

Dialectic of Transnationalism: Unauthorized Migration and Human Rights, 1993–2013

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Systematic violations of the rights of unauthorized migrants on the fault lines between developed and developing countries expose the dialectic of transnationalism, a dynamic that occurs when both policy and judicial review go transnational. Three concurrent patterns define the dialectic: First, executive and judicial networks are bifurcated from each other, producing significant policies beyond the reach of judiciaries. Second, judiciaries exacerbate their bifurcation from policymaking through transnational decisions. Third, transnational law replaces absolute legal rules with pragmatic problem solving, eroding the normative basis of human rights. Although these patterns seem to show that the violations are an intractable feature of contemporary international law, this Article proposes countering them with "critical absolutism." This approach identifies opportunities in which the dialectic can be challenged by presenting states with an existential dilemma: either treat people as humans and risk changing who you are (in terms of the composition of your population), or give up human rights and risk changing who you are (in terms of your constitutive commitments).

INTRODUCTION

Too many lives have already been lost. Too many others are in danger of being lost.

—Houston Expert Panel Report, Australia¹

Since the 1990s, the dominant theory of international law has been *transnational legal theory*, or "transnationalism."² This theory combines a descrip-

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1. AUSTRALIAN GOVERNMENT, REPORT OF THE EXPERT PANEL ON ASYLUM SEEKERS 13 (2012).

2. On the nature and importance of "transnational" law, see generally Harold Hongju Koh, *Why Transnational Law Matters*, 24 PENN ST. INT'L L. REV. 745 (2006); T. Alexander Aleinikoff, *Thinking Outside the Sovereignty Box: Transnational Law and the U.S. Constitution*, 82 TEX. L. REV. 1989 (2004); Peer Zumbansen, *Transnational Law*, in ENCYCLOPEDIA OF COMPARATIVE LAW 738 (Jan Smits ed., 2006). For a representative (but non-exhaustive) list of major examples of transnational legal scholarship, see generally Martin Shapiro, *The Globalization of Law*, 1 IND. J. GLOBAL LEGAL STUD. 37 (1993). For critical accounts, see Martti Koskeniemi, *Carl Schmitt, Hans Morgenthau, and the Image of Law in International Relations*, in THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS

tive account of the nature and function of international law with a normative account of its justification.³ Descriptively, the fundamental move of transnationalism is to collapse the traditional distinction between domestic and international law. Normatively, transnationalism's basic tenet is that collapsing this distinction is desirable.

Transnationalism appeared with the end of the Cold War and to some extent partook in optimism about the "end of history."⁴ Its normative vision focuses on the enforcement of human rights. This focus has been important not only in producing scholarly insight but also in framing human rights policy considerations by governments. Transnationalism's ideals have fueled legal initiatives to protect human rights internationally and have encouraged law students to participate in international human rights clinics and choose human rights-oriented careers.

This Article's examination of distinctly "transnational" responses to unauthorized migration—at transnationalism's twentieth anniversary—demonstrates that while transnationalism's *description* of law has proved prescient, its *normative* claims are inadequate.⁵ By focusing on unauthorized migrants and refugees, an increasingly contentious and paradigmatically transnational policy issue, this Article argues that there is little evidence that transnationalism has helped to enforce human rights. Along the fault lines between developing and developed countries, transnational law has been structurally implicated in distinctly "transnational" violations of migrant and refugee rights. Although lessons about the violation of migrant rights are not clearly generalizable to other areas of policy, they undermine transnationalism's normative aspirations.

To examine transnational policymakers and enforcement agencies, this Article relies on the work of Anne-Marie Slaughter, former Dean of the Woodrow Wilson School of Public and International Affairs at Princeton. For an understanding of transnational judiciaries, the Article turns to the work of Harold Koh, former Dean of Yale Law School and State Department

AND INTERNATIONAL LAW 17, 17 (Michael Byers ed., 2001); Paul Kahn, *Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order*, 1 CHI. J. INT'L L. 1 (2000).

3. See José E. Alvarez, *Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory*, 12 EUR. J. INT'L L., 183, 186–88 (2001) ("Slaughter's liberal theory professes to be, first, an accurate description . . . Slaughter's liberal theory is, secondly, prescriptive."); Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 184 (1996) (transnational legal process "embraces not just the descriptive workings of a process, but the *normativity* of that process . . .") (emphasis added); see also Koskenniemi, *supra* note 2, at 33.

4. See generally FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992). For a historical account of the role human rights took after the Cold War, and the way they were intertwined with Cold War politics, see generally SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* (2010). For some connections between the "end of history" and Anne-Marie Slaughter's legal theory, see, for example, Susan Marks, *The End of History? Reflections on Some International Legal Theses*, 3 EUR. J. INT'L L. 449, 469 (1997); Alvarez, *supra* note 3, at 189–90.

5. Since the major articulations of "transnational" in the 1990s, legal scholars have used the label "transnational" in many different ways, some of which do not have normative claims. My argument here only pertains to those theories that claim that transnational legal processes have progressive outcomes.

Legal Adviser during President Barack Obama's first term. Both scholars offer exemplary linkages between the *descriptive* and *normative* aspects of transnationalism. Both of their bodies of work prove today to be prescient descriptions of the global legal environment in which we live, but are also inappropriately optimistic about its normative appeal.

This Article aims to contribute to international legal theory by conceptualizing the double-edged process caused by the collapse of the domestic/international divide over the last two decades.⁶ In this legal environment, state competences have been increasingly transferred to transnational networks acting beyond borders. These networks are composed of executive agencies, international organizations, and judicial bodies, which developed countries flexibly disaggregate and reassemble. Transnational law, premised on intense cooperation beyond borders, was believed by its proponents to better enforce human rights by tackling problems at their roots, while still articulating global values.⁷ Transnationalism's failure to do this is, of course, not the result of nefarious intentions.

The *dialectic of transnationalism* is a dynamic that occurs when both policy and its judicial review become transnational. Although this dynamic sometimes alleviates the hardships of unauthorized migrants, it tends to reduce or even eliminate the human rights accountability of developed states. This dynamic is defined by three concurrent patterns.

First, executive and judicial networks are pulled apart and bifurcated from one another. This allows executive agencies to conduct overseas operations that are not subject to domestic judicial review. Imagine that transnational executive and judicial networks are two webs placed one over the other. As the logic of the judicial web is to follow only the places where the executive web *wields force*, some parts of the executive web will remain systematically uncovered by the judiciary web. In these parts, executive agencies of countries with relative economic power compel those of weaker countries to police their borders—beyond the reach of their own domestic courts. The *dialectic of transnationalism* should, however, by no means be understood as a story about “bad executives” and “good courts.”

The second pattern is that when transnational judicial bodies attempt to review policies implemented abroad (aiming to act effectively on the transnational plane), they end up exacerbating their own bifurcation from poli-

6. Cf. B.S. Chimni, *Globalization and Refugee Blues*, 8 JOURNAL OF REFUGEE STUDIES 298, 298 (1995) (“The dialectics of the globalization process has engendered a ‘power-geometry’ of time-space compression in which the power over mobility of some groups goes hand in hand with the incarceration of others.”).

7. Related arguments have also supported recent scholarship on constitutional pluralism, and the critique in this Article can therefore also be—with necessary amendments—a critique of that movement. See, e.g., Miguel Poiares Maduro, *Interpreting European Law—Judicial Adjudication in a Context of Constitutional Pluralism* (IE Law School Working Papers' Series, WPLS08-02, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1134503; Alec Stone Sweet, *A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe*, 1 JOURNAL OF GLOBAL CONSTITUTIONALISM 53 (2012).

cymaking. In the transnational legal environment, courts' opinions on refugees and unauthorized migration instruct executive agencies on *how* to further bifurcate executive and judicial functions, avoiding the costs imposed by human rights law.⁸

Third, transnational law erodes the normative basis of human rights by consistently replacing absolute legal rules with pragmatic problem solving. The transnational legal consciousness is thus epitomized by a motto recently voiced by the Houston Expert Panel Report, which was commissioned by the Australian government to address asylum policy. As the commission put it, "the perfect should not be allowed to become the enemy of the good."⁹ However, unlike the absolute human rights rules on which this Article focuses, this pragmatism does not apply equally to all human beings.¹⁰ The normative world it heralds is one in which policies may reasonably be described as enforcing or violating human rights, depending on from which side of the gun one looks.

Since its major iterations in the 1990s, scholars have developed transnational research agendas in many different directions. Some influential scholars employ the descriptive aspects of transnationalism while not favoring it over other kinds of law.¹¹ The latter are not the subject of this Article. Furthermore, this Article is far from being the first critique of transnationalism, which generated important debate while it was being developed.¹² However, other critiques focusing on transnationalism's normativity either introduce alternative normative standards¹³ or question the very notion that normative foundations exist at all.¹⁴ The present critique is unique precisely in that it can examine transnationalism with the benefit of historical hindsight. This will prove crucial for assessing this influential school of international law. Moreover, it is different from previous work in contesting

8. This pattern cautions against a naïve adoption of one of transnationalism's most central prescriptive tenets. This, in José Alvarez's terms, is the belief that "conscious attempts to engage in cross-border judicial communication" should be promoted and encouraged. See Alvarez, *supra* note 3, at 188.

9. AUSTRALIAN GOVERNMENT, *supra* note 1, at 7.

10. Or, in other words, it divorces transnational law from international law's traditional commitment to universalism. See Alvarez, *supra* note 3, at 185 (arguing that Slaughter's liberal theory "is touted as a corrective to the inclinations of universalist international lawyers").

11. See, e.g., SASKIA SASSEN, TERRITORY, AUTHORITY, RIGHTS: FROM MEDIEVAL TO GLOBAL ASSEMBLAGES (2006); Kim Lane Scheppele, *Global Security Law and the Challenge to Constitutionalism after 9/11*, PUBLIC LAW (2011).

12. See, e.g., MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960, at 413–509 (2001); Koskenniemi, *supra* note 2, at 17; Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16 EUR. J. INT'L L. 369 (2005); Alvarez, *supra* note 3 (though Alvarez's critique is directed towards earlier work by Slaughter, in which her emphases—as he points out towards the end of the essay—are different).

13. For a compelling early critique focusing on global distributive justice, see Benedict Kingsbury, *Sovereignty and Inequality*, 9 EUR. J. INT'L L. 599 (1998). For a more recent (and groundbreaking) critique focusing on democratic participation, see Benedict Kingsbury, Nico Krisch and Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS., 15, 50 (2005).

14. See Koskenniemi, *supra* note 2; MARTTI KOSKENNIEMI, THE POLITICS OF INTERNATIONAL LAW 147 (2011) (discussing the "Indeterminacy of Rights").

transnational law's capabilities to enforce human rights,¹⁵ a standard transnationalism proclaims *as its own*.¹⁶ Leaving aside the question of what is the philosophical justification for human rights, this article *assumes* the morality of their demand—and that its realization would contribute to “A Just World Order.”¹⁷ The relevant question is whether transnationalism ever contributed to the realization of this demand.

Can those of us who do believe in the demand of human rights reasonably expect to do anything to help enforce them? Today, this question must be asked in light of the critique of transnationalism. Building on a dichotomy—introduced by sociologist Max Weber—between an *ethics of conviction* and an *ethics of responsibility*,¹⁸ this Article proposes an approach called *critical absolutism*. On the one hand, transnationalism's conception of human rights must be politically contextualized and subjected to the realistic cost-benefit analysis Weber called an *ethics of responsibility*. On the other hand, if human rights are to retain normative force, their non-compromising, indeed, fundamentalist claims must not be done away with; politicization must leave room for an *ethics of conviction*. Practicing human rights lawyers have long applied both kinds of reasoning, even without fully articulating their underlying assumptions and complicated relationships. The last part of the Article is an attempt to do exactly that.

Part I, *Toward a Critique of Transnationalism*, is preliminary to the main argument. It reintroduces transnationalism and articulates some of the assumptions the Article will use throughout the argument as well as the relevant historical background. The constitutive moment this Article signals as the “birth” of transnationalism is a 1993 U.S. Supreme Court case called *Sale v. Haitian Centers Council*. This case exhibits the first signs of processes that would later shape transnational policymaking and adjudication worldwide. These two aspects of transnationalism will be explored separately.

Parts II and III focus on policymaking and enforcement, employing “disaggregated sovereignty” as the main analytic instrument. Part II, *Disaggregated Sovereignty and Unauthorized Migration*, shows the foresight of Slaughter's description of disaggregated sovereignty through a comparative review of the law and policy relating to unauthorized migration over the last

15. An important exception is B.S. Chimni's work on refugees, from which this Article's own account partly follows. Chimni demonstrated the contribution, to the violation of fundamental rights, of globalization processes similar to those described here. See generally B.S. Chimni, *Globalization, Humanitarianism and the Erosion of Refugee Protection* (University of Oxford Refugee Studies Centre, Working Paper No. 3, 2000); B.S. Chimni, *The Meaning of Words and the Role of UNHCR in Voluntary Repatriation*, 5 INT'L J. REFUGEE L. 442 (1993); Chimni, *supra* note 6. Another project from which this Article received inspiration is Kim Lane Scheppele's interrogation of the role of transnational legal processes in curtailing constitutional rights since 9/11. See Scheppele, *supra* note 11.

16. In that respect it is comparable to José Alvarez's critique of Slaughter's liberalism, which “examines liberal theory from the inside.” Alvarez, *supra* note 3, at 193.

17. This is the title of Chapter 6 of *A NEW WORLD ORDER*, a book that is at the center of this Article's own critique. See ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 216 (2004).

18. MAX WEBER, *THE VOCATION LECTURES* 92 (2004).

two decades. This background is internationally fact-intensive; the *dialectic of transnationalism* is not meant solely as a theoretical concept. Rather, it should be identifiable in real-life legal processes, some of which are still very much underway as this Article is being finalized. Part III, *Disaggregated Violence*, then highlights precisely how the disaggregation of sovereignty perpetuated human rights violations, both as a historical and as a structural matter. This Article focuses on the violation of the “absolute” rights that unauthorized migrants are presumed to have: the right of non-refoulement, and the right against inhuman and degrading treatment. Such violations are deeply related to the way transnationalism put “slices” of the sovereignty of developing countries on a global market. The implication was the bifurcation of judicial and executive competences; developed countries could “buy” developing countries’ executive competences, without adjoining judicial ones. Instead of all branches of government being unified by sovereignty and separated by borders, branches of single governments are now often *separated from each other but unified across borders*.

Part IV, *Transnational Legal Process and Unauthorized Migration*, shifts focus to transnational judiciaries. The fundamental analytic instrument here is Koh’s *transnational legal process*. This Part reviews a series of landmark cases, which seem to confirm many of Koh’s arguments and intuitions about the augmented protections that transnational courts provide to the globally disempowered. However, Part V, *Dialectic of Transnationalism*—the heart of the argument—reveals the ambiguous relationship of transnational courts with transnational executives in an environment of disaggregated sovereignty. Here the three “patterns” defining the *dialectic of transnationalism* are laid out and explained. The juxtaposition of judicial and policymaking networks demonstrates not only that executive agencies act beyond the reach of courts; it shows how courts have been active players in a process that reduces the accountability of executive branches for human rights violations. If extritorial jurisdiction “hangs from the mouth of a firearm,” as Judge Giovanni Bonello of the European Court of Human Rights (“ECtHR”) recently wrote in a landmark case, there is plenty of room to exercise policies abroad—without exposure to judicial review.¹⁹

Finally, Part VI, *The Normativity of Transnationalism*, offers some preliminary insights into how transnationalism should be applied today, if we are to retain its emphasis on human rights. This Part provides three provisional answers to the question as to what a politics freer from the failures of the dominant articulations of transnationalism might look like. The approach this Article proposes, *critical absolutism*, is not far from Koh’s *transnational public law litigation*. It presents, however, a more accurate assessment of the normativity of transnationalism. In the migration context, *critical absolutism* identifies opportunities in which a fundamental political challenge can be

19. Al-Skeini v. United Kingdom, App. No. 55721/07, Eur. Ct. H.R. (2011), available at <http://www.unhcr.org/refworld/docid/4e2545502.html>.

presented to states: either treat people as humans and risk changing who you are (in terms of the composition of the population), or give up human rights and risk changing who you are (in terms of your constitutive commitments).²⁰ The second path is the one to which transnationalism has led us thus far. The first is the one to which *critical absolutism* tries to lead us.

I. TOWARD A CRITIQUE OF TRANSNATIONALISM

A. *Transnationalism's Normativity*

The first influential articulation of the “transnational” character of law emerged with Phillip Jessup’s Storrs Lectures at Yale Law School in 1955.²¹ Jessup provided a holistic view of the rules bearing on any legal problem: some are “domestic,” while others are “international”; some “private,” while others “public.”²² He famously proposed that the term *transnational law* should “include all law which regulates actions or events that transcend national frontiers.”²³ The overlapping and sometimes contradictory authorities that come into play, in problems ranging from a divorce case to a peace treaty, are illuminated by procedural questions—notably, questions of jurisdiction.

Jessup’s contribution significantly altered international law’s traditional focus on states.²⁴ Since the emergence of Westphalian sovereignty through nineteenth-century international legal positivism, formally equal sovereign states were the sources of legal authority.²⁵ Jessup’s messier conception of law was comparatively compelling, not least because it seemed descriptively more accurate.²⁶ Jessup’s *transnational law* recognized that domestic rules

20. Theoretical context for this dilemma can be found in SEYLA BENHABIB, *THE RIGHTS OF OTHERS: ALIENS, RESIDENTS AND CITIZENS* (2004); RUTI G. TEITEL, *HUMANITY’S LAW* (2011).

21. PHILIP C. JESSUP, *TRANSNATIONAL LAW* (1956). The relevant ideas have deeper roots in classical international law. This Article refers exclusively to a transnationalism that began in the twentieth century, influenced by the end of WWII, the Nuremberg trials, and the end of decolonization. For a more nuanced historical view, see generally EDWARD KEENE, *BEYOND THE ANARCHICAL SOCIETY: GROTIUS, COLONIALISM AND ORDER IN WORLD POLITICS* (2002).

22. JESSUP, *supra* note 21, at 2, 26. See also Zumbansen, *supra* note 2.

23. JESSUP, *supra* note 21, at 2.

24. This Article employs the term “legal consciousness” as Duncan Kennedy defined it. See Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850–1940*, 3 RES. L. & SOC. 3, 6 (1980); for a discussion and assessment of the term’s legacy, see generally Susan Silbey, *After Legal Consciousness*, 1 ANNU. REV. L. & SOC. SCI. 323 (2005).

25. The added layer of customary international law was understood as an articulation of preexisting norms—binding because they were in fact respected. In this context, the doctrine of the “persistent objector” meant that this area of the law, too, did not override sovereignty. Bilateral and multilateral treaties organized the relationships between them, but in the lack of a full-blown international judiciary, the primary remedy for breach was reciprocity. For an interesting account of the normative underpinning of positing state sovereignty as the source of legal authority, see generally Benedict Kingsbury, *Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim’s Positive International Law*, 13 EUR. J. INT. LAW 401 (2002).

26. It is not by chance that his account of transnational law first influenced the social sciences, mainly sociology and political science.

abroad could, at times, have more influence on a state's population than its own legislation. One paradigmatic example comes from immigration law; legalizing or prohibiting certain categories of immigration in one country may significantly influence the lives of its neighbor's population.²⁷

In the 1990s, several decades after Jessup's original contribution, transnationalism became the primary orientation toward international law in American law schools.²⁸ The legacy that developed differed significantly from Jessup's original contribution. Now, an "absolutely central" aspect of transnationalism was that it was "normatively tinged."²⁹ The normative emphasis of transnationalism was developed by two of its preeminent theorists: Harold Koh and Anne-Marie Slaughter.

Koh focused on judicial and quasi-judicial processes when he introduced his two central, and related, conceptual contributions to transnational legal theory: *transnational legal process*³⁰ and *transnational public law litigation*.³¹ He embraced Jessup's description of intertwined and co-generative relations between domestic and international law and argued that courts, as well as other public and private agencies, are in constant cross-border dialogue.³² Through this dialogue, termed *transnational legal process*, these diverse institutions interpret international law and influence each other to "internalize" and further enforce international law. The normative bite comes from the fact that as human rights become part of that law, this process will promote greater human rights enforcement.³³ Examining the extent to which this occurred—or failed to occur—provides a good lens through which to assess transnationalism, as well as to theorize transnational normativity more accurately. The twin concept of *transnational public law litigation* is defined as

27. See JESSUP, *supra* note 21, at 3 (explaining that a traveler "whose passport or other travel document is challenged at a European frontier confronts a transnational situation").

28. Or, as Martti Koskeniemi scathingly put it, this "interdisciplinary approach" to international law and international relations "found no significant examples beyond the Universities of the American Northeast." KOSKENIEMI, *THE ROLE OF LAW IN INTERNATIONAL POLITICS*, *supra* note 2, at 30.

29. Koskeniemi, *supra* note 2; Koh, *supra* note 3.

30. Koh, *supra* note 3.

31. Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347 (1991).

32. Koh, *supra* note 3, at 186; Koh, *supra* note 2, at 745.

33. Koh's full explanation is as follows:

The process can be viewed as having four phases: interaction, interpretation, internalization, and obedience. One or more transnational actors provokes an *interaction* (or series of interactions) with another in a law-declaring forum, which forces an *interpretation* or enunciation of the global norm applicable to the situation. By so doing, the moving party seeks not simply to coerce the other party, but to *internalize* the new interpretation of the international norm into the other party's internal normative system. Its aim is to "bind" that other party to obey the interpretation as part of its internal value set. That party's perception that it now has an internal obligation to follow the international norm as it has been domestically interpreted leads it to step four: *obedience* to the newly interpreted norm.

Harold Hongju Koh, *How Is International Human Rights Law Enforced?* 74 IND. L.J. 1397, 1414 (1999). For an earlier explanation, which applied to international law more generally, see Harold Hongju Koh, *Why Do Nations Obey International Law?* 106 YALE L.J. 2599 (1997).

litigation in domestic or international fora aimed at enforcing human rights through transnational legal process.

Although Slaughter's work also includes invaluable insights into the function of judiciaries,³⁴ her most original contributions relate to the disaggregated nature of transnational policymakers, especially in executive branches. It is primarily in this context that this Article will revisit her work.

In her seminal book *A New World Order*,³⁵ Slaughter developed the idea of *disaggregated sovereignty*, focusing on cross-border networks.³⁶ In this and in her previous work, she articulates many of the same norm-enforcing potentials for transnational judicial review as Koh. More importantly, however, she draws attention to the exponential growth of low-level and informal cooperation among executives across borders.³⁷ These connections advance common purposes through what she calls "horizontal" coordination, which supplements traditional "vertical" or hierarchical coordination.³⁸

Slaughter's normativity is somewhat more elusive than Koh's. Unlike Koh, she invokes "liberalism" much more often than "human rights."³⁹ By "liberalism" one might refer to a family of political theories based on a social contract between formally equal individuals, constrained by fundamental values and institutions that protect them. However, the special nature of Slaughter's "disaggregated sovereignty" is that it *surpasses* a

34. See, e.g., SLAUGHTER, *supra* note 17, at 13–65; Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103 (2000); Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191 (2003); Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99 (1994); Laurence R. Helfer and Anne-Marie Slaughter, *Towards a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273 (1997).

35. SLAUGHTER, *supra* note 17.

36. All references to "networks" in this Article refer to the transnational networks Slaughter wrote about. For a different definition of networks, see DAVID SINGH GREWAL, *NETWORK POWER: THE SOCIAL DYNAMICS OF GLOBALIZATION* (2008).

37. SLAUGHTER, *supra* note 17, at 36–64, 131–65. See also Anne-Marie Slaughter, *The Real New Order*, 76 FOREIGN AFF. 183 (1997). This insight should, in the final analysis, problematize and relativize the notions of borders and territory. See generally BERTRAND BADIE, *LA FIN DES TERRITOIRES: ESSAI SUR LE DESORDRE INTERNATIONAL ET L'UTILITE SOCIALE DU RESPECT* (1995).

38. It is crucially important to establish at the outset that "disaggregated sovereignty" does not mean that sovereignty is diminished. What this process means is that sovereignty changes. See Anne-Marie Slaughter, *Disaggregated Sovereignty: Towards the Public Accountability of Global Government Networks*, 39 GOVERNMENT AND OPPOSITION 159, 189 (2004) ("At first glance, disaggregating the state and granting at least a measure of sovereignty to its component parts might appear to weaken the state . . . But in a world in which sovereignty means the capacity to participate in cooperative regimes in the collective interest of states, expanding the formal capacity of different state institutions to interact with their counterparts around the world means expanding state power."). Koh, too, rejected the idea that the internalization of international law characteristic of transnationalism reduces sovereignty. Rather, he emphasized how it can enhance "soft power." See Harold Hongju Koh, *Foreword: On American Exceptionalism*, 55 STAN. L. REV. 1479, 1480 (2003). For an alternative view according to which it is precisely the "waning" of sovereignty that accounts for intensified borders, see generally WENDY BROWN, *WALLED STATES, WANING SOVEREIGNTY* (2010).

39. For a critical analysis of Slaughter's liberalism, and its grounding in neo-Kantian political theory on the one hand and on an "empirical fact" on the other hand, see Alvarez, *supra* note 3, at 185–86.

contractual vision of sovereignty in important ways.⁴⁰ Here, the social contract between citizens can be preserved only as one contract among many; others constitute a network of flexible agreements through which state agencies connect to other entities outside of the state.

