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FEMINISM, MODERN PHILOSOPHY AND

THE FUTURE OF LEGITIMACY OF INTERNATIONAL CONSTITUTIONALISM

A. General Framework of Analysis

Since nineties, especially after the publication in the *American Journal of International Law* of the article by Hilary Charlesworth, Christine Chinkin and Shelley Wright dealing with feminist approaches to international law,¹ the feminist literature on international law, including international human rights law did not cease to grow.² These approaches take different forms, but they all reveal deficiencies, gaps, drawbacks of international law in addressing women's needs and interests. Even the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)³ the most

¹ Hilary Charlesworth, Christine Chinkin and Shelley Wright, "Feminist Approaches to International Law", 85 *American Journal of International Law* (1991) pp. 613-645.

² For a recent overview of developments in this field see Doris Buss, Ambreena Manji (eds.), *International Law: Modern Feminist Approaches* (2005).

³ Adopted by the General Assembly resolution 34/180 (1979) on 18 December 1979, entered into force 3 September 1981, UNTS 1249, 13.

comprehensive instrument dealing with women's rights is not an exception.⁴ As will be demonstrated below on hand of some examples, despite all positive achievements, this convention can still be criticised from several points of view which address its substantive provisions, as well as its enforcement and implementation mechanisms.

Thus, notwithstanding all optimistic aspects linked to the development of international human rights law an informed feminist lawyer is well aware of its deficiencies and necessity of constant improvement.

Contrasting with this critical and questioning approach is the stance developed in the constitutionalists thinking of international lawyers. International constitutionalism takes different forms in the doctrine of international law which will be briefly described below, but can be understood mainly as placing of constraints on the exercise of power by states, ultimate lawmakers and enforcers of international law. To put it differently,

⁴ Other instruments adopted by the UN General Assembly include Convention on the Nationality of Married Women, adopted by the General Assembly of the UN by its resolution 1040 (XI) of 29 January 1957, and entered into force on 11 August 1958, UNTS 309, 65; the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, adopted by the General Assembly of the UN by its resolution 1763 (XVII) of 7 November 1962, entered into force on 9 December 1964, UNTS 521, 231; Convention on the Political Rights of Women, adopted by the General Assembly of the UN by its resolution 640 (VII) of 20 December 1952, and entered into force on 7 July 1954, UNTS 193, 135. Moreover, other UN agencies also adopted women-specific conventions in their respective areas of activity. For some examples see e.g. the ILO Convention N° 100 concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, adopted by the General Conference of the ILO on 29 June 1951, and entered into force on 23 May 1953; the ILO Convention N° 111 concerning Discrimination in respect of Employment and Occupation, adopted by the General Conference of the ILO on 25 June 1958 and entered into force on 15 June 1960; Convention against Discrimination in Education, adopted by the General Conference of the UNESCO on 14 December 1960, entered into force on 22 May 1962.

international constitutionalism tends to reinforce legality of various norms and institutions of international law. Lawyers engaged with international constitutionalism tend to idealise human rights. None of the critiques made by feminist international lawyers is taken into account. International human rights law with all its gaps and deficiencies often even serves as the ultimate legitimising argument.

This article will attempt to demonstrate that to continue theorising international constitutionalism without taking into account feminist critiques of international law will ultimately lead to strengthening of gaps and deficiencies of international law in general and human rights law in particular, leaving interests of many human beings, majority of whom will be women, out of consideration. Moreover, in my view, international constitutionalism will also lose any claim to legitimacy. In order to avoid these outcomes, there is not only a need for mutual exchange between feminist and constitutionalist lawyers, but also a need for international lawyers to explore the notion of legitimacy and its use in the doctrine of international constitutionalism.

I will start by explaining the importance of the concept of legitimacy for theorisation of international constitutionalism. As a next step, major trends in the constitutionalist doctrine of international law will be presented, followed by an analysis of the notion of legitimacy as it is applicable to international constitutionalism. I will present one vision of legitimacy which comes closer than any other to my own understanding of this concept. The central part of the article will serve to demonstrate how both the international constitutionalism and even the most advanced vision of its legitimacy leave many individuals, in particular women out of consideration. I will conclude by indicating future directions both for international constitutionalism and the understanding of legitimacy in international law.

B. On Legitimacy and Legality in International Constitutionalism

Why should legitimacy and not only legality be important when talking about law, and more particularly about constitutional law?

I will mention just two reasons which appear to be fundamental to my inquiry. The first more general reason is linked to what I consider to be a broadly accepted vision of law. Law is no longer regarded through a criminal law prism. Law is not limited to rules imposed by a sovereign (be it a person or a group of persons) and compliance ensured through threat of sanctions. Rather, law is understood as an order-creating and maintaining mechanism, where compliance is achieved through voluntary adherence to rules based on their acceptance as legitimate.⁵ Such legitimacy-based compliance gains particular importance at the level of international law where possibilities of enforcement by other means are extremely limited.

Another reason is derived from the fact that the subject-matter of the study is constitutionalism. In many instances legitimacy plays an important role in the context of constitutionalisation and constitutionalism.⁶ Without transposing directly to the international plane issues discussed in relation to legitimacy in constitutional theory relating to domestic law, I will analyse some aspects of theorisation of constitutionalisation of international law in the mainstream doctrine. The literature on constitutionalism and constitutionalisation in international law is constantly growing. And although it is too early to affirm the existence of a constitution or constitutionalism

⁵ See e.g. Herbert Lionel Adolphus Hart, *The Concept of Law* (2nd ed., 1997) p. 39 in particular; Rosalyn Higgins, *Problems and Processes: International Law and How We Use It* (1994), p. 1 in particular.

⁶ One of the most difficult questions in political and legal theory which inevitably brings to the surface the issue of legitimacy relates to the binding nature of a constitution for subsequent generations (problem of time). For an example of discussion of this issue in legal philosophy see Jed Rubenfeld, "Legitimacy and Interpretation", in L. Alexander (ed.), *Constitutionalism: Philosophical Foundations* (1998) pp. 194-234.

in international law, theorisation of these issues in the mainstream doctrine is well developed but takes in my view a dangerous direction. The most devastating consequence of this could be a complete absence of legitimacy and thus denial of authority of and mistrust towards international law as an order. Consequently, constitutionalisation would lead to results opposite to those intended undermining even existing rules.

Finally, it is important to understand that the notion of legitimacy should not and does not replace legality. As I attempted to point out above, legitimacy fulfils its own important functions which do not overlap with functions of legality although often they are closely interrelated.⁷

C. Deficiencies of Theorisation of Constitutionalisation of International Law in the Mainstream Doctrine

The mainstream doctrine theorises constitutionalisation of international law from several perspectives: some authors pay particular attention to the nature of norms of international law (jus cogens, erga omnes, human rights obligations),⁸ others emphasise

⁷ Therefore, while I agree with scepticism and criticism concerning the use of the notion of legitimacy in certain circumstances, as for example expressed by Martti Koskenniemi (see e.g. Martti Koskenniemi, “Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization”, 8 *Theoretical Inquiries in Law* (2007) p. 14 in particular), I believe lawyers do not have to abandon taking legitimacy into account.

⁸ See in particular contributions in Christian Tomuschat, Jean-Marc Thouvenin (eds.), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (2006), but also Erika de Wet, “The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order”, 19 *Leiden Journal of International Law* (2006) pp. 611-632 and Christian Tomuschat, “Obligations Arising for States Without or Against Their Will”, 241 *Collected Courses of the Hague Academy of International Law* (1993) pp. 195-374.

the role played by organs of the United Nations (by the Security Council in particular) and attribute central role to the Charter of the United Nations.⁹

All contributions stress the changing nature of sovereignty in international law and mention human rights as an important part of the process of constitutionalisation. Some refer to human rights as ethical core of international constitution, others as a part of common interests of mankind that bind states and international organisations.

Some authors also argue that one of the manifestations of constitutionalisation of international law is the new understanding of statehood. While traditional international law made emphasis on effectiveness of the government, modern international law requires legitimacy through democracy and respect for human rights.¹⁰ The requirement of democracy and even promotion of democratic ordering of nation-states constitutes an important aspect of discussions around the constitutionalisation of international law.¹¹

⁹ Stefan Talmon, "The Security Council as World Legislature", 99 *American Journal of International Law* (2005) pp. 175-193; Bardo Fassbender, "The Meaning of International Constitutional Law", in R.St.J. Macdonald, D. M. Johnson (eds.), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (2005) pp. 837-851; Bardo Fassbender, "The UN Charter as Constitution of the International Community", 36 *Columbia Journal of Transnational Law* (1998) pp. 529-619; Ronald St John Macdonald, "The Charter of the United Nations in Constitutional Perspective", 20 *Australian Yearbook of International Law* (1999) pp. 205-231 and in a more general way Susan Marks, "Democracy and International Governance", in J.-M. Coicaud, V. Heiskanen (eds.), *The Legitimacy of International Organisations* (2001) pp. 47-68.

