 64, no. 1 (Winter 2001) 167-180. Available online at http://www.law.duke.edu/shell/cite.pl?64+Law+&+Contemp.+Probs.+167+(Winter+2001).

of a member state. This happened in 2005, when the Security Council passed resolution 1593,[59] containing, amongst others, the following phrases:

> Acting under Chapter VII of the Charter of the United Nations,
> 1. Decides to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court;
> 2. Decides that the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully;

Not surprisingly, the President of Sudan, Omar al-Bashir, denied jurisdiction, but an international arrest warrant has in the meantime been issued against him. Before discussing questions related to this international arrest warrant, it is necessary to examine the inevitability of choice in whom to prosecute. There are actions that are obvious atrocities, such as those committed in 2008 in Darfur, but there are also actions that are open to several different interpretations. Justified retaliation or excessive use of force? Pre-emptive defense, or act of aggression?

And the ICC has additional problems. For it is unsure what is 'a reasonable basis to proceed with an investigation', of the kind article 15 sub 1 of the Rome Statute provides as a legitimate ground for trying individuals.[60] The prosecutor and his pre-trial chamber may decide that although no knockdown evidence is ever likely to be produced, an investigation should be commenced anyway. As a result, the accused can be put under all kinds of restraints (including being held in custody in The Hague) and will certainly be brought under a grave public shadow. Indeed, with the ICC, the accused is not innocent until proven guilty,[61] but, in the eyes of the world, guilty even when *not* proven guilty[62]).

There is much to be said for the view that this is an inevitable hazard of any criminal prosecution. But unlike at the national level, there is at the supranational level no counterbalance to the discretionary powers of the prosecutors. States differ greatly in their constitutional structures, but what most modern democracies share is some check – whether ultimately derived from a parliament, a senate, or a senior council of state – on these discretionary powers (the balance or dialectic of power, see chapter 2). In the Netherlands, the executive power – in the person of the minister of justice – is ultimately responsible for the policy of

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[59] The resolution passed with the vote of 11 in favor and 4 abstentions, amongst which were the United States, and is available online at http://www.un.org/News/Press/docs/2005/sc8351.doc.htm.

[60] Article 15 sub 1 of the Rome Statute.

[61] Which is the official position of the ICC, article 66 of the Rome Statute.

[62] As happened to, for example, Milosevic, who was never convicted after six years of trial. I do not argue that he was innocent, but rather that he *could* have been innocent – as he was never convicted after six (!) years of trial. Cf. John Laughland, *Travesty. The trial of Slobodan Milosevic and the corruption of international justice* (London: Pluto Press, 2007) 2.

the prosecutor, and can be held accountable by parliament. Similarly, the Dutch law provides a procedure following article 12 of the code of criminal procedure, which enables concerned parties to file a complaint against the Prosecutor at the Court of Appeals. These sorts of checks and balances are fundamentally impossible to realize at the supranational level as they presuppose the existence of a full state. As a result, supranational prosecution will necessarily remain arbitrary and the powers of such institutions necessarily unchecked by balancing powers.[63]

Nor is it certain that the Court will accept justice done to 'war criminals' on national levels. For the ICC retains the ultimate authority to decide on whether that function has been adequately exercised,[64] and, if it finds that it has not been, the ICC can reassert jurisdiction.[65] For example Charles Graner and Lynndie England were sentenced to, respectively, ten and three years imprisonment by Court Martial of the US army for crimes committed at the Abu Graib prison in Iraq. The ICC could rule this punishment inadequate, and restart a criminal procedure against them (had the United States been part of the ICC, of course).

And this is a very serious point indeed. By becoming a member of the ICC, states have deputed their power to decide how to react to their own military troops committing mistakes or crimes, to the Prosecutor and his Pre-trial Chamber, to state requests, or to a majority in the Security Council. The ICC may even declare national reconciliation procedures void, thereby taking from the parties involved the decision of what justice requires in the circumstances. After the abolition of the Apartheid regime in South Africa, for example, many former government officials were not punished for crimes committed in the name of the regime if they admitted them before a special tribunal.[66] The ICC might in the future overrule such a reconciliation settlement (as the Prosecutor has for example said in the spring of 2011 that he would not accept immunity for Colonel Khadafi as part of a cease-fire). Even when the ICC has not in advance given notice that it would not accept a particular reconciliation settlement, it may still begin investigations. Whether or not the ICC is going to do so can thus never be guaranteed in advance.[67] This may cause many regimes to refuse

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[63] As Madison observed: 'The provision for defence must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to controul the abuses of government'. Hamilton, Madison and Jay, *The Federalist Papers* (New York: Bantam Dell, 1982) 316, Federalist no. 51 (Madison).

[64] As provided by article 20 of the Rome Statute.

[65] Henry Kissinger, 'The Pitfalls of Universal Jurisdiction', in: *Foreign Affairs*, vol. 80, no. 4 (July/August 2001) 95.

[66] See on this: Afshin Ellian, *Een onderzoek naar de Waarheids- en Verzoeningscommissie van Zuid-Afrika* (Nijmegen: Wolf Legal, 2003).

[67] Here, the example of General Pinochets peaceful resignation is also worth mentioning. The agreement that he would not be tried was violated by the claim to universal jurisdiction,

reconciliation tribunals (and continue fighting), as one cannot be sure that admitted crimes will not be used against one in The Hague. An armed conflict such as the aforementioned operation Desert Storm (1991) might not have been concluded with an armistice if there had been a fair chance that Saddam Hussein would have had to face extradition to The Hague.

Moreover, if the Court wants to be effective in its rulings its members will have to place their armies and police forces at the Court's disposal, because the ICC does not have its own means of enforcing its decisions and warrants. This implies the active participation of the 'international community' in the situations of armed conflict the ICC has chosen to involve itself in.

A glimpse of what this might amount to is found in the aforementioned resolution 1593 on Sudan, when the Security Council urged all states to cooperate with the proposed prosecution of the Sudanese leadership by the ICC. A next step in supranational direction might be that the Security Council (of which we will come to speak in depth in chapter 5 section 2) decides that all states *must* cooperate. While these legal considerations are unlikely to cause much unrest among insurgency and terrorist groups, or among undemocratic regimes, Western states with their rule of law, an obedient police force and respect for international law and diplomacy will always be directly held accountable and easily criticized.

Yet, is it likely that the ICC would ever assert jurisdiction over powerful countries? One critic put it this way:

> Today's international criminal justice only punishes certain criminals, those who can be apprehended because they belong to countries that find themselves in a weak and dependent position. Even if China and Russia were to ratify the treaty establishing the International Criminal Court, would the court be able to judge Chinese authorities for what they have done in Tibet? Or put Putin in the dock for crimes committed in Chechnya? Of course not.[68]

It would, however, be quite likely that regimes may use the ICC to dispose of political enemies. Generals who become a threat to the internal power base of presidents may be handed over to the ICC; some have pointed with suspicion at the fact that Congo's remarkable cooperation with the extradition of opposition leader Jean-Pierre Bemba to the ICC served the political interests of the president, his rival Joseph Kabila.[69]

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and this may set a precedent that may prevent future dictators from considering resigning from power (think of, for instance, Fidel Castro, who happened to be in Spain when the arrest warrant against Pinochet was issued – not surprisingly, Castro supported the former Chilean dictator in his objections to his prosecution).

[68] Delsol (2008) xvii.

[69] Daniel Howden, 'International justice and Congo "warlord" on trial', in: *the Independent* (23 November 2010): 'Mr. Bemba's supporters in the DRC have accused the ICC of allowing itself to be used to remove the political rivals of the President Joseph Kabila.' Available online at

To entrust all such matters to an international court is to entrust a great moral responsibility to the 'international community'. To do so is not realistic, Saudi Arabia still being a recognized adherent to the Convention to Eliminate All Forms of Discrimination Against Women (CEDAW),[70] as in 2003, the Iraq of Saddam Hussein, then the only regime in place that had ever used weapons of mass destruction on its own population, was chairing the 25th anniversary Disarmament Conference in Geneva, assisted by co-chair Iran.[71] These countries had recently been in a war with each other in which over a million people were killed. China claimed to be in full compliance with the Covenant on Civil and Political Rights, while Amnesty International devoted more pages in its 2006 annual report to Human Rights abuses in Britain and America than to those in Saudi Arabia and Belarus.[72] In addition, the UN Human Rights Commission (now reframed as Council) has not issued a single condemnation of the atrocities committed in Sudan in 2008 while it has repeatedly condemned Israel for its human rights violations, upon neglecting, largely, the abuses of its neighbours,[73] and so on. Is this the 'international community' we are entrusting all these powers to?