When Slaughter argues that *disaggregated sovereignty* will potentially advance “A Just World Order,” she means that it will promote a familiar set of *values*, best understood in terms of the liberties and protections that we think of when we talk about human rights. These are flexible and amenable to varying interpretations. But there are some actions that such values must categorically preclude: “Operating in a world of generalizable principles . . . requires a baseline of acceptable normative behavior.”⁴¹ What this means, minimally, is that it does not make sense to say that disaggregated sovereignty *advances* liberal values if it actually reproduces violations of these baseline rights.

More generally, if the distinctly *transnational* characteristics of law are implicated in violating human rights—even while otherwise promoting their enforcement—then both Koh’s and Slaughter’s normative positions are flawed. Transnationalism’s normative fervor should then be significantly rethought.

B. Conviction and Responsibility in Human Rights

What justifies human rights law is an open philosophical question. In particular, debate persists on the question as to whether they can be insulated from cost-benefit concerns.⁴² This Article will *assume* their philosophical justifiability and highlight some of its entailments. In the legal consciousness that does hold that human rights rules are morally binding, they flow from a demand to protect human dignity.⁴³ According to this

40. JOHN RAWLS, A THEORY OF JUSTICE (1971). Rawls’s *A Theory of Justice*, the most widely acknowledged twentieth-century articulation of political liberalism, was premised on political life in a state. It was only later that he attempted to apply his theory beyond the black box of sovereignty: “[T]he basic structure is that of a closed society: that is, we are to regard it as self-contained and as having no relations with other societies. Its members enter it only by birth and leave it only by death.” JOHN RAWLS, POLITICAL LIBERALISM 12 (1993) (quoted in Bruce Ackerman, *Political Liberalisms*, 91 J. PHIL. 364, 379 (1994) (critiquing Rawls)). Transnationalism challenges the domestic/international divide, and therefore necessarily challenges the universal validity of the order of priorities that appears in Rawls.

41. Slaughter, *supra* note 38, at 190.

42. The dilemma has been discussed endlessly in the context of the debate on torture and, particularly, with respect to the “ticking bomb scenario.” See, e.g., Henry Shue, *Torture in Dreamland: Disposing of the Ticking Bomb*, 37 CASE W. RES. J. INT’L L. 231 (2006).

43. See, e.g., Universal Declaration of Human Rights pmbl., G.A. Res. 217 (III) A, U.N. Doc. A/RES/3/217(III) (Dec. 10, 1948); U.N. Charter. German law is unique in the fact it has an absolute right to dignity. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I art. 1, § 1 (Ger.) (German Basic Law provision that human dignity is “inviolable”). See also G.P. Fletcher, *Human Dignity As a Constitutional Value*, 22 U. W. ONTARIO L. REV. 171, 171 (1984) (“No one would question whether the protection of human dignity was a primary task of contemporary legal culture”). On the ambiguous status of dignity in U.S. law, and its relationship with concepts of dignity in foreign and international law, see Vicki C. Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, 65 MONT. L. REV. 15 (2004). For an

demand, there are certain evils from which every human being should be protected at all costs, by virtue of membership in the human species. The question of who should be responsible for such protections—or pay their costs—can be deeply controversial. But the command of such rights is never thought to depend upon citizenship or physical location, let alone other more invidious distinctions between human beings. If transnational law systematically reproduces violations of the elementary obligations that follow from dignity, then it can no longer claim to help enforce human rights.

Human rights are broadly divided into two families. One family of rights is subject to legitimate limitations, on which states decide through political process. These include, among others, the right to privacy, freedom of expression, voting rights, and the right to property. This family of rights is subject to the considerations of social costs and benefits, which sociologist Max Weber called an *ethics of responsibility*.⁴⁴ Such determinations can be made by citizens, their representatives, or judges. Their articulation is “slow, strong drilling through hard boards, with a combination of passion and a sense of judgment.”⁴⁵

However, some rights are defined in positive law precisely by the idea that one *must not* take into account the social costs of protecting them. The rules that relate to them remain binding regardless of political determination. Weber called the relevant reasoning an *ethics of conviction*, which applies in moments when one has no choice but to act according to absolute imperatives: “[H]ere I stand, I can do no other.”⁴⁶ One of the most perplexing aspects of human rights law is, indeed, the attempt to define such moments by legal rules and doctrine.

Imperatives that “brook no compromise” are familiar to Americans from the Convention Against Torture (“CAT”). The absolute nature of the prohibition on torture grants it extraordinary importance in contemporary political discourse. Virtually all of the European bills of rights include a core set of such imperatives, which are best understood in terms of a Weberian *ethics of conviction*. These absolute commitments are imagined to be “the founding principle of a global order of reason in a post-sovereignty world.”⁴⁷ Such prohibitions are supposed to transcend political debate, and courts that enforce them are presumed to be acting outside of the political arena.⁴⁸ In European bills of rights, as in CAT, the scope of such absolutist, transcen-

alternative argument, according to which dignity is not the foundation value underlying human rights, see Jeremy Waldron, *Is Dignity the Foundation of Human Rights?* (NYU School of Law, Public Law Research Paper No. 12-73, 2013), available at <http://ssrn.com/abstract=2196074> or <http://dx.doi.org/10.2139/ssrn.2196074>.

44. WEBER, *supra* note 18.

45. Martti Koskeniemi, *Human Rights Mainstreaming as a Strategy for Institutional Power*, 1 HUMANITY 47, 55 (2010) (quoting MAX WEBER, *The Profession and Vocation of Politics*, in POLITICAL WRITINGS (Peter Lassman and Ronald Spiers eds.)).

46. WEBER, *supra* note 18, at 92.

47. Paul Kahn, *Torture and the Dream of Reason*, 78 SOC. RES. 747, 764 (2011).

48. *Id.*

dent rules extends further than just torture. The rules also apply to “inhuman and degrading treatment” (as provided for, for example, in Article 3 of the European Convention of Human Rights (“ECHR”)).⁴⁹ While the duty to grant Refugee Status does allow for exceptions, here, too, we find an underlying obligatory rule—that of *non-refoulement*.⁵⁰

What a court declares as inhuman or degrading treatment is prohibited activity for all agencies and organs on which the court has authority. These obligations, which all fall under Article 3 of the ECHR,⁵¹ figure in the transnational legal consciousness as a law on which all other law must depend; indeed, a kind of global *Grundnorm*, under which legal and moral

49. European Convention on Human Rights art. 3, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR]. The relationship between these two categories is not always clear and has been growing exceedingly controversial in the last decade or so. In this context, however, we can afford to avoid a deeper discussion about what these words should denote. For such a discussion, see Ronald Dworkin, *Cruel, Inhuman and Degrading Treatment*, (New York Univ. Public Law and Legal Theory Working Papers, Paper No. 98, 2008), available at http://lsr.nellco.org/nyu_plltwp/98. For the point made above, note language like that of the European Court of Human Rights in *Gäfgen v. Germany*:

Societies that are founded upon the rule of law do not tolerate or sanction, whether directly, indirectly or otherwise, the perpetration of treatment that is absolutely prohibited by Article 3 of the Convention. Neither the wording of Article 3 nor that of any other provision of the Convention makes a distinction between the consequences to be attached to torture and those attaching to inhuman and degrading treatment. There is thus no legal basis, in our view, for regarding inhuman treatment as different from torture in terms of the consequences that flow from the perpetration thereof.

Gäfgen v. Germany, App. No. 22978/05 Eur. Ct. H.R. (2010).

50. The principle of non-refoulement asserts the right not to be deported to where one is expected to suffer egregious human rights violations. It is put forth in Article 33 of the Refugee Convention, which provides the following:

1. No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

For the exceptions to the obligation to grant refugee status (but not to the rule of *non-refoulement*) see Article 1F of the Refugee Convention, stating that:

The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.

See Convention Relating to the Status of Refugees, Jul. 28, 1951 [hereinafter Refugee Convention]; Protocol Relating to the Status of Refugees, Jan. 31, 1967 [hereinafter Protocol]. Derogation in the case of “mass influx” does not appear in the Convention or its protocol, but was introduced, for example, in Article 2 of the European Temporary Protection Directive, July 20, 2001. For more on this, see generally ANN VIBEKE EGGI, *MASS REFUGEE INFLUX AND THE LIMITS OF PUBLIC INTERNATIONAL LAW* (2002).

51. See, e.g., *Abdolkhani v. Turkey*, App. No. 30471/08 Eur. Ct. H.R. (2009).

imperatives converge.⁵² If one expresses support for violating such rights, the position is judged as *morally* illegitimate; the adversity with whoever advances such a position is no longer political, insofar as politics requires discourse. The relationship becomes one of enmity.⁵³

Weber did not write about human rights, but his distinction is very useful in order to stress a doctrinal difference between different kinds of rights. Weber thought that these two modes of ethical reasoning were complementary. Although the *ethics of responsibility* is described as a result of political processes and the *ethics of conviction* is described as beyond politics (Weber's image is one of a prophet), "authentic" political life always involves *both*:⁵⁴ a pragmatic, utilitarian willingness to strike compromises, and a deontological, indeed, fundamentalist vision leading us beyond what is merely given by circumstances. A meaningful commitment to human rights is fruitfully characterized as being bound to this dual foundation.⁵⁵

The focus of this Article will be on the non-derogable human rights that require an *ethics of commitment*. Through an examination of transnational law along the fault lines between developed and developing states, this Article shows that transnationalism's distinctive characteristics have often reproduced their violation. Interestingly, these violations never occurred with a manifest denouncement of human rights. Rather, what we see throughout the last two decades is a constant push toward pragmatism. But, as this Article argues, once this push is complete, human rights lose their normative content.

C. *The Haiti Paradigm*

In the context of transnationalism, unauthorized migration is not just another policy issue. As many have shown in the social sciences, its salience around the world is a result of transnational processes.⁵⁶ Unauthorized migration is a paradigmatically transnational issue, and findings with respect to unauthorized migrants go to the heart of any normative assessment of transnationalism.

This is true not only analytically, but also historically. The Haitian refugee crisis, which began in the early 1980s off the coast of Florida, is a crucial

52. Paul Kahn, *The Question of Sovereignty*, 40 STAN. J. INT'L L. 259, 262 (2004) (discussing a transnational legal consciousness in which human rights replaced sovereignty as "the foundation of the international legal order"). See also Kahn, *supra* note 2, at 11–12 (discussing the role of *jus cogens* norms and explaining that "[h]uman rights norms establish the minimal conditions of the new legal order, without which we cannot speak of it as a legal order at all").

53. Such obligations thus delineate "the borders of tolerance" for a particular legal consciousness centered on universal human rights. For a related analysis of liberal tolerance, see Stanley Fish, *The Trouble with Tolerance*, THE CHRONICLE REVIEW, Nov. 10, 2006, at B8.

54. WEBER, *supra* note 18, at 92.

55. For a similar point made in a different context, see Itamar Mann, *The Dual Foundation of Universal Jurisdiction: Towards a Jurisprudence for the 'Court of Critique'*, 1 TRANSNAT'L LEGAL THEORY 485 (2010).

56. See, e.g., SASKIA SASSEN, TERRITORY, AUTHORITY, RIGHTS: FROM MEDIEVAL TO GLOBAL ASSEMBLAGES 291–96 (2006).

starting point for understanding the significance of migration problems for transnational legal theory.⁵⁷ Koh, responding to these events, articulated his ideas on *transnational legal process* as well as on *transnational public law litigation*, as he represented Haitian refugees in U.S. courts.⁵⁸ Moreover, the role of bilateral relations between the United States and Haiti in this crisis foreshadowed the dark sides of *disaggregated sovereignty*.⁵⁹ For better or worse, Haiti provided a paradigm for international law in the next two decades. The model of law that came out of the Haiti affair, combining bilateral relations, a treaty, and a domestic court, later migrated outside of the United States.⁶⁰

Facing an increasing number of Haitian refugees and unauthorized migrants, President Ronald Reagan published Executive Order 12,324 in September 1981.⁶¹ The Order, “the model . . . for all that has followed,”⁶² allowed the U.S. Coast Guard to intercept Haitians on the high seas. These passengers of often-unseaworthy boats were then returned to Haiti under a bilateral agreement with the Haitian government.⁶³ Traditionally, international law does not allow states to perform enforcement tasks on the high

57. For an overview of the relevant history, see generally Harold Hongju Koh, *America's Offshore Refugee Camps*, 29 U. RICH. L. REV. 139 (1994).

58. See generally Koh, *supra* note 57.

59. This Article ascribes considerable weight to bilateral treaties in shaping the international legal environment. One justification for this approach appears in Gabriella Blum, *Bilateralism, Multilateralism, and the Architecture of International Law*, 49 HARV. INT'L L.J. 323, 379 (2008) (arguing that “the role of BLTs as a source of international law and a tool of international relations should be restored from its currently neglected place in international law scholarship”).

60. The idea that law “migrated” is borrowed from Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564, 1576 (2006). Koh believed there was a wide divide on the relevant legal issues between American and foreign law on these issues. While the U.S. Supreme Court could flout international law, foreign courts were bound by “principles of comity, sanctity of treaty, and respect for human rights that must form the bedrock of any new world order.” Harold Hongju Koh, *Reflections on Refoulement and Haitians* Centers Council, 35 HARV. INT'L L.J. 1, 20 (1994). The same general idea appears in the work of Jürgen Habermas, who believes there is a considerable gap between American and European ideas of law on a global scale: “The crucial issue of dissent is whether justification through international law can, and should, be replaced by the unilateral, world-ordering politics of a self-appointed hegemon.” Jürgen Habermas, *Interpreting the Fall of a Monument*, 4 GER. L.J. 701, 706 (2003). See also Martti Koskeniemi, *International Law as Political Theology: How to Read Nomos der Erde?*, 11 CONSTELLATIONS 492, 493 (2004). This Article, however, emphasizes the continuum between the *behaviors and policies* of developed countries, even if legal reasonings sometimes differed. It turns out that it is precisely values like comity and sanctity of treaty that can contribute to human rights problems characteristic of “the new world order.”

61. Exec. Order No. 12,324, 46 Fed. Reg. 48, 109 (Sept. 29, 1981).

62. Guy S. Goodwin-Gill, *The Right to Seek Asylum: Interception at Sea and the Principle on Non-Refoulement*, 23 INT'L J. REFUGEE L. 443, 443 (2011). Koh was the first person to argue that the Haitian refugee crisis should be understood “not as *sui generis*, but as illustrating a paradigmatic crisis of the New World Disorder.” Harold Hongju Koh, *Refugees, The Courts, and the New World Order*, 1994 UTAH L. REV. 999, 1009 (1994). See generally Harold Hongju Koh, *The “Haiti Paradigm” in United States Human Rights Policy*, 103 YALE L.J. 2391 (1994). For a broader account of Haiti's place in the history of world politics, see generally SUSAN BUCK-MORSS, *HEGEL, HAITI, AND UNIVERSAL HISTORY* (2009).

63. Migrants—Interdiction: Agreement Effected by Exchange of Notes, U.S.-Haiti, Sept. 23, 1981, 33 U.S.T. 3559.

seas (under the doctrine of the “freedom of the high seas”),⁶⁴ but the state of embarkation is not bound by this rule.⁶⁵ The way around this limitation was therefore for the United States to obtain Haiti’s permission. When this cooperation was established, Haitians seeking asylum were sent to a facility in Guantanamo Bay, where their requests for protection were processed.

After Haitian President Jean-Bertrand Aristide was ousted in September 1991 by a military *coup d’etat*, the number of refugees and migrants seeking asylum in the United States surged.⁶⁶ President George H.W. Bush responded to this influx in May 1992 with Executive Order 12,807. Under this new, more restrictive measure, President Bush authorized the U.S. Coast Guard to return all fleeing Haitians to their country—this time, with no process at all.⁶⁷ The legality of the policies put in place by the earlier Executive Order 12,324 was questionable and led to “transnational public law litigation.”⁶⁸ But many activists and scholars believed that the new order even more flagrantly violated both domestic and international obligations.⁶⁹ Under the 1967 Protocol to the 1951 Refugee Convention, the United States was required to grant access to asylum and to not return people to places where their rights would be violated (“*non-refoulement*”).⁷⁰

Several court cases were brought during a campaign against the “policy of *refoulement*” launched by the *Haiti Centers Council* and other organizations.⁷¹ Some courts granted refugees and unauthorized migrants important remedies.⁷² However, the efforts of these activists reached a dead end in *Sale v. Haitian Centers Council*, where the principal question came before the U.S.

64. This is not something the court discusses in *Sale*, presumably (among other reasons) because the United States is not a signatory to the United Nations Convention on the Law of the Sea (“UNCLOS”). However, many of UNCLOS’s provisions are considered to be part of customary international law. For this reason, such an agreement was presumably required to offset Article 87 of the Convention. The provision, codifying the ancient principle of “the freedom of navigation,” bars the interception of boats on the high seas. United Nations Convention on the Law of the Sea art. 87, Dec. 10, 1982, 1833 U.N.T.S. 397, 432 [hereinafter UNCLOS].

65. Under Article 94 of UNCLOS, the “flag state” maintains jurisdiction over its own boats when they are on the high seas. UNCLOS, *supra* note 64, at 434. “These asylum seekers were interviewed . . . aboard Coast Guard cutters,” and twenty-eight “were found to have credible asylum claims . . .” *U.S. Processing of Haitian Asylum Seekers: Testimony before the Subcomm. on Legis. and Nat’l Security of the H. Comm. on Gov’t Operations*, 102d Cong. 1 (1992) (statement of Harold J. Johnson, Director, Foreign Econ. Assistance Issues, Nat’l Security and Int’l Affairs Div., Gov’t Accountability Office).

66. From 1981 to 1991, approximately 24,600 Haitian asylum seekers were interdicted at sea en route to the United States. U.N. High Commissioner for Refugees, *The State of the World’s Refugees 1993: The Challenge of Protection*, ch. 2, at 15 (Jan. 1, 1993), available at <http://www.unhcr.org/4a4c6da96.html>.

67. Exec. Order No. 12,807, 3 C.F.R. 303–04 (1993). This order came to be known as the “Kennebunkport Order.” See also Koh, *supra* note 62, at 2396.

68. See generally Koh, *supra* note 67, at 2398–2409.

69. Jeffrey Sterling Kahn, *Islands of Sovereignty: Haitian Migration and the Orders of Empire* (Mar. 2013) (unpublished Ph.D. dissertation, University of Chicago) (on file with author).

70. See United Nations Protocol Relating to the Status of Refugees, art. 1, Jan. 31, 1967, 606 U.N.T.S. 268, 268.

71. See, e.g., Koh, *supra* note 60, at 13.

72. The Haitian Centers Council won an important district court judgment that ordered the release to the United States of more than 200 Haitian refugees, who were being held in Guantanamo. See *Haitian Ctrs. Council, Inc. v. Sale*, 823 F. Supp. 1028 (E.D.N.Y. 1993).

Supreme Court: did interception on the high seas violate the United States's obligations under the 1967 Protocol to the Refugee Convention?⁷³

Justice John Paul Stevens, writing for the majority, found that the duty of *non-refoulement* does not extend to the high seas. Choosing a narrow textual interpretation of the Convention centered on the fact that the French verb "*refouler*" means "to expel" or "to deport," he held that its obligations are strictly territorial.⁷⁴

Justice Harry Blackmun wrote a minority opinion that would subsequently prove important in the precedent's transnational legal trajectory. According to Blackmun, the policy introduced by Executive Order 12,807, intercepting unauthorized Haitian migrants at sea and returning them to Haiti, violated the Convention's central provision—the rule of *non-refoulement*.⁷⁵ He thus rejected Stevens' textual interpretation.

Blackmun's opinion rests upon an alternative underlying theory of when Convention obligations apply. The important factor, according to this theory, is that agents and organs of the U.S. government were intercepting refugees. These agents remain bound to treaty obligations, even when they act extraterritorially.⁷⁶ Though Blackmun does not use the (technical) term, the underlying rule here is one of *effective control*.⁷⁷ The United States is, of course, not required to grant access to asylum to all asylum seekers the world over. Only when it uses force beyond its own borders does it create certain rights (of access to asylum) to the people upon whom it uses force.

Blackmun considers fulfilling those rights—and the obligations that follow—as a conviction deeply related to a historical experience. Thus, he closes his opinion with dramatic lines: "The convention that the Refugee Act embodies was enacted largely in response to the experience of Jewish

73. See *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 158–59 (1993). Although the case raised important issues in domestic U.S. immigration law, this Article chooses to focus here on the international law issues, as they are the ones relevant to the general argument.

74. Justice Stevens wrote:

The drafters of the Convention . . . may not have contemplated that any nation would gather fleeing refugees and return them to the one country they had desperately sought to escape; such actions may even violate the spirit of Article 33; but a treaty cannot impose un contemplated extraterritorial obligations on those who ratify it through no more than its general humanitarian intent. Because the text of Article 33 cannot reasonably be read to say anything at all about a nation's actions toward aliens outside its own territory, it does not prohibit such actions.

Id. at 183.

75. See *id.* at 188–90.

76. *Sale*, 509 U.S. at 190–93.

77. Relatively recently, the European Court of Human Rights developed this concept significantly in *Al-Skeini*, *supra* note 19. Compare *id.* with *Boumediene v. Bush*, 553 U.S. 723, 770–71 (2008) (requiring de facto sovereignty in order to apply habeas corpus); David Jenkins, *Habeas Corpus and Extraterritorial Jurisdiction after Boumediene: Towards a Doctrine of 'Effective Control' in the United States*, 9 HUM. RTS. L. REV. 306 (2009). The Habeas Corpus Suspension Clause is arguably "[t]he most important human rights provision in the Constitution." Zechariah Chafee, Jr., *The Most Important Human Right in the Constitution*, 32 B.U. L. REV. 143, 143 (1952).

refugees in Europe during the period of World War II. The tragic consequences of the world's indifference at that time are well known."⁷⁸ Immediately thereafter, the words that come directly before "I dissent" espouse a theory of dignity centered on a *right to be heard*: "We should not close our ears" to the refugees, says Blackmun.⁷⁹ The moral force of this obligation, which Blackmun understood to be above and beyond the bilateral relations the United States has formed with Haiti, binds one as a matter of an *ethics of conviction*.

However, no less important than the differences between the two opinions—and this is worth emphasizing—are their common underlying assumptions. These assumptions may seem so obvious as not to require explanation.⁸⁰ They are common to any court engaged in rights-based judicial review—at least so long as no such court has truly universal jurisdiction.⁸¹ Both opinions implicitly imagine a plain of executive policies, some of which take place inside of and some of which take place outside of U.S. sovereign territory. Under both of these opinions, only *part* of these policies (and the effects they have) is judicially reviewable. This may seem inconsequential, but it is not. Blackmun, like Stevens, focused exclusively on the policies established by Executive Order 12,807. The earlier policies of Executive Order 12,324 were beyond his consideration, as was the bilateral agreement with Haiti, which allowed U.S. agents to intercept Haitian nationals on the high seas.

One might imagine executives and judiciaries as having perfectly compatible authorities and competences, neatly folding into each other under a unitary sovereignty.⁸² According to such a picture, all executive acts are potentially subject of rights-based judicial review.⁸³ With respect to actions taken abroad, however, this is never true; both Stevens and Blackmun omit-

78. Sale, 509 U.S. at 207.

79. *Id.* at 208.

80. This is a truism about adjudication, in the sense that Scott Shapiro discusses truisms about law. SCOTT SHAPIRO, *LEGALITY* 15–16 (2011). Cf. Duncan Kennedy, *supra* note 24, at 6.

81. Some courts have universal criminal or civil jurisdiction, but the idea of a universal human rights court, though not new, is far from any serious implementation. For a review of the history of this idea and its possible contemporary relevance, see Manfred Nowak, *On the Creation of a World Court of Human Rights*, 7 NAT'L TAIWAN U. L. REV. 257 (2012).

82. The position that judicial review should potentially reach every state act is associated with Aharon Barak's jurisprudence, and expounded in Owen M. Fiss, *Law is Everywhere*, 117 YALE L. J. 257, 275, 278 (2007). In the context of administrative acts, see Kingsbury et al., *supra* note 13, at 17 (explaining that "[d]omestic law presumes a shared sense of what constitutes administrative action, even though it may be defined primarily in the negative—as state acts that are not legislative or judicial—and even though the boundaries between these categories are blurred at the margins[,] but immediately contrasting this characterization with the form that law takes in the transnational condition, stating that "[b]eyond the domain of the state, no such agreed functional differentiation prevails; the institutional landscape is much more variegated than in domestic settings.").

83. See *Al-Skeini v. United Kingdom*, App. No. 55721/07, Eur. Ct. H.R. (2011), for the most recent articulation of the latter view. See also Edwin D. Dickinson, *Jurisdiction at the Maritime Frontier*, 40 HARV. L. REV. 1, 1 (1926) ("The maritime frontier presents some unique jurisdictional difficulties If jurisdiction on the one side is primarily territorial in nature, on the other side it would seem to be primarily personal or national.").

ted a discussion of the agreement with Haiti, placing that aspect of U.S. policy beyond Supreme Court review.

Thus, the Haiti affair raises a structural issue that recurs throughout the following two decades. Where do obligations that particular states owe to all human beings begin? And where do they end? The unfolding of *the dialectic of transnationalism* over this period will be a story about the difficult attempts to negotiate this line.

One can trace to the present day a red thread of related and incrementally developing policies, passing through various jurisdictions and flowing from the 1981 “model for all that followed.”⁸⁴ The idea that a bilateral agreement would grant a developed state enforcement authorities that initially belonged to a developing one became a paradigm for the next two decades. The relevant history leads from Haiti to Europe, Africa, Australia, and Southeast Asia. It contains important lessons on how *transnationalism* delivered on its promises—and where it failed to do so. The 1993 *Sale v. Haitian Centers Council* decision is our point of departure.