¹⁰ Anne Peters, "Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures", 19 *Leiden Journal of International Law* (2006) pp. 589-591.

¹¹ See e.g. Thomas Franck, "The Emerging Right of Democratic Governance", 46 *American Journal of International Law* (1992) pp. 46-91 and Thomas Franck, *Fairness in International Law and Institutions* (1995) chapter 4.

“(I)t can hardly be denied that the international legal order is in the process of shifting from an order based on ‘Westphalian sovereignty’ (conceived as carte blanche for national governments to organize their domestic legal and political structures without any authoritative external interference)...”¹²

While I do not dispute that the international legal order is undergoing significant modifications, nature of these modifications is questioned. In my opinion they do not necessarily mean more respect for individual rights and more legitimacy of international law.

I will particularly concentrate on the use of human rights rhetoric in theorising and conceptualising international constitutionalism. Thus, it might well be correct to affirm that “the core of constitutionalised international law is the general acceptance of a **common interest** of **mankind** that transcends the sum of individual state interests.”¹³ But it is dangerous and naïve to take for granted and not to question the presumably ‘common’ nature of this interest, at least as far as prioritisation is concerned. Moreover, from the point of view of feminist analysis the use of the term ‘mankind’ instead of ‘humanity’ highlights biases or at least indifference of the writer.

In a similar way, it is enchanting to affirm that one of the unique functions of the international human rights legal system is “that it enshrines – and clarifies – the distinct normative basis for the protection of fundamental human rights as rights of human beings rather than as rights of citizens.”¹⁴ However, it is necessary to inquire what kind

¹² A. Peters, *supra* note 10, p 586.

¹³ Brun-Otto Bryde, “International Democratic Constitutionalism”, in R.St.J. Macdonald, D. M. Johnson (eds.), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (2005) p. 107 (emphases added).

¹⁴ Stephen Gardbaum, “Human Rights as International Constitutional Rights”, 19 *European Journal of International Law* (2008) p. 767.

of human rights and to what extent are really protecting human beings and not only citizens/legal residents of some states.

To summarise my concerns in relation to the theorisation of the issue of constitutionalisation of international law, I reproduce the following quotation which well expresses similar concerns, although it was formulated in relation to a different type of question:

“(W)hen we treat international law as a redemptive force that could save the world if only it were properly respected and enforced, we obscure the possibility that international legal norms may themselves have contributed to creating or sustaining the ills from which we are now to be saved.”¹⁵

While in this statement, ills created and sustained by international law are already done, I believe that the constitutionalist project in international law being in process of formation and formulation can not only avoid creating and sustaining such ills, but even serve to eliminate some of them if only lawyers recognise its drawbacks and deficiencies sufficiently early.

D. What is the Meaning of Legitimacy?

The use of this term is often very indeterminate, therefore there is a need to clarify at least what I mean when I talk about legitimacy of international constitutionalism. At the same time, I believe that existence of a legal order based on voluntary compliance is closely linked to an adequate understanding and theorisation of legitimacy.

First of all, I would like to emphasise that for purposes of the present research normative accounts of legitimacy reveal themselves as very narrow and inappropriate,

¹⁵ Susan Marks, “State-Centrism, International Law, and the Anxieties of Influence”, 19 *Leiden Journal of International Law* (2006) pp. 339-347.

as do accounts of legitimacy which place at the centre any immutable system of values.¹⁶

Another very wide-spread, even if not always expressly defined concept of legitimacy, which I will prefer here as a starting point of analysis relates to the democratic procedures and decision-making processes. Without going into a complicated theoretical and philosophical debate about conditions, content and meaning of democracy, I will again focus on one in my view important understanding of it in the context of the notion of legitimacy. What democracy certainly does not mean is the simple rule of majority. Without fully transposing to international law the theory of constitutional democracy developed by Habermas, I emphasise the need for finding ways to adapt to international law one fundamental idea which is based on republican view of democracy:

“(T)he substance of the constitution will not compete with the sovereignty of the people only if the constitution itself emergence from an inclusive process of opinion and will-formation on the part of citizens.”¹⁷

Habermas adds, however, one very important element stemming from his defence of deliberative democracy and consideration of the issue of procedural legitimacy of the outcomes of any given discourse, which ultimately depends “on the

¹⁶ See for example the notion of legitimacy in Thomas Franck, *supra* note 11, pp. 25-46, where it is linked to determinacy, symbolic validation, coherence, and adherence. Even more troubling in my view is the understanding of legitimacy in Mattias Kumm, “The Legitimacy of International Law: A Constitutionalist Framework of Analysis”, 15 *European Journal of International Law* (2004) pp. 917-927 in particular. Also John Rawls, “The Idea of Public Reason Revisited”, 64 *University of Chicago Law Review* (1997) pp. 765-807.

¹⁷ Jürgen Habermas, “Constitutional Democracy: A Paradoxical Union of Contradictory Principles?” 29 *Political Theory* (2001) p. 771.

legitimacy of rules according to which that type of discourse has been specified and established from temporal, social and material points of view.”¹⁸ This idea is a vision of a truly democratic (and thus legitimate) constitution as a “tradition-building project with a clearly marked beginning in time.”¹⁹ The most important for our purposes statement is the following:

*“To be sure, this fallible continuation of the founding event can break out of the circle of the polity’s groundless discursive self-constitution only if this process – which is not immune to contingent interruptions and historical regressions – can be understood in the long run as a **self-correcting learning process.**”*²⁰

All these ideas are developed by Habermas in relation to constitutional democracy of a nation-state. As such, they can not adequately respond to all questions arising in relation to international law where collective entities largely replace individuals.

Thus, democratic decision-making procedures existing at the level of international law mainly in the framework of international organisations cannot legitimise decisions which directly affect individuals, such as those related to human rights issues. This legitimacy becomes even more questionable if one considers the argument about legitimacy through the medium of legitimate constitutional democracies of nation-states: There are on international arena so many non-democratic states whose votes have the same value as that of democratic.

¹⁸ Id., p. 774.

¹⁹ Id.

²⁰ Id. (emphasis added).

Habermas in his works addresses the issue of legitimacy of constitutionalism in international law. Constitutionalisation of international law takes two forms according to his vision: transnational and supranational.²¹ At the level of transnational constitution, namely negotiation and co-ordination of interests of states by various global players (in such areas as economic cooperation, trade, environmental protection), he argues that legitimacy will be achieved through democratisation of participating states. At supranational level constitutionalisation means articulation and enforcement of non-use of force and respect for basic human rights by the organs of the United Nations, mainly by the Security Council. The legitimation comes here from informal networks (civil society) reacting in cases of grave breaches. According to Habermas, there will be sufficient consensus on most fundamental issues. He gives as example crimes against humanity and military aggression.²²

While I have reservations with regard to both visions of legitimacy, my most serious concerns relate to the latter assumption. Most importantly, because it departs from the legitimacy based on deliberative democracy (discourse theory) and shifts to accounts of democracy and legitimacy assuming and essentialising certain values as fundamental. Consider, for example, the following account of this version of legitimacy:

“Consonance in reactions of moral outrage toward egregious human rights violations and manifest acts of aggression is sufficient (...) This basis for judgement provided by common cultural dispositions (...) suffices for bundling the worldwide normative reactions into an agenda for the international

²¹ Jürgen Habermas, *Der gespaltene Westen*, (2004) pp. 133-135.

²² *Id.*, pp. 140-141.

community and it lends legitimating force to the voices of a global public whose attention is continually directed to specific issues by media.”²³

The legitimating force of individual voices continually intervening into the ‘self-correcting learning process’ at the level of nation-states becomes obscured and is even silenced by some supposedly common cultural dispositions at the international level. Equally questionable can be the role of media in directing attention of the public. Many factors influence selection and presentation of issues by the media. Moreover, media do not function in the same way and do not play the same role in the so-called Western developed democracies as in the third-world countries, so that it is difficult to speak in this relation about a ‘global’ public. However, before coming to a more detailed critique of theoretical accounts of democracy and my related proposals in this regard, I would like to demonstrate on hand of concrete examples that even the application of these quite generous accounts of legitimacy of constitutionalisation of international law reveals significant areas of lack of legitimacy.