Finally, within the ICC, the Prosecutor has discretionary competencies that can have enormous effects. This became clear when in March 2009, Luis Moreno-Ocampo openly requested an arrest warrant against the Sudanese president al-Bashir. But by openly doing so, Antonio Cassese argued,[74] he implicitly warned al-Bashir that attempts at prosecution were at hand, and thereby reduced the ICC's chances of ever trying him. Cassese even suggested that Moreno-Ocampo did in fact not sincerely attempt to further the case against al-Bashir, but might have had other motives.[75] A prosecutor with so much power can only be supported if one accepts the supranational world-view, according to

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http://www.independent.co.uk/news/world/europe/international-justice-and-congo-warlord-on-trial-2141135.html.

[70] Rabkin (2004) 107.

[71] R. Roth, 'Iraq to chair disarmament conference', on: *CNN.com,* 29 January 2003. Available online at http://edition.cnn.com/2003/WORLD/meast/01/28/sprj.irq.disarmament.conference/.

[72] Amnesty International Report 2006. The report can be found on Amnesty's website, http://www.amnesty.org/en/library/info/POL10/001/2006. See for critical commentary also: 'Many rights, some wrong', in: *The Economist*, March 22nd, 2007.

[73] 26 of its 32 condemnations have been against Israel: R. Farrow, 'Beware of the U.N. Human Rights Council; Obama should be careful about lending legitimacy to bad actors', in: *The Wall Street Journal*, April 5th, 2009.

[74] Antonio Cassese, 'Flawed International Justice for Sudan', in: *Project Syndicate*, June 15th, 2008, available online at http://www.project-syndicate.org/commentary/cassese4/English.

[75] As he writes: '(…) if Moreno-Ocampo intended to pursue the goal of having al-Bashir arrested, he might have issued a sealed request and asked the ICC's judges to issue a sealed arrest warrant, to be made public only once al-Bashir traveled abroad.' Antonio Cassese, 'Flawed International Justice for Sudan', in: *Project Syndicate*, June 15th, 2008, available online at http://www.project-syndicate.org/commentary/cassese4/English.

which – and this is the recurring theme of this chapter – *the question for political legitimacy never arises*. It is only in nation states that powerful functionaries can be subjected to checks and balances. It is inherent in the supranational idea that these functionaries are installed *without* those checks, precisely because those checks can only exist within a state and form an integral part of the concept of statehood. For those checks require other elements of sovereignty that a supranational organization can never possess.

Collateral damage is, moreover, an unavoidable consequence of any military involvement in armed conflicts. Though during operation 'Desert Storm' (1991) it was announced that the era of 'clean wars' had commenced, it never, despite impressive technological improvements and conscious efforts, quite arrived. Does this mean that all those who participate in military conflicts will run the risk of being tried by the ICC in the future?

The International Criminal Court is probably not intending to prosecute UN Peacekeeping personnel when they may, as sometimes happens in wars, accidentally have bombed and devastated a village of innocent farmers and craftsmen. A comparable situation occurred for instance when NATO bombed Serbia in 1999. But the ICC *would* want to prosecute the dictator such as Milosevic who has acted similarly. It will prove almost impossible for the ICC to remain 'objective' and 'neutral' while making such choices in military conflicts.

We have arrived at perhaps the most fundamental difficulty for an international court with supranational powers, which is the impossibility of neutrality. It may already be tremendously difficult to decide which is the more legitimate military force in an armed conflict; to decide on whether the amount of force used was 'disproportionate' or imposed too much harm on civilians is clearly a political matter. Why trust an outsider, or the 'international community' to decide such questions?

It was also this dilemma that caused Immanuel Kant to ultimately reject the idea of a supranational court, considering in the *Metaphysik der Sitten* (1797) that

> No war of independent states against each other can be a *punitive war (bellum punitivum).* The punishment occurs only in the relation of a superior (*imperantis)* to those subject to him *(subditum),* and states do not stand in that relation to each other.[76]
> (…)
> The right of a state *after a war*, that is, at the time of the peace treaty and with a view to its consequences, consists in this: the victor lays down the conditions on which it will come to an agreement with the vanquished and hold *negotiations* for concluding peace.

[76] Immanuel Kant, *The metaphysics of morals.* Translated and edited by Mary Gregor (Cambridge: Cambridge University Press, 1996) 117 (par. 57).

> The victor does not do this from any right he pretends to have because of the wrong his opponent is supposed to have done on him; instead, he lets this question drop and relies on his own force. The victor can therefore not propose compensation for the costs of the war since he would then have to admit that his opponent had fought an unjust war. While he may well think of this argument he still cannot use it, since he would then be saying that he had been waging a punitive war and so, for his own part, committing an offense against the vanquished.[77]

Contrary to what is commonly believed, Kant had argued likewise in his well known essay on international relations, *Zum ewigen Frieden* (1795).[78] While stressing that 'war is only a regrettable expedient for asserting one's rights by force within a state of nature, where no court of justice is available to judge with legal authority', Kant found that 'neither party can be declared an unjust enemy, for this would already presuppose a judge's decision', and that it was the outcome of the conflict itself that would determine 'who is in the right', and that for this reason, 'a war of punishment between states is inconceivable, since there can be no relationship of superior to inferior among them'.[79] Acknowledging that 'perpetual peace, the ultimate goal of the whole right of nations, is indeed an unachievable idea',[80] Kant, in his *Metaphysik,* goes on to discuss the possibilities for a congress of states, of the kind that 'took place (…) in the first half of the present century in the assembly of the States General at the Hague'.[81] This, however, would not have supranational powers but would merely be accepted as 'arbiter, so to speak'.[82] Kant finishes with the caveat that 'by a congress is here understood only a voluntary coalition of different states which can be dissolved at any time', and which serves to aid the nations in 'deciding their disputes in a civil way'.[83]

The tradition of organizing such an international conference of 'arbiters' continued until the Hague Peace Conferences of the beginning of the 20th century, and was surely one of the most important reasons why 'the Dutch government, proud of its tradition of offering political asylum and of its respect for international law, resolutely refused to extradite the Kaiser when he sought asylum there' after World War I.[84] The former head of the German state was to be tried by an international tribunal as demanded by the allies under the provisions

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[77] Kant (1996) 117-118 (par. 58).

[78] Immanuel Kant, *Zum ewigen Frieden. Ein philosophischer Entwurf* (Stuttgart: Philipp Reclam, 2005).

[79] In Kant's vision, the only way in which states could relate to each other in a peaceful manner was by mutual recognition of their sovereign equality. This implied for him the impossibility of judgment of states' behaviors, even in wartime: Immanuel Kant, 'Perpetual Peace', in: *Political Writings.* Edited with an introduction and notes by Hans Reiss. Second, enlarged edition (Cambridge: Cambridge University Press, 1991) 96 (first section, par.6).

[80] Kant (1996) 119 (par. 61).

[81] *Ibidem.*

[82] *Ibidem.*

[83] *Ibidem.*

[84] Laughland (2008) 55-56.

of article 227 of the Versailles treaty,[85] but found refuge in the Netherlands and died in Doorn in 1941.

The aforementioned problems have plagued international tribunals ever since the rise of sovereign statehood (see also chapter 1), and it becomes clear that the two are fundamentally irreconcilable.

4.2. *The European Court of Human Rights*

The same idea as implied in the ICC – that supranational judges and functionaries should uphold abstract rules of 'fundamental value' – underlies human rights discourse. This is evident generally from a great number of UN commissions as well as NGO's labouring for increased 'human rights protection'[86] – and it has become manifest most obviously in the European Court of Human Rights (ECHR). At present, this Court is the only supranational Human Rights-institution that may impose legally binding decisions, and therefore this section is primarily about the Strasbourg bench. However, it is necessary first generally to examine human rights discourse, or, as it has been called, 'rights talk',[87] because deeper and largely neglected questions that should be brought to the fore lie underneath the specific questions related to the Strasbourg court.