II. DISAGGREGATED SOVEREIGNTY AND UNAUTHORIZED MIGRATION

A. *The Migration of Regulation*

The *New York Times* report on *Sale* foresaw key features of what was to follow in the next two decades.⁸⁵ It already suggested that the border enforcement practices that the Supreme Court upheld in *Sale* would be adopted in legal systems abroad.⁸⁶ This Part aims to demonstrate that the disaggregation of sovereignty provides the most accurate analytic model of how this occurred. As the newspaper reported:

[L]ast week, when the Supreme Court, in an 8-1 decision, upheld the Haitian repatriation policy, immigration experts could not help but wonder: Will this ruling by one of the most influential courts in the world set a tempting precedent, particularly for developing nations? If the United States, with imprimatur of its highest court, appears to put the protection of its borders above its responsibilities under international law, will others be enticed to follow suit?⁸⁷

Although developing states would later play a critical role in the history that unfolded, the most direct importers of the American precedent were developed ones.

84. Goodwin-Gill, *supra* note 62, at 443.

85. See Deborah Sontag, *Reneging on Refuge: The Haitian Precedent*, N.Y. TIMES, June 27, 1993, available at <http://www.nytimes.com/1993/06/27/weekinreview/reneing-on-refuge-the-haitian-precedent.html?pagewanted=all&src=pm>.

86. See *id.*

87. *Id.*

In March 1997, Italy concluded a bilateral agreement with the Albanian government, which would allow Italy to intercept boats of unauthorized migrants on the high seas.⁸⁸ The legality of this measure was premised on Executive Order 12,807. The Italians have reportedly been pushing back Albanian migrants and refugees with no process at all since 1991.⁸⁹ But now, the measure was justified in light of President Bush's Executive Order. Like Bush's order did in Haiti, the Italian-Albanian agreement established a maritime blockade around Albania, while a growing number of people fled Tirana. As one Italian legal scholar clarified, citing *Sale*, the freedom of the high seas is merely a presumption of international law; it can be altered under bilateral agreements.⁹⁰

Four years later, the Australian government followed suit with the more ambitious "Pacific Solution."⁹¹ This milestone policy was ignited by the August 2001 *MV Tampa* Affair.⁹² The *Tampa*, a Norwegian boat that saved 438 Afghans from drowning off the coast of Australia, sought to disembark in Australia. The Australian government refused to accept the Afghans and instead deployed Australian Special Forces to prevent the ship from disembarking.⁹³

Determined to prevent such events from happening again, Australia adopted several measures that removed thousands of Pacific Islands from Australia's "migration zone."⁹⁴ With the "Pacific Solution," the islands were redefined so that they would no longer constitute Australian sovereign

88. See TUGBA BASARAN, SECURITY, LAW AND BORDERS 78 (2010); International Organization for Migration, *Return and Readmission to Albania: The Experience of Selected EU Member States*, at 102–04 (2006), <http://www.iomtirana.org.al/en/E-Library/Books/EC%20research.pdf>.

89. *See id.*

90. The inspiration coming from the U.S. arrangement was likely quite direct; in a 1999 treatise on the Rules of International Law on Illegal Immigration by Sea, Italian legal scholar Tullio Scovazzi specifically cites Reagan's Executive Order 12,324 as a precedent for the legality of the Italian-Albanian agreement. Scovazzi, a leading authority on maritime law, clarifies that the "freedom of the high seas" is merely a presumption of international law, and can therefore be altered under bilateral agreements providing otherwise. See Tullio Scovazzi, *Le Norme di Diritto Internazionale Sull'immigrazione Illegale via Mare Con Particolare Riferimento Ai Rapporti Tra Albania e Italia*, in *LA CRISI ALBANESE DEL 1997* (Andrea de Guttry and Fabrizio Pagani eds., 1999). See also Efthymios Papastavridis, 'Fortress Europe' and FRONTEX: *Within or Without International Law?*, 79 *NORDIC J. INT'L L.* 75, 87–88 (2010).

91. Penelope Mathew, *Australian Refugee Protection in the Wake of the Tampa*, 96 *AM. J. INT'L L.* 661, 661 (2002). See generally PETER MARES, *BORDERLINE: AUSTRALIA'S RESPONSE TO REFUGEES AND ASYLUM SEEKERS IN THE WAKE OF THE Tampa* (2003); Ausl., Report of Select Comm. on a Certain Maritime Incident, Senate, Oct. 23, 2002, 1–12.

92. Mathew, *supra* note 91, at 661; Ausl., Report of Select Comm. on a Certain Maritime Incident, *supra* note 91, at 1–4.

93. The measure was upheld by the Australian High Court in its landmark decision in *Ruddock v. Vadarlis*. While the two majority judges in the application for *habeas corpus* held that closing the maritime borders was the prerogative of the executive branch, the minority judge found that such measures would require a parliamentary act. And indeed, with the "Pacific Solution," the legislature took that invitation to put in place a much wider framework for offshore processing. See *Ruddock v. Vadarlis* (2001) 110 *FCR* 491 (Fed. Ct.) (three-judge panel) (Aus.).

94. Mathew, *supra* note 91, at 662; AUSTRALIAN PARLIAMENT, *supra* note 91, at 5.

territory for the purpose of refugee protection.⁹⁵ Australia employed its navy to intercept migrants and asylum seekers who sailed in. These people originally came mainly from Afghanistan, but also from Iraq, Iran, China and Vietnam. Under this policy, asylum seekers could more easily be intercepted extraterritorially, and sent to detention and offshore processing sites on Christmas Island, Manus Island in Papua New Guinea, and the tiny island nation of Nauru.⁹⁶ According to the new law, the Australian government had discretion as to whether it would hear the asylum applications of those held outside the “migration zone.”⁹⁷

The new policy was based upon the idea that Australia was not required to grant access to Refugee Convention rights to those intercepted outside of Australia’s “migration zone.”⁹⁸ This demanded legal justification, which Australian government lawyers were quick to provide.⁹⁹ One comment is particularly indicative of their inspiration: “Support for this conclusion is to be found in the US Supreme Court case of *Sale v. Haitian Centers Council Inc.* . . . [I]n an 8:1 decision the Court considered the terms of the Convention and the travaux préparatoires and concluded that the Convention did not place any limits on the President’s authority to repatriate aliens interdicted beyond the territorial seas of the United States.”¹⁰⁰ Australia adopted the American position.¹⁰¹

Both Italy and Australia were pioneers in establishing fruitful new partnerships with developing states to solve their migration problems.¹⁰² In the

95. For detailed accounts of the legislation that this required, see Mathew, *supra* note 91, at 661; Michelle Foster, *The Implications of the Failed ‘Malaysian Solution’: the Australian High Court and Refugee Responsibility Sharing at International Law*, 13 MELBOURNE J. INT’L L., 1, 4–6 (2012); AUSTRALIAN PARLIAMENT, *supra* note 91, at 5.

96. For a detailed account of the relevant navy operation (“Operation Relex”), see AUSTRALIAN PARLIAMENT, *supra* note 91, at 13–30.

97. This arrangement was not challenged again in the Australian High Court after *Ruddock*, *supra* note 93.

98. AUSTRALIAN PARLIAMENT, *supra* note 91, at 5.

99. See, e.g., *Article 31—Refugees Unlawfully in the Country of Refuge—An Australian Perspective*, Refugee and Humanitarian Division Department of Immigration and Multicultural and Indigenous Affairs (Oct. 2002).

100. *Id.* at 129.

101. One Australian scholar cites this as a possibility in a “current development” piece about the Pacific Solution, granting more evidence that the precedents occupied the minds of Australian lawyers at the time. See Mathew, *supra* note 91. However, the truth is that the influence was more direct:

The Australian government appears to think that interdiction is compatible with the Refugee Convention. In support of this view, it could cite the precedent of the United States’s interdiction of Haitian asylum seekers. However, although at various times the U.S. program did provide for some sort of hearings (albeit unsatisfactory ones) regarding the Haitians’ claims, refugee advocates fear that many genuine refugees were rejected. In any event, the U.S. Supreme Court’s 8-1 decision upholding the practice (Justice Harry Blackmun dissented) which rests on the supposed territorial scope of the Refugee Convention has been criticized.

Id. at 666. See also Azadeh Dastyari, *Refugees on Guantanamo Bay: A Blue Print for Australia’s ‘Pacific Solution’?*, 79 AUSTRALIAN Q. 4 (2007).

102. On Italy, see, for example, Mateo Tondini, *Fishers of Men? The Interception of Migrants in the Mediterranean Sea and Their Forced Return to Libya*, INEX Paper, 4–10 (2010); Salvatore Coluccello and

next years, Southern European countries—which under the Schengen Convention had largely opened their own internal borders—faced an influx of unauthorized migrants, particularly from the Middle East and Africa.¹⁰³ Across the Mediterranean and the Western coast of Africa, European member states established agreements with authorities in migrant-sending countries and “transit countries.”¹⁰⁴ Under these agreements, European member states provided equipment such as boats to African navies or coastguards, and manned these boats with their own personnel, often termed “experts.”¹⁰⁵

The migration of law from U.S.-Haiti relations to other parts of the world is consistent with Slaughter’s descriptive account of disaggregated sovereignty. It suggests, first, that—like property—sovereignty is conceptualized as a “bundle of rights” which one can add to or detract from at will.¹⁰⁶ It also suggests that policymakers learn from each other, across borders.¹⁰⁷ However, “disaggregated sovereignty” implies a stronger claim. More than just a study of sovereignty’s un-bundling, or a comparative study of mutual influences, it is a theory of *how* such processes are generated. The next three subsections focus precisely on that *how*. Cross-border influence is generated through (1) policymaking networks; (2) enforcement networks; and (3) human rights and refugee protection networks.

1. *Policymaking Networks*

How did the numerous bilateral (and multilateral) agreements on migration control develop? In the United States, Europe, and Australia, these agreements were the result of negotiations, which spawned fruitful policymaking networks. These networks are composed of diplomats and regulators and, occasionally, domestic legislators.¹⁰⁸

Simon Massey, *Out of Africa: The Human Trade between Libya and Lampedusa*, 10 TRENDS ORGAN. CRIM. 77, 81–84 (describing partnerships with Tunisia, Morocco and Libya). On the cooperative frameworks Australia developed immediately after the *Tampa Affair*, see, for example, AUSTRALIAN PARLIAMENT, *supra* note 91, at 291–313.

103. Perhaps the most familiar example is the cooperation between Italy and Libya. For a good review of the most important bilateral treaty between the two, see Natalino Ronzitti, *The Treaty of Friendship, Partnership and Cooperation between Italy and Libya: New Prospects for Cooperation in the Mediterranean?*, Paper presented at the Mediterranean Strategy Group Conference on “Is regional cooperation in the Maghreb possible? Implications for the Region and External Actors,” in cooperation with German Marshall Fund of the United States (Genoa, 11–12 May 2009), www.iai.it/pdf/DocIAI/iai0909.pdf.

104. See, e.g., Tine Van Criekinge, *The EU-Africa Migration Partnership: A Case Study of the EU’s Migration Dialogue with Ghana and Senegal*, EUI Migration Working group papers (2010).

105. See, e.g., Tondini, *supra* note 102; Coluccello and Massey, *supra* note 102; see also *Jamaa v. Italy*, Eur. Ct. H.R. (Grand Chamber No. 27765/09, Feb. 23, 2012) (discussed *infra* Parts IV–V).

106. On sovereignty as a “bundle of rights,” see SASKIA SASSEN, *LOSING CONTROL? SOVEREIGNTY IN AN AGE OF GLOBALIZATION* 39–41 (1996).

107. SLAUGHTER, *supra* note 17, at 25.

108. SLAUGHTER, *supra* note 17, at 264 (explaining that policy networks “permit a loose, flexible structure that can bring in national officials from a wide range of different countries as needed to address specific problems. [The networks] can target problems at their roots, plug loopholes in national jurisdictions, and respond to goods, people, and ideas streaming across borders.”).

In Europe, these migration networks became incredibly complex.¹⁰⁹ The vast majority of networks connect European capitals to policy centers in Africa.¹¹⁰ One such representative initiative is the “Global Approach to Migration,” a framework that has been implemented by executive as well as legislative networks since 2005.¹¹¹ The basic premise here is that African and European countries could establish partnerships on migration enforcement, if the latter would “pay” the former with various forms of development aid.

For example, in 2005, the European Commission put forth a policy focusing on migration from “the Mediterranean area and Africa.”¹¹² The stated objective, “improving global migration,” was framed to impartially promote European interests, alongside the interests of African countries. “[I]f well managed,” reads the document the Commission published, migration “can be beneficial both to the EU and to the countries of origin.”¹¹³ The European Council adopted the Commission’s proposal and released its “Global Approach to Migration: Priority Actions Focusing on Africa and the Mediterranean.”¹¹⁴ Here, border control was not cast simply as an enforcement issue but also as a way of regulating markets. The policymakers who wrote this document were aware not only of the need to keep people out but also of market demands for workers. Furthermore, immigrants’ potential capacity as consumers was also noted.¹¹⁵ However, the proposal focused on border *enforcement* rather than on legal migration.¹¹⁶

This global approach embeds illegal migration in a host of international economic and security policies, aimed to address the “root causes” of illegal

109. A good summary of policymaking network activities involving Libya appears in SYLVIE BREDLOUP & OLIVER PIEZ, *THE LIBYAN MIGRATION CORRIDOR* (2011).

110. The legal architecture of this network is a considerable set of bilateral and multilateral agreements. The Cotonou Agreement, “the most comprehensive partnership agreement between developing countries and the EU,” both constituted this network, and prepared the grounds for its further development. Cotonou Agreement, *available at* http://ec.europa.eu/europeaid/where/acp/overview/cotonou-agreement/index_en.htm. The Cotonou Agreement contains provisions on trade, development, criminal enforcement, the International Criminal Court (ICC), and unauthorized migration. *Id.*

111. Van Criekinge, *supra* note 104, at 4.

112. Priority Actions for Responding to the Challenges of Migration: First Follow-up to Hampton Court COM (2005) 621 final (Nov. 30, 2005).

113. *Id.*

114. European Council, Global Approach to Migration: Priority Actions Focusing on Africa and the Mediterranean 15744/05 of 13 Dec. 2005.

115. For example:

While immigration should be recognised as a source of cultural and social enrichment, in particular by contributing to entrepreneurship, diversity and innovation, its economic impact on employment and growth is also significant as it increases labour supply and helps cope with bottlenecks. In addition, immigration tends to have an overall positive effect on product demand and therefore on labour demand.

Priority Actions for Responding to the Challenges of Migration, *supra* note 112 (preamble).

116. *Id.*

migration.¹¹⁷ As it developed, it named poverty, oppressive regimes, human rights violations, and gender discrimination as reasons for emigration.¹¹⁸ It also takes into account the costs migration imposes on African countries in terms of “brain-drain”¹¹⁹ and the benefits it creates through remittances (often representing a considerable part of a sending country’s GDP).¹²⁰

But the Commission does not envision replacing enforcement tasks with a global fight against poverty and human rights violations. The idea is to integrate enforcement strategies with aid, reducing the incentives people have to leave their own countries, while augmenting countries’ incentives to enforce the EU’s borders from without.¹²¹ The language used by the Council is not one of control but one of management.¹²² The first concrete recommendation the Council adopts is thus framed somewhat opaquely—to “implement border management measures in the Mediterranean region.”¹²³ Three countries are identified in the document as “high priority partners”: Morocco, Algeria and Libya.¹²⁴ The first addressee the Council turns to with concrete tasks of *implementing* the Global Approach is Frontex, the EU’s border control agency, established in 2004.¹²⁵

One important step the EU took to implement the global approach was the “Joint Africa-EU Declaration on Migration and Development” concluded in Tripoli, Libya, in late November 2006. The declaration, negotiated between African and European ministers of foreign affairs, migration, and development, is a pledge to create additional networks for all areas of

117. For a paper arguing for this approach, see ANDREW GEDDES, *MIGRATION AS FOREIGN POLICY? THE EXTERNAL DIMENSION OF EU ACTION ON MIGRATION AND ASYLUM* 25 (2009).

118. Commission Staff Working Paper on Migration and Development, accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *The Global Approach to Migration and Mobility COM (2011) 743 final* of Nov. 18, 2011.

119. Communication from the Commission to the Council and the European Parliament, *The Global Approach to Migration one year on: Towards a Comprehensive European Migration Policy COM (2006) 735 final* of Nov. 30, 2006, at 6–8, 23.

120. For up-to-date information, see LEON ISAACS, CARLOS VARGAS-SILVA AND SARAH HUGO, *EU REMITTANCES FOR DEVELOPING COUNTRIES, REMAINING BARRIERS, CHALLENGES AND RECOMMENDATIONS* (2012).

121. On the development of this idea and initial reluctance to embrace it in the EU, see, for example, Carl Levy, *The European Union after 9/11: The Demise of a Liberal Democratic Asylum Regime?*, 40 *GOVERNMENT AND OPPOSITION* 26, 45–46 (2005). The Council’s Global Approach document is indicative in this context. While its first page eloquently presents the anti-poverty policies through a “genuine partnership” with “Africa and the Mediterranean Countries” its second more operative part specifies that the partnership in question will be realized through policing. *Global Approach to Migration: Priority Actions Focusing on Africa and the Mediterranean*, *supra* note, at 3, 4, 7.

122. *Id.*

123. *Global Approach to Migration: Priority Actions Focusing on Africa and the Mediterranean*, *supra* note 114, at 4.

124. All these countries had had crucial roles in anti-migration networks, both before and after the Arab Spring. See MIGREUROP, *EUROPEAN BORDERS: CONTROLS, DETENTION AND DEPORTATIONS* 5 (2009–2010).

125. Frontex Website, <http://www.frontex.europa.eu/>. Frontex’s role will be discussed in more detail below (under “enforcement networks”).

border management.¹²⁶ Thus, we encounter what Slaughter terms “networks of networks.”¹²⁷

Slaughter, however, is interested less in ministers than in lower-level officials.¹²⁸ Indeed, the EU—itself Slaughter’s most celebrated network—has freestanding bodies responsible for continuous networking on the development-migration nexus.¹²⁹

One sees a similar cooperative paradigm in the case of Australia. Although Australia had a certain level of cooperation on migration issues with its regional neighbors since at least the late 1970s, the *MV Tampa* affair signaled a new era.¹³⁰ As in Europe, migration became an area of disaggregated policymaking, in which enforcement and policing tasks were closely linked with foreign aid.

The Pacific Solution extended to several Pacific islands a role similar to the one Guantánamo Bay served during the 1980s in Reagan’s earlier frame-

126. Joint Africa-EU Declaration on Migration and Development, Tripoli, 22–23 Nov. 2006 (final version), 11.

127. SLAUGHTER, *supra* note 17, at 132. Another similar example was the “Euro-African Ministerial Conference on Migration and Development.” After it met for the first time in July 2006 in Rabat, Morocco, France invited the network of “ministers in charge of migration” to a meeting in Paris, held in November 2008. The countries represented were (in alphabetical order): Austria, Belgium, Benin, Bulgaria, Burkina Faso, Cameroon, Cape Verde, Chad, Cote D’Ivoire, Central African Republic, Congo, Cyprus, Czech Republic, Denmark, Equatorial Guinea, Estonia, Finland, France, Gabon, Gambia, Germany, Ghana, Greece, Guinea, Guinea Bissau, Hungary, Ireland, Italy, Latvia, Liberia, Libya, Lithuania, Luxemburg, Mali, Malta, Morocco, Mauritania, Netherlands, Niger, Nigeria, Norway, Poland, Portugal, Democratic Republic of Congo, Romania, Senegal, Sierra Leone, Slovakia, Slovenia, Spain, Switzerland, Sweden, Togo, Tunisia, United Kingdom; and the European Commission. Third Euro-African Ministerial Conference on Migration and Development, *available at* http://ec.europa.eu/home-affairs/news/intro/docs/Dakar%20strategy_%20Ministerial%20declaration%20migration%20and%20development_%20EN.PDF (last visited Mar. 27, 2013 8:48 PM). This meeting concluded with a “Three-Year Cooperation Programme.” The program similarly created a framework for providing aid and simultaneously revamping borders.

128. SLAUGHTER, *supra* note 17, at 63 (arguing that “regulators are the new diplomats”).

129. One such initiative is Euromed, the members of which are Algeria, Egypt, Israel, Jordan, Lebanon, Morocco, the Occupied Palestinian Territories, Tunisia, Turkey and Syria (with which cooperation has been suspended). *Euro-Mediterranean Partnership (EUROMED)*, European Union External Action, http://www.eeas.europa.eu/euromed/index_en.htm (last visited Mar. 27, 2013 8:52 PM). Another one is European Migration Network (EMN), which aims to provide policymakers with migration-related information. Similar initiatives include the Berne Initiative, launched in June 2001 under the auspices of the Swiss government and in cooperation with the International Organisation for Migration (IOM), promotes informal intergovernmental dialogue on migration among sending, transit and destination countries aimed at information sharing and other related initiatives; the 5+5 Dialogue, launched in Rome in 1990, following a high-level meeting of the Ministers of Foreign Affairs of France, Italy, Spain, Portugal, Malta, Mauritania, Morocco, Algeria, Tunisia and Libya, fosters regional political and economic cooperation in the Western Mediterranean. 5+5 Mediterranean Dialogue, International Waters Learning Exchange & Resource Network, <http://iwlearn.net/news/iwlearn-news/5-5-mediterranean-dialogue> (last visited Mar. 27, 2013 8:55 PM). Furthermore, the Rabat Declaration, organized by Morocco, Spain and France, gathered the EU member states as well as countries from West, Central and South Africa. It was held in July 2006, when fifty-seven countries signed the Rabat Declaration, which aimed to foster “a close partnership on the management of legal and illegal migration.” Rabat Declaration, *available at* http://www.maec.gov.ma/migration/Doc/RABAT%20DECLARATION_EN.pdf. The United States, too, is represented in some of these networks. See, for example, the Center for Strategic and International Studies, which has sponsored work on this topic.

130. Mathew, *supra* note 91.

work.¹³¹ The policy required engagement with the governments of these small nations. One month after the Tampa affair, René Harris, president of Nauru, and then Australia's Minister of Defense, Peter Reith, signed a "Statement of Principles." The two declared that Nauru will house 800 detainees in a new facility, and Australia would pledge \$26.5 million for the country's development.¹³² On December 11, 2001, a Memorandum of Understanding was signed between Australia and Nauru, further expanding this framework both in terms of detention capacity and Australian aid.¹³³ As this memorandum clarifies, Australia became the implementer of a Nauruan asylum system, complete with processing, detention, and deportation.¹³⁴ This overhaul of the Nauruan Ministry of the Interior by a neighboring country illustrates the disaggregation of both Nauruan and Australian sovereignty.¹³⁵

But the bilateral process quickly developed into a much thicker network, in policies advanced in "the Bali Process," sponsored by Australia; following large numbers of illegal boats, the Bali Ministerial Conference on People Smuggling, Trafficking in Persons, and Related Transnational Crime was held in February 2002.¹³⁶ This conference brought together thirty-eight source, transit and receiving (destination) countries from throughout the region.¹³⁷ In order to carry out ambitious regional policy, "[m]inisters agreed that senior officials develop practical plans of action."¹³⁸ The United Nations High Council for Refugees ("UNHCR") and the International Organization of Migration ("IOM") were also brought to the table, as were human rights organizations.¹³⁹

131. The Australian model in turn influenced policymakers in Europe. See Levy, *supra* note 121, at 47–48.

132. AUSTRALIAN PARLIAMENT, SELECT COMMITTEE ON A CERTAIN MARITIME INCIDENT (2002), xliii.

133. *Id.* at 297.

134. "Australia will continue to meet all costs associated with the transfer, processing and accommodation of the asylum seekers, in addition to meeting the operating costs of the processing centres. The MOU also guarantees that Australia will ensure no persons will remain in Nauru after appropriate processing procedures are completed." http://www.dfat.gov.au/media/releases/foreign/2001/fa177_01.html.

135. As pointed out by an Australian parliamentary committee, "Critics of the arrangement have contended that Australia is using its economic power to export its problems to its poorer neighbors, imposing significant pressures on already limited natural resources and undermining regional aid objectives of good governance and sustainable development." AUSTRALIAN PARLIAMENT, *supra* note 91, at 295.

136. Bali Process Website, <http://www.baliprocess.net/index.asp?pageID=2145831401>.

137. *Id.*

138. *Id.*

139. A similar Memorandum of Understanding signed under the auspices of UNHCR, demonstrated how far the Australian government went in reaching for "root causes." For more than a decade, Pacific or Southeast Asian countries have not been sending the most migrants to Australia. Consistently, it was Afghanistan; in January 2011, Australia was finally able to sign an agreement with that country. By now, unsurprisingly, the agreement delegates decision-making tasks down the administrative ladder, authorizing the parties to "invite representatives of relevant organizations in an advisory capacity." See Memorandum of Understanding between the Government of Australia, the Government of the Islamic Republic of

It is almost as if transnational migration policy—at least in the cases of Europe and Australia—was devised to fit Slaughter’s model:

The new model . . . assumes disaggregated states in which national government officials interact intensively with one another and adopt codes of best practices and agree on coordinated solutions to common problems—agreements that have no legal force but that can be directly implemented by the officials who negotiated them.¹⁴⁰

As Slaughter continued,

[A]ctive engagement in enforcement cooperation that does and can take place in government networks can give government officials in weak, poor, and transitional countries the boost they need. Their counterparts in more powerful countries, meanwhile, can reach beyond their borders to try to address problems that have an impact within their borders.¹⁴¹

The next subsection demonstrates in more detail how these notions of enforcement played out in practice.