E. Forgotten Voices of International Law

Below will be given examples from just two areas showing how at the international law level decisions are taken and norms are formulated without adequate and sometimes without any participation and taking into account of interests of individuals concerned. Often, decisions and norms give express preference to the interests of states over interests of affected individuals without any real justification.

2. Women’s Rights

The first example is taken from an area directly affecting women or better to say intended to protect women’s rights and improve the degree of recognition of their experiences and needs by international law. I will address here the CEDAW as a most

²³ Jürgen Habermas, *The Divided West* (2006) p. 143 (emphasis added).

comprehensive albeit not the only instrument in this field. The CEDAW can be criticised from several points of view. I chose two of them as examples: one related to the substance of this international instrument, another to its implementation and enforcement.

As far as the criticism on the substance of the CEDAW is concerned, it is often affirmed that not all areas and aspects of women's lives are adequately covered by this convention. I will just mention the issue of violence against women. Despite the time spent on discussion and elaboration of the CEDAW,²⁴ it is significant that the issue of violence against women does not appear at all in the text of the convention. It took another ten years to the CEDAW Committee²⁵ to adopt its very short general recommendation on violence against women²⁶ and tree more years to the United

²⁴ The preliminary stage of seeking opinions of governments on the possibility of the adoption of such a convention (prior to the year 1975) took a long time and revealed a religious and ideological divide among states which influenced the wording of the convention. After 1975, a year which was proclaimed by the United Nations International Women's Year (General Assembly resolution 3010 (XXVII), December 1972) and was followed by a decade (1976-1985) for Women Equality, Development and Peace there was a rush toward the adoption of the text of the convention, which should be ready for the International Women's Conference planned for the year 1980.

²⁵ Committee established in accordance with article 17 of the CEDAW and composed of 23 members. The main objective of the Committee is to consider the progress made in the implementation of the Convention (art. 17, para. 1 of the CEDAW). For the fulfillment of this function it examines periodic reports submitted by states parties (art. 18 of the CEDAW) and along with reporting about its activities to the General Assembly of the UN, makes suggestions and general recommendations (art. 21 of the CEDAW).

²⁶ Due to its extreme brevity this first recommendation on violence against women (General Recommendation No 12 adopted at Committee's 8th session in 1989) was followed by a second, more detailed recommendation (General Recommendation No 19, adopted at Committee's 11th session in

Nations to adopt a more general document on the subject.²⁷ All this reluctance and lack of attention on the part of international law was persistent despite involvements of various NGOs which raised the question already during the preparatory stage of the CEDAW. Although we have to admit that NGOs' activities were not so well-developed far back in 70-ties as they are now, we can still ask the following question: If it was impossible for international public opinion to sufficiently mobilise for this issue, why should we hope that it will always be possible with regard to other issues involving women?

2. Women's Rights and Islam

Let us turn now to the intersection of culture and gender in the context of the CEDAW, an issue closely linked to implementation difficulties of the CEDAW. Despite participation of a great majority of Muslim States in the CEDAW,²⁸ Muslim women have serious obstacles making their voices heard. These obstacles are situated at two different levels. Firstly and most obviously, even in Muslim countries where democratic

1992). See *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies*. 8 May 2006, HRI/GEN/1/Rev.8. All general recommendations of the CEDAW Committee are also available online at <http://www2.ohchr.org/english/bodies/cedaw/comments.htm>. (last visited 10 February 2009).

²⁷ Declaration on the Elimination of Violence against Women, adopted on 20 December 1993 GA Res. 48/104. Significantly, this is a non-binding instrument. Despite its non-binding nature this Declaration is better implemented in majority of states than many formally binding provisions of the CEDAW. States parties to the CEDAW also routinely include in their reports information on measures undertaken to combat violence against women. This example is a good illustration of the importance of achieving legitimacy when formulating norms of international law.

²⁸ For a detailed analysis of Muslim states' participation in the CEDAW see e.g. Ekaterina Yahyaoui Krivenko, *Women, Islam and International law: Within the Context of the Convention on the Elimination of All Forms of Discrimination Against Women* (2009).

processes at certain levels and in certain areas exist,²⁹ when it comes to negotiating and discussing religious issues, the majority of women's voices are silenced. As will be demonstrated below, the situation of Muslim women citizens of Western democracies is not always more advantageous. Secondly, when Muslim women attempt to express their voices outside the country of their origin, either at the international arena or in Western democracies, they are either hardly or not heard at all.

(a) Muslim Women and Internal Democratic Processes

Even if we consider only women who fully adhere to religious values of Islam as official religion of their nation-states they are not able (or only to a very limited extent) to make their opinions on issues of religious interpretation heard. A recent case of an Egyptian woman appointed first female marriage registration officer in Egypt on 27 September 2008 is very illustrative in this regard. The woman, Amal Soliman was 32-years old at the time of application, mother of three children and holds a Masters Degree in Islamic Law. In October 2007 she (with her husband as she stated in an interview to Al-Jazeera)³⁰ applied for this position traditionally reserved to men only. She took her husband with her because she was afraid she would be made fun of. She (accompanied by her husband) had to persuade the clerk receiving applications just to accept her application which he refused. In order simply to be allowed to present her application for the position she consulted a local magistrate as well as the head judge of the family court of the locality where the position was open. Even after the selection committee

²⁹ I use this very cautious formulation because many Muslim states are classified among non-democratic and even dictatorial regimes. However, this does not necessarily mean complete absence of any democratic processes.

³⁰ Farah El Alfy, *Muslim Woman Defies Male Dominance*, 18 November, 2008, available at <http://english.aljazeera.net/focus/2008/11/20081118103940850761.html> (last visited 10 February 2009).

preferred her candidature to ten other men applicants no one of whom holds a Masters degree, the Ministry of Justice which had to approve her candidature as all other candidates for similar positions, was very reluctant to take a decision in favour of her nomination. It took seven months from the selection to approval by the Ministry.

As positive as the final outcome of the case might appear, it is alarming that a woman has to be accompanied and supported by her husband, that her voice is only heard if there is some male involvement on her side. She stressed herself that media coverage was important for the success of her case. Although this situation is quite similar to battles which many Western women had to pursue especially during 50-ties or 60-ties, the case is in so far alarming, as it clearly shows exclusion faced by Muslim women inside their own religion. Imagine that she would be less educated or have less support from her husband? And what about her chances to succeed in relation to another more important or influential religious/judicial position? For the purposes of present analysis, it is apparent that woman's own interpretation of Islamic law as to the possibility for women to hold similar positions is not taken into account at all, whatever her qualifications in this regard. Even a clerk who registers applications has more say in the matter than the woman herself.

Before coming to the next set of examples, I would like to emphasise that one should not be too hasty in attributing the lack of recognition of Muslim women's voices within Muslim states exclusively to the undemocratic structure of these states. Even Muslim women citizens of Western presumably well-developed democracies are often silenced when they attempt to express some views related to the interpretation of their religion. The debate over Islamic headscarf, especially jurisprudence of the European

Court of Human Rights on this issue is a good illustration.³¹ Without going into much detail of this highly complex topic³², I will just mention the fact that the Court permitting bans of Islamic headscarves imposed on women its own interpretation of the meaning of this religious practice without paying any attention to these women's views and choices. As Jill Marshall convincingly argues in her article, the Court's case law in this regard is

*“paternalistic, seeking to force women to conform to standards they may not agree with, all in the name of gender equality. Not only is this case law therefore to be criticised as disrespectful of women's autonomy, and inconsistent with more sophisticated versions of equality and freedom, (...) it can additionally be seen as contradictory to its own jurisprudence, which has developed a right to personal autonomy and identity.”*³³

In my view this attitude of the Court is potentially more dangerous than the situation in Muslim states, because the silencing of women is masked beneath the vocabulary of protecting public order and gender equality, both of which the Court does not really discuss or substantiate.³⁴ The Court also does not explain its preference for the interpretation of the religious practice of wearing a headscarf as humiliating to and

³¹ Two cases are particularly important: *Dahlab v. Switzerland* (dec.), no. 42393/98, ECHR 2001-V and *Leyla Şahin v. Turkey* [GC], no. 44774/98, ECHR 2005-XI.