Thinking in terms of 'human rights' has gained enormous momentum in the past decades. Rights discourse usually distinguishes between three main categories of 'human rights': classical rights, social rights, and group rights. Rights that fall in the first category concern the negative freedoms of the individual, and include the freedom of speech, a fair trial, *habeas corpus,*[88] freedom of religion, and so on. They require primarily abstention of the state from the arbitrary use of power. The second category encompasses all those rights of which the enforcement requires an active role of the state. They are the rights to education, to an adequate standard of living, adequate food, clothing and housing,[89] and so on. In more recent years, a third category of rights has been developed, the social group rights: people can claim rights because they belong to a certain group, for example an ethnic minority, a sexual minority, or even a generation

[85] Available online at http://net.lib.byu.edu/~rdh7/wwi/versa/versa6.html.

[86] Examples are the UN Human Rights Council, the UN High Commissioner on Human Rights, Amnesty International, Human Rights Watch, and so on.

[87] Mary Ann Glendon, *Rights Talk. The impoverishment of political discourse* (New York: The free press, 1991).

[88] The principle of habeas corpus denotes the right not to be held prison without charges being pressed.

[89] International Covenant on Economic, Social, and Cultural Rights (1966), article 11: 'The States Parties to the present covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions'.

(e.g. 'youth rights'). These rights are what multiculturalism argues for, as will be discussed in chapter 6.

Most advocates of all these universal 'rights', however, speak in metaphors rather than in factual terms. They mistake the wish for the reality. What is often meant – and this applies to all three categories – is not 'rights' in any juridical sense, but 'humanitarian principles', 'Christian values' or 'natural law' that *ought to be installed as rights*. 'Human rights' have become the umbrella concept to denote general principles of justice. It has become a habit to express disapproval of genocide, suppression, severe abuse of power, and so on, as violations of 'human rights' of some sort. We say, for instance, that in a war in Africa 'basic human rights' are infringed, or that the regime in Burma 'gravely violates the human rights' of its citizens. Sometimes it seems that modern man can only conceive of moral ideas when they are expressed as 'rights' of some sort.

Nevertheless, as I said above, all such use of the term 'human rights' is *metaphorical*. Whoever uses the term does not refer to actually existing *rights*: for in order to do that, those 'rights' ought already to have been legislated and to be enforceable by a court. The same goes for the great number of other 'rights' that are currently advocated – for instance 'animal rights' and the 'rights of the environment'.[90] For defenders of the flora and fauna of the world, the word 'rights' has a completely different meaning from that in the positive, *legal* sense. Animals are not legal subjects because they couldn't possibly defend themselves in a court of law. To speak of – or even legislate – animal rights is ultimately about how *we,* as human beings, *ought to treat* animals, and certainly not about what one animal may do to – or invoke against – another animal, for instance.[91] Many national laws forbid certain forms of animal maltreatment, but however important these regulations may be, they amount to something entirely different from considering animals legal subjects and bearers of individual, inalienable 'rights', with an entitlement to enforce them in a court of law against any other mammal or reptile. The same goes, *a fortiori*, for trees and the earth's crust. Those invoking supposedly universal 'human rights', 'animal rights' and the 'rights of the tree' thus do not invoke any actually existing rights, but principles of justice, decent behaviour, responsible stewardship – expressed through the *metaphor* of 'rights'.[92]

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[90] Cf. the French philosopher Michel Serres who defends the 'rights' of the ocean: Michel Serres, *Le contrat naturel* (Paris: François Boudin, 1990).

[91] The fact that some of such 'animal rights' have now been 'recognized', as has been done for instance in Spain, does not affect this.

[92] To say that it is absurd – in the literal sense – to grant rights to non-rational actors is by no means to say that we are without duties towards them, of course. We are never free from duties towards children, mentally disabled or people suffering from dementia. Nor are we even without duties towards non-living objects, for example a painting of Rembrandt. In fact, there is a good case to be made for the view that rights talk impoverishes moral thinking rather than enriching it.

Though dating back to the second half of the eighteenth century,[93] the several declarations of the universal rights of man have, to this day, never gained legal status either. The United Nations' *Universal Declaration of Human Rights* of 1948 has no legal validity, as it is a *declaration* and not a treaty.[94] The International Covenants on Civil and Political Rights, and on Economic, Social and Cultural Rights (both drawn up in 1966) do not pretend to codify universal 'human rights', but a range of political themes so wide as to annul the very idea of a universal core of natural law. Rather, these treaties sum up the elements a wise government ought to take into account. Even the ominous right of prisoners for their 'reformation' is included, as well as the right of working mothers to 'paid leave or leave with adequate social security benefits', the 'fundamental right of everyone to be free from hunger' and the right to the enjoyment of 'the highest attainable standard of physical and mental health'.[95]

It is clear that these 'rights' do not indicate universal, ultimate boundaries which governments may not cross in any circumstances whatever. They may denote desirable policy proposals (although the 'reformation of prisoners' reminds one of the Gulag archipelago), but they are not universal and inalienable moral imperatives.[96]

Even more importantly, these rights cannot be claimed universally, as there is no world court – let alone a world police force to guarantee the enforcement of the rulings of such a hypothetical court. As a consequence, their interpretation will differ from country to country. Countries like Bolivia or Ghana have different standards of 'highest attainable standards of health' from those of Switzerland or Sweden; China and Saudi-Arabia mean something different by the 'reformation of prisoners' than most Western states. In any event, there is no way of speaking of 'universal' human rights, based on any of the UN's declarations and treaties.

Cf. Roger Scruton, *Animal Rights and Wrongs* (London: Continuum, 2000), Glendon (1991), and the excellent essay by Theodore Dalrymple, 'The demoralization of abortion', in: Claire Fox (ed.), *Abortion: whose right?* (London: Hodder & Stoughton, 2002). On page 38, Dalrymple writes: '(…) I have the right to buy a painting by Rembrandt, if I have enough money. Once such a painting is in my possession I have the legal right to destroy or deface it, if I so desire: but surely no one would argue by way of exculpation or even mitigation, were I to do so, that I had acted within my rights. My rights have nothing to do with the question. A woman who believes that she has a right to an abortion, which should require no further justification than that she wants it, as an instance of her right to self-determination (the 'it's-my-body' argument) overlooks morally important aspects of her own situation.'

[93] A major source of inspiration being, of course, John Locke's *Second Treatise of Government* (1690). John Locke, *The second treatise of Government* (1690) especially chapter XIX: 'Of the dissolution of government'.

[94] J.H. Burgers, 'The Road to San Francisco: the revival of the Human Rights Idea in the Twentieth Century', in: *Human Rights Quarterly,* vol. 14 (1992) 447-477.

[95] UN Covenant on Civil and Political Rights (1966) articles 10, 11 and 12 respectively.

[96] Cf. Cliteur, 'Steeds maar nieuwe rechten. Inflatie als juridisch probleem', in: Cliteur, *Tegen de Decadentie. De democratische rechtstaat in verval* (Amsterdam: De Arbeiderspers, 2004) 161ff.

But not only do universal human rights not exist because they have never been codified and could never be enforced; in the hypothetical situation that we *did* codify and enforce them centrally, their application would hardly be unproblematic.

Suppose we made the 'right to life' a 'universal human right' – applied universally by, in the last instance, a world court. Would that mean a ban on abortion and euthanasia? Many people – including many judges from all over the world – would say yes. Would it mean a ban on the death penalty? Overwhelmingly, European elites think so – while many Americans and Asians do not. Nor is it difficult to reframe the right to life into a positive obligation of the state to provide the basic needs of all.[97] Does standing by without providing a remedy while someone dies violate his right to life or not? Must this not mean that the welfare state follows necessarily from this 'right to life'?

Or take the principle of non-discrimination. Again, this is something that sounds 'fundamental' and important. But consistent application of this principle could justify the prohibition of just about anything from hereditary monarchies to the constitutional rule that in order to become American president, a candidate has to have been born in the US and be at least 35 years of age.[98] Because no two individuals are entirely the same, the principle of non-discrimination is endless in its application – just as consistent application of the principle of 'equal opportunities' would require a ban on private property and the dissolution of families.

Likewise, the prohibition of discrimination inevitably clashes with classic civil liberties such as those of expression, conscience and religion.[99] The privileged positions that many states – for a variety of social, cultural and historical reasons – preserve for a specific religious denomination, for instance the Anglican Church in Britain, or the Lutheran in Denmark, or clubs that discriminate on the basis of sex, are all in violation of this supposedly fundamental principle.[100]

A recent Dutch case against the Christian Orthodox party SGP is an example of how arbitrary the application of the 'fundamental principle of non-discrimination'

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[97] In the Case of *Osman v. United Kingdom (Application no. 87/1997/871/1083)* Judgment Strasbourg 28 October 1998, the Court for instance ruled that 'Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk' (B.2, par. 115).

