



## ***Erga Omnes***

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### **An Imagination of International Law: Some Progressive Views?**



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*Author's Note: Any piece of writing demonstrably takes one of the two forms – an inspirational output or else the produce of hard-fought academic labour. This write-up represents the former. The ideas are presented in a reflective tone, with the foreground of an unfinished conversation.*

*Summary Statement: The write-up critiques the constitutionalizing role of the human rights jurisprudence within the corpus of international law; environmental law and trade law provides the necessary context.*

The way environmental law has developed is both exciting and intriguing – exciting, since it brought local problems to the attention of the global audience; intriguing, because of the same reason whereby it turned local problems into global problems. What binds the excitement with the resulting intriguingness is the way we connect the local with the global. Are there any limits?

Allow me to be devil's advocate for a while (which obviously I'm not; I don't identify myself as the quintessential anarchist of any progressive discourse), but only till the time you end up reading this post!

The progress of environmental law and international trade law has been differential on similar issues. The recourse to international law is generally made to create positive legal obligations for the environmental law regime, whereas, for international trade, international law is resorted to create negative obligations for the discipline. In both instances, the usual ally or the companion is the human rights jurisprudence – environmental law finds support from international law to develop its fangs, its biting ability whereas trade law seeks human rights to

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rearrange its canines so that they look more beautiful. Interesting enterprise human rights jurisprudence has become!

The question of 'legitimacy' has intrigued every international lawyer since the beginning of the times ([Lauterpacht](#), [Allot](#)). While some have attempted to address the question from the inherent contradiction in the language of international law ([Kennedy](#), [Koskenniemi](#)) and then moving on to describe its constitutionalizing tendency in the mindset of its practitioners ([Koskenniemi](#), [Klabbers](#)); others have first exposed the inherent biases of its narrative ([Anghie](#), [Chimni](#)), proceeding on to attempt building a more informed discourse by mainstreaming resistance ([Chimni](#)).

On the doctrinal level, both environmental law and trade law have been attempting to address the question of legitimacy by leaning on the jurisprudential (and not doctrinal) corpus of human rights law. This has been more due to the trumping effect that the human rights jurisprudence has come to enjoy within the discipline ([Petersman](#), [Teson](#)). It is this trumping effect that has led to the humanization of international law discourse, much critiqued, especially at the hands of the scholars from the developing world ([Mani](#)). The dangers of this humanization project seem to stem from the skewed understanding of human rights that shapes this discourse; informed by the liberal traditions of civil and political rights and much lesser from the economic, social and cultural aspects of the human rights tradition ([Petersman](#)).

The humanization of international law has the inherent tendency to seek constitutionalization of the discipline. The constitutionalization ([Klabbers/Peters/Ulfstein](#)), which seems to be the core element of the modern international law project since the [Ghent Conference of 1873](#) (or in its classical form arising out of the [Salamancan tradition](#)), within its current global disciplinary discourse, is seen either as a civilizing project or else as the progressive psyche ([Koskenniemi](#)). While the former smacks of the power discourse in international law (much along the [realist lines](#) ([Slaughter/Tulumello/Wood](#)), the latter aligns more with the psychology of the discourse (or the [constructivist mould](#)) ([Aalberts](#)).

The constitutionalization tendency from the former perspective holds hidden dangers – the dangers of the hegemonization of the discipline. As understood, any project in the 'universalization' of international law is bound to be a hegemonization discourse ([Koskenniemi](#), [Klabbers](#)). The 'constitutionalization' discourse, therefore, in its any form – institutional ([Jackson](#)), normative

([Petersman](#), [Teson](#), [Reisman](#)) (also [Dunoff](#)) has the dangers of pitting one project against the other (exemplified by [TWAIL II](#)) ([Singh](#)).

My core argument stems only from this perspective – is not the ‘climate change and human rights’ or else ‘business and human rights’ not a hegemonization discourse? Cannot we say that humanization of international law has the inherent tendency to bring back the memories of our colonial past? ([Howse/Teite](#)) Would it not be better if we continue looking at human rights through its doctrinal lens and not through its moral glasses? Or else we lose the path to the progression of our discipline at the hands of a ‘project’, which international law should not become.