³² For more detailed discussion of this issue see e.g. Dawn Lyon, Debora Spini, “Unveiling the Headscarf Debate”, 12 *Feminist Legal Studies* (2004) pp. 333-345; Jill Marshall, “Conditions for Freedom? European Human Rights Law and the Islamic Headscarf Debate”, 30 *Human Rights Quarterly* (2008) pp.: 631–654 and Jill Marshall, “Women's Rights to Autonomy and Identity in European Human Rights Law: Manifesting One's Religion”, 14 *Res Publica* (2008) pp. 177-192.

³³ *Id.*, p. 190.

³⁴ For a good analysis of Court's arguments in this regard see e.g. *Id.*, p. 181-183.

oppressive of women over women's own explanations in this regard. Everybody is aware of the inadequacy of the rule not allowing women to express their views on religious issues in Muslim states. However, it is more difficult to challenge a justification preferring one right over the other or one interpretation of a right over another interpretation of the same right.

These cases clearly demonstrate that even the existence of democratic processes does not guarantee inclusion of all voices. We need to be more attentive to the nature and quality of democratic processes.

(b) Muslim Women and International Community

At the other edge lies the difficulty for progressive but Muslim women (women affirming their belonging to the religion of Islam) to make their voices heard at the international arena by international community, difficulty to be accepted as full members of the global civil society. The Third Congress of Islamic Feminism which took place in Barcelona in October 2008 is a good example.³⁵ One of the stated aims of the Congress was to give visibility to this movement.³⁶

³⁵ All information about the Congress is available at <http://www.feminismeislamic.org/eng/>, last visited 10 February 2009.

³⁶ The place of Islamic feminism – which is defined as feminism because of its opposition to patriarchy and any form of oppression of women and as Islamic because of its adherence to religion of Islam – at the international arena and difficulties it faces is a captivating and complex issue which cannot be addressed here except as an example of exclusion. For more detail and further references see e.g. Jasmin Zine, “Between Orientalism and Fundamentalism: The Politics of Muslim Women’s Feminist Engagement”, 3 *Muslim World Journal of Human Rights* (2006) article 5, available at <http://www.bepress.com/cgi/viewcontent.cgi?article=1080&context=mwjhr> (last visited 10 February 2009). She captures well the essence of this double exclusion in following words: “Muslim feminists and activists must engage with the dual oppressions of ‘gendered Islamophobia’, that has re-vitalized Orientalist tropes and representations of backward, oppressed and politically immature women in need of

Paradoxically, Muslim women continue to face exclusion and their expression of opinions on Islam is silenced even outside their nation-states, when they arrive in Western countries supposedly democratic and guaranteeing freedom of religion, freedom of expression and other civil and political rights to all without discrimination. This silencing is particularly visible in the context of refugee claims of women coming from Muslim states. This tendency in refugee status determination procedures in many Western states is closely linked to totalising orientalist vision of Islam which regards Islam as a homogeneous block and accepts and holds for ‘truly Islamic’ only one, in the majority of cases the most conservative interpretation of Islam.³⁷ The case which attracted attention of a large public to this issue dates back to 1991.³⁸ In this case Nada, a young Saudi woman, claimed her right to refugee status on the ground of persecution because of her refusal to wear the veil and thus to adhere to traditionally and legally imposed dress-code. Without going into detail of refugee status determination procedure, I will just mention that her lawyer claimed among others that she was persecuted on the ground of her political opinion, namely feminism.³⁹ Her claim was

liberation and rescue through imperialist interventions as well as the challenge of religious extremism and puritan discourses that authorize equally limiting narratives of Islamic womanhood and compromise their human rights and liberty.” (Id., p. 1).

³⁷ A very informative article on this subject was published in 2000: Susan Mussarat Akram, “Orientalism Revisited in Asylum and Refugee Claims”, 12 *International Journal of Refugee Law* (2000) pp. 7-40.

³⁸ Immigration and Refugee Board Decision, File no. M91-04822. *P. (F.V.)(Re)*, [1991] CRDD No. 1096 (QL). Nada is not a real name of the claimant.

³⁹ For a claim for refugee status to be accepted a claimant has to demonstrate among others that she is persecuted on one of the following grounds: race, religion, nationality, political opinion, membership in a particular social group. The latter includes women. See article 1A(2) of the 1951 Refugee Convention: Convention Relating to the Status of Refugees, 28 July 1951, UNTS 189, 137.

dismissed not only by the Immigration and Refugee Board, but also by the Federal Court. Not only was she advised to follow this conservative and extreme interpretation of Islam applied in Saudi Arabia, but also it was mentioned that Canada cannot impose its values on the rest of the world. The decision-makers thus, firstly, refuse to recognise the claimant's right to think differently about her own religion, but also simply do not accept that a Muslim woman can have the same values as Canada does. They overlook that the case is not about imposing Canadian values on Saudi Arabia (and even less on the rest of the world) but about recognising the right of Muslim women to adhere to values different from those expressed by the dominant patriarchal elite in their countries of origin. One might wonder why recalling this case which is now almost 20 years old and the legislation and politics with regard to gender-related claims have significantly evolved since that time. The answer is that the same pattern of denial to women of the possibility to live according to their own understanding of religion (Islam) still exists at various levels of decision-making in some Western states. I will give the example of a recent case which arose in the United Kingdom.⁴⁰ This will be quite a long discussion of the case because it raises complex issues situated at the intersection of international human rights and their domestic implementation. Furthermore, it also demonstrates how legal argument (legality) is used to exclude consideration of women's interests which as the involved lawyers themselves admit are perfectly legitimate and deserving protection.

⁴⁰ Opinions of the Lords of Appeal for the Judgement in the Case EM (Lebanon) (FC) (Appellant) (FC) v. Secretary of State for the Home Department (Respondent), 22 October 2008: [2008] UKHL 64; the Judgement of the Supreme Court of Judicature, Court of Appeal (Civil Division) of 21 November 2006: 2006 EWCA Civ 1531; and Case No C5/2006/0410 Asylum and Immigration Tribunal, Appeal No AS/04832/2005.

The appellant, a citizen of Lebanon was married in her country of origin to a man who according to the facts accepted to be true by judges married her just because of her money. He did not want children and was violent towards his wife. Thus, due to a hit into her stomach her first pregnancy was interrupted and she lost her first child. When her son was born in 1996, the father came to the hospital just to take the child away from the mother in order to bring him to another country. He was prevented from doing so, and became even more violent and never cared for his wife or his child. The appellant succeeded in obtaining divorce from Lebanese courts. As a result of divorce procedure the custody of the child was attributed to the mother until the child reaches the ages of seven. After that date the custody is automatically transmitted to the father or another male relative of the father's family. The mother could only hope to obtain occasional and supervised visitation rights in a place designated by court, but not at her home.

On the approach of the seventh birthday of her son in order to avoid losing her son the appellant first left the place of her habitual residence and in December 2004 managed to come to the United Kingdom with her son, where she applied for asylum.

Her asylum application was rejected. As was initially her application to remain in the country on humanitarian grounds.⁴¹ The reasoning behind these rejections is quite similar to that in the case of Nada. Moreover, even while finally granting to the appellant the right to stay in the United Kingdom on humanitarian grounds members of the House of Lords refer to some questionable statements made on previous stages thus reaffirming them. They also added some observations which recall many of the existing prejudices with regard to Islam detrimental to the situation of Muslim women.

⁴¹ The permission to stay on humanitarian grounds was granted at the final stage by the House of Lords (see Opinions of the Lords of Appeal, *supra* note 40).

Firstly, when considering the application for refugee status, members of the Asylum and Immigration Tribunal (AIT) while recognising existence of “some discrimination against women in family law” in Lebanon (para. 7) observed that

“Muslims in Lebanon are governed, in family matters, by Muslim law.

The fact that the rules of Muslim law operate in a way which some Western societies might regard as discriminatory does not show that all women are deprived of standing before the law.”⁴²

This is for the AIT a sufficient motivation for rejecting the existence of persecution against women as a social group in Lebanon. The fact that women are arbitrarily denied such a fundamental right as right to family life, to relationship with their children, is not seriously considered by the AIT. Moreover, the above quotation suggests that the very fact that the family matters are governed by Muslim law is sufficient to justify at least some forms of discrimination without any regard to the fact that there exists in Muslim law a variety of interpretative possibilities which allow establishment of family law systems eliminating discrimination against women at least to some degree in the matter of guardianship and custody of children upon divorce.⁴³ The AIT judged it necessary to add that even if there would be ill-treatment on one of the Refugee Convention grounds, it would not amount to a persecution. This statement implies that an eventual prison term which she could have to suffer upon return to Lebanon for attempting to defend her right to maintain her relationship with her child

⁴² Asylum and Immigration Tribunal, Appeal No AS/04832/2005, para. 9.