[98] The unavoidability of discrimination will be discussed more extensively in chapter 8 and 9.

[99] A comparable critique of the supposed universal 'right to free speech' has been given by Stanley Fish, *There's No Such Thing As Free Speech. And It's a Good Thing, Too* (Oxford: Oxford University Press, 1994).

[100] An example is the Dutch *Commission for Equal Treatment* ('Commissie Gelijke Behandeling') which found in June 2011 that a café that organized a 'ladies night' was applying intolerable discrimination on the basis of gender, because women received five free consumptions. Cf. 'Café berispt om ladies' night-korting', NOS, June 30th, 2011, http://nos.nl/artikel/252403-cafe-berispt-om-ladies-nightkorting.html.

may in practice turn out to be, when on April 9th, 2010, the Dutch Supreme Court ruled that the Netherlands' oldest political party had violated the 'principle of non-discrimination' by not allowing women to stand for election on behalf of their party. The Dutch court considered, that:

> The prohibition of discrimination outweighs, in so far as it guarantees the franchise of all citizens (…) other constitutional rights involved.[101]

But why did the prohibition of discrimination outweigh other constitutional rights in this case? Well, because the Court thought so.[102] And why was the SGP, which had been denying women the right to stand for election ever since it was founded in 1918, only been prohibited from doing so in 2009? Surely because our views on this subject have proven susceptible to change over time.

The fundamental problem of 'rights talk' is thus that rights (all rights, in all circumstances) are always open to multiple interpretations. Their precise meaning is never obvious. The application of rights, to say the same thing in different words, requires a political choice. This is evident from the situation in the United States too, where judicial appointments to the Supreme Court are in practice political appointments. Through their jurisprudence, these judges may indeed take decisive political decisions in areas such as national security (qualifying practices at Guantanamo Bay as torture), ethics (allowing or prohibiting abortion and euthanasia), criminal justice (capital punishment), immigration (permitting or prohibiting the rejection of asylum seekers), and international law (declaring treaties unconstitutional).[103] American presidents nominate judges with views consistent with their own.[104] The Senate, which must ratify the appointments, can oppose the nomination when the majority has a different political opinion (as happened in 1987 when Ronald Reagan's

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[101] '[Het] Discriminatieverbod weegt, in zoverre het de kiesrechten van alle burgers waarborgt (…) zwaarder dan de andere grondrechten die in het geding zijn': LJN: BK4547, Hoge Raad, 08/01354, ruling of 9 April 2009.

[102] To arrive at its conclusion, the Court interpreted article 7a of the UN Convention on the Elimination of Discrimination against Women (CEDAW), which had already been entered into force in 1981, in a particular way. Cf. http://www.un.org/womenwatch/daw/cedaw/history.htm.

[103] Another example is the way the American Supreme Court has over time stretched the meaning of the right to free speech, now also encompassing incitement, sedition, and obscenity. Cf. Stanley Fish, *There's No Such Thing As Free Speech. And It's a Good Thing, Too* (Oxford: Oxford University Press, 1994), Ronald Dworkin, 'Why must Speech be free?' and 'Pornography and Hate', in: Ibidem, *Freedom's Law. The moral reading of the American Constitution* (Cambridge, MA: Harvard University Press, 1996) 195-226, as well as Milos Forman's movie *The people vs. Larry Flynt* (1996).

[104] Cf. Bork (1990); Stephen Breyer, *Making our democracy work. A judge's view* (New York: Alfred A. Knopf, 2010); Erwin Chemerinsky, *The conservative assault on the constitution* (New York: Simon & Schuster, 2010); Jeffrey Toobin, *The Nine. Inside the secret world of the supreme court* (New York: Anchor Books, 2007).

candidate Robert Bork was rejected[105]). Americans know where the judges of the Supreme Court stand and weigh their chances to push for certain political changes when a judge is replaced. Democrats are currently hoping that during Barack Obama's term some Republican judges will be replaced by Democrats (and that, for instance, this may lead to the abolition of the death penalty).

There are thus already considerable problems related to 'rights talk' on a national level. But the larger the juridical scope of a court, the greater the difficulties, as different countries arrange their affairs differently. If the writ of the US Supreme Court also ran in Canada, Mexico, Guatemala and Venezuela, the situation would soon get out of hand. Therefore, the application of rights on a supranational level multiplies the problems. What is more, the powers of the US Supreme Court are held in check by the legislature, which may provide countervailing legislation if it does not agree with the court's rulings. That is the idea of constitutional checks and balances: 'ambition must be made to counteract ambition', and different bodies of the state must keep one another in check.[106] This does not – and cannot – exist on the supranational level, as it requires a full state.

It is, however, also an option constitutionally to forbid judges from applying 'fundamental rights' to democratically passed legislation, and so tackle the danger of politicized 'rights talk'. This has traditionally been the Dutch approach.[107] The argument against constitutional review is that reviewing laws on their constitutionality implies interpretation of the constitution, and interpretation of the constitution is inherently political.[108] The more fundamental the rule in question, the vaguer its application by definition becomes. Therefore, critics argue, allowing constitutional review will over time lead to a weakening of the

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[105] Cf. for a critical account of the events surrounding the nomination, Ronald Dworkin, 'Bork: The Senate's Responsibility', 'What Bork's Defeat Meant', and 'Bork's own Postmortem', in: Ibidem (1996) 261-305.

[106] 'The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices should be necessary to controul the abuses of government'. Alexander Hamilton, James Madison and John Jay, *The Federalist Papers* (New York: Bantam Dell, 1982) 316, Federalist no. 51 (Madison).

[107] Cf. on the Dutch view: Paul Cliteur, *Constitutionele toetsing, met commentaren van R.A.V. van Haersolte, J.M. Polak en T. Zwart* ('s Gravenhage: Geschrift 74 van de Prof. mr. B.M. Teldersstichting, 1991) 179ff.

[108] There have been many political thinkers who have opposed constitutional review, ranging from Hegel to Henry Steele Commager, and from James Bryce to Maurice Cranston. For an overview, see Paul Cliteur, *Rechtsfilosofie. Een thematische inleiding* (Amsterdam: Ars aequi libri, 2001) 179ff. For the arguments of John Marshall in the US supreme court case of *Marbury v. Madison* (1803), see Bork (1990) 20ff. Cf. William J. Brennan, jr., 'Why have a Bill of Rights?', in: *Oxford Journal of Legal Studies,* vol. 9, no. 4 (1989) 425-440; and Antonin Scalia, *A matter of interpretation. Federal courts and the law* (Princeton: Princeton University Press, 1997).

primacy of politics in deciding political questions and to a colonization of the neutral territory of the law by political bias.[109]

It is with this concern in mind that judges in the Netherlands – though allowed to review the constitutionality of lower (e.g. municipal or provincial) legislation as well as decisions of the executive ('royal resolutions') –, cannot review laws passed by the national parliament. Article 120 of the Dutch constitution forbids a direct appeal to fundamental rights to negate a national legal provision. The idea is that political primacy should lie with the democratically elected Second Chamber – held in check through all kinds of constitutional balancing powers such as the Senate, the Council of State, the Queen, elections, the free press, the public debate, and so on – and that the Dutch court does not rule on the interpretation of fundamental rights, which is regarded as being inherently political. The framers of the Dutch constitution thus chose to have the constitutional bill of rights as a reminder for the legislator to take into account the principles of justice they point to, and not as 'trumps' in the hands of citizens or judges to enforce their views through undemocratic means.[110] It is largely for this reason that the Dutch Supreme Court has, over the years, managed to maintain a fairly apolitical profile.[111]

But this immediately brings us to the European Court of Human Rights. Contradictory to the original philosophy of the Dutch constitution, the Council of Europe, an organization itself installed by the Treaty of London, on May 5th, 1949, drew up the Convention of Human Rights in 1950 including provisions for the setup of a fundamental rights court.[112] It entered into force in September 1953, counting 14 member states at the time.[113] Today, the Council of Europe has 47 member states.[114]

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[109] As, indeed, the development of the United States Supreme Court seems to show.

[110] Though J.R. Thorbecke himself was, oddly enough, a defender of Constitutional review; J.R. Thorbecke, *Bijdrage tot de herziening van de Grondwet* (1848).