2. *Enforcement Networks*

“[W]hat do government networks do?” asks Slaughter, who immediately answers, “Their members talk a lot.”¹⁴² This clearly applies to policymaking networks in the migration context. However, as Slaughter explains,

In a second category of networks, talk leads to action – direct aid in enforcing specific regulations against specific subjects. These are enforcement networks, which also encompass training and technical-assistance programs of developed-country regulators for their counterparts in developing countries in order to build the recipients’ capacity to enforce their own domestic regulations.¹⁴³

Frontex, mentioned above, is at the center of the most impressive European enforcement network. This EU executive agency was conceived of as a body of *experts*.¹⁴⁴ Frontex was mandated to “coordinate” and “implement”

Afghanistan and the United Nations High Commissioner for Refugees (UNHCR) on Migration and Humanitarian Cooperation (Aug. 10), Art. 6.

140. SLAUGHTER, *supra* note 17, at 263.

141. *Id.* at 266.

142. *Id.* at 51.

143. *Id.* at 52.

144. Indeed, Frontex has been described as a:

[S]pecialised expert body tasked with improving the coordination of operational cooperation between Member States in the field of external border management should therefore be established in the shape of a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

cooperation under agreements with non-European countries.¹⁴⁵ Its founding regulation reiterates the language Slaughter uses with respect to “enforcement networks”; just as she speaks of “technical assistance,” the regulation speaks of “necessary technical support and expertise.”¹⁴⁶ The description below demonstrates how Frontex is a paradigmatic example of a disaggregated enforcement network.

Since it was established, Frontex has organized these “joint operations” in which the forces of European member states would act in “solidarity” when enforcing borders.¹⁴⁷ For example, in a 2006 to 2007 operation designated “Hera”—like many other operations named after Greek gods—Frontex deployed ships from Italy, Portugal, and Finland along the coasts of Mauritania, Senegal, Cape Verde, and the Canary Islands.¹⁴⁸ These ships monitored migrant boats that left Africa for the Canary Islands, which are under Spanish control.¹⁴⁹ Once they had been spotted by “joint operations,” Senegalese and Mauritanian navy boats could be summoned to intercept them.¹⁵⁰

Council Regulation 2004 O.J. (L 349) 1.

145. *Id.* See also Frontex Agency: *Which Guarantees for Human Rights?*, A Study Conducted by Migreurop on the European External Borders Agency with View of the Revision of its Mandate, The Greens—European Free Alliance (2011) (for background on the human rights concerns that have been raised regarding the actions of this agency); see also Council Regulation 2004 O.J. (L 349) 5–6.

146. Council Regulation 2004 O.J. (L 349) 3 (stating that “[t]he Agency shall also provide the Commission and the Member States with the necessary technical support and expertise in the management of the external borders and promote solidarity between Member States.”)

147. For a concise explanation of the legal foundations of these joint operations, see Seline Trevisanut, *Maritime Border Control and the Protection of Asylum-Seekers in the European Union*, 12 *TOURO INT’L L. REV.* 157, 157–58 (2009).

148. This is how the agency describes its operation in West Africa:

Senegal, Mauritania and Cape Verde have all been integrated into Frontex operations for many years with good results, always demonstrating a willingness and capacity to work for the same aims and goals as their European colleagues. Although we do not have formal working arrangements in place yet with these countries, we are able to work together on the basis of their existing bilateral provisions with Spain. This cooperation has had measurable results in reducing people smuggling via the Canary Islands and in preventing the loss of human lives at sea.

See Frontex Signs Cooperation Agreement with Cape Verde, Frontex (Jan. 23, 2011); Frontex Signs Working Arrangement with Nigeria, Frontex (Jan. 19, 2012), available at <http://www.frontex.europa.eu/news/frontex-signs-working-arrangement-with-nigeria-E980f4>.

149. Trevisanut, *supra* note 147, at 157–58.

150. The latter countries have bilateral enforcement agreements, on which other cooperation with other EU countries also rested, with Spain. Frontex Annual Risk Analysis 2012, at 19, available at http://migrantsatsea.files.wordpress.com/2012/05/frontex_annual_risk_analysis_2012.pdf; S.O.S. Europe: Human Rights and Migration Control, Amnesty International, at 3, available at <http://www.amnesty.org/en/library/asset/EUR01/013/2012/en/bc2ed705-d497-4a50-8c47-5995d3e2eb64/eur010132012en.pdf>. This preemptive strategy is reflected in the agency’s reports and public statements. For example, in its 2006 general report, Frontex noted that it was able to “avoid the departure of more than one thousand people” from Senegal. See FRONTEx, ANNUAL REPORT 12 (2006). Similarly, the advocacy group Migreurop has reported that in 2009 it has seen documents in which the Mauritanian police (Sûreté Nationale) prevented migrants from leaving the Coast. See *id.*; THE GREEN IN GROUP IN THE EUROPEAN PARLIAMENT, *supra*, note 145, at 13.

This “externalization” of European border controls has received noteworthy scholarly attention in recent years.¹⁵¹

According to Frontex’s assessment, this cooperation diverted migrants further east,¹⁵² causing a mass influx into Greece and a human rights crisis there. On September 21, 2010, the United Nations High Commissioner on Refugees (“UNHCR”) declared a “humanitarian emergency” in Greece.¹⁵³ Like the policies that caused it, the response to this crisis was not a matter solely for the Greek government alone but rather a cooperative one. Executive agencies from various countries, as well as from other public and private entities, shared nearly all responsibilities, once again in networked and disaggregated fashion.¹⁵⁴

After being “exported” and reshaped extra-territorially,¹⁵⁵ the European border was now brought into the territory of the EU.¹⁵⁶ In October 2010,

151. As migration has been high on Europe’s list of policy issues, it developed into an obsession of sorts, with a growing number of universities, think tanks, and governmental research institutions dedicating considerable energy and funds to examining its legal and economic foundations. See, e.g., EXTRA-TERRITORIAL IMMIGRATION CONTROL: LEGAL CHALLENGES (Bernard Ryan and Valsamis Mitsilegas, eds., 2010); THOMAS GAMMELTOFT-HANSEN, ACCESS TO ASYLUM: INTERNATIONAL REFUGEE LAW AND GLOBALISATION OF MIGRATION CONTROL (2011); Jorrit J. Rijpma and Marise Cremona, *The Extra-Territorialisation of EU Migration Policies and the Rule of Law* (European Univ., EUI Working Paper LAW No. 2007/01, 2007); Jorrit J. Rijpma, *Building Borders: The Regulatory Framework for the Management of the External Borders of the European Union* (2009) (On file with author); Lori Nessel, *Externalized Borders and the Invisible Refugee*, 40 COLUM. HUM. RTS. L. REV. 625 (2009); Maria-Teresa Gil-Bazo, *The Practice of Mediterranean States in the Context of the European Union’s Justice and Home Affairs*, 18 INT’L J. REFUGEE L. 571 (2006); Madeline Garlick, *The EU Discussions on Extraterritorial Processing: Solution or Conundrum?*, 18 INT’L J. REFUGEE L. 601 (2006); Trevisanut, *supra* note 147.

152. See Frontex, *FRAN Quarterly, April–June 2010*, at 9–12, Reference No. 13792 (Sept. 2010). According to Phil Woolas, former British Minister for Borders and Immigration, Frontex was first able to block migration via the western coast of Africa; this caused the diversion of movement from sub-Saharan Africa into the Sahara desert to North Africa, and from there people embarked with boats, typically to Libya. See EUROPEAN UNION COMMITTEE, THE STOCKHOLM PROGRAMME: HOME AFFAIRS, 2008–09, H.L. 175, Minutes of Evidence 8 (U.K.), available at <http://www.publications.parliament.uk/pa/ld200809/ldselect/ldecom/175/175.pdf>. Other countries on the margins of Europe experienced, at various times, similar problems. For an analysis of the case of Malta, see Derek Lutterbeck, *Small Frontier Island: Malta and the Challenge of Irregular Migration*, 20 MEDITERRANEAN Q. 119 (2009). An EU-wide readmission agreement was in its final stages of drafting when the Gaddafi government fell. See Remarks by EU High Representative Catherine Ashton at the end of her visit to Egypt, EU Doc. A 067/11 (Feb. 22, 2011), at 1–2, available at http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/119445.pdf.

153. Alongside criticizing Greece for violating the basic rights of asylum seekers, the organization called upon the EU to “step up its assistance to help Greece to comply with its international and European obligations.” Briefing Notes, UNHCR Says Asylum Situation in Greece Is ‘a Humanitarian Crisis’, U.N. High Comm’r on Refugees (Sept. 21, 2010), available at <http://www.unhcr.org/4c98a0ac9.html>.

154. Frontex, *RABIT Operation 2010 Evaluation Report* (Aug. 2011), available at http://www.frontex.europa.eu/assets/Attachments_News/fer_rabit_2010_screen_v6.pdf.

155. On the extraterritorial construction of the border, see generally Elspeth Guild, *Danger: Borders Under Construction: Assessing the First Five Years of Border Policy in an Area of Freedom, Security and Justice*, in FREEDOM, SECURITY AND JUSTICE IN THE EUROPEAN UNION: IMPLEMENTATION OF THE HAGUE PROGRAMME 45 (Jaap W. de Zwaan & Flora A.N.J. Goudappel eds. 2006); Nick Vaughan-Williams, *Borderwork Beyond Inside/Outside? Frontex, the Citizen-Detective and the War on Terror*, 12 SPACE & POLITY 63 (2008).

156. With the revolution and civil wars that set North Africa ablaze, and threats to the power of chief EU partner Mouammar Gaddafi, the “exported border” collapsed in other places as well, and was tempo-

Frontex agents first arrived at the Greek border with Turkey, initially examining the possibility for a land deployment.¹⁵⁷ High-ranking officials toured the detention centers in the border region of Evros and saw squalid conditions.¹⁵⁸ By the start of November, 175 Frontex “guest officers” were deployed on the Greek-Turkish border, in what was initially defined as a temporary emergency measure.¹⁵⁹ Border guards from almost all other European member states, (in addition to several non-EU states), patrolled in their national uniforms. Frontex quickly replaced this temporary mission—called Rapid Border Intervention Team, or “RABIT”—with a permanent force.¹⁶⁰ As of the writing of this Article, the permanent force regularly performs enforcement tasks alongside Greek policemen.¹⁶¹

The EU was now sharing the Greek government’s “monopoly on the legitimate use of violence” in two important ways: (1) Frontex border guards, provided by EU Member States from their own security forces, apprehended migrants and transferred them to Greek detention facilities and (2) once in detention, Frontex agents conducted interviews, which helped determine where migrants came from and thus facilitated their deportation.¹⁶²

Deportation is also managed cooperatively by Frontex and rests on a network of partner organizations and bilateral agreements.¹⁶³ Either EU member states or the EU sign “readmission agreements” with “source” or “transit” countries, and migrants are sent there for refugee status determination or for repatriation.¹⁶⁴ For this purpose, Frontex provides detention

rarily imported into Italy. *In the Face of Revolution: the Libyan Civil War and Migration Politics in Southern Europe* 445–49, in *The EU and Political Change in Neighbouring Regions: Lessons for EU’s Interaction with the Southern Mediterranean* (Stephen Calleya, Derek Lutterbeck, Monika Wohlfeld, and Omar Grech, eds., 2011).

157. Human Rights Watch, *The EU’s Dirty Hands: Frontex Involvement in ill-treatment of migrant detainees in Greece*, at 21 (2011), available at http://www.hrw.org/sites/default/files/reports/greece0911webwcover_0.pdf.

158. *Id.* at 20–21.

159. Human Rights Watch, *supra* note 157, at 2. See also Press Release, Frontex, Frontex to Deploy 175 Specialist Border Personnel to Greece (Oct. 29, 2010), <http://www.frontex.europa.eu/news/frontex-to-deploy-175-specialist-border-personnel-to-greece-JSRbF4>.

160. Human Rights Watch, *supra* note 157, at 2.

161. When operation RABIT 2010 ended, Frontex deployed Joint Operation Poseidon to the Greek-Turkish border, where it conducted essentially the same tasks. Press Release, Frontex, RABIT Operation 2010 Ends, Replaced by JO Poseidon 2011 (Mar. 3, 2011), <http://frontex.europa.eu/news/rabit-operation-2010-ends-replaced-by-jo-poseidon-2011-pWiZjT>.

162. Human Rights Watch, *supra* note 157, at 38–40.

163. Operations: Return, *Frontex*, <http://www.frontex.europa.eu/operations/return> (last visited Mar. 2, 2013).

164. Readmission agreements are a whole other area for policymaking and enforcement networks, which I cannot go into in detail here. Here too enforcement policy is closely linked with development and foreign aid. One commentator explains this in terms that ring familiar from Slaughter’s theorization of disaggregated sovereignty:

The issue of readmission tends not to be tackled in isolation but in close connection with other issues of common concern. Given the asymmetry in benefits that characterizes cooperation between Mediterranean countries and EU member states, alternative solutions have been found to ensure flexible cooperation on readmission. The objective remains unchanged, but in relations with Southern Mediterranean countries, the emphasis has been placed more on pragmatic

facilities with language experts who interview the migrants and employ their expertise in vocabulary, dialect, and accent in order to identify where a migrant is from.¹⁶⁵ The authorities of the “host state”—in this case, Greece—are formally responsible for the determination.¹⁶⁶ A Frontex expert passes a recommendation to a Greek border guard, who then confirms it.¹⁶⁷

Similarly, in Australia, enforcement networks complement cooperative policy frameworks. For example, in 2004 Australia established the Jakarta Centre for Law Enforcement Cooperation, designating \$36.8 million for a five-year budget.¹⁶⁸ The center prides itself on being a resource for the Southeast Asia region in the “fight against transnational crime, with a focus on counter-terrorism.”¹⁶⁹ In fact, many of the resources are dedicated to training Indonesian and other police forces to prevent migration to Australia.¹⁷⁰ On the operational level, the Australian Federal Police worked closely with the Indonesian National Police to “disrupt” migration flows.¹⁷¹

All of the central aspects of Slaughter’s enforcement networks exist in both the European and Australian contexts; she writes that “[a]t a very concrete level, enforcement cooperation is exactly the sharing of information and the collaborative development of specific enforcement strategies in individual cases.”¹⁷² Such information sharing exists in Frontex activities, as well as in the Bali Process; “[m]easures to promote compliance in turn can lead to consultation on the provisions of the law in the first place.”¹⁷³

steps than on the conclusion of formal agreements. Actually, the operability of the cooperation on readmission has been prioritized over its formalization.

Jean-Pierre Cassarino, *Informalising Readmission Agreements in the EU Neighbourhood*, 42(2) THE INTERNATIONAL SPECTATOR 179, 192 (2007).

165. Human Rights Watch, *supra* note 157, at 40.

166. *Id.*

167. *Id.* at 3.

168. Since the establishment of the center, Canada, Denmark, Germany, Spain, the United Kingdom, the United States, and the Netherlands have all contributed and increased its funds and activities. *Speech by Australian Foreign Minister at JCLEC*, Jakarta Centre for Law Enforcement Cooperation, www.jclec.com/index.php?option=com_content&task=view&id=75&Itemid=2&limit=1&limitstart=2 (Dec. 9, 2005); *Jakarta Centre for Law Enforcement Cooperation Annual Report 2011*, available at http://www.jclec.com/index.php?option=com_docman&task=doc_download&gid=305&mode=view; About JCLEC, JCLEC (May 12, 2005), http://www.jclec.com/index.php?option=com_content&task=view&id=14&Itemid=28.

169. About JCLEC, *supra* note 168.

170. *Id.*

171. When asked if legal advice had been sought with regard to this “disruption strategy,” the Australian Federal Police Commissioner, Mick Keelty, answered in a way that nicely illustrates how disaggregation allows different agencies to act together while imagining themselves under separate legal rules: “No. there is no reason to. Nothing untoward came to our attention. As far as we are aware and can possibly be aware, the Indonesians were acting lawfully in Indonesia and we were acting lawfully in Australia.” Australian Parliament, Select Committee on a Certain Maritime Incident, *supra* note 91, at 8–12.

172. SLAUGHTER, A NEW WORLD ORDER, *supra* note 17, at 56–57.

173. *Id.* at 57.

Slaughter identified this back-and-forth movement between consultation and lawmaking.¹⁷⁴

Slaughter understood, however, that this cooperation requires giving something in return.¹⁷⁵ In policymaking networks, what was given in return could be anything from an apology for the colonial past, to foreign aid, to increased economic opportunities.¹⁷⁶ In enforcement networks, on the other hand, consideration was in the form of operational capacities: maritime and military technologies, training, and greater access to information.

3. *Human Rights Networks*

Human rights and refugee protection agencies also organize themselves in the transnational networks Slaughter described. These networks are divided into two traditionally distinct groups: governmental and non-governmental agencies. These organizations often have as their stated goal the “mainstreaming” of human rights.¹⁷⁷

One such agency is the European Union Agency for Fundamental Rights (“FRA”). The FRA “helps to ensure that fundamental rights of people living in the EU are protected.”¹⁷⁸ It does this by collecting evidence about the situation of fundamental rights across the European Union (“EU”) and providing advice, based on evidence, about how to improve the situation.¹⁷⁹

The FRA conducts sophisticated human rights reporting. It has formulated recommendations on asylum seekers’ and unauthorized migrants’ rights in the EU. In a report titled *The Duty to Inform Applicants about Asylum Procedures: The Asylum Seeker Perspective*, the FRA conducted a country-by-country analysis of asylum seekers’ procedural rights in EU Member

174. *Id.*

175. *Id.* (“[A]ll of these activities will come to naught if some members of the network do not have sufficient capacity—buildings, computers, personnel, training—actually to engage in enforcement activity. All the will and cooperation in the world cannot compensate for lack of capacity. One of the principal activities of enforcement networks thus becomes capacity-building through technical assistance and training.”)

176. In the context of the Italian-Libyan agreement, Berlusconi said that “in the name of the Italian people, as head of government, I feel it is my duty to offer an apology and make plain our sorrow for that which happened so many years ago, and which affected so many of your families.” *Italy to Pay Libya \$5 Billion*, N.Y. TIMES, Aug. 30, 2008.

177. Christopher McCrudden defines this phenomenon: “By ‘mainstreaming’, I mean the reorganization, improvement, development and evaluation of policy processes, so that a human rights perspective is incorporated in all policies at all levels and at all stages, by actors normally involved in policy-making.” Christopher McCrudden, *Mainstreaming Human Rights* 1, Research Paper No. 47, University of Michigan School of Law Public Law and Legal Theory Research Paper Series, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=568642. For a compelling critique of “mainstreaming,” see generally Koskeniemi, *supra* note 45.

178. *About the FRA*, European Union Agency for Fundamental Rights, <http://fra.europa.eu/en/about-fra> (last visited Mar. 27, 2013, 9:37 PM).

179. *Asylum Procedures Should be Harmonised and Improved*, FRA (Sept. 13, 2010), http://fra.europa.eu/fraWebsite/media/mr-080910_en.htm.

States.¹⁸⁰ It has demanded a “harmonization” of asylum procedures across the Union,¹⁸¹ and it has reported the violation of asylum seekers’ rights in EU territories, most importantly in Italy and Greece.¹⁸²

The agency engages with Frontex through an interagency cooperation agreement. After the agreement was signed on May 27, 2010, Ilkka Lai-tinen, Frontex’s Executive Director, expressed hope that “[t]his new cooperation arrangement with our colleagues at the FRA will provide us with access to valuable expertise.”¹⁸³ Frontex has also commissioned a report on the “Ethics of Border Security.”¹⁸⁴

Intimately related with human rights networks are Slaughter’s “networks of networks.” In Australia, for example, the Bali Process involves human rights and refugee protection groups (“NGOs”).¹⁸⁵ This participation of International Governmental Organizations and NGOs in intergovernmental processes—also familiar from the European context—is just one more instance in which it may seem like actors in the field of migration have read *A New World Order*.

III. DISAGGREGATED VIOLENCE

A. Migrants’ Rights Compromised

As developed countries increase their involvement in developing countries, limited evidence shows that disaggregated sovereignty has advanced human rights protections. Such evidence suggests that disaggregated processes led by developed countries have positive externalities—that exporting borders has also meant exporting human rights.¹⁸⁶

180. *Fundamental Rights Agency, The Duty to Inform Applicants about Asylum Procedures: The Asylum Seeker Perspective* (Sept. 2010), available at http://fra.europa.eu/fraWebsite/research/publications/publications_per_year/2010/pub_asylum-seekers_en.htm.

181. *Id.* at 3.

182. *Fundamental Rights Agency, Coping with a Fundamental Rights Emergency: The Situation of Person Crossing the Greek Land Border in an Irregular Manner* (Mar. 2011), available at <http://fra.europa.eu/en/publication/2011/coping-fundamental-rights-emergency-situation-persons-crossing-greek-land-border>.

183. Press Release, FRA: Frontex Signs Cooperation Arrangement with Fundamental Rights Agency (May 27, 2010), available at http://fra.europa.eu/fraWebsite/media/mr-270510_en.htm.

184. See Centre for the Study of Global Ethics, University of Birmingham, *Ethics of Border Security*, (2010), available at http://www.frontex.europa.eu/assets/Publications/Research/Ethics_of_Border_Security_Report.pdf.

185. *About the Bali Process*, THE BALI PROCESS: ON PEOPLE SMUGGLING, TRAFFICKING IN PERSONS AND RELATED TRANSNATIONAL CRIMES, <http://www.baliprocess.net> (last visited Mar. 2, 2013).

186. One case in point is Nauru, which has ratified the Refugee Convention and its Protocol in June 2011, quite clearly as a result of its engagement with Australia. Further below, this Article discusses similar processes that have now been ignited with regards to other countries in the region. European engagement in North Africa has similarly sought Libyan accession to the Convention and Protocol. Some have cited the end of the Qaddafi’s regime as an auspicious moment for such change. *Motion for a Resolution*, European Parliament (Nov. 20, 2012), available at <http://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=B7-2012-504&language=en>. In Mauritania, a working group was created at the end of 2010 to develop “a national strategy on asylum.” *Update on UNHCR’s operations in the Middle East and North Africa (MENA) – 2011*, Executive Committee of the High Commissioner’s Pro-

Both policymaking networks and enforcement networks foster highly “legalized” processes. The relevant documents on border enforcement cooperation often include language requiring all parties to the negotiations to protect human rights and observe the principle of *non-refoulement*.¹⁸⁷ The assumption is that the whole process helps build important governance capabilities and thus allows developing countries to improve their positions in the global arena—which is followed by human rights compliance.

The evidence for this happening, however, remains sparse. Even when new law is introduced, it sometimes advances violation, rather than protection, of human rights.¹⁸⁸ More importantly, disaggregated policymaking and enforcement networks have contributed to human right violations—often through collaborations with longstanding human rights violators.¹⁸⁹ As opposed to the few indicators of advancement in human rights protections—which largely relate to law in the books—noticing such violations requires some attention to facts on the ground.¹⁹⁰

Since Europe’s engagement with Africa on migration issues began, efforts to prevent unauthorized migration have worked around the absolute prohi-

gramme (Sept. 29, 2011), available at <http://www.unhcr.org/4e85836f9.pdf>. Within the territory of Europe, Greece has in recent years been subject to considerable pressures from policymaking, enforcement and human rights networks—which have all tried to push it to meet its international obligations. See *Greece gets Frontex help, told to improve refugee conditions*, The Sofia Echo (Mar. 2, 2011 5:09PM), http://sofiaecho.com/2011/03/02/1053207_greece-gets-frontex-help-told-to-improve-refugee-conditions; UNHCR says asylum situation in Greece is ‘a humanitarian crisis’, UNHCR, <http://www.unhcr.org/4c98a0ac9.html> (Sept. 21, 2010); 2013 UNHCR regional operations profile – North Africa, UNHCR, <http://www.unhcr.org/pages/49e4860d6.html> (last visited Mar. 27, 2013 9:57PM).

187. See, e.g., Council Regulation (EC) 2007/2004, pmb1. ¶ 22.

188. To name only one example, in 2004, the Tunisian government introduced new laws to counter illegal migration. New criminal provisions included sentences of up to twenty years for crossing a border without the necessary documents, as well as heavy fines. Such laws are designed to deter refugees and other migrants from crossing borders. See Nadine Sika, *Irregular Migration in North Africa: Libya, Tunisia and Algeria*, Partners in Development Research Paper, 15.

189. Migreurop made this case forcefully in its report. MIGREUROPE, *supra* note 124. With respect to Mauritania, Amnesty International has argued that:

Since 2006, thousands of migrants, accused of setting out from Mauritania with the intention of entering the Canary Islands (Spain) irregularly, have been arrested, then forcibly returned to Mali or Senegal without any right of appeal to challenge the decision before judicial authority This policy of arrests and collective expulsions by the Mauritanian authorities is the result of intense pressure exerted on the country by the European Union (EU), and Spain in particular, as they seek to involve certain African countries in their attempt to combat irregular migration into Europe.

Mauritania: Nobody Wants to Have Anything to Do With Us: Arrests and Collective Expulsions of Migrants Denied Entry to Europe, (AMNESTY INTERNATIONAL, New York, N.Y.), July 1, 2008 at 2 [hereinafter “*Mauritania*”]. With respect to Frontex, see, e.g., *Les Verts/ALE, Agence Frontex: Quelles Garanties pour les Droits de l’Homme?* 20 (2010), available at http://europeecologie.eu/IMG/pdf/dossier_frontex.pdf.