⁴³ The analysis of legislation of states incorporating in one way or another Islamic law in their family law legislation reveals that in many such states the guiding principle in deciding on the guardianship and custody of children upon dissolution of marriage are best interests of the child and not the sex of the parents. Such is the situation, for example, in Egypt, Iraq, the Maldives, Mauritania, Morocco, Pakistan, Tunisia.

and ultimately perhaps to protect her child from father's abuse is not a persecution.⁴⁴ The very fact that such a regulation on guardianship upon divorce places women in a highly dependant position and subjects them to whimsical will of their husbands sometimes putting them in a slave-like position either does not seem to be important to judges or does not appear to them at all.

Another troubling aspect of this case appears in the opinion of Lord Hope of Craighead of the House of Lords. When considering the request to stay on humanitarian grounds, he addresses the issue of violation of human rights of the appellant under the European Convention on Human Rights (ECHR)⁴⁵, and more precisely under its article 8 (right to family life). In fact the judicial system of the United Kingdom has no mechanism which would allow the invocation of violation of rights under other human rights instruments. Nevertheless, in paragraph 14 of his opinion he mentions Lebanon's participation in the CEDAW. Firstly, he states that "As the case shows, the principle that men and women have equal rights is not universally recognized."⁴⁶ However, the very fact that Lebanon became party to the CEDAW is a sufficient evidence that the country recognises equality as a principle of law. We can question the degree of implementation and way of interpretation of the notion of equality in Lebanon and some other Muslim countries, but not the fact of recognition of this principle. Lebanon as

⁴⁴ The fact that she most probably will have to serve a prison sentence by return to Lebanon is recognised by the AIT. See Asylum and Immigration Tribunal, Appeal No AS/04832/2005, para. 14.

⁴⁵ Convention for the Protection of Human Rights and Fundamental Freedoms adopted by the Council of Europe on 4 November 1950, in force since 3 September 1951. The official text is available at the Council of Europe web-site: <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=005&CL=ENG> (last visited 10 February 2009).

⁴⁶ Opinions of the Lords of Appeal, *supra* note 40, para. 14.

many other states parties to the CEDAW where Islamic law is applicable state it unequivocally in their periodic reports submitted to the CEDAW Committee.⁴⁷ Then Lord Hope mentions Lebanon's reservation to article 16, para. 1 (f) of the CEDAW which requires states to grant to men and women same rights and responsibilities as parents and stresses that in all cases the interests of the children shall be paramount. He concludes: "For the time being that declaration (of equal rights and responsibilities as parents) remains in most, if not all, Islamic states at best an aspiration, not reality."⁴⁸ This last comment is highly controversial, first because many Muslim states parties to the CEDAW did not reserve this provision and contain in their legislation provisions ensuring equal rights of parents at least upon divorce and best interests of the child as a guiding principle.⁴⁹ On the other hand, even if, like Lebanon, a state maintains its reservation and does not modify provisions of its family law, the reservation to article 16 can still be qualified as incompatible with the object and purpose of the CEDAW, and according to one of the widely accepted opinions can be separated from the state's consent to become a party with the effect that the state remains party to the CEDAW as if it did not enter a reservation and is thus bound by the entire treaty.⁵⁰ As a

⁴⁷ See for example Third periodic report of Lebanon, 7 July 2006, CEDAW/C/LBN/3, para. 5. For some other Muslim states see Combined initial and second periodic report of Saudi Arabia, 29 March 2007, CEDAW/C/SAU/2, p. 7; Combined third and fourth periodic report of Morocco, 10 September 2006, CEDAW/C/MAR/4, paras. 37-43; Combined initial and second periodic report of Malaysia, 12 April 2004, CEDAW/C/MYS/1-2, para. 45.

⁴⁸ Opinions of the Lords of Appeal, *supra* note 40, para. 14.

⁴⁹ *Supra* note 43.

⁵⁰ See Human Rights Committee General Comment No 24 (General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, 04/11/94. CCPR/C/21/Rev.1/Add.6). In this

consequence Lebanon can be regarded as violating its international obligations by maintaining and implementing such a law. However, at this stage of my reasoning many lawyers would object and say that the House of Lords has not as a mandate to oversee compliance by other states with their international obligations. But then why was it necessary to mention the CEDAW in such a controversial context and in such a controversial manner essentialising and reinforcing the most conservative interpretations of Islam which have no valid claim to authenticity? Moreover, these few sentences introduce into a human rights framework a scale of values which places

connection I would like also to mention the following fact. This general comment is sometimes said to have encountered no general acceptance among states (See for example Second Report on Reservations to Treaties by Alain Pellet, Special Rapporteur, International Law Commission, 48th session, 13 June 1996, A/CN.4/477/Add. 1, para. 60. But the fact is that only France, the United States and the United Kingdom objected to this comment and its conclusions, whereas the statement of the United Kingdom is rather formulated as a clarifying comment than as an objection to fundamental ideas expressed therein. (See in the Nineteenth Report of the Human Rights Committee to the General Assembly, A/50/40, at 131 and 135 for remarks of the United States and the United Kingdom and the Twentieth Report, A/51/40 at 104 for the remarks of France). In this connection we can think again about what universality and common interests really mean in the context of constitutionalisation of international law, if objection by only two states is sufficient to disregard silent agreement of almost two hundred remaining states. The similar remark was made with regard to formation of norms of customary law by several scholars, some of them emphasise the lack or deficit of legitimacy of customary international law. See e.g. Oscar Schachter, "New Custom: Power, *Opinio Juris* and Contrary Practice", in J. Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century* (1996) p. 531; Onuma Yasuaki, "A Transcivilizational Perspective on Global Legal Order in the Twenty-first Century: A Way to Overcome West-centric and Judiciary-centric Deficits in International Legal Thought", in R. St. J. Macdonald, D. M. Johnson (eds.), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (2005) pp. 176-181; Ben Chigara, *Legitimacy Deficit in Custom. A Deconstructionist Critique* (2000) pp. 102-117.

cultural justifications, state interests over rights of single individuals. In particular, indirectly it denies the right of the appellant to exercise her right to freedom of consciousness and religion. Is it just because we deal with Islam that the state should have final say about what individuals should believe their religion requires them to do?

Lord Hope of Craighead also formulates in paragraph 15 the following idea:

*“Domestic violence and family breakdown occur in Muslim countries just as they do elsewhere. (...) On a purely pragmatic basis Contracting States cannot be expected to return aliens only to a country whose family law is compatible with the principle of non-discrimination assumed by the Convention.”*⁵¹

Here again the reversal of values is striking. Firstly, the case is not simply about family breakdown and domestic violence, which by the way was already in itself recognised as a sufficient ground for granting of a refugee status in the absence of an effective state protection.⁵² What we have to deal with, is a system of institutionalised suffering, affecting moral and physical well-being of women.⁵³ Secondly, when he

⁵¹ Opinions of the Lords of Appeal, *supra* note 40, para. 15.

⁵² See e.g. for the first guideline on gender-related persecution in refugee status determination: Canada, Immigration and Refugee Board, *Guideline 4: Women Refugee Claimants Fearing Gender Related Persecution*, effective 13 November 1996, Ottawa, Canada, available at http://www.irb-cisr.gc.ca/en/references/policy/guidelines/women_e.htm (last visited 10 February 2009). For the particular case of the United Kingdom see: United Kingdom: Asylum and Immigration Tribunal Authority, *Immigration Appellate Authority (UK): Asylum Gender Guidelines*, 1 November 2000, Sections 2A and 2B in particular, available at http://www.unhcr.org/refworld/category,POLICY,GBR_AIT,,,3ae6b3414,0.html (last visited 10 February 2009).