[111] Cf. on the Dutch debate, Joost Sillen, 'Tegen het toetsingsrecht', in: *Nederlands Juristenblad,* vol. 43 (10 december 2010) 2231-2748.

[112] Counting 10 formative states, namely, Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden, and the United Kingdom. Winston Churchill had (Especially in his speech of 19 September 1946 in Zurich) promoted the idea of this organization as a means to bring reconciliation to Europe after the devastation of the World Wars. Article 1(a) of the Statute explains that 'The aim of the Council of Europe is to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress'.

[113] New members were: Greece (1949-08-09), Turkey (1949-08-09), Iceland (1950-03-09), and West-Germany (1950-06-13).

[114] Austria (1956-04-16), Cyprus (1961-05-24), Switzerland (1963-05-06), Malta (1965-04-29), Portugal (1976-09-22), Spain (1977-11-24), Liechtenstein (1978-11-23), San Marino (1988-11-16), Finland (1989-05-05), Hungary (1990-11-06), Poland (1991-11-26), Bulgaria (1992-05-07), Estonia (1993-05-14), Lithuania (1993-05-14), Slovenia (1993-05-14), Czech Republic (1993-06-30), Slovakia (1993-06-30), Romania (1993-10-07), Andorra (1994-10-10), Latvia (1994-10-10), Albania (1995-06-13), Moldova (1995-06-13), FYR Macedonia (1995-11-09), Ukraine (1995-11-09), Russia

The convention recognizes a wide range of rights, complemented by a number of protocols containing additional rights. The rights guaranteed in this code can go pretty far. Take the example of protocols 6 and 13, which establish the prohibition of the death penalty. It is clearly questionable how universal, nonpolitical such a prohibition is. Not only from the standpoint of political theory,[115] but also democratically. A recent poll showed that more than half of the European population is in favor of capital punishment in specific, unusually severe cases.[116] Nevertheless, it has now been declared a violation of 'fundamental human rights' in all circumstances whatever.[117]

The Parliamentary Assembly of the Council of Europe, upon state submission, installs the judges of the Court. Each member state nominates three nationals (who do not need to have worked as judges in their national legal system), and the Assembly then decides who it likes best. With one judge for each member state, Monaco and Azerbaidjan have as much say in the European Court of Human Rights, as do Germany and Britain (although whatever is said during deliberations must obviously be translated, with judges from 47 different countries).

Applicants from all different member states (both citizens and non-citizens) may file a complaint for an alleged violation by any of its member states of the rights recognized in the Convention and protocols. The conditions for admissability of the case are formal: domestic remedies should have been exhausted (art. 35 sub 1 ECHR), no complaint may be anonymously filed, et cetera – but these conditions do not confine the jurisdiction of the Court to for instance 'the severest cases only'. Through its jurisprudence, the Court has in recent years also assumed jurisdiction over behavior of its member states' military forces in occupied territories. Thus the United Kingdom was convicted, for instance, in

(1996-02-28), Croatia (1996-11-06), Georgia (1999-04-27), Armenia (2001-01-25), Azerbaijan (2001-01-25), Bosnia and Herzegovina (2002-04-24), Serbia (2003-04-03), Monaco (2004-10-05), and the most recent one, Montenegro (2007-05-11).

[115] Cf. Paul Cliteur, 'Afschaffing van de doodstraf als nationale folklore', in: *Ibidem*, *Moderne Papoea's. Dilemma's van een multiculturele samenleving* (Amsterdam: De Arbeiderspers, 2002) 106-136. Cliteur discusses the great body of political theory in support of the death penalty, as well as such a case as that of Adolf Eichmann, who was hanged, to the general approval of many, in 1962.

[116] Facts on this are abundant. See for instance Prague Daily Monitor, July 13th, 2009, 'Poll: almost two-thirds of Czechs support capital punishment'; A. Moravchik, 'The new abolitionism: why does the U.S. practice the death penalty while Europe does not?', in: *European Studies* (September 2001), writes: 'European public opinion, and that of other advanced industrial abolitionist nations, views the death penalty positively. In France, for example, President Mitterrand abolished the death penalty in 1982 despite 62% percent of the French being retentionists; only last year did poll support dip for the first time below 50%. Two-thirds of the German population favored the death penalty at the time of its abolition. Today 65-70% of Britons, nearly 70% of Canadians, a majority of Austrians, around 50% of Italians, and 49% of the Swedes favor its reinstatement.'

[117] Cf. J.M. Marshall, 'Death in Venice: Europe's Death-penalty Elitism, in: *The New Republic* (July 31, 2000).

2011, after Iraqi nationals filed a complaint in Strasbourg against the conduct of British soldiers in the Iraqi province of Basrah during a night patrol.[118]

Given the Dutch tradition of withholding from judges the power to interpret constitutional principles, it is not surprising that many government officials in the Netherlands were reluctant to embrace the idea of a Court of Human Rights in the first place. Prime Minister Drees resisted the individual complaints mechanism of the court until the last moment. Amongst his objections was the fear that it would make it impossible for the Dutch state to defend itself against disruptive individuals within its territory (especially, national-socialists and communists),[119] because defence against them would sometimes compel the state to take measures infringing the 'rights' such a Court might want to uphold for them.[120]

In the end, the Dutch government ratified the convention after the advice of several experts in international law who proclaimed that none of the laws of the Netherlands were in contradiction with the Convention.[121] The Council of State, however, was unremitting in its rejection of the Convention. It clearly saw the problems posed by the infringement of the country's sovereignty inherent in the ECHR, and held that should the Netherlands become part of the court, a reservation on the right to individual applications should be made. In any case, accession to the ECHR should, according to the Council of State, be regarded as a constitutional treaty and would thus have required a qualified majority.[122]

But the Council of State and the Prime Minister were overruled by the enthusiasm of the Dutch Parliament for the Convention, and the Netherlands joined the ECHR in 1954 upon unqualified (and uncounted, but generally assumed) majority vote in Parliament.[123]

In the discussion of its legitimacy, the first argument defenders of the ECHR use is that the Court will help emerging democracies such as Bulgaria, Russia and Turkey to function properly. The Court would protect the freedom of expression

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[118] Grand Chamber judgement in the Case of *Al-Skeini and Others v. the United Kingdom* (application no. 55721/07). For a comparison with previous cases concerning extraterritorial jurisdiction of the ECHR (most notably the case of *Bankovic and others v. Belgium & Others* – 52207/99 [2001] ECHR 890, 12 December 2001), see: Alasdair Henderson, 'Al-Skeini v. United Kingdom (7 july 2011)', in: *Human Rights and Public Law Update* (14 July 2011), available online at http://www.1cor.com/1315/?form_1155.replyids=1402.

[119] The actuality of this argument is illustrated by the way some Islamist radicals use Human Rights to continue their terrorist activities unhindered, as described in: Melanie Phillips, *Londonistan* (London: Gibson Square 2006) 63 and further.

[120] Y.S. Klerk and L. van Poelgeest, 'Ratificatie a contre Coeur: de reserves van de Nederlandse regering jegens het Europees Verdrag voor de Rechten van de Mens en het individueel klachtrecht', in: *RM Themis* 5 (1991) 220-246.

[121] Most notably prof. dr. François and mr. Eijssen, see on this: Klerk and Van Poelgeest (1991) 220-246.

[122] Klerk and Van Poelgeest (1991) 220-246.

[123] *Ibidem.*

and right to a fair trial of journalists and opponents of these governments; it would help to improve living conditions of prisoners, and the position of women.