190. The claim here is not that “aggregated” forms of government—whatever those may be—would necessarily have resulted in the enforcement of the rights of unauthorized migrants. As the latter are some of the world’s most disempowered groups, it may very well be that they would be victimized anyways, even if in different ways. But just as a strict “but for” causation is not required when one aids a crime that would have been carried out anyway, here, too, the fact that violations may have occurred in other patterns is not a redeeming factor.

bition of violating *non-refoulement*.¹⁹¹ Italy, for example, has repeatedly been criticized for its complicity in violating the rights of migrants in Libya.¹⁹² This complicity includes not only returning asylum seekers to potential persecution but also funding detention facilities that hold people with no access to asylum in inhuman conditions.¹⁹³ But Italy is not alone. The Nouadhibou detention center, which Spain established in Mauritania, developed a particularly bad reputation.¹⁹⁴ While Mauritanian authorities referred to Nouadhibou as a “welcome center,” locals preferred the name

191. Trevisanut, *supra* note 147, at 160. Historically, the Italian government was the European pioneer of this model, first implemented in its response to Albanians that fled their country during a series of crises there in the nineties. See Ted Perlmutter, *The Politics of Proximity: The Italian Response to the Albanian Crisis*, 32(1) INT'L MIG. REV. 203 (1998). Note that these bilateral agreements do not always meet public international law standards. Often, they are concluded in the form of non-binding memoranda of understanding between Ministries of Interior. As one commentator noted, “this means that they escape parliamentary scrutiny in Member States.” JORRIT J. RIJPM, *BUILDING BORDERS: THE REGULATORY FRAMEWORK FOR THE MANAGEMENT OF THE EXTERNAL BORDERS OF THE EUROPEAN UNION* (2009), at 3. He notes that “[o]nly with Cape Verde does Spain have a fully-fledged bilateral agreement in place that allows joint patrols in the territorial waters of this island state.” *Id.* Compare this with the interception of Haitian refugees and migrants seeking access to the United States, as described generally in Harold Koh, *The “Haiti Model” in United States Human Rights Policy*, 103 YALE L.J. 2391 (1994).

192. See, e.g., Human Rights Watch, *supra* note 178.

193. *Id.* Coluccello and Massey describe the depth of this complicity, explaining that:

Italy pressed for the United Nations sanctions on Libya to be lifted and on 24 August 2004 an agreement to combat illegal immigration was concluded. A further agreement was concluded between the Prodi government and Libya in September 2006. Libya agreed to control its 2,000 km coastline and 7,000 km land borders and to put in place barriers against immigration from the south. Ghadafi also agreed to accept the readmission of illegal migrants from Italy. In return Libya receives material assistance in terms of planes, helicopters, boats, all-terrain vehicles and surveillance equipment, as well as the assistance of officers from the Servizio Centrale Operativo (SCO), the security agency charged with coordinating the intervention squads and special units in the fight against organized crime. Italy also finances a detention camp in northern Libya and two more in the south of the country. Perhaps most persuasive, the deal offered the opportunity to be seen to be cooperating in combating the smuggling of persons, enhancing Libya's reputation as a responsible state. With the agreement in place the Berlusconi government established a “fast-track” repatriation policy with a significant number of illegal migrants arriving in Lampedusa being peremptorily sent back to Libya without potential claims for asylum being considered. In October 2004, Libya accepted 1,000 such returnees from Italy and since it is not a signatory of the Geneva Convention redeported them, at Italy's expense, to Egypt and Nigeria without checking whether they had a valid claim for asylum (Schuster 2005). These “fast-track” deportations have been suspended by the Prodi government.

COLUCCELLO & MASSEY, *supra* note 102, at 84.

194. *Guantanamo*, 45 AFRICA RESEARCH BULLETIN 17560 (2008). In a report about this place, Amnesty International said it was “extremely concerned about the security policy of the EU and its Member States These States are in the process of externalizing their policy of migration flow management by pressing the migrants' countries of origin, or countries through which they pass—especially certain countries of the Maghreb and sub-Saharan Africa—to themselves manage the flow of migrants who attempt to reach Europe from their territory. These countries have become the de facto ‘policemen of Europe.’” *Mauritania*, *supra* note 189, at 22. See also *The Externalisation of Migration and Asylum Policies: The Nouadhibou Detention Centre*, SOCIAL WATCH NATIONAL REPORTS (2009), www.socialwatch.org/sites/default/. . ./ESW2009_spain_eng.pdf.

“Guantanamo,” meaning “little Guantanamo.”¹⁹⁵ The nickname reflected a globalized political imagination inspired by the U.S. “war on terror”¹⁹⁶ but ironically echoes the earlier function of the prison in Guantanamo Bay, housing unauthorized Haitian and Cuban migrants.¹⁹⁷ In a 2008 report, Amnesty International alleged that with this facility, Mauritania was becoming Europe’s police force.¹⁹⁸

When Mark Boulware, the U.S. Ambassador to Mauritania, visited the premises in June 2009, he learned that Spain was “providing patrolling services, technical assistance and training to help Mauritians fight illegal migration networks and prosecute traffickers.”¹⁹⁹ Notably, the ambassador wrote to colleagues in Washington that “the conditions in the center are not dire but are poor and could be improved, particularly because this detention center is a European-driven endeavor.”²⁰⁰ He added that “the conditions for detainees are no worse than those of average Mauritians.”²⁰¹

European policymakers largely believed that the EU’s involvement in Africa to be a success; it reduced the number of illegal migrants.²⁰² Some understood, however, that this reduction would entail circumventing human rights standards. Although “there are people who would like it to apply everywhere,” explained Phil Woolas, British Minister of State, in his testimony on cooperation with Libya, “we have to recognise that the European Convention on Human Rights applies in Europe.”²⁰³ The tension between these jurisdictional limits and the universal promise of absolute human rights imperatives is at the center of the *dialectic of transnationalism*.

The diversion of unauthorized migrants into Greece came to a peak in 2010, when ninety percent of the clandestine entrants came from the land border between Greece and Turkey.²⁰⁴ The burden on Greece was further

195. Cable from Mark Boulware, U.S. Ambassador to Mauritania, Long Detention Periods and Poor Conditions at the “Mauritanian Guantanamo” (June 8, 2009), available at <http://www.cablegatesearch.net/cable.php?id=09NOUAKCHOTT379>.

196. Mark Boulware, U.S. Ambassador to Mauritania, referred to Nouadhibou as the “Mauritanian Guantanamo” in a cable. *Id.*

197. See Dastyari, *supra* note 101.

198. *Mauritania*, *supra* note 189, at 22.

199. Cable, *supra* note 195.

200. *Id.*

201. *Id.*

202. This is reflected in the way that the cooperative measures were continuously augmented by policymakers since the wake of the Global Approach to migration in 2005. See e.g., *Communication from the Commission on Policy Priorities in the Fight Against Illegal Immigration of Third-Country Nationals*, COM (2006) 402 final (July 19, 2006) (discussing policy priorities in the fight against illegal immigration of third-country nationals).

203. EUROPEAN UNION COMMITTEE, *supra* note 152, at 9. Chimène Keitner’s recent comparative work confirms that even in a context in which courts increasingly face claims regarding the rights of people located beyond their countries’ borders, they largely remain bound to territorial adjudication. Chimène I. Keitner, *Rights Beyond Borders*, 36 YALE J. INT’L L. 55, 57–58 (2011).

204. See generally Christal Morehouse and Michael Blomfield, *Irregular Migration in Europe*, TransAtlantic Council on Migration, available at <http://www.migrationpolicy.org/pubs/tcmirregularmigration.pdf>. As reported by the EU authorities at the border, “the most commonly detected nationalities were citizens of Asian countries (Afghanistan and Iraq), but there was also an increasing number of detections

increased by the Dublin II Regulation, which provided that migrants apprehended all over the Union could be returned to the first EU country they entered.²⁰⁵ Both the increased number of migrants entering through Greece, and the fact they were expected to remain there, are aspects of the EU's *disaggregated sovereignty*.

As early as 2005, this considerable pressure created a crisis in Greece, which has not yet ceased.²⁰⁶ As the Council of Europe's Committee for the Prevention of Torture ("CPT") said in a public statement dated March 15, 2011:

[T]he 2005, 2007, 2008 and 2009 visits all paint a similar picture of irregular migrants being held in very poor conditions in police stations and other ill-adapted premises, often disused warehouses, for periods of up to six months, and even longer, with no access to outdoor exercise, no other activities and inadequate health-care provision.²⁰⁷

In one detention center, detainees, some of them children, were crammed behind bars in unlit cells in which sewage was running on the floors.²⁰⁸ Greek guards "wore surgical masks when they entered the passageway between the large barred cells."²⁰⁹ The conditions were unsanitary, inhuman,

of irregular migrants coming from North Africa. *General Report 2010*, at 8, FRONTEX (2011), available at http://www.frontex.europa.eu/assets/About_Frontex/Governance_documents/Annual_report/2010/frontex_general_report_2010.pdf. Most Africans detected at the Greek land border with Turkey had first taken a plane to Istanbul, taking advantage of low fares and Turkish visa liberalisation. *Id.*

205. *M.S.S. v. Belgium*, App. No. 30696/09 Eur. Ct. H.R. (2011). In this Article's analysis of *M.S.S.* below, there will be some more discussion about this Regulation. First, however, this Article will provide a more theoretical analysis of how disaggregated executives operate more generally.

206. This case was built over a few years by a variety of human rights monitors. See generally U.N. High Comm'r for Refugees, Asylum in the Eur. Union: A Study of the Implementation of the Qualification Directive, (Nov. 2007), <http://www.unhcr.org/47302b6c2.html>; No Place for an Asylum-Seeker in Greece, AMNESTY INTERNATIONAL, (Feb. 28, 2008, 2:23 PM), <http://www.amnesty.org.au/news/comments/9711/>; *Left to Survive: Systemic Failure to Protect Unaccompanied Migrant Children in Greece*, REP., (Human Rights Watch, New York, N.Y.), Dec. 2008; Alexia Vassiliou, *The Dublin Dilemma—"Burden Shifting" and Putting Asylum Seekers at Risk*, GREEK COUNCIL FOR REFUGEES (Feb. 15, 2009), available at http://www.proasyl.de/fileadmin/proasyl/fm_redakteure/STARTSEITE/Griechenland/Greek_Refugee_Council_DublinSituationNote.pdf; *Out the Back Door: The Dublin II Regulation and Illegal Deportations from Greece*, REP., (Norwegian Helsinki Comm., Norwegian Org. for Asylum Seekers & Aitima, Oslo/Athens), Oct. 2009; *Greece: Unsafe and Unwelcoming Shores*, HUMAN RIGHTS WATCH, (Oct. 12, 2009), <http://www.hrw.org/news/2009/10/09/greece-unsafe-and-unwelcoming-shores>; *The Dublin II Trap: Transfers of Asylum-Seekers to Greece*, (Amnesty Int'l, London), Mar. 2010; Spec. Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, U.N. Doc. A/HRC/16/52/Add.4 (Mar. 4, 2011) (by Manfred Nowak); European Union Agency for Fundamental Rights, *Coping with a Fundamental Rights Emergency: The Situation of Persons Crossing the Greek Land Border in an Irregular Manner* (2011), http://fra.europa.eu/sites/default/files/fra_uploads/1500-Greek-border-situation-report2011_EN.pdf.

207. Press Release, European Comm. for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Public Statement Concerning Greece, CPT/Inf (2011) 10 (Mar. 15, 2011), <http://www.cpt.coe.int/documents/grc/2011-10-inf-eng.htm>.

208. Human Rights Watch, *supra* note 157, at 3.

209. *Id.*

and entailed an absolute loss of privacy, along with the risk of contracting disease and occasional physical violence.²¹⁰ One fourteen-year-old Eritrean said in an interview:

I have been here 26 days, after I came from Turkey. For three days in the beginning I was sleeping on the floor. Now I'm sharing a bed with another five people: a Somali, a Bangladeshi, an Afghani, an Egyptian, and one other Eritrean. We use the bed in shifts, which means that some use the bed during the day and others during the night. In general, we are 83 people in a room with 30 beds.

There is no way to go out for fresh air, and it is impossible to use the toilets because they are too filthy. We don't brush our teeth because we do not have toothbrushes. They took our belongings from us outside, and did not let us take them back until now. There is only cold water and no soap. Only recently they gave us three pieces of soap and after many days I was able to wash myself. The worst problem is that they don't tell us how long we'll have to stand this. Every week they say, "one more week."²¹¹

As explained in a report, for Human Rights Watch, authored by the writer of this Article, this testimony could have direct bearing on the normative assessment of enforcement networks in the EU. Frontex officials were deployed on the premises and knew about the conditions.²¹² Nevertheless, they participated on joint patrols with Greek border guards, arrested unauthorized migrants, and handed them over to this place and other equally disturbing places.²¹³

In 2011, at the height of Frontex's emergency intervention in Greece, the ECtHR released *M.S.S. v. Belgium and Greece*.²¹⁴ The court explained that by deporting an Afghan migrant to Greece under the Dublin II Regulation, Belgium violated the prohibition on inhuman and degrading treatment: the country "knowingly exposed" him to the possibility of ill treatment in Greek detention facilities.²¹⁵ Frontex conducted actions very similar to those for which Belgium was blamed. Rather than knowingly exposing migrants to unlawful detention in Greece *from Belgium*, Frontex agents—some of them Belgian—were doing the same thing from within Greek territory.²¹⁶ By and large, the agency did not intervene in detention facilities or in refugee protection procedures.²¹⁷ High-ranking officers explained they were not

210. *Id.* at 29–37.

211. *Id.* at 30–31.

212. *Id.* at 53.

213. *Id.* at 46–52.

214. *M.S.S. v. Belgium*, App. No. 30696/09 Eur. Ct. H.R. (2011).

215. *Id.* ¶¶ 367–68.

216. Bill Frelick, *Sharing Greece's Asylum Shame*, EUROPEAN VOICE, Sept. 22, 2011.

217. HUMAN RIGHTS WATCH, *supra* note 157, at 29.

mandated to help.²¹⁸ The limited mandate that granted the agency authority to wield state force, but not to protect from state force, is the hallmark of *disaggregated violence*. This violence emanates from a powerful transnational actor assuming some aspects of sovereignty, in this case enforcement, while not overtaking other aspects of it, in this case human rights protections.

In its RABIT 2010 Evaluation Report,²¹⁹ the agency described its mission in Greece in celebratory terms: “RABIT 2010 will be remembered as a milestone. . . . For the first time the officers and assets of the Agency’s Rapid Pool were called upon to act and the resultant show of European solidarity was an event unprecedented in European history.”²²⁰ What constitutes the environment in which the same behavior can be characterized by a transnational court (for example, the ECtHR) as inhuman and degrading treatment, and by the executive (Frontex) as a milestone in European history? This Article contends that this pattern is typical of *disaggregated sovereignty*.

After the January 2011 revolution in Tunisia and the events that followed in Libya, cooperation between European and North African countries was destabilized, but it is quickly recovering.²²¹ It now appears that cooperation with Europe on migration control has become one of the main interests of the new Libyan government.²²²

218. *Id.* at 38–40. The European Committee for the Prevention of Torture (CPT) described the conditions that existed in the detention facilities in January 2011, while border guards from all over Europe were sending people there:

Police and border guard stations continued to hold migrants in ever worse conditions. For example, at Soufli police and border guard station, in the Evros region, members of the Committee’s delegation had to walk over persons lying on the floor to access the detention facility. There were 146 irregular migrants crammed into a room of 110m², with no access to outdoor exercise or any other possibility to move around and with only one functioning toilet and shower at their disposal, 65 of them had been held in these deplorable conditions for longer than four weeks and a number for longer than four months. They were not even permitted to change their clothes.

Public Statement Concerning Greece, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, (Mar. 15, 2011), ¶ 7. Alongside unacceptable detention conditions, explained Manfred Nowak, Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment for the UN Human Rights Council, allegations of physical violence abounded. Human Rights Council, *supra* note 206, at 11. Furthermore, he said, the condition in the facilities “creates an environment of powerlessness for victims of physical abuse and may perpetuate a system of impunity for police violence.” *Id.* at 1.

219. FRONTEx, *supra* note 154.

220. *Id.* at 4.

221. An Aljazeera report from that period explained how the Tunisian border police would not allow Italian boats into Tunisia’s territorial waters—but did take financial compensation and equipment in return for preventing unauthorized migrants to leave their territorial waters. See *Deal Reached Over Tunisia Exodus*, ALJAZEERA, (Feb. 15, 2011), <http://www.aljazeera.com/news/europe/2011/02/201121513182181420.html>.

222. Ilkka Laitinen, the Finnish Executive Director of Frontex, proposed to “create a completely new border security system for Libya, for instance.” *Frontex Director says EU Could take part in border security in Arab countries*, HELSINGIN SANOMAT (Dec. 15, 2011), <http://www.hs.fi/english/article/Frontex+director+says+EU+could+make+part+in+order+security+in+Arab+countries/1135270037144>.

B. *Migration and the Global Market for Sovereignty*

The normative shortcomings of *disaggregated sovereignty* do not only stem from the recognition that its realization heralded human rights abuses as a contingent historical matter. More interestingly, the evidence from the migration context suggests that the normative aspirations voiced in transnationalism are misleading with regard to its very *structure*.

Slaughter emphasizes cross-border cooperation between states on issues that are in the interest of all states involved.²²³ However, she understands these interests as pre-determined, rather than as themselves constructed by global power relations. She does not sufficiently take into account how interests are constituted, particularly the role of money in transforming conflicting interests into common interests.²²⁴ In other words, unauthorized migration was not always a cross-border policy *problem*. Before that, it was perhaps a problem for developed countries but often a blessing for developing countries, as remittances represented a significant portion of their GDP.²²⁵

When enforcement is mobilized as a result of such economically driven interests, state violence can be intensified and redirected against populations that would not otherwise have been targeted. If such enforcement denies a refugee access to asylum, the result is not only protecting violations from judicial review, but also *producing* violations abroad.

Slaughter is clear about the fact that enforcement cooperation is often conducted between developing and developed countries.²²⁶ These countries do not come to the relevant networks on equal footing. As a result, “one of the principal activities of enforcement networks thus becomes capacity-building through technical assistance training.”²²⁷

Capacity building programs, like those Australia has with its neighboring island states, are always conditional.²²⁸ Slaughter’s characterization in this context is confusing. This characterization suggests that a developing state

223. SLAUGHTER, *supra* note 17, at 15.

224. Oona Hathaway has illuminatingly discussed such incentives to enter into international legal obligations, which she calls “collateral consequences.” See Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 469 (2005). For an analysis (and comparison) of the ways in which cooperation on migration issues changed the interest calculus for Ghana and Senegal, see Van Criekinge, *supra* note 104, at 23. For a general theory of how money transforms opposing forces into interacting ones, see GEORG SIMMEL, *THE PHILOSOPHY OF MONEY* 120 (David Frisby, ed., 3rd ed. 2011).

225. A 2005 study by two researchers at the World Bank found that remittances from migration reduce poverty in developing countries. While this conclusion applies to both authorized and unauthorized migration, the study includes a reservation regarding the level of poverty reduction, as many migrants—especially unauthorized ones—tend to send remittances back home through informal channels, which make it hard to estimate how much money they send. See Richard H. Adams Jr. & John Page, *Do International Migration Remittances Reduce Poverty in Developing Countries?* 33(10) *WORLD DEVELOPMENT* 1645, 1660 (2005).

226. SLAUGHTER, *supra* note 17, at 4, 19, 63.

227. *Id.* at 57.

228. AUSTRALIAN PARLIAMENT, *supra* note 91, at 293–302.

wants to attain a certain policy goal that is common to it and to a developed state, but simply does not have the means to do that. She does not talk about altruism but does talk about mutual interests. To forward its interests, the developed country will help the developing one by providing it with the required capacities, equipment or training.²²⁹ The story is a completely different one if the very goals or priorities the developing country is expected to fulfill are shaped by the aim to obtain these “capacities.”

Enforcement networks are entrusted with the authority to execute violent policies on the state’s behalf. At the same time, the sovereignty of developing states can be apportioned and distributed, or “sold” to foreign countries. The Weberian idea—that states have a monopoly over the legitimate use of violence within their own territories—no longer applies.²³⁰

This dissection of sovereignty, now sold on a global market, also potentially influences the accountability of enforcement networks toward domestic constituencies in developed countries.²³¹ It has the effect of transforming decisions regarding absolute rights into cost-benefit decisions. In other words, decisions that legally require an *ethics of conviction* transform into decisions sustained by an *ethics of responsibility*.

Slaughter focuses on the cooperation between branches of government across borders and on their partnerships with NGOs and private actors in common networks of governance.²³² However, the more that government branches cooperate with one another across borders, the more the internal cohesiveness between them deteriorates. This, in turn, allows transnational branches of various governments to carry out autonomous policy, protected from other branches of their own governments. Instead of branches of government unified by sovereignty and separated by borders, branches of disaggregated sovereigns are unified across borders.

229. SLAUGHTER, *supra* note 17, at 57.

230. See generally THE GLOBALIZATION OF POLITICAL VIOLENCE: GLOBALIZATION’S SHADOW (Richard Devetak & Christopher W. Hughes eds., 2008).

231. In the context of Australia’s Pacific Solution, several policymakers noticed these perils in real time. For example, Noel Levi, Secretary General of the Pacific Islands Forum Secretariat, said in October 2001:

The emerging refugees market in the region where Forum Island Countries lease out their territories for quarantine and processing services carries unknown risks. Yet it is evolving rapidly without the necessary legal and policy framework to ensure its proper and equitable regulation. Such a substantial population influx places extreme pressure on our already very limited resources, exposing our small and vulnerable economies to further social and economic problems which we can ill afford.

AUSTRALIAN PARLIAMENT, *supra* note 91, at 295. Anthony Audoa, a Nauruan Member of Parliament also expressed his concern, in quite direct terms:

I don’t know what is behind the mentality of the Australian leaders but I don’t think it is right. A country that is desperate with its economy, and you try to dangle a carrot in front of them, of course, just like a prostitute . . . if you dangle money in front of her, you think she will not accept it. Of course she will, because she’s desperate.

See *id.* at 299; AUSTRALIAN PARLIAMENT, *supra* note 91, at 295–99.

232. SLAUGHTER, *supra* note 17, at 9.

In an environment of disaggregated sovereignty, multiple spaces of immunity appear. However, in order to fully appreciate the structure of immunity that characterizes this environment, one must also take a much closer look at transnational adjudication. Part IV moves on to discuss judiciaries. It shifts attention to Koh's *transnational legal process*, both as an analytic instrument for understanding the contemporary transnational condition, and as an object of critique.

IV. TRANSNATIONAL LEGAL PROCESS AND UNAUTHORIZED MIGRATION

A. *The Migration of Precedent*

In the wake of the Haitian refugee crisis, several of Koh's important contributions were closely linked to his role as advocate on behalf of the Haitian refugees. In *The "Haiti Paradigm" in United States Human Rights Policy*, Koh speculated that the precedent set in *Sale* would be overturned when *transnational legal process* set *transnational public law litigation* in motion.²³³ The narrative is heroic. *Transnational public law litigation* will lead foreign courts to decide on the issues that were decided in *Sale*. Unlike the U.S. Supreme Court, such courts will interpret the applicable law correctly, protecting *non-refoulement* and allowing human rights to prevail. The U.S. Supreme Court will be bound, in turn, to follow. Koh likened the process to what he believed were the rather routine dynamics in European human rights courts: "adverse Supreme Court decisions are no longer final stops However unfamiliar this argument may be to American lawyers, European civil rights litigants have long understood that adverse national court decisions may be 'appealed' to and even 'reversed' by the European Court of Human Rights."²³⁴

While Slaughter's *disaggregated sovereignty* speaks primarily to academics and policymakers, Koh's version of transnationalism speaks not only to legal scholars, but also to a community of human rights lawyers and activists. It grants license to believe that human rights litigation can become universal, and to harbor the hope that a professional toolbox of norms will promote global justice. Two decades after *Sale*, is there any evidence that such hopes are justified? Recent landmark cases suggest that transnational courts have made every attempt to answer this question affirmatively.²³⁵ The journey between these cases may at first glance seem like the unfolding of moral truth, in which Koh so adamantly believed. The following summary of the relevant case law first shows how Koh's hypothesis seems to be confirmed; but after that, the way in which courts have partaken in the "disaggregated violence" described above will be demonstrated.

233. Koh, *supra* note 67, at 2406.

234. *Id.*

235. See *infra* Part IV.A.1–3.

1. *Haitian Centre for Human Rights v. United States* (1997)

The first case that should be discussed was decided upon basically the same facts as *Sale*. In March 1997, the Inter-American Commission on Human Rights decided on a petition filed by several refugee rights groups and Haitian refugees.²³⁶ The Commission found that by intercepting Haitian refugees on the high seas and returning them to Haiti, the United States violated its *non-refoulement* obligations under the Protocol.²³⁷ The Commission received the petition in October 1990, and the proceedings took a long time, following U.S. policy through considerable fluctuations. During this period, the Coast Guard shifted from the Reagan policy of interception at sea and offshore processing to direct returns to Haiti under the first Bush Administration; later, it reverted back to offshore processing under Clinton. The Commission found that *all* these policies violated unauthorized migrants' rights.²³⁸

Though the Commission's findings yielded a declaratory decision that the applicants' rights were violated, it had no power to bind the U.S. government.²³⁹ It was thus sufficient for the United States to respond by saying that the Commission's analysis was "legally flawed."²⁴⁰

In itself, this does not undermine the assumptions of *transnational legal process*. Contrary to what may seem to be the implication of the language above—an "appeal" that will ostensibly "reverse" a wrong decision—the theory does not aim to establish such hierarchies. Rather, it emphasizes "horizontal process," echoing the language that Slaughter had also used.²⁴¹ The relevant actors *interact* with and *interpret* international law in a gradual, discursive manner, finally leading them to *internalize* the law.²⁴² The idea is not that there would be a higher world-court with universal jurisdiction that would tell the U.S. Supreme Court what to decide.²⁴³

The expansive opinion—covering practices under Executive Order 12,324 as well as those under Executive Order 12,807—realizes Koh's belief that transnational courts would pay special heed to human rights.²⁴⁴ What allowed the Commission to reach such a conclusion was the fact that it was not satisfied merely with interpreting the relevant law; it discussed the relevant facts in detail. Unlike the Supreme Court, the Commission discussed

236. *Ctr. for Human Rights v. United States*, Inter-Am. Comm'n H.R., Report No. 51/96, OEA/Ser.L/VII.95, doc. 7 rev. at 550 (1997).