⁵³ Moral and physical integrity is also protected by the ECHR under the private life rubric of Article 8.

mentions “pragmatic point of view”, what Lord Hope actually means is that there is apparently such a great number of women and children subject to similar arbitrary ‘Islamic’ family laws that we cannot afford to receive them all in our country. Our economic interests, our well-being is more important than their suffering and protection of their fundamental human rights. Fortunately, House of Lords at the final end granted the appellant and her son the right to remain in the United Kingdom, but it is worth mentioning that at a previous stage judges of the Supreme Court denied this right to the appellant while expressing a strong feeling of taking an unjust decision. Implicitly the judges say that they prefer a lawful decision to a just one. Two of three judges of the Supreme Court formulate this feeling. Thus, Lord Justice Carnwath when deciding against the existence of a complete denial of the right to family life: “With considerable misgivings, I am forced to [that] conclusion (...) My misgivings are due principally to the **natural** reluctance of an **English** judge to send a child back to a legal system where a **crucial** custody issue will be decided without necessary reference to his welfare.”⁵⁴ This idea is expressed even more clearly by Lord Justice Gage: “For my part I have not found it an easy case. On the one hand to deny a mother the right to care for her child seems totally wrong. (...) To deny this right **offends against all principles of the fairness** (...)”⁵⁵ nevertheless he concludes that “the risk of such breaches of her human rights as may occur in respect of the appellant’s right to care for her son are not sufficient to be categorized as flagrant.”⁵⁶

⁵⁴ 2006 EWCA Civ 1531, para.36, emphasis added.

⁵⁵ Id., para. 55, emphasis added.

⁵⁶ Id., para. 57.

The reasoning in the case evolves around the notion of a flagrant denial or nullification of a right, in our case right to family life. This notion is applicable only to so-called ‘foreign cases’. In such cases

*“it is not claimed that the state complained of has violated or will violate the applicant’s Convention rights within its own territory but in which it is claimed that the conduct of the state in removing a person from its territory (...) to another territory will lead to a violation of the person’s Convention rights in that other territory.”*⁵⁷

This notion is not peculiar to the judicial system of the United Kingdom, but characterises the entire system of human rights protection of the ECHR.⁵⁸ What this notion suggests is that the state when it removes a foreigner to its state of origin does not violate this foreigner’s right, in our case right to family life, it is the state of origin who violates these rights, if at all. Because it can well be that the state of origin undertook no international obligations to protect such rights at all. In such foreign cases according to the well-established jurisprudence developed under the ECHR protection is accorded only in cases of violations of right to life (article 2 of ECHR) and prohibition of inhuman and degrading punishment or treatment (article 3 of ECHR). If other rights protected by the ECHR are at stake (as for example right to family life in our case), protection can only be afforded in cases of a flagrant violation or denial of such a right.⁵⁹ However, judging about existence of a flagrant denial in any concrete case is a

⁵⁷ Ullah case: R. (*Ullah*) v. *Special Adjudicator* [2004] INLR 381, para. 9.

⁵⁸ See e.g. the reaffirmation of this notion by the European Court of Human Rights with the emphasis of ‘pragmatic point of view’ in a decision *Z. and T. v. the United Kingdom* (dec.), no. 27034/05, ECHR 28 February 2006, p. 7.

⁵⁹ In the above mentioned decision *Z. and T. v. United Kingdom* (Id.) the Court stated it in following terms: “It is true that the responsibility of a Contracting State may be engaged, indirectly, through placing an

matter of degree or of a point of view adopted. The case described above illustrates well the argument. Even if we suppose that visitation rights will be granted and their respect ensured by Lebanese judiciary– which in itself is very questionable given the attitudes of Lebanese courts in such matters⁶⁰ – do these visitation rights which as judges affirm themselves will be limited to few hours per week and confined to a place designed by court constitute a family life for a mother who cared alone for her child during ten years? Moreover, in this case the suffering of the mother fearing to lose her child, abandoning him to a violent and indifferent father can be compared to torture. Many women continue to suffer violence and mistreatment over years in order to be able to protect their children at least to some extent and keep the relationship to them. Why is such a situation not comparable to inhuman and degrading treatment prohibited by

individual at a real risk of a violation of his rights in a country outside their jurisdiction. This was first established in the context of Article 3 (*Soering v. the United Kingdom*, judgment of 7 July 1989, Series A no. 161, § 88). The case-law that followed, and which applies equally to the risk of violations of Article 2, is based on the fundamental importance of these provisions (...) Such compelling considerations do not automatically apply under the other provisions of the Convention. On a purely pragmatic basis, it cannot be required that an expelling Contracting State only return an alien to a country where the conditions are in full and effective accord with each of the safeguards of the rights and freedoms set out in the Convention (...)” *Id.*, pp. 7-8. For a more detailed analysis see e.g. Michel Puéchavy, « Renvoi des étrangers à l’épreuve de la convention européenne des droits de l’homme », in P. Lambert, C. Pettiti (eds.), *Les mesures relatives aux étrangers à l’épreuve de la Convention européenne des droits de l’homme* (2003) pp. 75-95.

⁶⁰ Lord Justice Carnwath of the Supreme Court indirectly expressed these concerns when he commented on the decision of the single judge: “The single judge felt able to infer that “there is every likelihood that she will be allowed visitation rights.” The basis for this is not clear to me (...)” Judgement, *supra* note 40, para. 6 However, he did not develop this argument further because according to him the claimant did not establish to the necessary standard that she would not obtain visitation rights. (*Id.*)

article 3 of the ECHR and regarded as sufficient to establish a case for allowing a foreigner to stay in the receiving country?

These arguments are a perfect demonstration of a way in which legality of gaps and deficiencies of human rights law reinforced by international constitutionalism can serve to exclude vulnerable individuals from the benefit of human rights protection.

Implied in the reasoning is also the argument that economy and well-being of progressive developed states is more important than protection of fundamental human rights of foreigners, which obviously is a complete denial of constitutionalist's values and associates in my mind with extraordinary rendition. This brings me to another area which serves as an example for my arguments.

2. (In)secure Sovereignties and Migration

As explained above in relation to theorisation of constitutionalism in the mainstream doctrine of international law, although to various degrees, the majority of authors would agree that sovereignty undergoes nowadays significant modifications. At certain points, States effectively lose parts or bits of their sovereignty and have to admit their inability to control some areas which traditionally belonged to the untouchable sphere of their internal affairs.

I argue that in response to this weakening of sovereignty in certain areas states tend or attempt to exercise more intense control over other areas which previously were considered of lesser importance to affirmation of state's sovereignty, or lesser control was considered sufficient for affirmation of exercise of sovereign rights in such areas. The most important of these areas is migration and thus control over people crossing state's borders.

How are interests and needs of migrants taken into account in these processes?

First of all, many migrants are simply prevented through strict controls, visa regulations and other measures to reach a developed and democratic country of their choice. Therefore, migrants, many of whom flee violence and abuse of their human rights are forced to remain in neighbouring developing countries, where they have little if any access to protection mechanisms. Their opportunities to express their concerns and claims to human rights protection are even more restricted.⁶¹

NGOs do not operate adequately in camps or developing states where majority of migrants are located, migrants who are at the territory of a state without required permissions and documents facing particularly extensive exclusion. Statistics of the Office of the United Nations High Commissioner for Refugees (UNHCR) estimate that only 14% of world's refugees are located in Europe. Among these 14% as much as 90% are estimated to be refugees of 'European origin.'⁶² Among ten major refugee-hosting countries only three are developed Western democracies, not one of them is among top three, which are Pakistan, Syria and Iran.⁶³ When UNHCR operates in developing countries, it employs less qualified and less experienced local personnel. There is a difficulty with media coverage and access of NGOs to many of these places and also Western media demonstrate less interest to current situation in these locations. What do

⁶¹ For some examples of suffering inflicted on persons fleeing violence by strict border-controls in Europe see a recent publication by European Council on Refugees and Exiles, *What Price does a Refugee Pay to Reach Europe?* 10 February 2008, available at http://www.ecre.org/files/ECRE_Access_Case_Studies_Feb_09.pdf (last visited 10 February 2008).

⁶² UNHCR 2007 *Statistical Yearbook: Trends in Displacement, Protection and Solutions*, UNHCR, December 2008, pp. 25 and 27, also available at <http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.pdf?id=4981c4812&tbl=STATISTICS> (last visited 10 February 2009).

⁶³ Id., p. 26. Germany occupies 4th place, the United Kingdom 8th and the United States 10th. Remaining countries in the list are Jordan, Tanzania, China and Chad.

we finally know about what is happening there? If we take camps as an example, the first peculiarity relates to the transformation of these places intended as temporary solutions, and consequently organised as such into permanent place of residence for many migrants.⁶⁴ However, the international community oftentimes ignores this transformation and continue to treat them as temporary solutions thus silencing particular forms of expression and political organisation which can emerge in such places, not to speak about almost complete absence of assistance from the international community to facilitate and make visible voices of persons concerned.⁶⁵

One of the examples of complete disregard for constitutionalist's values in relation to migration issues is the case of Afghanistan. Since the US invasion and completion of Bonn process there is a general agreement in the international community that Afghanistan has now a democratically elected president, a parliament and a constitution. This in turn seems to be enough to ascertain that rights of all Afghan citizens are sufficiently protected and thus initiate massive return operations, which are proudly demonstrated at the UNHCR's web-site.⁶⁶ However, this rhetoric masks reality

⁶⁴ See e.g. Tom Clarck, *The Global Refugee Regime: Charity, Management and Human Rights* (2004) p. 80.