There are two ways to integrate human rights jurisprudence within our disciplinary understanding while bypassing the ‘project’ sentiment – either to proceed with the constitutional psyche and keep human rights as our abstract moral compass ([Koskeniemi](#), [Klabbers](#)) or else to radically absorb the tradition of resistance within the constitutionalization project ([Chimni](#), [Baxi](#)).

I rest my case here!

## References :

- i. Anne-Marie Slaughter, Andrew S. Tulumello and Stepan Wood, *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92(3) AJIL 367 (1998).
- ii. Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP, 2005).
- iii. B.S. Chimni, *International Law and World Order. A Critique of Contemporary Approaches* (CUP, 2017).
- iv. B.S. Chimni, *Third World Approaches to International Law: A Manifesto*, 8 ICLR 3 (2006).
- v. David Kennedy, *International Legal Structures* (Baden-Baden: Nomos Verlagsgesellschaft, 1987).
- vi. Ernst-Ulrich Petersmann, *Time for a United Nations “Global Compact” for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration*, 13 EJIL 621 (2002).
- vii. Fernando Tesón, *Humanitarian Intervention: An Inquiry into Law and Morality* (Brill, 3<sup>rd</sup> ed., 2005).
- viii. Hersch Lauterpacht, *The Function of Law in the International Community*, (OUP, 2011).
- ix. Jan Klabbers, Anne Peters and Geir Ulfstein, *The Constitutionalization of International Law* (OUP, 2009).
- x. Jan Klabbers, *The Bridge Crack’d: A Critical Look at Interdisciplinary Relations*, 23(1) Int. Relat. 119 (2009).
- xi. Jeffrey L. Dunoff, *Constitutional Conceits: The WTO’s ‘Constitution’ and the Discipline of International Law*, 17(3) EJIL 647 (2006).
- xii. John Jackson, *The World Trade Organization Constitution and Jurisprudence* (Royal Institute of International Affairs, 1998).
- xiii. Jutta Brunnée & Stephen J. Toope, *Constructivism and International Law* in Jeffrey L. Dunoff & Mark A. Pollack (eds.), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* 119 (CUP, 2012).

- xiv. Klabbers, *Towards a Culture of Formalism: Martti Koskenniemi and the Virtues*, 27 *TICLJ* 417 (2013).
- xv. Martti Koskenniemi, *Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization*, 8 *Theor. Inq. Law* 9 (2007).
- xvi. Martti Koskenniemi, *Empire and International Law: The Real Spanish Contribution*, 61(1) *Univ. Tor. Law J.* 1 (2011).
- xvii. Martti Koskenniemi, *From Apology to Utopia the Structure of International Legal Argument* (CUP, 2009).
- xviii. Martti Koskenniemi, *Law, Teleology and International Relations: An Essay in Counterdisciplinarity*, 26(1) *Int. Relat.* 3 (2012).
- xix. Michael Reisman, *Designing and Managing the Future of the State*, 8 *EJIL* 409 (1997).
- xx. Petersmann, *How to Constitutionalize International Law and Foreign Policy for the Benefit of Civil Society?*, 20 *Mich. J. Int. Law* 1 (1998).
- xxi. Philip Allott, *The True Function of Law in the International Community*, 5(2) *Indiana J. Glob. Leg. Stud.* 391 (1998).
- xxii. Prabhakar Singh, *Indian International Law: From a Colonized Apologist to a Subaltern Protagonist* 23(1) *LJIL* 79 (2010).
- xxiii. Robert Howse and Ruti Teite, *Does Humanity Law Require (or Imply) A Progressive Theory of History? (And Other Questions for Martti Koskenniemi)*, 27 *TICLJ* 377 (2013).
- xxiv. Stephen D. Krasner, *Realist Views of International Law*, 96 *Proceedings of ASIL* 265 (2002).
- xxv. Taanja E. Aalberts, *Interdisciplinarity on the Move: Reading Kratochwil as Counter-Disciplinarity Proper* 44(2) *Millenn. J. Int. Stud.* 242 (2016).
- xxvi. Upendra Baxi, *B. S. Chimni, International Law and World Order: A Critique of Contemporary Approaches*, second edition, Cambridge University Press, 2017, xviii+629, 59 *IJIL* 469 (2021).
- xxvii. V. S. Mani, ““Humanitarian” Intervention Today (Volume 313)” in *Collected Courses of the Hague Academy of International Law* (2005).

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