237. The United States also violated a host of other international legal instruments that the U.S. Supreme Court did not make reference to. *Id.* ¶¶ 88, 163, 171, 177, 183–88.

238. *Id.* ¶ 90.

239. *Id.* ¶ 182.

240. *Id.*

241. See Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 *IND. L.J.* 1397, 1401, 1406 (1999).

242. *Id.* at 1406.

243. See SLAUGHTER, *supra* note 17, at 68 (explaining that "neither national nor international tribunals hold the definitive upper hand").

244. See Koh, *supra* note 67, at 2406.

evidence of what happened to refugees and unauthorized migrants *after* disembarking in Haiti.²⁴⁵

This attention to facts revealed that even when unauthorized migrants were politically persecuted, they did not have opportunities to appropriately voice their claims. Pierre Esperance, a researcher for the National Coalition for Haitian Refugees, gave particularly interesting testimony on the treatment of Haitian repatriates upon their arrival at Port-au-Prince.²⁴⁶ Esperance “experienced a pattern of intimidation, threats and summary arrests on the docks against returned boat people by the Haitian army and attachés *in full view of United States officials* and humanitarian agencies.”²⁴⁷ As he explained, prior to the coup in September 1993, U.S. officials, Haitian soldiers and armed civilians, the Red Cross, the media, and some human rights monitors were present at the docks. However, since September 1993, only U.S. officials, the Red Cross, Haitian soldiers, and armed civilians were allowed on the docks.²⁴⁸ Journalists and human rights monitors were no longer allowed.²⁴⁹ This reflected the involvement of U.S. officials in Haiti’s internal policies. Engaging in such issues, transnational public law litigation inched beyond formal sovereignty, seeking, as it were, a *de facto* analysis of the responsibility for returnees.

The United States, foreshadowing arguments later voiced both by the Italian and Australian governments, argued that its policies *realized* human rights values.²⁵⁰ The argument, which had previously been voiced in front of the Supreme Court in *Sale*,²⁵¹ was that if it were not for interception activities, a *larger* number of Haitian refugees would surely die drowning: “Suspending interdiction would be tantamount to adopting a policy of promoting exodus at the cost of potentially large loss to life.”²⁵²

2. *M70/2011 v. Minister of Immigration and Citizenship (2011)*

Another milestone in this history is *M70/2011*.²⁵³ In this Australian High Court judgment, a majority held that asylum seekers intercepted in areas distanced from Australia by the “Pacific Solution” could not be sent to Malaysia for offshore processing.²⁵⁴

On May 7, 2011, the Prime Ministers of Australia and Malaysia announced an agreement that would see up to 800 asylum seekers arriving by

245. The Centre for Human Rights, *supra* note 236, ¶¶ 15–34.

246. *Id.* ¶ 23–28.

247. *Id.* ¶ 26 (emphasis added).

248. *Id.*

249. *Id.*

250. *Id.* ¶ 54.

251. *See generally* *Sale*, 509 U.S. 155.

252. *Id.*

253. Plaintiff *M70/2011 v. Minister for Immigration and Citizenship*; and Plaintiff *M106/2011 v. Minister for Immigration and Citizenship*, [2011] HCA 32, (Austl.).

254. *See id.* ¶ 148.

sea to Australia transferred to Malaysia for asylum screening. In exchange, “Australia [would] expand its humanitarian program and take on a greater burden-sharing responsibility for resettling refugees currently residing in Malaysia.”²⁵⁵ Australia committed to resettling 4,000 refugees then residing in Malaysia in its own territory.²⁵⁶

Under the arrangement, Malaysia was to provide transferees with the opportunity to have their asylum claims considered by UNHCR, and would “respect the principle of *non-refoulement*.”²⁵⁷ When a transferee was determined to be a refugee, she would be referred to resettlement countries “pursuant to the UNHCR’s normal processes and criteria.”²⁵⁸ Australia was to “meet all costs arising under the arrangement,”²⁵⁹ including transportation, health, welfare and resettlement (voluntary, or by force). The countries specified that the arrangement represented “a ‘record of [their] intentions and political commitments’” but was not “legally binding.”²⁶⁰

The majority was not satisfied that this arrangement would properly enforce the rights of asylum seekers. It was concerned about the fact that Malaysia was neither a signatory to the Refugee Convention or Protocol nor did it take on Convention responsibilities “bilaterally.”²⁶¹ It was also concerned that the agreements were undermined by the fact that there was no protection for transferees against being charged with crimes of illegal entry.²⁶² As the opinion notes, illegal migrants in Malaysia were liable to imprisonment, fines, or a caning penalty consisting “up to six strokes.”²⁶³

With its decision to strike down the arrangement, the Australian court extended its review to areas with direct foreign policy consequences.²⁶⁴ Indeed, the decision struck a considerable blow not only to the Australian government’s bilateral relationship with Malaysia but also to similar frameworks around the region. As Australia’s Solicitor General Stephen Gageler observed in his analysis immediately after the decision, the judgment called into question longstanding relations with Nauru, dating back to the September 2001 Statement of Principles.²⁶⁵ It imperiled similar arrangements with Papua New Guinea.²⁶⁶

255. *Id.* ¶ 19.

256. *Id.*

257. *Id.* ¶9.

258. *Id.* ¶ 22.

259. *Id.*

260. *Id.*

261. *Id.* ¶ 131.

262. *Id.* ¶ 33.

263. *Id.* ¶ 30.

264. Plaintiff M70/2011 v. Minister for Immigration and Citizenship for Offshore Processing of Asylum Seekers under the Migration Act 1958 (CTH), SG No. 21 of 2011, Opinions of Solicitor General Stephen Gageler, Sept. 2, 2011.

265. *Id.* ¶ 3.

266. *Id.* ¶ 38–45.

These were Australia's principal policymaking and enforcement networks, constituting the core of the country's version of "the Haiti Paradigm." At the very least, it seems that a vigilant judiciary halted *Sale's* migration to faraway jurisdictions. This, once again, would confirm Koh's hypotheses. However, Part V below reveals how the opinion worked in reality.

3. *Hirsi Jamaa v. Italy and Others* (2012)

In *Hirsi*,²⁶⁷ the ECtHR even more directly addressed the principal issues that the U.S. Supreme Court considered when it decided *Sale*.²⁶⁸ At the same time, the case provided valuable insights on how a transnational judiciary can respond to central perils of disaggregated executive authority (detailed in Part II above).²⁶⁹ The question as to what the value of such a response is will be discussed separately below. For now, suffice it to say that *Hirsi* is a transnational judgment *par excellence*.²⁷⁰

The applicants to the Court, eleven Somalis and thirteen Eritreans, were part of a group of about 200 people who left Libya in three vessels, aiming to reach Italy. On May 6, 2009, three ships from the Italian Revenue Police²⁷¹ and the coastguard intercepted their boats on the high seas, thirty-five nautical miles south of the Italian Island of Lampedusa. As the court recounts:

The occupants of the intercepted vessels were transferred onto Italian military ships and returned to Tripoli On arrival in the Port of Tripoli, following a ten-hour voyage, the migrants were handed over to the Libyan authorities. According to the applicants' version of events, they objected to being handed over to the Libyan authorities but were forced to leave the Italian ships.²⁷²

The applicants said that they requested international protection.²⁷³

The next day, the Italian authorities announced that the operation was performed under bilateral agreements with Libya, and "represented an important turning point in the fight against clandestine immigration."²⁷⁴ On

267. *Jamaa v. Italy*, Eur. Ct. H.R. (Grand Chamber No. 27765/09, Feb. 23, 2012).

268. *Id.* at 80.

269. *Id.* at 73. On the *Hirsi* decision generally, see Tondini, *supra* note 102, at 10–11.

270. The list of sources that the court discusses includes domestic Italian law; bilateral agreements between Italy and Libya; the 1951 Refugee Convention; human rights law; various instruments of the international law of the sea; European Union law; and a variety of soft-law documents by various international organizations. The factual basis on which the decision was made included, among other sources, reports by leading human rights monitors such as Human Rights Watch and Amnesty International, which reflected NGO participation that Koh celebrated. Indeed, alongside the applicants and the Italian government, the sides to litigation included the UNHCR as well as the Columbia Law School Human Rights clinic, which were granted permission to intervene as third parties. *Hirsi*, Eur. Ct. H.R. (Grand Chamber No. 27765/09), ¶¶ 7, 22–44.

271. The "Guardia di Finanzia."

272. *Hirsi*, Eur. Ct. H.R. (Grand Chamber No. 27765/09), ¶ 12.

273. *Id.* ¶ 133.

274. *Id.* ¶ 13.

May 25, the Italian Minister of the Interior told the country's Senate that between May 6 and May 10, "471 . . . migrants had been similarly intercepted on the high seas and transferred to Libya."²⁷⁵ The applicants' principal argument was that Italy violated their rights under Article 3 of the ECHR.²⁷⁶ In its decision, the ECtHR goes into some detail regarding the relevant agreements between Italy and Libya.²⁷⁷ The court quotes Article 2 of a relevant bilateral cooperation agreement, dated December 27, 2009:

Italy and the "Great Socialist People's Libyan Arab Jamahiriya" undertake to organise maritime patrols using six ships made available on a temporary basis by Italy. Mixed crews shall be present on ships, made up of Libyan personnel and Italian police officers, who shall provide training, guidance and technical assistance on the use and handling of the ships. Surveillance, search and rescue operations shall be conducted in the departure and transit areas of vessels used to transport clandestine immigrants, both in Libyan territorial waters and in international waters, in compliance with the international conventions in force and in accordance with the operational arrangements to be decided by the two countries.²⁷⁸

As the court explained, "Italy undertook to cede to Libya, for a period of three years, three unmarked ships (Article 3 of the Agreement) and to encourage the bodies of the EU to conclude a framework agreement between the EU and Libya (Article 4 of the Agreement)."²⁷⁹

The composition of "mixed crews" in which Italian police officers provide "training, guidance, and technical assistance" should be familiar. They are reminiscent of the RABIT teams deployed in Greece, in which "guest officers" from all European states were coupled with local Greek border guards.²⁸⁰ The Italian officers, whose country had promoted the interest in controlling this particular border, are cast in technical roles emphasizing expertise rather than command, in this case in "handling of the ships." The "operational arrangements" of the last clause leave room for the low-level cooperation between executive agencies.²⁸¹ Implicitly, not all the terms of

275. *Id.*

276. *See id.* ¶ 83–158. The applicants also argued that Italy violated their rights under Article 4 of protocol no. 4: "Collective expulsion of aliens is prohibited"; Article 13 taken together with Article 3 of the Convention and Article 4 of Protocol no. 4; Articles 46 and 41 of the Convention. *See id.* ¶¶ 159–215.

277. Hirsi, Eur. Ct. H.R. (Grand Chamber No. 27765/09), ¶ 19.

278. *Id.*

279. *Id.* As exposed by a July 14, 2008 Wikileaks cable, the Libyan government was keenly interested in such a framework agreement, which it saw as a potential source of significant revenue. *See The EU-Libya Framework Agreement: Veni, Visas, Veto*, THE TELEGRAPH, (Jan. 31, 2011, 9:36 PM), <http://www.telegraph.co.uk/news/wikileaks-files/libya-wikileaks/8294843/THE-EU-LIBYA-FRAMEWORK-AGREEMENT-VENI-VISAS-VETO.html>.

280. HUMAN RIGHTS WATCH, *supra* note 157, at 39.

281. Hirsi, Eur. Ct. H.R. (Grand Chamber No. 27765/09), ¶ 19.

the agreement are specified in the bilateral treaty. All of these demonstrate the continuity and similarity between this operation, which the ECtHR intervened against, and other similar operations like the U.S. presence in Haiti and the Joint Operations and mixed European/Greek land patrols that Frontex facilitates.

The most important part of the judgment for present purposes is the discussion of jurisdiction. While the court emphasizes that jurisdiction is in principle territorial, it adds that ex-territorial jurisdiction accrues from *effective control*.²⁸² The Italian government argued that it did not have *non-refoulement* obligations towards the migrants, because it was acting to rescue them from drowning. But the court dismisses the argument:

[I]taly cannot circumvent its “jurisdiction” under the Convention by describing the events at issue as rescue operations on the high seas. In particular, the Court cannot subscribe to the government’s argument that Italy was not responsible for the fate of the applicants on account of the allegedly minimal control exercised by the authorities over the parties concerned at the material time.²⁸³

But the court’s reasoning is slightly more complex. The determination that the Italian policemen had effective control over the migrants—and that the court therefore has jurisdiction to review their actions—rests on *two different* aspects of the operation: “In the court’s opinion, in the period between boarding the ships of the Italian armed forces and being handed over to the Libyan authorities, the applicants were under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities.”²⁸⁴ The court goes further than just considering which one of the forces *physically* detained the migrants when they were on the boats.²⁸⁵ Under the guidance of the relevant maritime law provisions, the court grants considerable weight to the rule that the *flag* under which a vessel sails determines state jurisdiction over that vessel.²⁸⁶ In this case, Italian flag vessels intercepted the migrants and returned them to Libya.²⁸⁷

Was Italy guilty of violating the absolute prohibitions on inhuman and degrading treatment and *refoulement*? The court answered this question in the affirmative and found that migrants are regularly ill-treated in Libya.²⁸⁸ It also found that these migrants are at risk of being sent back to dangerous countries such as Eritrea and Somalia, without access to asylum.²⁸⁹ More

282. *Id.* ¶ 73.

283. *Id.* ¶ 79.

284. *Id.* ¶ 81.

285. *Id.*

286. Hirsi, Eur. Ct. H.R. (Grand Chamber No. 27765/09).

287. *Id.* ¶ 85.

288. *Id.*, at 57.

289. *Id.* ¶¶ 146–58.

interestingly, however, the court identified the underlying structural dangers of *disaggregated sovereignty*. It seemed to announce rather boldly that enforcement networks cannot bifurcate executive agencies from judicial review. Contract must not replace obligation. The court says:

[I]taly cannot evade its own responsibility by relying on its obligations arising out of bilateral agreements with Libya. Even if it were to be assumed that those agreements made express provision for the return to Libya of migrants intercepted on the high seas, the Contracting States' responsibility continues even after their having entered into treaty commitments subsequent to the entry into force of the Convention or its Protocols in respect of these States.²⁹⁰

Hirsi is important in illustrating the dialogue among transnational courts, to which Koh calls our attention. ECtHR reaches back to the constitutive moment that occurred with *Salé*. Although the U.S. Supreme Court of course has no precedential force in ECtHR, Judge Pinto De Albuquerque symbolically overturned the by-now historical decision.²⁹¹ The final words of his concurring opinion—incidentally also the final words of the judgment—are devoted to Justice Harry Blackmun's minority opinion:

The words of Justice Blackmun are so inspiring that they should not be forgotten. Refugees attempting to escape Africa do not claim a right of admission to Europe. They demand only that Europe, the cradle of human rights idealism and the birthplace of the rule of law, cease closing its doors to people in despair who have fled from arbitrariness and brutality. That is a very modest plea, vindicated by the European Convention on Human Rights. "We should not close our ears to it."²⁹²

Reading *Hirsi* along with the other decisions described in this subsection leaves the unrelenting impression that *transnational legal process* can realize the promise of transnationalism. This vision, coupling a universalist commitment to certain legal protections for all humans with the limitations of jurisdiction, seems tenable. All three judgments are especially impressive since across the globe, the rights of unauthorized migrants have become one of the most contested issues of public policy. The jurisprudence coming out of ECtHR paints a picture according to which there are fundamental values that remain insulated from politics. An *ethics of conviction* is defended.

Like both the Inter-American Commission and the Australian High Court, ECtHR in *Hirsi* went quite a ways further than Blackmun in *Salé*. Neither Stevens nor Blackmun discussed the details of the bilateral agree-

290. *Id.* ¶ 129.

291. *See id.* at 80.

292. *Id.*

ment between Haiti and the United States, leaving it to the executive's prerogative. In *Hirsi*, on the other hand, the ECtHR Grand Chamber considered all the relevant law—including the bilateral agreement between Libya and Italy—under one human rights umbrella and within its wider diplomatic context in the EU.²⁹³ This allowed the court to push toward a substantive rather than a merely formal notion of jurisdiction: the Somali and Eritrean asylum seekers who were intercepted were under Italian responsibility not only *de jure* (as the vessels sailed under an Italian flag) but also *de facto* (as the Italians had the power to decide on the asylum seekers' plight).²⁹⁴

ECtHR thus responded in *Hirsi* to something that had been beyond the considerations of the U.S. Supreme Court in *Sale*. While policymaking and enforcement networks could function as a veil over human rights violations, *transnational legal process* could potentially pierce that veil. But could it really? And, under what conditions?

V. DIALECTIC OF TRANSNATIONALISM

A. *Transnationalism as Dialectic Process*

As is the case with Slaughter's transnationalism, today Koh's vision of transnationalism is questionable. Most obviously, the U.S. Supreme Court never in fact overturned *Sale*, and is not likely to do so in the foreseeable future.²⁹⁵

Part II above demonstrated that violations of migrant and refugee rights persisted in the last two decades, at the fault lines between developing and

293. See *Hirsi*, Eur. Ct. H.R. (Grand Chamber No. 27765/09), ¶¶ 22–44.

294. See *id.* ¶¶ 80–82.

295. Koh acknowledged this, but did not believe it to be relevant to the central issue, taking instead a pragmatic approach:

In the end, the Supreme Court rejected our arguments, leaving the United States legally free to continue the extraterritorial return policy. But other international forums, such as the U.N. High Commission on Refugees, the Inter-American Commission on Human Rights, and other bodies began to condemn the U.S. action. Various legislative efforts were made to overturn the Supreme Court's ruling, and the issue later became the subject of domestic political pressure from the African-American community, the Congressional Black Caucus, and Trans-Africa, all of whom began to promote the notion of a safe haven for Haitian refugees. Finally, in the fall of 1994, the U.S. government changed its Haitian policy, and intervened to return the refugees. When the issue arose again the following year, with regard to fleeing Cuban refugees, the Administration first resisted, then ultimately admitted into the United States those Cuban refugees being detained at offshore refugee camps. Although the U.S. stated policy remains problematic, at this writing, the actual practice of the U.S. government has moved into greater compliance with international law.

Koh, *supra* note 33, at 1415–16. There is a related ongoing debate about extraterritorial detainees' habeas rights under the United States Constitution. See, e.g., Gerald L. Neuman, *After Guantanamo: Extraterritoriality of Fundamental Rights in U.S. Constitutional Law*, 3 JUS POLITICUM (2009), http://www.juspoliticum.com/IMG/pdf/JP3_neuman.pdf. Though undoubtedly important (and independently thorny), that is of course not the issue that was decided in *Sale*, and not the issue discussed here.

developed countries. This ongoing concern shows transnationalism's failure to bring about a brave new world order of human rights in a paradigmatically transnational area of policy. The way developed states were able to "buy" sovereign capacities of developing states and use them as instruments of domestic policies foreshadowed the dynamic this Article refers to as the *dialectic of transnationalism*. The invocation of "dialectic" in this context means that seemingly opposing powers had mutually constituted one overarching process.²⁹⁶

In the history of philosophy, the synthesis of opposing forces has at times been thought to reveal "higher" forms of knowledge, value, or social order.²⁹⁷ Such an optimistic worldview is implicit in Koh's *transnational legal process*. *Transnational legal process* assumes that repeated litigation and argumentation before transnational courts will produce more robust political and social commitments to human rights. But dialectical processes have also been associated with movements in the opposite direction; the clash of opposing political and cultural forces can lead to gradual moral or political degradation.²⁹⁸ The relevant literature describes such processes as self-defeating; the more one strives to discover the truth or realize the good, the more one strays away from doing so.²⁹⁹

Why did the most robust human rights decisions by transnational judiciaries prove not to protect the rights of migrants and refugees in real life? The question may seem to contrast "law on the books" with "law in action." But an answer relying on this familiar distinction would not suffice. A fuller account has to do with the disorientation that transnationalism produces with respect to the most basic question of legal theory, namely, *what is law?* What is the relationship between law and transnationalism's vision of global justice, epitomized by the imperatives of human rights?

Examining transnational law and policy relating to unauthorized migration in the last two decades reveals a self-defeating dialectic process. The *dialectic of transnationalism* can be summarized by the following three fundamental insights, which will be described at greater length below:

(1) When executive and judicial competences are reformulated as transnational capacities, they become bifurcated from each other.

296. In the history of philosophy, dialectic processes were the building blocks of narratives of historical progress. Most famously in the philosophical works of G.W.F. Hegel and Karl Marx, dialectics were theorized as processes of a gradual exposure of the truth, or a realization of the moral good. For a classical exposition of this philosophical tradition, see generally SIDNEY HOOK, *FROM HEGEL TO MARX* (1994).

297. The view that humanity is in a state of moral progress is a general tenet of enlightenment. Specifically, this theory is associated with G.W.F. Hegel's dialectic. See generally G.W.F. HEGEL, *PHENOMENOLOGY OF SPIRIT* (1977).

298. This position is especially associated with THEODOR W. ADORNO AND MAX HORKHEIMER, *DIALECTIC OF ENLIGHTENMENT* (2002) ("What we had set out to do was nothing less than to explain why humanity, instead of entering a truly human state, is sinking into a new kind of barbarism.").

299. See generally THEODOR W. ADORNO AND MAX HORKHEIMER, *DIALECTIC OF ENLIGHTENMENT* (2002); THEODOR W. ADORNO, *NEGATIVE DIALECTICS* (1981).

(2) When transnational judiciaries aim to defend human rights, they show a tendency to accelerate disaggregation processes and, hence, to further their own bifurcation from policy. Transnational judiciaries thus unwittingly participate in diluting the accountability of executives in future cases.

(3) Transnational legal process advances policy solutions that reformulate absolute human rights rules as political compromises, transforming an *ethics of conviction* into an *ethics of responsibility*. But the result is that transnational policies may reasonably be described as enforcing or violating human rights, depending on which side of the gun we are looking from.

1. *The Bifurcation of Executive and Judicial Competences*

While all transnational courts, by definition, have limited jurisdiction (reducible to either national sovereignty or treaty), transnationalism's normative claim is universal; it aims to make *the world* a better place. However, as already demonstrated above with regard to *Sale*, executives and judiciaries never have perfectly coinciding capacities. No matter how far transnational courts will go, executives acting internationally will remain incongruent with judiciaries that act within their own jurisdictional limits.

As was discussed above, transnationalism appeared to put "slices" of developing states' sovereignty on the global market. The implication is that developed states could "buy" their executive competences *independently*, without adjoining judicial ones. Alternatively, they could aggregate relatively strong enforcement agencies with relatively weak courts, through networks of bilateral and multilateral agreements. Transnational courts hand down magnificent human rights judgments. But the transnational bifurcation of judiciaries from policymaking leaves significant areas of policy beyond judicial reach, or under diminished judicial oversight.

We see the simplest version of this disaggregation in the institutional making of the Inter-American Commission of Human Rights. This transnational body did not have binding authority over the United States, the policies of which it aimed to review. The emphasis on non-binding, persuasive authority is typical of transnationalism, and is sometimes justified in transnationalism's own terms. From a different perspective, however, this bifurcation between a transnational judiciary and U.S. policies means that this transnational court could not grant a remedy.³⁰⁰

The United States ceased its policy of interception with no process as early as May 8, 1994.³⁰¹ The Clinton administration did not do this because of judicial intervention. Rather, it was more sophisticated policymaking, enforcement, and human rights networks that allowed it to change policy.

300. The Inter-American Commission therefore does not meet the ancient condition which the common law drew from Roman law: *Ubi jus, ibi remedium* ("Where there is a right, there is a remedy").

301. See Gwen Ifill, *Clinton Grants Haitian Exiles Hearings at Sea*, N.Y. TIMES, May 8, 1994, available at <http://www.nytimes.com/1994/05/08/world/clinton-grants-haitian-exiles-hearings-at-sea.html?src=pm>.

The Administration sought to obtain a network of “safe haven” zones for Haitians in the Caribbean. When Caribbean states refused to resettle the refugees, Clinton sent them to Guantanamo.³⁰² In June of that year, the United States started processing Haitians’ asylum claims aboard *Comfort*, a Naval Ship deployed in Jamaican territorial waters.³⁰³ The framework allowed refugees access to asylum but simultaneously removed them from U.S. territories, stripping them of procedural rights.³⁰⁴ With his options for controlling the refugee flood severely limited, the President committed the United States to quickly restoring democratic government to Haiti.³⁰⁵

The exodus of Haitian refugees slowed and finally stopped with the September 1994 invasion.³⁰⁶ The Haitian model that migrated across global fault lines between developing and developed countries was not one of returns with no process.³⁰⁷ It was a model of offshore *process*—with reduced or eliminated judicial oversight—that became the leading model worldwide.³⁰⁸

In *Hirsi*, the same bifurcation is subtler. The court did step in against such bifurcation;³⁰⁹ but alter the facts of *Hirsi* to imagine another version of the same scenario. In this version, the flag on the vessel intercepting the Eritrean and Somali migrants belongs to Tunisia or Libya, not to Italy. Would the result of the case be the same? Under domestic Italian law, that vessel would no longer be considered to be under Italian jurisdiction. This simply amounts to an adjustment in the terms agreed upon between enforcement networks. Granted, ECtHR suggested that *de facto* control might be on par with *de jure* jurisdiction. But it is difficult to imagine that a court would hold a state conducting enforcement by proxy to be responsible for *refoulement*. Especially, for example, if the Italian “experts” are no longer physically present on the boat conducting enforcement and give their instructions or recommendations from afar. Like taxes, human rights become obligations that can be cleverly and legally avoided.