⁶⁵ For an detailed analysis of situation see Michel Agier, *Gérer les indésirables : des camps de réfugiés au gouvernement humanitaire* (2008).

⁶⁶ See at <http://www.unhcr.org/afghan.html>. Information found on this web-site on issues of return to Afghanistan is contradictory in itself. You will find information about difficulties faced by returnees in terms of economic, social and security situation, including accounts of persons saying "I do not know why we came back" (Vivian Tan, *Weaving themselves back into the Afghan social fabric*, Qalinbafan, Afghanistan, 2 January 2009, available at <http://www.unhcr.org/cgi-bin/texis/vtx/afghan?page=news&id=495e12f74>, last visited 10 February 2009) as well as affirmations that **voluntary** repatriation will continue to be the preferred solution (UNHCR, *Afghanistan – The Challenges of Sustaining Returns*, updated November 2008, available at [32](http://www.unhcr.org/cgi-</p></div><div data-bbox=)

not only of extreme poverty, instability and insecurity, but also of serious human rights violations which continue to affect significant parts of Afghan population, women and girls in particular.⁶⁷ These human rights violations range from lack of access to education and health care to domestic violence, rapes and murder. More significantly, the government is not only unable to protect women, but often unwilling due to the fact that many fundamentalists warlords hold high offices and either do not regard women as being worth of protection or are themselves perpetrators or accomplices of these violations.⁶⁸ What kind of constitutionalism are international lawyers advocating for if a simple proclamation of a country being democratic and having a constitution suffices to send people back to a place where not only their well-being, corporal integrity, but also their life will be in danger? Why should then the non-recognition of Taliban regime by international community serve as an example of constitutionalisation of international

bin/taxis/vtx/afghan?page=intro, emphasis added, last visited 10 February 2009). It is particularly unbelievable to read in the first document, which represents an account of a situation of a group of Afghan returnees from Pakistan that while they were able to rent a five-rooms house with a yard in Pakistan, they are accommodated in a UNHCR shelter upon their return to Afghanistan; while in the Afghan refugee village in Pakistan all children went to school, many returnees either attend classes outdoor or not at all. Could such returns be qualified as ‘voluntary’?

⁶⁷ For a recent overview of the situation see e.g. Human Rights Watch *World Report*, 2009, Events of 2008, pp. 209-215. Available at http://www.hrw.org/sites/default/files/reports/wr2009_web_1.pdf. (last visited 10 February 2009)

⁶⁸ The Human Rights Watch report contains following statements: “(T)he increasingly authoritarian government has repressed critical journalism (...) In July 2008 a private TV program airing accusations of government corruption was pulled off the air **on the orders of the president’s office**. (...) Journalists are also attacked by warlords, insurgents, **parliamentarians**, and the security forces.” Id., p. 214, emphases added.

law⁶⁹ if the simple adoption of a constitution and acquiring by representatives of Taliban movement of a status of parliamentarians suffice to recognise them despite continual perpetration of similar violations of human rights? Considered through this prism, an observation made by one author acquires symbolic significance. Jean d'Aspremont, affirming existence in international law of the requirement related to the creation of democratic states and linking it in his theory to the contemporary understanding of the principle of self-determination states the following:

*“Whatever the legal ground of this practice may be, it is beyond doubt that whilst the international community cannot entirely control the birth of States, it strives to choose the gender of the « newborn child », that is to say, to impose a precise type of political regime.”*⁷⁰

When he employs the term ‘gender’ in this context, he necessarily suggests that there is one which is better than the other. Without discussing here the appropriateness of this allegorical use of the term, I think that unwittingly, by using this expression the author also raised more questions than he intended, first and foremost about legitimacy and ethical value of such operations, but also about the means used to impose the gender of the child and the final result of the operation which somehow deviated from initial project and the child still behaves as he or she (we are left here with our own preferences) did before the operation.

We are once again faced with disregard for values and mechanisms proposed by constitutionalist’s doctrine of international law, as well as insufficiency of global civil society and democratic states.

⁶⁹ See e.g. A. Peters, *supra* note 10, p. 590.

⁷⁰ Jean d’Aspremont, « La création internationale d’États démocratiques », 109 *Revue Générale de Droit International Public* (2005) p. 908.

F. Future Legitimacy and Constitutionalisation of International Law

1. Future of Constitutionalisation

What the above examples show, is that human rights do not or do not adequately play the role assigned to them by theorists of constitutionalisation of international law. The desired hierarchy of values is not really present. For example, in cases involving refugee claims, the interests of states to limit and control access to their territories often override claims of persons to refugee status based on violation of their fundamental human rights and confine them to a continual existence in life-threatening conditions. This “great importance of operating firm and orderly immigration control”⁷¹ is nowadays taken for granted and often invoked by state authorities without any further explanation. If explained and justified, this interest is linked in discourses of state authorities either to security concerns or economic considerations, neither of which is empirically established in the vast majority of cases. When in concrete cases states’ interest to control migration overrides interests of individuals to seek and acquire protection from violation of their fundamental human rights, it implies that purely theoretical economy and security interests of a state are more important than protection of fundamental human rights. This argument about presumed advantages of states’

⁷¹ This affirmation made in *Davaseelan v Secretary of State for the Home Department* [2002] IAT 702, [2003] Imm AR 1, para. 111 and quoted in the Judgement of the Supreme Court (Judgement, *supra* note 35, para. 17 to support the position adopted in this Judgement. Similar ideas are formulated by the European Court of Human Rights on numerous occasions: “It is the Court’s settled case-law that as a matter of well-established international law, and subject to their treaty obligations, including those arising from the Convention, Contracting States have the right to control the entry, residence and removal of aliens (see, among many other authorities, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment of 28 May 1985, Series A no. 94, § 67, and *Boujlifa v. France*, judgment of 21 October 1997, *Reports of Judgments and Decisions* 1997-VI, § 42).” *Saadi v. Italy* [GC], no. 37201/06, § 124, ECHR-I.

migration controls becomes even more absurd if we consider the thesis about not only inevitability, but also virtual impossibility to control migration as states pretend to be able to do.⁷²

Let us recall again the United Kingdom's case described above. The claim for refugee status was rejected as was the request for permission to stay on humanitarian grounds before the case was considered by the House of Lords. One of the arguments when rejecting the latter request related to the fact that the case was the so-called 'foreign case'. It is impossible to affirm that human rights offer here any additional protection to human beings qua human beings and not only citizens. Let us also recall the situation of millions of refugees who are denied any protection by Western states through the introduction of too strict border and migration controls and are thus condemned to either constantly suffer persecution or simply survive in camps or other locations where they cannot exercise many of their civil and political rights so highly valued in any constitutional system. This does not correspond to the picture of constitutionalism described in the writings of many international lawyers.

States do not fully implement and protect human rights in their domestic legislation, especially with regard to foreigners. But the very logic of human rights requires that they should be granted to all without distinction as to citizenship, or place of residence. There is, therefore, a need to rethink protection and implementation of human rights as well as the role of state and sovereignty in this regard. An idea

⁷² For an example of such an argument see Melissa Lane, "A Philosophical View on States and Immigration", in K. Tamas, J. Palme (eds.), *Globalizing Migration Regimes: New Challenges to Transnational Cooperation* (2006) pp. 131-143.

attributed in international law to Christian Tomuschat⁷³ seems particularly attractive to me as a starting point for reflection. According to him states become and should more and more be regarded as mere instruments “whose inherent function it is to serve the interests of their citizens as legally expressed in human rights.”⁷⁴ He also stated that “(t)he international community ... views the State as a unite at the service of the human beings for whom it is responsible.”⁷⁵ Taking these two statements as a starting point, we have to reflect on a fundamental difference appearing in these two quotations which at the first glance seem to express fundamentally the same idea. While in the former it is affirmed that states have to serve interests of their citizens, the latter refers to human beings in general. I believe that international lawyers should be very attentive in using one of these expressions in relation to states’ human rights obligations. They are not interchangeable and in order for constitutionalisation of international law to become what it is affirmed to be in the mainstream doctrine of international law, it is the latter which should prevail. Furthermore, these instruments, namely states, should be used more effectively, with their functions and roles subject to constant review and questioning in view of achieving more complete respect for human rights. The human rights themselves should also be constantly scrutinised to improve and develop a more complete and adequate reflection of interests of all human beings. As I attempted to demonstrate above, the current system of NGOs’ involvement in this process is not a sufficient remedy to existing exclusions.