It is true that the Court frequently slaps those countries on the wrist (though its rulings are often ignored – either because the awarded indemnifications are not paid, or because the demanded amendments to legislation are not made[124]). However, the Court does much more than that. It often focuses on Western Europe and forces mature democracies with a properly functioning rule of law to revise democratically established policies. The ECHR interferes not only with torture and disappearances, with clandestine state practices and incipient ethnic cleansings in Eastern Europe, but also with everyday issues such as the voting rights for prisoners,[125] provisions for public education,[126] policies concerning homebirth,[127] regulations with regards to house searchings,[128] and police interrogations.[129] Moreover, the Court also interferes with important national questions such as political asylum and immigration,[130] national security, and the combating of terrorism.[131]

The question why the judges from Strasbourg should be allowed to impose their views on these issues to the rest of Europe is pressing – even in the view of the ECHR itself. Acknowledging that they are surely an extremely small group that is outside the control of national parliaments, a doctrine of a 'margin of appreciation' has been developed by the Court, that would help it to distinguish between 'fundamental' questions that would fall under its jurisdiction, and less fundamental or everyday ones that should be left at a national level. According to the doctrine of the 'margin of appreciation', the Court should perform a 'marginal' check only and thus function merely as an ultimate 'watchdog' of

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[124] As of yet, no systematic quantitative research on the compliance with judgments of the ECHR has been undertaken. However, several studies have pointed at the lack of compliance of for instance Russia with the ECHR's rulings. See for instance Julia Lapitskaya, 'ECHR, Russia, and Chechnya: two is not company and three is definitely a crowd', in: *International Law and Politics* (NYU, Vol. 43, 2011) 479-547.

[125] Case of *Hirst v. The United Kingdom* (no. 2) (*Application no. 74025/01),* Judgment Strasbourg 6 October 2005.

[126] Case of *Lautsi v. Italy (Application no. 0814/06)* Judgment Strasbourg 3 November 2009; and Grand Chamber: *(Application no. 30814/06)* Judgment Strasbourg 18 March 2011.

[127] Case of *Ternovszky v. Hungary (Application no. 67545/09)* Judgment Strasbourg 14 December 2010.

[128] Case of *Sanoma Uitgevers B.V. v. The Netherlands (Application no. 38224/03)* Grand Chamber Judgment Strasbourg 14 September 2010.

[129] Case of *Salduz v. Turkey* (Application no. 36391/02) Judgment Strasbourg 27 November 2008.

[130] For instance through interim measures preventing the expulsion of asylum seekers in October 2010. Cf. *MSS v. Belgium & Greece* (application no. 30696/09) Judgment Strasbourg 21 January 2011. Remarkable in this case was the scarcity of evidence the applicant provided for the inhumane situation in Greece he allegedly had been in.

[131] Case of *Kelly and others v. The United Kingdom* (*Application no. 30054/96*) Judgment Strasbourg 4 May 2001.

the most basic natural law.[132] In the words of the Dutch judge at the ECHR, Egbert Myjer, the Court is the guarantor of 'European minimum standards'.[133]

But the problem with this is that it is the Court itself that decides the width of the margin of appreciation. As a result, we have seen the ECHR appropriate more and more jurisdiction to itself.[134] 'In practice', as the former British high court judge Lord Leonard Hoffmann argued, 'the Court has not taken the doctrine of the margin of appreciation nearly far enough. It has been unable to resist the temptation to aggrandise its jurisdiction and to impose uniform rules on Member States'.[135]

The ECHR has for instance, as mentioned before, ruled against Britain for its refusal to grant the right to vote to convicted criminals while they are in prison. Although the British High Court had considered that:

> if an individual is to be disenfranchised that must be in the pursuit of a legitimate aim. (…) As [the counsel for the Secretary of State] submits, there is a broad spectrum of approaches among democratic societies, and the United Kingdom falls into the middle of the spectrum. In course of time this position may move, (…) but its position in the spectrum is plainly a matter for Parliament not for the courts.[136]

The Strasbourg Court, however, thought differently. 'A general, automatic and indiscriminate restriction on a vitally important Convention right must be seen as falling outside any acceptable margin of appreciation', it held with the vote of twelve in favor to five against.[137] The Court considered, amongst other things, that 'there is no evidence that parliament has ever sought to weigh the competing interests or to assess the proportionality of a blanket ban on the right of a convicted prisoner to vote. (…) It may perhaps be said that, by voting the way they did to exempt unconvicted prisoners from the restriction on voting, parliament implicitly affirmed the need for continued restrictions on the voting rights of convicted prisoners. Nonetheless it cannot be said that there was any substantive debate by members of the legislature on the continued justification in light of modern day penal policy and of current human rights standards for

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[132] Cf. Jeroen Schokkenbroek, 'The Basis, Nature and Application of the Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights', in: *Human Rights Law Journal*, vol. 19, no. 1 (April 1998) 30-36, as well as the other articles in this particular issue of the Journal, which was dedicated entirely to the doctrine of the Margin of Appreciation.

[133] 'Zolang als u maar niet door de Europese minimumnorm zakt', in Buitenhof, 5 December 2010.

[134] In this respect, the Public Choice Theory is interesting, as it provides models for understanding the ever-expanding nature of institutions.

[135] Leonard Hoffmann, *The Universality of Human Rights* (Judicial Studies Board Annual Lecture, 19 March 2009), available online at www.shrlg.org.uk/wp-content/plugins/download…/download.php?id=15.

[136] Case of *Hirst v. The United Kingdom (no. 2) (Application no. 74025/01)* Grand Chamber Judgment Strasbourg 6 October 2005.

[137] *Ibidem*. The Chamber had ruled unanimously against the UK in 2004.

maintaining such a general restriction on the right of prisoners to vote'.[138] It is remarkable, to put it no higher, that a supranational court is here not only assessing the legal system of one of its member states, but also goes at some length evaluating the deliberations of its parliament.

In 2010, the ECHR, noticing that the UK had not amended its provisions concerning the prisoners' voting ban, reconfirmed its views on the matter, and concluded that:

> the respondent State must introduce legislative proposals (…) within six months of the date on which the present judgment becomes final.[139]

Days before this ruling, the British Prime Minister David Cameron had declared that the idea of prisoners having the right to vote made him 'physically sick',[140] and he was backed by an overwhelming majority in Parliament resisting to review the provisions in the British criminal code. In February 2011, the British Parliament voted with 234 to 22 votes to continue the ban on prisoners' voting rights. In April 2011, the ECHR rejected (by an anonymous panel of five judges) the British application for appeal to the Grand Chamber, thus making the previous judgment final and so bringing an obligation on the United Kingdom to change its laws before 11 October 2011.[141]

It was not the first time that the Court had had views regarding punishments conflicting with those of the United Kingdom. More than thirty years earlier, in the *Tyrer v. UK* case of 1978, the Court had already interfered with practices on the Isle of Man, which ultimately came down to declaring all forms of corporal punishment to juveniles a form of 'degrading' punishment prohibited in article 3 (although it remains questionable if any child is ever brought up without having received an occasional slap by his parents). In his dissenting opinion, Judge Sir Gerald Fitzmaurice considered:

> I have to admit that my own view may be coloured by the fact that I was brought up and educated under a system according to which the corporal punishment of schoolboys (…) was regarded as the normal sanction for serious misbehaviour, (…). Generally speaking, and subject to circumstances, it was often considered by the boy himself as preferable to probable alternative punishments such as being kept in on a fine summer's evening to copy out 500 lines or learn several pages of

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[138] *Ibidem*.

[139] Case of *Greens and M.T. v. The United Kingdom (Applications nos. 60041/08 and 60054/08)* Judgment Strasbourg 23 November 2010.

[140] Cameron declared this on November 3rd, 2010, in a debate in Parliament. Cf. B. Quinn, 'Prisoners' voting rights: government loses final appeal in European court. European court of human rights rules UK must draw up proposals to end ban on prisoners voting within six months', in: *The Guardian,* Tuesday 12 April 2011. Available online at http://www.guardian.co.uk/politics/2011/apr/12/prisoners-vote-government-loses-appeal?&.

[141] This information is provided by the British Parliament itself, available online at http://www.parliament.uk/documents/commons/lib/research/briefings/snpc-01764.pdf.