This “adjusted” model is not a speculative or theoretical one. As described above, it is the model that was implemented by Frontex “joint oper-

302. See Patrick Gavigan, *Migration Emergencies and Human Rights in Haiti*, Paper Prepared for the Conference on Regional Responses to Forced Migration in Central America and the Caribbean (Sep. 30–Oct. 1, 1997), available at <http://www.oas.org/juridico/english/gavigane.html>.

303. See Bill Frelick, *U.S. Refugee Policy in the Caribbean: No Bridge Over Troubled Waters*, 20-FALL FLETCHER F. WORLD AFF. 67, 69 (1996).

304. See in this context, Koh’s observation (made precisely in this context) that “a fine line separates a desirable policy of temporary safe haven from a counter-productive one of indefinite arbitrary detention.” Koh, *supra* note 62, at 1020.

305. Gavigan, *supra* note 302.

306. This was known as the “safe haven” policy. For an analysis of this policy, see generally T. Alexander Aleinikoff, *Safe Haven: Pragmatics and Prospects*, 35 VA. J. INT’L L. 71 (1994).

307. The Clinton administration returned to the policy of intercepting Haitian boat people and summarily returning them without a hearing. See Bill Frelick, *U.S. Refugee Policy in the Caribbean*, *supra* note 303, at 67.

308. The level of adjudication that was applied varied, from “shipboard adjudicators” to some access to U.S. courts.

309. *Hirsi*, Eur. Ct. H.R. (Grand Chamber No. 27765/09), at 80.

ations” both in the Mediterranean and off of the western coast of Africa. In other words, in *Hirsi*, ECtHR reviewed an obsolete model, an Italian relic of the past. This “primitive” version of the leading European model for interceptions at sea included components of both *de facto* and *de jure* sovereignty. These allowed the European court to reach out and re-aggregate the disaggregated governmental competences; the use of force and its review by courts were joined together. But in more sophisticated Europeanized enforcement networks, these components were “cleaned” by using foreign-flag boats.

Transnationalism allows not only for a bifurcation and disaggregation among judicial and executive agencies of various kinds, but also their re-aggregation in ways that a unitary vision of sovereign competences would not expect. This is clear in the regulation that allowed Frontex to send armed border guards to Greece from various EU Member States. The regulation provided that civil liability for the misconduct of RABIT teams would not be ascribed to the states that sent their border guards to participate in these teams.³¹⁰ Rather, as the regulation states, “[w]here guest officers are operating in a host Member State, *that Member State shall be liable* in accordance with its national law for any damage caused by them during their operations.”³¹¹

Knowingly sending unauthorized migrants into inhuman and degrading detention conditions may presumably constitute a tort under the law of all EU Member States. However, the “host country” (Greece) is the only one that can be held liable.³¹² A potential plaintiff who is exposed to inhuman and degrading treatment by border guards coming from a variety of countries, some of which have efficient judicial systems and deeper pockets than Greece, will have to sue Greece. This also explains the composition of the multi-national border guard teams. Under the regulation, every team performing enforcement activities must have at least one border guard from the “host Member State,” retaining formal responsibility over the operation.³¹³ Moving to criminal liability, here one immediately finds a similar immunity constructed through the same kind of “jurisdictional jockeying.”³¹⁴ High-ranking officials enjoy the immunity of international organizations, once again severing them from judiciaries.³¹⁵

310. Council Regulation 863/2007, art. 10b(1), 2007 O.J. (L 199) 30, 38.

311. *Id.* (emphasis added).

312. This is not true when such damage is caused by “gross negligence.” *See id.* at art. 10b(3).

313. *Id.* at art. 10(3).

314. The term is borrowed from LAUREN BENTON, *LAW AND COLONIAL CULTURES: LEGAL REGIMES IN WORLD HISTORY 1400–1900*, at 3 (2001).

315. *See* Treaty on the Functioning of the European Union art. 343, May 9, 2008, 2008 O.J. (C 115) 47, 194 (stating that “[t]he Union shall enjoy in the territories of the Member States such privileges and immunities as are necessary for the performance of its tasks, under the conditions laid down in the Protocol of 8 April 1965 on the privileges and immunities of the European Union. The same shall apply to the European Central Bank and the European Investment Bank.”). *See also* Protocol on the Privileges and Immunities of the European Communities art. 11, Apr. 8, 1965, 2006 O.J. (C 321 E) 318, 321

An interesting version of this bifurcation between transnational judiciaries and executives emerges from another case mentioned in passing above. In early 2011, a little more than a year before ECtHR released *Hirsi*, it handed down *M.S.S. v. Belgium and Greece*.³¹⁶ Like *Hirsi*, *M.S.S.* seems to be a manifestation of the merits of *transnational legal process*. Here, too, the idea that international agreements and cooperation can bifurcate executive action from judicial review is addressed head-on.

As briefly noted in Part II, *M.S.S.* pierced through one veil that severed executive power from judicial review (the Dublin II Regulation), but the more sophisticated veil remained out of reach (the Frontex Regulation). As Human Rights Watch pointed out, Frontex during its presence in Greece was knowingly involved in exposing about 12,000 migrants to inhumane and degrading treatment in Greek detention facilities.³¹⁷ Belgians could serve among the “guest officers.”³¹⁸ After *M.S.S.*, Belgium was enjoined not to participate in this abusive system. Ironically, it could still send its border guards to Greece on the Frontex mission to do the same thing from up close.³¹⁹

Of course, Frontex’s RABIT deployment in Greece was not the issue that came before the court. The applicant was not a victim of this operation, and no evidence was brought before the court regarding this particular issue. But in many ways, that just restates the problem. The transnational condition allows such functional separation between disaggregated executives and judiciaries. In this context, notice the similarity between the arrangement in Greece, where border patrols had to have at least one Greek border guard, and the Italian maritime arrangement; boats with foreign flags conduct enforcement activities based on European priorities.

In the wake of *Sale*, it was pretty much settled that sovereign states could contract out many of their capacities, including jurisdiction. Disaggregated sovereignty allowed *effective control* to be granted to a foreign executive agency. Casting a domestic enforcement policy as international would thus

(“Representatives of Member States taking part in the work of the institutions of the Communities, their advisers and technical experts shall, in the performance of their duties and during their travel to and from the place of meeting, enjoy the customary privileges, immunities and facilities.”)

316. *M.S.S. v. Belgium*, App. No. 30696/09 Eur. Ct. H.R. (2011).

317. Human Rights Watch, *supra* note 157, at 1.

318. Frontex operatives are chosen from a pool including EU countries, in addition to Norway and Iceland; the United Kingdom, Ireland, and Denmark did not participate in Frontex’s founding regulation. See Human Rights Watch, *supra* note 157, at 11 n. 2.

319. Or, as Bill Frelick of Human Rights Watch put it: “It’s a disturbing contradiction that at the same time that the European Court of Human Rights was categorically ruling that sending migrants to detention in Greece violated their fundamental rights, Frontex, an EU executive agency, and border guards from EU states were knowingly sending them there.” *HRW Report: Frontex Exposes Migrants to Abusive Conditions in Greece*, MIGRANTS AT SEA (Sept. 22, 2011, 4:09 AM), <http://migrantsatsea.wordpress.com/tag/bill-frelick/>.

bifurcate it from domestic judicial review, even if it were thereby made more complicated administratively.³²⁰

2. *Courts as Disaggregation Accelerators*

But this story is not one about “bad” executives and “good” judiciaries. Saying that transnational courts have tried to uphold absolute rights, while transnational executives have spun networks that circumvent courts, misses the ways in which both institutions are implicated. The second pattern constituting the *dialectic of transnationalism* is that, precisely when they try the hardest to protect rights beyond territorial borders, courts acquire the most significant role in providing the conditions for the rights’ further violation.

When courts review policy and enforcement directed towards unauthorized migrants, they provide guidelines to policymaking and enforcement networks on how to push policies beyond the courts’ jurisdiction. Transnational judicial review becomes less about protecting rights, and more about ensuring that a particular agency over which the court has jurisdiction will not violate rights. The price of this kind of judicial review can be that migrants’ rights will be violated by other agencies (the powers of which are beyond courts’ reach). In such cases, transnational courts become “disaggregation accelerators”; they structurally reinforce the bifurcation between transnational policies and courts.

Though *Hirsi* reviewed an obsolete Italian model of disaggregation that already had a more sophisticated European alternative, it contributed to understandings of how to evade judicial review in future cases. By saying that a state must not turn back asylum seekers with boats under their *de jure* or *de facto* control a court is also *inviting* such policies, as long as they can be conducted with no such control. This invitation to transfer more capacities to developing countries was echoed in Australian policymaking networks.³²¹

Indeed, the political process that *M70/2011* generated, still very much underway, provides a fascinating case of a court becoming a disaggregation

320. From this perspective, the division of the world into sovereign states provides dominant states with opportunities for implementing policies at home that rely on costs abroad, contrary to the assertion that formal sovereignty restrains power. For instance, Nico Krisch argues that, as a general matter:

The sovereign equality of states has, since the 17th century, become a building block of international legal system, and even though it embodies only a very formal notion of equality, it poses significant obstacles to powerful states. This is true, on the one hand, for the rules on jurisdiction that flow from it: *par in parem non habet imperium* prevents the direct governance of other states by means of international law.

Krisch, *supra* note 12, at 377. But of course, direct governance is often an unwanted liability.

321. The Houston expert panel, which will be discussed immediately below, vetted against turning back unauthorized migrants at sea, noting, *inter alia*, that ECtHR has held that a person will be subject to a state’s jurisdiction where the state exercises effective control over a person extraterritorially. It recommends that unauthorized migrants will be turned back only after “changes in the understandings that exist with regional states.” AUSTRALIAN GOVERNMENT, *supra* note 1, at 54.

accelerator. The main players in this process are Australian government agencies. But other countries in the region are also constantly engaged with.

When the Australian High Court found in *M70/2011* that the offshore processing framework was illegal, the decision immediately became a blueprint for another offshore processing framework. Mere days later, the Australian government began to explore its options.³²² The Australian Solicitor General's opinion initially concluded that this might not be possible in light of the High Court's decision.³²³

Ten days later, Dr. David Benett, former Australian Solicitor General, intervened in the debate.³²⁴ Benett pointed at a path we are already familiar with both from Slaughter's work and from Europe; *deeper* engagement with intended offshore processing countries would push human rights performance in those countries to a level acceptable to the court.³²⁵ In other words, Australia should purchase more aspects of these countries' sovereignty:

[T]here is no legal reason why steps could not be taken with Nauru, Papua New Guinea or Malaysia (or indeed any other willing

322. In the hours after the High Court's emphatic decision that the Government's proposed "Malaysian Arrangement" is legally invalid, Immigration Minister Chris Bowen declared that the result was "profoundly disappointing" and intimated that the High Court had "applied a new test" which varied from the previous understanding of the law relating to "third country processing." Former Prime Minister Julia Gillard added to these comments the following day, saying that the High Court's decision "basically turns on its head the understanding of the law in this country." She singled out Chief Justice Robert French, stating that "his Honour . . . considered comparable legal questions when he was a judge of the Federal Court and made different decisions to the one that the High Court made yesterday" (presumably alluding to *Ruddock*, 110 FCR 491). See Transcript of Press Conference on High Court Decision, Minister for Immigration and Citizenship (Austl. Gov't) (Aug. 31, 2011), <http://www.minister.immi.gov.au/media/cb/2011/cb171159.htm>; Transcript of Joint Press Conference on Malaysia Agreement, Prime Minister of Australia (Sept. 1, 2011), <http://www.pm.gov.au/press-office/transcript-joint-press-conference-brisbane-1>; *Greg Weeks: Attacking the High Court: a Comment on the Malaysian Solution Case and its Aftermath*, UK CONSTITUTIONAL GROUP (Sept. 3, 2011, 12:11 PM), <http://ukconstitutionallaw.org/2011/09/03/greg-weeks-attacking-the-high-court-a-comment-on-the-malaysian-solution-case-and-its-aftermath/>.

323. The opinion stated:

We would have confidence that the power conferred by s 198A would be available to be exercised to take asylum seekers from Australia to Nauru only if it were able to be demonstrated to the satisfaction of an Australian court: first, that appropriate arrangements were in place to ensure practical compliance by Nauru with its obligations under the Convention and the Protocol; and, secondly, that Nauru in its treatment of asylum seekers and refugees complied in practice with human rights standards acceptable at least to the United Nations High Commissioner for Refugees. These are complex issues of fact and degree requiring detailed assessment and analysis. Even when that assessment and analysis was complete, the issues might well be the subject of contested evidence. In the absence of a detailed assessment and analysis of these issues, we are unable to form a view as to whether either of the two conditions we have identified would be capable of being demonstrated to the satisfaction of an Australian court.

Gageler, *supra* note 264, ¶ 3.

324. David Bennett, *Offshore Processing still Possible Despite High Court Decision*, SYDNEY MORNING HERALD, Sept. 12, 2011, <http://www.smh.com.au/opinion/politics/offshore-processing-still-possible-despite-high-court-decision-20110911-1k40s.html>.

325. *Id.*

partner country), which would enable the minister to declare them satisfactory. It is significant that Nauru has now acceded to the Convention Relating to the Status of Refugees and the Protocol Relating to the Status of Refugees. Much attention to detail would be required. In particular, any agreement with Australia should, unlike the agreement with Malaysia, be expressed to be legally binding.³²⁶

On the day the op-ed was published, former Australian Prime Minister Julia Gillard announced that the government would introduce legislation to “provide for the government to proceed with transfers under the Arrangement with Malaysia.”³²⁷ In the next few months, the coalition in the Australian Senate drafted a bill with the advice of Bennett, who concluded that the final draft provided more protections for asylum seekers and was “less likely to be subject to complex judicial proceedings.”

In June 2012, the Australian government attempted to pass a new bill providing for offshore processing, and failed.³²⁸ At this impasse, Gillard commissioned yet another expert opinion on offshore processing. Angus Houston, former Chief of the Defence Force, led the new “expert panel.”³²⁹ The resulting report, which the Australian government has since endorsed, recommended “high level and broad-ranging cooperation with Indonesia and Malaysia in particular.”³³⁰ Thus, it laid out in detail what had to be done to meet the requirements of the Australian High Court, introducing an even deeper disaggregation.³³¹

326. *Id.*

327. Press Release, Prime Minister of Australia & Minister for Immigration, Legislation to Restore Migration Act Powers (Sept. 12, 2011), <http://www.pm.gov.au/press-office/legislation-restore-migration-act-powers>.

328. One of the amendment’s objectives was to “affirm that offshore entry persons, including offshore entry persons in respect to whom Australia has or may have protection obligations, should be able to be taken to any country designated to be an offshore assessment country, *and the designation of a country to be an offshore assessment country need not to be limited by reference to the international obligations or domestic law of that country.*” Explanatory Memorandum for Migration Legislation Amendment (The Bali Process) Bill 2012, Parliament of Australia (2012) (italics not in original), http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r4747. The Act also provides that in such assessment, the Australian minister must consult with UNHCR (whose recommendations are not binding), such consultation being distinctly “transitional.” *Id.* As required by *Human Rights (Parliamentary Scrutiny) Act 2011* (Austl.), a “Statement of Compatibility with Human Rights” is appended to the proposal. The statement concludes with an interesting paragraph that once again illustrates the crucial role of horizontal networks (in Slaughter’s terms), stating that “[t]he Bill is compatible with human rights because, to the extent that it engages human rights and seeks to limit the level of protection currently offered under existing legislation, it does not limit those rights as they may be considered through administrative practices.” *Id.*

329. *Houston to Lead Asylum Policy Panel After Senate Rejects Bill*, ABC RADIO AUSTRALIA, <http://www.radioaustralia.net.au/international/2012-06-28/houston-to-lead-asylum-policy-panel-after-senate-rejects-bill/968696>, (June 29, 2012, 12:04 AM).

330. AUSTRALIAN GOVERNMENT, *supra* note 1, at 12.

331. *Id.* at 31.

The trajectory of *M70/2011* provides an outstanding case study illustrating the strange way in which transnationalism defeats its own human rights commitments. The Australian High Court wrote what is perhaps the most powerful defense of the absolute obligations of human rights in the short history reviewed above. The decision seems to include profound articulations of the *ethics of conviction* of human rights. But with some diplomatic work, its prohibitions were found to leave significant opportunities for policymaking networks that would not violate the rules that the court set out. With their re-articulation in the Houston report, the court's findings were reformulated in terms of an *ethics of responsibility*. Asylum seekers could now be detained offshore for years, with significantly reduced procedural rights. They would be granted access to asylum, but the chance that they would be exposed to absolutely prohibited policies such as *refoulement* or inhumane and degrading treatment would probably increase. This goes back to the first pattern described above—the bifurcation of judicial and executive capacities—and to Blackmun's words.³³²

Furthermore, after *M70/2011*, significant evidence shows that incentives for preventive interceptions have increased.³³³ Such interceptions rely on foreign enforcement agencies blocking people from access to asylum, just as Frontex "joint operations" do. On July 24, 2012, Jakarta agreed to joint navy patrols between the two navies, to take place between Java and Christmas Island.³³⁴ As explained in the context of *Hirsi*, it is doubtful that any court will be able to help future asylum seekers who are intercepted by foreign agencies under this cooperative model.

When Judge Giovanni Bonello of the ECtHR wrote recently in a landmark case that "jurisdiction hangs from the mouth of a firearm,"³³⁵ he was precisely on the mark, but perhaps not for the reasons he thought. The judgment, given *vis-à-vis* activities of the UK military in Iraq, stands for the proposition that governments that acceded to ECtHR cannot wield un-

332. Sale, 509 U.S. at 208.

333. See, e.g., *Australia Poised to Strike a Boat Deal with Indonesia*, SYDNEY MORNING HERALD (Aug. 1, 2012), <http://www.smh.com.au/opinion/political-news/australia-poised-to-strike-boat-deal-with-indonesia-20120801-23e3q.html>; George Roberts, *Aus Authorities to be Given Free Reign in Indon Waters*, ABC NEWS, <http://www.abc.net.au/am/content/2012/s3557883.htm> (Aug. 1, 2012, 8:03 AM).

334. Peter Alford, *Jakarta Agrees to Joint Patrols for Asylum Boats*, THE AUSTRALIAN (July 24, 2012), <http://www.theaustralian.com.au/national-affairs/politics-news/jakarta-agrees-to-joint-patrols-for-asylum-boats/story-fn59nqld-1226433393250>.

335. He continued:

Jurisdiction flows not only from the exercise of democratic governance, not only from ruthless tyranny, not only from colonial usurpation. It also hangs from the mouth of a firearm. In non-combat situations, everyone in the line of fire of a gun is within the authority and control of whoever is wielding it.

checked force extraterritorially.³³⁶ But there are subtler implications to this proposition that are appropriate in the present context.

Outside the borders of sovereignty, guns precede law. Imagine that transnational executive and judicial networks are two webs placed one over the other. As the logic of the judicial web is to follow only the places where the executive web wields force, some parts of the executive will systematically be spun first and remain uncovered by judicial networks. Jurisprudence helps executives and policymakers better understand where enforcement vacuums will appear next.

Recall the original dictum to which Judge Bonello alluded: Chairman Mao's assertion that "political power grows out of the barrel of a gun."³³⁷ This assertion sounds invidious to any ear accustomed to the terminologies of liberal democracy. But as democratic government does not extend beyond its own borders, extraterritorial jurisdiction flows from violence in areas where enforcement vacuums exist. The result is that there is plenty of room to exercise policies abroad—even in order to advance domestic agendas—without exposure to judicial review. This does not mean that policies will be rid of violence. Rather, it simply means that developing countries that are beyond the court's jurisdiction will wield such violence on behalf of developed countries. As we have seen above, getting them to do that does not normally require violence, but only economic power. High-minded judicial opinions thus become guidelines explaining how not to be held responsible for human rights violations. They may impose extra costs on executive agencies. But there is no real hope to prevent future violations from happening, or even to hold perpetrators accountable.

This, of course, does not mean that the international terrain is lawless. Where judicial networks are absent, policymaking networks reign, with their financially driven dynamics through which international law transforms disparate interests into common ones. The interests of developing states thus seem to converge with those of developed states.

Transnationalism structurally reproduced unchecked powers, but this is of course not the result of nefarious intentions. One must, however, bear in mind that extending *all* branches of government *equally* to new territories abroad, something that might promise democratic checks and balances, would not be transnationalism or disaggregation at all. It would simply be an annexation of new territories, transforming them into parts of a unitary sovereignty.

336. See Marko Milanovic, *European Court Decides Al-Skeini and Al-Jedda*, EJIL TALK! (July 7, 2011), <http://www.ejiltalk.org/european-court-decides-al-skeini-and-al-jedda/>.

337. Mao Tse-Tong, *Problems of War and Strategy*, in *SELECTED WORKS*, VOL. II 224 (1938).

3. *The Conviction/Responsibility Substitution Effect*

But is the disaggregation of sovereignty we now see in Australia normatively objectionable? Many Australians are presumably celebrating the new policies.³³⁸ Instead of allowing them to drown at sea, Australia will now be able to save asylum seekers and process them outside of the country. The argument is one we have seen throughout the cases above. It was voiced by the Bush administration in front of the U.S. Supreme Court,³³⁹ and was raised again before the Inter-American Commission of Human Rights.³⁴⁰ It was raised by Italy in *Hirsi*,³⁴¹ and Frontex raises it regularly with respect to the maritime enforcement activities of which the agency is in charge.³⁴² As countless migrants have lost their lives drowning in the last two decades, it may seem like there is something to this argument.

The world that it heralds, however, is one in which normative judgments are always relative. The only ethical reasoning that counts is the pragmatism of an *ethics of responsibility*.

What can be said for this pragmatism, and for the policies recommended in the Houston Report? If developing countries like Papua New Guinea, Indonesia, and Nauru will improve their asylum capacities with the new framework, it is conceivable that the world population of refugees will benefit. The model might be thought of as a sophisticated version of the regional solutions James Hathaway and Peter Schuck suggested in the 1990s.³⁴³ At the time, there was growing dissatisfaction among scholars and policymakers with the Refugee Convention, which had already been deemed a relic of the post-war era.³⁴⁴ Disaggregation and transnational legal process in this optimistic vision can represent a more pragmatic way of dealing with what seems to be a regularized problem: “mixed flows” of refugees and other migrants seeking a way out of developing countries.

The underlying moral dilemma appeared in the question posed to the High Court in *M70/2011*. The issue the court discussed was whether the

338. In a poll published in July 2012, 60% of the Australians asked answered that the government was “too soft” on asylum seekers, while only 12% thought the government policy was “too tough.” See *Essential Report: Too Soft or Too Tough on Asylum Seekers*, ESSENTIAL VISION, July 9, 2012, <http://essentialvision.com.au/too-soft-or-too-tough-on-asylum-seekers>.

339. See *Sale*, 509 U.S. at 163–64. Justice Stevens reiterated the U.S. government’s position, according to which “allowing Haitians into the United States for the screening process . . . would have posed a life-threatening danger to thousands of persons embarking on long voyages in dangerous craft.” *Id.*

340. *The Centre for Human Rights*, *supra* note 236, ¶ 182.

341. *Hirsi*, Eur. Ct. H.R. (Grand Chamber No. 27765/09), ¶ 13.

342. See FRONTEx, <http://www.frontex.europa.eu/operations/types-of-operations> (last visited Mar. 2, 2013) (“Saving lives at sea and intercepting both migrants and the people who smuggle them go hand in hand.”).

343. See generally Peter Schuck, *Share the Refugees*, N.Y. TIMES, Aug. 13, 1994, <http://www.nytimes.com/1994/08/13/opinion/share-the-refugees.html>; James C. Hathaway, *Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection*, 10 HARV. HUM. RTS. J. 115 (1997). On the affinity between Koh’s transnationalism and Schuck’s proposals, see Koh, *supra* note 62, at 1023.

344. See generally Schuck, *supra* note 343; Hathaway, *supra* note 343.

Australian government had power to conclude its bilateral arrangement with Malaysia.³⁴⁵ In the background, however, lay another question, totally absent from the legal discussion, but present in any consideration of the facts on political or moral terms. The deal was a swap in humans. Four thousand people, already determined to be *bona fide* refugees, were to be transferred from Malaysia to Australia and resettled in Australia over a period of four years. In return, Australia would send 800 asylum seekers for refugee status determination procedures in Malaysia. Even if, as the court found, there was a danger that the fundamental rights of some of these 800 would be violated, the potential benefit also seemed to be large; the 4,000 refugees living in limbo in Malaysia would now have a chance to recommence a dignified life. By upholding an *absolute* understanding of human rights, the High Court denied them these hopes. By adopting the perspective of an *ethics of conviction*, the court abandoned serious considerations stemming from an *ethics of responsibility*.