⁷³ Armin von Bogdany, “Constitutionalism in International law: Comment on a Proposal from Germany” 47 *Harvard International Law Journal* (2006) p. 228.

⁷⁴ Christian Tomuschat, “International Law: Ensuring the Survival of Mankind on the Eve of a New Century”, 281 *Collected Courses of the Hague Academy of International Law* (1999) p. 161.

⁷⁵ *Id.*, p. 95.

The task is not an easy one, especially for international law including human rights law and international lawyers, who are accustomed and even trained in over-generalisation and abstraction. The difficulty becomes even more apparent if one considers the thesis that “traditional Western conceptions of the human being have been inadequate in that they have failed to encompass all human beings.”⁷⁶ How can it be ensured that human rights law and international law more generally operate taking into account an inclusive conception of humanity and human? How to prevent the use of the human rights law itself as a instrument for excluding some persons from protection and thus denying their humanity, as in the above examples? In my view this can gradually be achieved through adoption of a new, more complete understanding of legitimacy, which will allow and even require inclusion of all voices, consideration of interests of all human beings. The legitimacy thus understood shall be attributed a central role in the structure and functioning of the future constitution of international community, which will allow for creation and development of “a social, interconnected, caring, empathetic environment”.⁷⁷

2. Future of Legitimacy

The above examples clearly demonstrate that in the current system of international law, including human rights law, interests of many groups of human beings are not sufficiently taken into account. These groups are either constituted of women (women coming from countries traditionally regarded as applying Islamic law) or women form a large part of them (internally displaced persons, refugees). Continue theorising constitutionalisation of international law without paying due regard to existing exclusions of which the two above mentioned groups are mere examples is contrary to

⁷⁶ Jill Marchall, *Humanity, Freedom and Feminism* (2005), p. 1

⁷⁷ *Id.*, p. 167.

moral as well as certain legal claims of constitutionalism. These examples also demonstrate that the two models of democratic control proposed by Habermas, namely through the intermediary of national democracies and of international civil society are not sufficient for large segments of marginalised and vulnerable groups, significant part of them being women.

The starting point for the analysis of the notion of legitimacy was emergence and continuation of a self-correcting learning process. However, its application to international law constructed around the notion of state sovereignty reveals to be problematic. Are there any possibilities of establishing and maintaining of such a process at the level of international law while paying due regard to interests of affected persons, human beings?

I would like first to recall the notion of ‘*démocratie à venir*’ developed by Jacques Derrida because it illustrates better certain aspects of this legitimising democracy. Thus, he attracts our attention to the fact that this ‘*démocratie à venir*’ does not mean that ‘*démocratie est à venir*’ (democracy is to come). Rather this expression reminds us that democracy will never exist in the sense of present existence because democracy is ‘*aporetic*’ in its structure returning constantly to such fundamental characteristics of democracy as self-critique and perfectibility. As a consequence, it also helps us to protest in its own name against any political abuse, rhetoric claiming to have actually established democracy.⁷⁸

⁷⁸ I reproduce here some quotations in French which help to acquire a deeper understanding of this notion. “L’expression « *démocratie à venir* » traduit certes ou appelle une critique politique militante et sans fin. (...) [E]lle proteste contre toute naïveté et tout abus politique, toute rhétorique qui présenterait comme *démocratie présente* ou existante, comme *démocratie de fait*, ce qui reste inadéquat à l’exigence démocratique(...) L’ « *à venir* » ne signifie pas seulement la promesse, mais aussi que la *démocratie* n’existera jamais au sens de l’existence présente (...) parce que elle restera toujours *aporétique* dans sa

Derrida acknowledges the absolute necessity and difficulty of applying this notion to the setting of international legal order.⁷⁹ For him the announcement, the indication of such possibility is made through adoption of the Universal Declaration of Human Rights,⁸⁰ because the concept of human rights presupposes a new sovereignty, sovereignty of an individual which opposes the sovereignty of nation-states.⁸¹ Without questioning the necessity and utility of states, without denying the importance of the role they have been playing at the international arena, he calls us to rethink the state and sovereignty which does not suppress, make invisible interests, needs, suffering of human beings.⁸²

At another occasion he stresses the almost complete absence of victims' voices at the level of international law.⁸³ By extension we can say that international law despite its human rights rhetoric is only to a very limited and highly selective extent accessible to those who claim violation of their rights or contest existing human rights framework

structure (force *sans* force, singularité incalculable *et* égalité calculable, commensurabilité *et* incommensurabilité, hétéronomie *et* autonomie, souveraineté indivisible *et* divisible ou partageable, *nom vide*, messianicité désespérée ou désespérante, etc.)” Jacques Derrida, *Voyous* (2003), p. 126

⁷⁹ Id., p. 127.

⁸⁰ Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948. In French he emphasises “des droits de l’homme (et non des droits de l’homme et du citoyen)” because for him it is important to think about a new international legal and political space beyond nation-state and beyond citizenship Jacques Derrida, *supra* note 78, p. 127.

⁸¹ « [L]a Déclaration des droits de l’homme ne s’oppose pas, pour la limiter, à la souveraineté de l’État-nation comme un principe de non-souveraineté à un principe de souveraineté. Non, c’est souveraineté contre souveraineté. Les droits de l’homme posent et supposent l’homme (égale, libre, auto-déterminé) en tant que souverain. » Id., p. 128.

⁸² Id., pp. 203-217

⁸³ Jacques Derrida, *Cosmopolites de tous les pays, encore un effort!* (1997) pp. 16-17.

as not taking their interests into account. This is particularly well illustrated by the situation of refugees established in less developed countries, in refugee camps, displaced persons, persons present illegally at the territory of a state. Global civil society, NGOs are only a very limited remedy to this problem.

The real legitimacy of international law will come from inclusion of all these voices into the framework of international law. Especially when formation and implementation of human rights is at stake, international law mechanisms should be more individual-centred establishing procedures and creating opportunities for giving voices to persons concerned. Although inclusion of NGOs on various levels of functioning of international law is a step forward in this direction, the danger resides in the satisfaction with what we have and regarding it as sufficient. I deliberately choose the form of case-studies, describing the plight of single individuals because I believe that international lawyers shall strive to give a human face to their discipline. As a first step, all who have to deal with issues related to human rights – judges, law schools professors, NGO activists – have constantly to be attentive to what they do in the name of human rights. We need institutions, legal and political systems to organise our life, but we shall do our best to keep them human, not letting them to attract us back to abstraction and over-generalisation. This is particularly important and difficult at the level of international law, where we have to deal with abstract collective entities.

I will conclude with a quotation from a book analysing philosophical thought of Emmanuel Lévinas and summarising the essence of it in relation to human rights and in my view also constitutionalist project of international law:

“When they (human rights) are defined primarily by a right to freedom and then bound by the self-interested effort to be, or as Levinas puts it ‘the Same’, then they become sources of violence. But when they are centred on the

Stranger who is a unique Other, they become the source of peace, proximity and fraternity. With the arrival of a third person, however, these human rights must be translated into social, economic, juridical, and political structures, laws and institutions. As such they become once again the source of violence, conflicts and new injustices. Therefore, in their purely non-political formulation, they must transcend the social, economic, judicial and political forms which they receive, and even place them in question, so that the rights of the Other person can be taken to heart anew. (...) For their (human rights) realization we do not need propaganda or preaching, but just and holy people, people who are, in the literal sense of the word, "extra-ordinary."”⁸⁴

Post-scriptum

I deliberately terminate this paper on a quotation which raises many questions about its implications for functioning of a legal system. Its last sentence can be particularly confusing and even appear absurd to lawyers. At this point, I would like just to ask the reader to think about these questions and why they arise. A more detailed discussion of them would require more space and time and my research on them is ongoing. I hope, later I will have an opportunity to publicise its results.

⁸⁴ Roger Burggraeve, *The Wisdom of Love in the Service of Love: Emmanuel Levinas on Justice, Peace, and Human Rights* (2002) pp. 185-186.