> Shakespeare or Virgil by heart, or be denied leave of absence on a holiday occasion. (…) Yet I cannot remember that any boy felt degraded or debased. Such an idea would have been thought rather ridiculous. The system was the same for all until they attained a certain seniority. If a boy minded, and resolved not to repeat the offence that had resulted in a beating, this was simply because it had hurt, not because he felt degraded by it or was so regarded by his fellows: indeed, such is the natural perversity of the young of the human species that these occasions were often seen as matters of pride and congratulation, – not unlike the way in which members of the student corps in the old German universities regarded their duelling scars as honourable – (though of course that was, in other respects, quite a different case).[142]

It was also in this *Tyrer* case, that the Court for the first time declared that 'the Convention is a living instrument which (…) must be interpreted in the light of present-day conditions' – which meant that in theory, the Court was now no longer restrained by a strict, literal interpretation of the text of the Convention.[143]

As a result, ever since this ruling, the Court has given new – and expanding – interpretations to the rights under its jurisdiction. 'The Strasbourg court has taken upon itself an extraordinary power to micromanage the legal systems of the member states of the Council of Europe', Lord Hoffmann observed in 2011.[144]

In 2007, for example, the ECHR ruled that the Somali asylum seeker Salah Sheekh could not be expelled from the Netherlands because expulsion would infringe his right not to be tortured. The Dutch government's agency on immigration had concluded beforehand that Salah Sheekh did not run the risk of torture. Dutch national immigration policy, established after extensive public debate and sanctioned by the democratically elected parliament, has thus been overruled.[145] Following this case, the Chamber of the Court decided in the case of *A. v. the Netherlands* of in July 2010, that a Libyan asylum seeker, who was regarded a threat to national security by the Dutch secret services (AIVD) and

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[142] Case of *Tyrer v. The United Kingdom (Application no. 5856/72)* Judgment Strasbourg 25 April 1978. The Court has also referred to a 'European consensus', a 'trend', an 'international consensus' (Case of *Christine Goodwin v. The United Kingdom (Application no. 28957/95)* Judgment Strasbourg 11 July 2002), all of which being not even remotely clear in their definition. Should a 'consensus' develop that the Court finds unwelcome – for instance concerning opposition to gay-rights, a viewpoint that a great serious number of member states of the Council of Europe indeed seem to increasingly share – it is unclear what the Court would do. Cf. K. Dzehtsiarou, 'Consensus from within the Palace Walls: UCD Working Papers in Law, Criminology & Socio-Legal Studies Research Paper No. 40/2010' (September 17, 2010) available online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1678424.

[143] Case of *Tyrer v. The United Kingdom (Application no. 5856/72)* Judgment Strasbourg 25 April 1978.

[144] Leonard Hoffmann, 'Foreword', in: Michael Pinto-Duschinsky, *Bringing Rights Back Home. Making human rights compatible with parliamentary democracy in the UK* (London: Policy Exchange, 2011) 7.

[145] Case of *Salah Sheekh v. The Netherlands (Application no. 1948/04)* Judgment Strasbourg 11 January 2007.

later by the Dutch government and the courts as well (due to active participation in a jihadist network), could not be expelled because, so the Court believed, he might be tortured in Libya.[146]

It were precisely such cases that were feared by those who objected to granting the Court the right to receive individual complaints – and it was precisely with such cases in view, that guarantees were given to the Netherlands before accession, that its decisions in these matters would not be interfered with.[147]

The examples are abundant, and the potential contradictions between national preferences and the momentary moral whims of a human rights court are endless. In *Lautsi v. Italy*, the ECHR initially ruled that crucifixes in Italian public schools were a violation of the fundamental right to freedom of religion (article 9 of the Convention) taken together with article 2 of the second Protocol, that requires that 'the State shall respect the right of parents to ensure such education and teaching in conformity with their own religions and philosophical convictions', and sentenced Italy to pay 5,000 euros 'non-pecuniary damage'.

The ruling was unanimous, and the wording of the ruling strict and highly critical of Italy:

> The Court considers that the presence of the crucifix in classrooms goes beyond the use of symbols in specific historical contexts.
> (…)
> The Court acknowledges that, as submitted, it is impossible not to notice crucifixes in the classrooms.
> (…)
> The presence of the crucifix may easily be interpreted by pupils of all ages as a religious sign (…). What may be encouraging for some religious pupils may be emotionally disturbing for pupils of other religions or those who profess no religion. That risk is particularly strong among pupils belonging to religious minorities.[148]

But in appeal, the Court reversed its conclusion. With a great majority of fifteen votes to two, the court all of a sudden concluded that, in fact, no violation of the convention had occurred. While 'the decision whether or not to perpetuate a tradition falls in principle within the margin of appreciation of the respondent State', the Court considered that 'a crucifix on a wall is an essentially passive symbol'. In addition, it concluded that:

> There is no evidence before the Court that the display of a religious symbol on classroom walls may have an influence on pupils and so it cannot reasonably be asserted that it does or does not have an effect on young persons whose convictions are still in the process of being formed.

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[146] Case of *A. v. The Netherlands (Application no. 4900/06)* Judgment Strasbourg 20 July 2010.
[147] Klerk and Van Poelgeest (1991) 220-246.
[148] Case of *Lautsi v. Italy (Application no. 30814/06)* Judgment Strasbourg 3 November 2009.

The Court also reminded the plaintiff that she 'retained in full her right as a parent to enlighten and advise her children, to exercise in their regard her natural functions as educator and to guide them on a path in line with her own philosophical convictions'.[149]

Two other examples of the Court's ambivalence are the case of *Pye v. UK* and that of *Hatton v. UK*. In *Pye v. UK,* the Court considered the extent to which British limitations on land ownership claims were contrary to the 'right to protection of property' (Article 1 of the first Protocol). Initially, the Court ruled that there was indeed a conflict, but the Grand Chamber then considered that England was within its right to decide for itself on these matters.[150] In *Hatton and others v. UK,* the Court ruled with 5 to 2 votes that night flights regulations concerning Heathrow Airport, decided upon by the British Secretary of State upon an assessment of the national economic interest concerned, were a violation of the right to respect for the privacy of those living in the area of the airport. The Grand Chamber overruled this decision again with the vote of 12 to 5.[151]

If the two chambers of the Court could differ so greatly, how 'universal' then could the fundamental principles on which they decided the case have been? Is it not a basic assumption of a supranational Human Rights court – and was it not a basic assumption of the ECHR in Strasbourg – that it would merely deal with principles of basic justice ('self-evident' principles, as it were[152]) that we all agreed with?[153] The whole point of a supranational court of Human Rights is that there are some 'fundamental' values that we all agree upon – and that we have a Court to make sure they are protected – while more ordinary or disputable questions remain within the competence of national politics.

But it is becoming increasingly clear that the European Court of Human Rights does not aim to perform that role. In a significant number of cases, the Court hardly performs 'marginal', 'subsidiary' interpretation of otherwise universal principles, immediately recognized by any civilised nation. While the Court was set up to pass judgment on gross violations of undisputed matters only, it is gradually applying the European Convention of Human Rights as law to the

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[149] Case of *Lautsi and others v. Italy (Application no. 30814/06)* Grand Chamber Judgment Strasbourg 18 March 2011.

[150] Case of *J.A. Pye (Oxford) Ltd. v. The United Kingdom (Application no. 44302/02)* Judgment Strasbourg 15 November 2005; and Grand Chamber Judgment Strasbourg, 30 August 2007.

[151] Case of *Hatton and others v. The United Kingdom (Application no. 36022/97)* Grand Chamber Judgment Strasbourg, 8 July 2003.

[152] As the American declaration of independence famously denotes such basic principles.

[153] For not only did the Grand Chamber rule completely opposite to the Chamber, the votes of the judges itself show serious discord as well. While the Chamber judgment had *unanimously* held that there had been a violation, the Grand Chamber again overwhelmingly voted (with 15 to 2) that in fact there had *not* been such a violation.

cases brought before it – thus accepting the panel of international judges coming from 47 countries as the ultimate authority in increasingly ordinary disputes.[154]

One of its judges has even considered in a dissenting opinion that speed limits might be a violation of a universal human right, considering that 'it is difficult for me to accept the argument that hundreds of thousands of speeding motorists are wrong and only the government is right'.[155] In other cases, the Court interferes not with its member states' governments, but with its member states' judges. Thus the ECHR overruled the German Supreme Court's decision to allow the publication by the press of pictures of the Princess of Hannover and her children, stating that such publication would violate her right to privacy (Article 8 of the Convention). The Court thought the disputed pictures made no 'contribution (…) to a debate of general interest', while Germany, aware of its particular history of curtailing free expression in public, had thought it best to allow such a publication.[156] The judge from Slovenia in his concurring opinion rose to the occasion to present his own philosophical position on the freedom of speech:

> I believe that the courts have to some extent and under American influence made a fetish of the freedom of the press. (…) It is time that the pendulum swung back to a different kind of balance between what is private and secluded and what is public and unshielded. The question here is how to ascertain and assess this balance …'[157]

Apart from the unusual liberty assumed here by Judge Zupancic to express his views on the alleged American 'fetish' of the freedom of the press and the undoubtedly political viewpoint that 'it is time that the pendulum swung back', it is important to note that he believed it was the task of the ECHR to 'ascertain and assess' this issue.

But not only does Strasbourg – as we have seen in these examples – assume jurisdicton in increasingly far-reaching and political questions, in practice its rulings reach even further, since the rights of the convention and the jurisprudential course of the Court are also applied by national judges in national courts, as if they were precedents.

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[154] Sometimes, the European Court also seems to use its Convention as the Constitutional appeal of a supposed 'Federal State of Europe'. As indeed acknowledged by the Court itself in the Loizidou-case (Preliminary objections, March 23, 1995), when the Court described the European Convention on Human Rights as 'a constitutional instrument of European public order'. See R.A. Lawson and H.G. Schermers, *Leading cases of the European Court of Human Rights* (Leiden: Ars Aequi 1995) vii.

[155] Case of *O'Halloran and Francis v. The United Kingdom* (Applications 15809/02 and 25624/02) Judgment Strasbourg 29 June 2007.

[156] Case of *Von Hannover v. Germany (Application no. 59320/00)* Judgment Strasbourg 24 June 2004.

[157] Concurring opinion of Judge Zupancic, Case of *Von Hannover v. Germany (Application no. 59320/00)* Judgment Strasbourg 24 June 2004.

We are already seeing that all kinds of articles of domestic law are being interpreted according to the European Court's jurisprudence. A recent example from the Netherlands was the decision of the Court of Appeal of The Hague, which declared new legislation concerning the eviction of illegal squatters a violation of the European Court's interpretation of the right to family life.[158] On November 8th, 2010, the mayor of Amsterdam, Eberhard van der Laan, was thus prevented from executing democratically passed new legislation on the matter.[159] We have also seen the principal of precedent being applied in the Dutch jurisprudential interpretation of freedom of speech, which was extensively reviewed in the light of Strasbourg jurisprudence during the trial of Geert Wilders, as if it were authoritative law applying directly to the Dutch case.[160]

In *Salduz v. Turkey*, the Court decided that there must be no police interrogation of suspects without the presence of a lawyer. This case created a precedent for the Dutch criminal justice system that has traditionally allowed interrogation of suspects immediately after arrest.[161]

It is possible that there will soon be an Islamic interest group that will challenge the French ban on the burqa in Strasbourg by invoking the right to freedom of religion. Or the Swiss minaret-ban. What will the Court say? Thomas Hammarberg, who works as a 'commissioner for human rights' at the Council of Europe, has already announced on July 20th, 2011, that he saw such a ban as 'a sad capitulation to the prejudices of xenophobes', and Erdogan, the prime minister of Turkey – which is also a member of the Council of Europe – has declared that to his mind, this ban violated the 'freedom of religion'.[162] Perhaps

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[158] Gerechtshof 's-Gravenhage, November 8th, 2010, published November 11th, 2010; LJN: BO3682, 200.076.673/01. The decision was supported by the Supreme Court on October 28, 2011.

[159] The anti-squatting law had been initiated by three members of Parliament, Ten Hoopen (Christian-Democrats), Slob (Christian party) and Van der Burg (Liberal Party). The Second Chamber passed it in October 2009, and the Senate passed it in June 2010. More information available online at http://www.eerstekamer.nl/wetsvoorstel/31560_initiatiefvoorstel_ten.

[160] Rick Lawson, 'Wild, wilder, wildst. Over de ruimte die het EVRM laat voor de vervolging van kwetsende politici', in: *NJCM-Bulletin*, vol. 33, no. 4 (2008) 481. Cf. Thierry Baudet, 'De vrijspraak van Geert Wilders is uniek in Europa', in: *Trouw*, 25 June 2011. The article has been translated as 'Geert Wilders, a Voltaire for our times?', and is available online at http://www.presseurop.eu/en/content/article/743751-geert-wilders-voltaire-our-times; it was criticized by Rick Lawson, 'Werd Islamcritici de mond gesnoerd? Helemaal niet', in: *Trouw*, 28 June 2011; which was again answered on the weblog *Dagelijkse Standaard*, 'Professor Rick Lawson nu zelf onzorgvuldig', 1 July, 2011, available online at http://www.dagelijksestandaard.nl/2011/07/professor-rick-lawson-nu-zelf-onzorgvuldig.

[161] Cf. Alexander de Swart, 'Toch nog een raadsman bij het politieverhoor? Enkele ontwikkelingen na *Salduz/Panovits*', in: *Nederlands Juristenblad,* no. 4, 29 January 2010, 223-226; Alexander de Swart, 'Update *Salduz*-doctrine. Toch nog een raadsman bij het politieverhoor? Part II', in: *Nederlands Juristenblad,* no. 42, 4 December 2010, 2692-2695.

[162] Quoted in: 'Council of Europe blasts burqa ban', in: *www.euractiv.com* (20 july 2011) available online at: http://www.euractiv.com/en/culture/council-europe-blasts-burqa-ban-news-506689. Cf. 'Penalising women who wear the burqa does not liberate them', in: *The Council of Europe Commissioner's Human Rights Comment,* 20 July 2011. Available online at: http://commissioner.cws.coe.int/tiki-view_blog_post.php?postId=157.

that a ban on the burqa or on new minarets will indeed be found to be in conflict with the 'human rights' of immigrants, nobody can know in advance, but there is now a fair chance in almost any legal dispute that involves moral questions to win your case in Strasbourg. The Court has a waiting list approaching 200.000 cases, growing everyday.

4.3. *The International Court of Justice*

The International Court of Justice has become one of the leading fora for international dispute settlement since its installation simultaneously with the founding of the United Nations.[163] In principle, it is not a supranational court because referral of disputes by states to it is always on a voluntary basis. Article 36 par. 1 reads: 'The jurisdiction of the Court comprises all cases which the parties refer to it'. And it takes two to tango.[164]

Yet, the possibility exists for a state to accept the jurisdiction of the ICJ in any international dispute it may have, and it is then obliged to accept the ruling of the Court. This possibility is given in par. 2 of the same article 36. It reads:

> The states parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes (…).

Making such an article 36 declaration makes the ICJ a supranational institution *for that state* and *for the type of disputes* that have been declared to be falling under the compulsory jurisdiction of the Court. An impressive range of states has accepted this compulsory jurisdiction: 66 in total.[165]

Yet if we look at the provisions in the declarations of these 66 states, we understand that this acceptance of compulsory jurisdiction is often merely *pro forma*: most states have made extensive lists of exceptional circumstances in which they do not recognize the compulsory jurisdiction of the ICJ – circumstances such as border disputes, disputes concerning armed conflicts, disputes where, in

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[163] The 'introductory note' to the Charter of the United Nations reads: 'The Statute of the International Court of Justice forms an integral part of the Charter of the United Nations.'

[164] Though the ICJ itself goes so far as to denote itself as the 'world court', http://www3.icj-cij.org/jurisdiction/index.php?p1=5. The Permanent Court of International Justice has also been denoted as such, see for instance Michael P. Scharf, 'The ICC's jurisdiction over the nationals of non-party states: a critique of the U.S. position', in: *Law & Contemporary Problems*, vol. 64, issue 1 (Winter 2001) 67-118, there 73.

[165] As of Spring 2011. Information is available online at http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3.

the case of states such as India, 'other commonwealth or former commonwealth states' are involved, and the like.[166]

Moreover, just as with the ICC, most states that are likely to be involved in serious armed conflicts in the near future have not recognized this compulsory jurisdiction, for example China, Russia, United States, France, Israel, Iran, and others.

What we see in the ICJ is therefore an international organization with embryonic supranational powers. There have been worrying examples of what these capabilities may amount to, however. One is the 1986 case of Nicaragua v. the United States.[167] In this case, the US was condemned to pay indemnification to Nicaragua for its aggression in supporting rebels who opposed the pro-communist Nicaraguan regime at the time. The United States had agreed to accept the compulsory jurisdiction of the ICJ under article 36 (be it with a number of important reservations). The Security Council then proposed a resolution to demand that the United States comply with the rulings of the ICJ. The United States was able to veto this resolution. But if a non-veto power had been in the position of the United States in this case, it might have been obliged to comply with the ruling of an international court that it did not accept (following this affair, the United States withdrew its acceptance of compulsory jurisdiction of the ICJ under article 36 and has never restored it).

[166] These and other countries' declarations can be found online at http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3

[167] Military and paramilitary activities in and against Nicaragua (*Nicaragua v. United States of America*), Merits, Judgment, ICJ Reports 1986.