However, attached to the tail of this providential vision is a catastrophic one,³⁴⁶ which would predict that even the most perfect offshore arrangement would invite foreseeable human rights violations.³⁴⁷ This can be called the “Greek effect.” A country that is transformed into a stepping-stone to the developing world quickly attracts large numbers of people. It may have all of the necessary legal provisions to protect refugees. But with no real capacities to implement them, that country’s legal obligations—even if initially met—can quickly turn into a dead letter.³⁴⁸ Now, the stronger neighboring country’s court can no longer effectively intervene. Many who otherwise

345. Plaintiff M70/2011 v. Minister for Immigration and Citizenship; and Plaintiff M106/2011 v. Minister for Immigration and Citizenship, [2011] HCA 32, (Ausl.), ¶ 1.

346. Paraphrasing Adi Ophir, *The Two-State Solution: Providence and Catastrophe*, 8 THEORETICAL INQ. L. 117 (2007).

347. Amir Tejo, *No Time Wasted in Asylum Seekers’ East Java Escape*, JAKARTA GLOBE (July 31, 2012), <http://www.thejakartaglobe.com/news/no-time-wasted-in-asylum-seekers-east-java-escape/533881>. This report reflects the recent confusion of Malaysian authorities with respect to requirements to detain migrants in humane conditions. After 66 asylum seekers were rescued in July 2012 by Malaysian authorities from the tiny island Gogo, they had all escaped. *Id.* The asylum seekers were stranded for seven days on the island. *Id.* When they were transferred to Malaysia—or so recounts an immigration officer named Dwi Widodo—there was not enough room in existing facilities to detain them. *Id.* “As we were transferring them from the Coast Guard headquarters to the detention facility and the hotel, there were arguments,” Dwi said. “Many of them insisted that they be moved to a hotel. Taking advantage of the heated situation and the limited number of immigration officials, the asylum seekers escaped.” *Id.*

348. Oona Hathaway explains the underlying problematic in very clear terms:

The more the government of a state expects to face domestic enforcement of the state’s international commitments, the more likely it is to expect to be required to change its practices to abide by international law if its practices are not already consistent with that law. And the more likely a state is to change its practices to abide by international law, the more costly and hence less attractive committing to it will appear. States that are more likely to engage in domestic enforcement of the terms of international legal agreement are therefore less likely to commit to them in the first place, all other things held equal. In other words, generally speaking, the more likely an international agreement is to lead to an improvement in a state’s practices, the less likely the state will join it.

Hathaway, *supra* note 224, at 499.

would have had a chance to gain protection are returned to persecution. A pattern of systematic abuses, typical of the transnational condition, reappears.

As discussed above, the Houston Expert Panel Report provides the most striking example of how this may happen. Responding to *M70/2011*, the Houston report minimizes legal language, speaking instead in the language of “reasonableness, fairness, and humanitarian need.”³⁴⁹ It urges that “practicality and fairness should take precedence over theory and inertia; and that the perfect should not be allowed to become the enemy of the good.”³⁵⁰ In its assertion that “[a] strategic and comprehensive response needs to reflect circumstances as they currently exist and are likely to develop rather than what they have been in the past,”³⁵¹ it speaks in more than just a hint against the Refugee Convention. What this should be read to say is that the Convention presents the past, when racial and political persecution motivated its framers. “[T]he circumstances as they currently exist” (which the Panel alludes to but does not spell out) are, first and foremost, global disparities of wealth. These have displaced asylum seekers and economic migrants alike, sending them all into orbit from the developing world to the developed one.³⁵²

The central and truly most intriguing proposal of the Houston Report is the “no advantage principle,” meant to offset incentives to seek asylum in Australia.³⁵³ According to this proposal, offshore detention periods will be extended so that asylum seekers do not gain from unauthorized entry. This reflects yet another aspect of the substitution effect. Human dignity is understood in terms that allow policymakers to believe that they protect asylum seekers from themselves: “The incentives and disincentives we recommend complement each other. In our view, they need to be pursued in that comprehensive and integrated context as the most effective way of discouraging asylum seekers from risking their lives on dangerous maritime voyages to Australia.”³⁵⁴ The extent to which the proposal moved toward the disaggregation of sovereignty is most clearly expressed in its recommendation that all of Australia’s territory could be excised from Australia’s sovereignty for the purpose of migration.³⁵⁵ The proposal thus takes the Pacific Solution to its logical extreme.

These measures deal yet another blow to the idea that law should be grounded in universal justice. In its claim to defend human rights, transnational law has ended up fully instrumentalizing human rights. Cost-benefit solutions like those of the Houston Panel always beg questions about whose

349. AUSTRALIAN GOVERNMENT, *supra* note 1, at 7.

350. *Id.*

351. *Id.* at 10.

352. *Id.*

353. *Id.* at 14.

354. *Id.* at 8.

355. *See id.* at 17. This has since been implemented by Prime Minister Julia Gillard.

costs and whose benefits are to be considered. When such analysis occurs within a state, it may sometimes have considerable merits; the underlying premise is that policies are designed to maximize benefits and minimize costs for all members of the polity (although how to do so fairly is another question). But on the transnational plain they have no such analytic integrity. Are costs for citizens and for migrants really comparable? And how are migrants defined for the purposes of such measures? (How about those who may be on the way?) There is a slippery slope here that may lead us to believe that *all* humans should be taken into account, but that of course also doesn't make sense.

In the final analysis, behaviors that from one perspective are described as humanitarian appear from another perspective as violations of the most fundamental of rights.³⁵⁶ For one thing, asylum seekers aiming to reach Australia have made abundantly clear how the policies put in place by the Houston Expert Panel look from their perspective. As Australian offshoring resumed, and in the following months, many different groups have engaged in hunger strikes, measures of self-harm, and detention riots.³⁵⁷ Through a Facebook group, they aim to reach worldwide audiences in their protest against the Australian policies.³⁵⁸ In these conditions, parts of Australia's networks, notably the UNHCR, are starting to respond negatively.³⁵⁹ The Pacific Solution script is replayed all over again.

The same dynamics occur in Europe. Systematically exposing people to inhumane detention, as Frontex does in Greece, is traditionally thought to be a rather egregious breach of international law.³⁶⁰ But the agency continues to proudly operate under the flag of human rights. Indeed, in its Work Program for 2010 to 2013, the agency "identified 'humanity' as one of the core values which shall be endorsed, shared, lived and performed by each member of staff and which shall form the foundation of Frontex activities at

356. The importance of the imperative to prevent countries from taking such action is illustrated by Article 7(1)(e) of the Rome Statute (which established the International Criminal Court): "imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law," when "part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack" is defined as a crime against humanity. Rome Statute of the International Criminal Court, art. 7(1)(e), 2187 U.N.T.S. 90 (July 17, 1998).

357. *Nauru is waiting to explode in wake of asylum seeker unrest*, THE AUSTRALIAN (Nov. 7, 2012), <http://www.news.com.au/national-news/nsw-act/nauru-is-waiting-to-explode-in-wake-of-asylum-seeker-unrest/story-fndo4bst-1226511796636>.

358. The group is called "Ir,Sr,Irq,Afgh in nauru 2012" (standing for Iranian, Sri Lankan, Iraqi and Afghan asylum seekers on Nauru Island). *Ir,Sr,Irq,Afgh in nauru 2012*, Facebook group, available at <http://www.facebook.com/>.

359. See, e.g., Phil Mercer, *UN Criticizes Australian Offshore Asylum Camp*, VOICE OF AMERICA (February 4, 2013), <http://www.voanews.com/content/un-criticizes-australian-offshore-asylum-camp/1596562.html>; George Roberts, *UN Fears Aust Asylum Regime 'Another Road to Indefinite Detention'*, ABC NEWS (November 14, 2012), <http://www.abc.net.au/am/content/2012/s3632233.htm>.

360. Under Article 7 of the Rome Statute, when inhumane treatment is inflicted "as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack," it is defined a "crime against humanity." Rome Statute of the International Criminal Court art. 7, July 17 1988, 2187 U.N.T.S. 90.

all levels.”³⁶¹ The language might make one smile. But if law stands for an ultimate prohibition of a certain kind of state violence—and at the same time authorizes it—legality itself is thrown into crisis. This crisis is not something that attacks law from the outside—say by its political or economic subversion. The crucial lesson of the *dialectic of transnationalism* is that it arises from law’s own transnational structure.

One might ask whether there really is something so unique in the so-called *dialectic of transnationalism*. After all, the “dialectic” scenario is familiar from introductory classes on judicial review. The government introduces a bill and passes it through the parliament, relying on a majority. The court strikes it down, deeming it unconstitutional. Government lawyers go back to the drafting table, and propose a bill that will achieve the same policy goals but will not be caught in the net of judicial review.

But if *rights-based* judicial review is in question, we would like to think that a new bill would pass muster only if it *reduces* the violation of rights. Only a new bill that does not violate *absolute* rights *at all* should be deemed legitimate. But rights-based judicial review of refugee and migration issues in transnational courts often simply shifts the location of violations. Next time, they are likely to happen where the court will not have jurisdiction, no matter how expansively defined. The difference between the domestic and the international context is, crucially, not one of degree but one of category. In the domestic context, all branches of government are united by their responsibility to uphold the same law; but this cohesiveness immediately collapses once we step over the border or out of the judiciary’s jurisdiction.

VI. THE NORMATIVITY OF TRANSNATIONALISM

A. *The Politics of Human Rights*

What, then, does the *dialectic of transnationalism* leave of transnationalism’s hopes for a better world?

This Article has taken no position on the question as to whether absolute rules of human rights law *should* have any binding moral claims upon us as a philosophical matter. Similarly, this Article does not offer justifications—if indeed there are any—for legal rules that are grounded in an *ethics of conviction*. Weber thought that an ethics of conviction is a necessary component of political life.³⁶² But it is doubtful if he would deem it appropriate to formulate an *ethics of conviction* as a form of law.

361. Preamble to the Cooperation Arrangement between The European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union and The European Union Agency for Fundamental Rights, May 26, 2010, *available at* http://fra.europa.eu/sites/default/files/fra_uploads/891-Cooperation-Agreement-FRA-Frontex_en.pdf.

362. See WEBER, *supra* note 18, at 92 (“‘Here I stand, I can do no other.’ . . . [T]his is a situation that *may* befall *any* of us at some point, if we are not inwardly dead. In this sense an ethics of conviction and an ethics of responsibility are not absolute antitheses but are mutually complementary, and only when

The idea that there are certain policies and categories of behavior to which no human should be subjected is by no means self-explanatory. Indeed, it may not be easy to explain at all, if by that we refer to a series of deductive or inductive operations. As others have suggested, absolute human rights rules may be best explained as articles of faith.³⁶³ Weber illustrates what he means by an *ethics of conviction* with the example of a prophet.³⁶⁴ For better or worse, by binding states to absolute rules, human rights law invites each and every one of us to partake in a modern form of prophecy.

This last Part of the Article speaks to members of the secularized religion of human rights, for whom the tenets of this faith have purchase. As many faiths do, this faith imbues the lives of its adherents with a sense of meaning. In the last two decades, transnationalism's normative claims have been particularly important in the production of such meaning. It operationalized moral commitments, allowing the committed to believe not only that they understand the world, but also that they can change it. Harold Koh had his own version of this old Marxian message:

[I]f my question is 'how is international human rights law enforced?', my answer is simple. International human rights law is enforced, I would say, not just by nation-states, not just by government officials, not just by world historical figures, but by people like us, by people with the courage and commitment to bring international human rights law home through a transnational legal process of interaction, interpretation, and internalization.³⁶⁵

Such words push some of us to believe that we can do something to realize universal values. In governmental agencies, in NGOs, and in law school clinics, considerable resources are dedicated to the operationalization of this faith. If the normative claims of transnationalism have proven over time to be false, it would seem like transnationalism's agendas should change considerably.

The tendency to replace absolute rules of international law with pragmatic policy solutions is not new. It grows from a post-war suspicion towards any political philosophy that claimed access to absolute truths about human nature. Much of the most important political theory of the twentieth century articulates this suspicion. These theories present, in different ways, a narrative about how such absolutism led to the consolidation of totalitarian power—and the worst human rights abuses.³⁶⁶ Though human rights are

taken together do they constitute the authentic human being who *is capable* of having a 'vocation for politics.'").

363. See, e.g., Martti Koskeniemi, *What Should International Lawyers Learn from Karl Marx?* 17LEIDEN JOURNAL OF INTERNATIONAL LAW, 229 (2004) (critiquing theological tendency).

364. WEBER, *supra* note 18, at 85.

365. Koh, *supra* note 33, at 1417.

366. See generally HANNAH ARENDT, *ORIGINS OF TOTALITARIANISM* (1973); FRIEDRICH HAYEK, *THE ROAD TO SERFDOM* (2010); ISAIAH BERLIN, *FOUR ESSAYS ON LIBERTY* (1969).

often thought to be an integral part of this post-war legal consciousness, they too have been subjected to the same critique that rejects any kind of absolutism.³⁶⁷

Unrelenting commitment to absolutist legal rules may sometimes lead to human rights crises. But in a post-Cold War world, that twentieth century story is far from being the only possible road to oppression. Our story of a global crisis in migrant rights generated by affluent democracies around the world is largely one about the lack of such commitments; it is a story of the displacement of such commitments by international agreements and contracts governing flexible cooperative networks. Pragmatic policy solutions are operative in the continuous exposure of unauthorized migrants from developing countries to inhumane and degrading treatment and *refoulement*.

The inadequacy of transnationalism may disillusion those who have looked to human rights for a source of meaning and a justification for political engagement. As an afterthought to the main critical thrust of this Article, this last Part offers a typology of three possible ways to deal with this loss of meaning. Whether articulated or tacitly assumed, these have long existed in discussions among lawyers, policymakers, and citizens of the world. Each response adopts some of transnationalism's insights, as well as some of its critique. Each of the three responses retains the idea that law must allow a space for an *ethics of conviction*. As Weber knew, by leaving room for an ethics of conviction in our law, we might not only be saving the human rights project, but also saving ourselves.

None of the options is a fully satisfying way out of the predicament described above; enforcing human rights would, in many cases, still spell their further violation. At best, this typology can offer a few signposts that can help members of the human rights community make their choices. This typology includes: (1) *the return to sovereignty*, which reformulates human rights law as constitutional law (which could include treaty law); (2) *radical disaggregation*, which embraces self-help human rights remedies that migrants and refugees have pursued; and (3) *critical absolutism*, which asserts absolute human rights rules only when they are politically viable. These three options are discussed in more detail below. Though they all have certain merits, the last one appears to be the most compelling.

1. *Back to Sovereignty*

Slaughter and Koh did not recognize the dark sides of transnationalism, but other legal theorists did understand its potential normative pitfalls. One of them who responded early on to the transnationalist call for the disaggregation of sovereignty was Benedict Kingsbury. In a 1998 article entitled *Sovereignty and Inequality*, Kingsbury defended the older international legal

367. See generally Martti Koskeniemi, *The Effects of Rights on Political Culture*, in THE EU AND HUMAN RIGHTS 99 (Philip Alston ed., 1999); SAMUEL MOYN, THE LAST UTOPIA.

consciousness centered on sovereignty.³⁶⁸ Returning to the positivist legacy of sovereignty, Kingsbury argued that its disaggregation would increase global inequality. His critique focuses on transnationalism's movement from status to contract, which he believes disempowers populations in the developing world. The more traditional idea of sovereignty would allow citizens of impoverished countries fuller access to international legal processes through citizenship and political participation.³⁶⁹ Transnationalism, on the other hand, threatens to privatize politics in developing countries, while maintaining the public nature of sovereignty in developed ones.³⁷⁰ The call for a return to sovereignty that Kingsbury and others have voiced posits two related agendas in order to offset "disaggregated violence": one is democratizing transnational legal processes, and the other is reviving democratic accountability in the traditional form of constitutional norms.

Since this early critique, Kingsbury has led a workgroup at New York University Law School on international administrative law.³⁷¹ The group directly addresses the bifurcation of transnational judiciaries and executives, focusing on the democratization of transnational legal processes through analogies to domestic administrative law.³⁷² In so doing, it has been influential in articulating, for example, the disadvantages of opaque negotiations for bilateral agreements (highlighted above).³⁷³ It has also criticized the role

368. See generally Kingsbury, *Sovereignty and Inequality*, *supra* note 13. See also Kingsbury, *Legal Positivism as Normative Politics*, *supra* note 25.

369. Kingsbury, *Sovereignty and Inequality*, *supra* note 13, at 623.

370. See Kingsbury, Krich and Stewart, *supra* note 13, at 27 ("Thus, from the perspective of smaller developing countries, global regulatory institutions including the WTO, IMF, World Bank, and U.N. Security Council might already appear to be "administering" them at the bidding of industrialized countries, which are generally subject to far less intrusive external regulation.")

371. The term the group uses is *global* administrative law, but here I use the word "international" to signal openness to other scholarly engagements as well. "As a matter of provisional delineation, global administrative action is rulemaking, adjudications, and other decisions that are neither treaty-making nor simple dispute settlements between parties." This loose definition captures much of the activities this Article has attempted to conceptualize. See Kingsbury, Krich and Stewart, *supra* note 13, at 17. The steps domestic institutions have taken to impose checks on international organizations demonstrate the link between the idea of returning to sovereignty and the program of global administrative law. *Id.* at 31–33. And in the context of global administrative law, "an international order based on individual or economic rights may be too close to Western, liberal conceptions to be universally acceptable. Emphasizing the organizing role of state sovereignty may prove superior in coping with the challenge of diversity." *Id.* at 51. See also Benedict Kingsbury, *The Administrative Law Frontier in Global Governance*, 99 AM. SOC'Y INT'L L. PROC. 143 (2005).

372. See, e.g., Kingsbury, Krich and Stewart, *supra* note 13, at 16 (discussing the "accountability deficit" of Transnationalism, and proposing "two different types of responses: first, the attempted extension of domestic administrative law to intergovernmental regulatory decisions that affect a nation; and second, the development of new mechanisms of administrative law at the global level to address decisions and rules made within the intergovernmental regimes.")

373. B.S. Chimni has pointed to international organizations, and singled out UNHCR in particular in this context. See Chimni, *Globalisation, Humanitarianism and the Erosion of Refugee Protection* 16 (Refugee Studies Centre, Working Paper No. 3, 2000); Chimni, *The Meaning of Words and the Role of UNHCR in Voluntary Repatriation*, 5 INT'L J. REFUGEE L. 442 (1993); Chimni, *Globalization and Refugee Blues*, 8 JOURNAL OF REFUGEE STUDIES 298 (1995); B.S. Chimni, *The Geopolitics of Refugee Studies: A View from the South*, 11 JOURNAL OF REFUGEE STUDIES 350 (1998). See also Kingsbury, Krich and Stewart, *supra* note 13, at 21.

of technical expertise in international law making,³⁷⁴ which the Article alludes to above.

Having mapped out the workings of transnational networks, one can imagine what changes could be proposed in policymaking and enforcement networks from a perspective informed by administrative law. Frontex, for example, would look different if it would adhere to doctrines like “natural justice” in deportation or detention decisions.³⁷⁵ Add democratic public participation in negotiations on readmission agreements, and the result comes close to a re-aggregation of disaggregated networks in the form of democratic sovereignty.

This naturally leads to a response that counters transnationalism’s harms with a return to democratic constitutionalism. A return to sovereignty aims to “break free” from the dialectic process this Article has described. This means reintroducing the idea that human rights are constitutional rights. According to this approach, absolute human rights prohibitions can and should be heightened expressions of popular will. We would not expect democratic constituencies to agree to measures that violate human rights, if those rights would be defined as profoundly *their own*.³⁷⁶ In a recent illuminating book, French legal historian Patrick Weil showed how in the United States, the right to citizenship rose to the level of an absolute right through the development of constitutional doctrine.³⁷⁷

David Singh Grewal makes related arguments in his book *Network Power*.³⁷⁸ Grewal argues that rather than voluntary networks or “coalitions of the willing” (which this Article has referred to as “human rights networks”), the best way to ameliorate the injustices of disaggregated sovereignty is through “re-engagement” with sovereignty.³⁷⁹ For Grewal, national politics remain the preferable arena for making normative claims, even claims with regard to international legal regimes. Drawing on examples of the reassertion of national languages in the face of language loss³⁸⁰

374. See, e.g., Kingsbury, *The Administrative Law Frontier*, *supra* note 371, at 151.

375. Global administrative law “focuses in particular on administrative structures, on transparency, on participatory elements in the administrative procedure, on principles of reasoned decisionmaking, and on mechanisms of review.” Kingsbury, Krisch and Stewart, *supra* note 13 at 28. With respect to Frontex and other enforcement networks, this can be achieved through what they call “the bottom-up approach.” *Id.* at 55.

376. Evidence shows that popular sentiment is oftentimes against receiving asylum seekers, however. See, e.g., Duncan Graham, *Asylum Seekers, Welcome to Transit Indonesia Year*, THE JAKARTA POST (Aug. 2, 2012), <http://www.thejakartapost.com/news/2012/08/02/asylum-seekers-welcome-transit-indonesia-year.html> (“[C]ould these Australian relocation ideals work? The more important question is: Would Indonesia agree? The plans have been conceived in isolation without input from the Indonesian people. Even if the government agreed, at what political cost?”).

377. Patrick Weil, *From Conditional to Secured and Sovereign: the New Strategic Link Between the Citizen and the Nation-State in a Globalized World*, 9 INT. J. CONST. L. 615 (2011); PATRICK WEIL, *THE SOVEREIGN CITIZEN* (2012).

378. See generally GREWAL, *supra* note 36.

379. *Id.* at 191–92.

380. *Id.* at 170.

and the reestablishment of national monetary regimes, he emphasizes the potential for liberation that citizenship still has under conditions of globalization.³⁸¹

The various articulations of an approach calling for a return to sovereignty have common tenets. They assume that transnationalism can be understood almost exclusively through its emphasis on *contract* (or international bilateralism).³⁸² Rules such as the protection against inhumane treatment are considered to be extremely thin, having little or no bearing on a conversation about global power relations. In *Sovereignty and Inequality*, Kingsbury nods toward the role of human dignity in transnationalism, only to dismiss it.³⁸³

By emphasizing power relations, however, these criticisms are left in a difficult position. In order to produce more egalitarian programs, existing power relations must be overthrown. But those relations are precisely what rendered sovereignty so fragile for citizens of these countries in the first place. That is the case in the examples Grewal invokes; some groups simply can't *afford* to preserve their own languages or have their own independent economies. Highlighting human rights as *separate* from constitutional rights, on the other hand, is meant to make persuasive claims in the name of all human beings, including people that are simply too disempowered to challenge the structure of global power relations.³⁸⁴ In an imperfect world in which more people are displaced, the thin protections granted by the right to asylum or to protection from inhumane treatment are sometimes more important than one's citizenship. It is not by chance that Weil is able to

381. *Id.* at 191. See also Martti Koskenniemi, *What Use for Sovereignty Today?* 1 ASIAN J. INT'L L. 61, 69–70 (2011) (“But one of [sovereignty’s] meanings is the one it receives in polemical confrontations over the sense and direction of “globalization”, over the emergence of transnational networks of private interest, and the occupation of the spheres of politics by economic and technical vocabularies with their expert systems and embedded preferences. In such contexts sovereignty expresses frustration and anger about the diminishing spaces of collective re-imagining, creation and transformation of individual and group identities by what present themselves as the unavoidable necessities of a global modernity. Against those, sovereignty articulates the hope of experiencing the thrill of having one’s life in one’s own hands.”).

382. Thus, Grewal talks about “coalitions of the willing,” emphasizing volition rather than conviction. GREWAL, *supra* note 36, at 190.

383. Kingsbury, *Sovereignty and Inequality*, *supra* note 13, at 623 (“These different approaches all allow greater scope for the substance of international law to be influenced by ‘global public policy’. This policy spans managed trade, market liberalism, protection of intellectual property and wildlife, civil rights, public participation and a range of other values favoured in the political West. It encompasses a commitment to some basic equality among human beings, but it is not at present a strongly egalitarian policy. The commitments of the various advocates differ, but the aggregate of forces pushing to shift legal thought from a normative-status view of sovereignty to a functional-contractual view are not at present accompanied by a corresponding impetus to ameliorate and manage problems of inequality.”).

384. That is why pleas like B.S. Chimni’s may sound hopeless. Cf. Chimni, *Globalisation, Humanitarianism*, *supra* note 373, at 16 (“[T]he humanitarian community needs to work towards getting the Northern states to change their non-entrée policies. Today, there is a passive acceptance of the erosion of core principles of refugee protection and rights in the name of spurious realism. While there is no wishing away the difficulties in altering the course of Northern states, there is no alternative either to educating and mobilising people against the policies of exclusion.”) See also Kingsbury, Krisch and Stewart, *supra* note 13, at 52 (“In order to address the central problems of accountability, global administrative law might have to devise ways to empower and include people and their representatives from the South.”).

show the rise of an absolute right to citizenship within U.S. constitutional law.³⁸⁵ Would the same process be possible in Haiti?

A return to sovereignty aspires to a heroic obliteration of the *dialectic of transnationalism*. As David Kennedy pointed out, however, a call for a return to sovereignty may be meaningless; after all, for developed states, the disaggregation of sovereignty is not a negation of sovereignty but rather a way of realizing it.³⁸⁶ Though seemingly liberating, a program of returning to sovereignty therefore does not give much of an answer to the most pressing question raised by unauthorized migrants and refugees: What are the remedies that are available for those whose citizenship simply grants them no rights at all?

2. Radical Disaggregation

In 1986, Robert Keohane had already anticipated many of the theoretical underpinnings of Slaughter's disaggregated sovereignty. Keohane wrote: "The anarchic structure of world politics does mean . . . that the achievement of cooperation can depend neither on deference to hierarchical authority nor on centralized enforcement. On the contrary, if cooperation is to emerge, whatever produces it must be consistent with the principles of sovereignty and self-help."³⁸⁷ But if even sovereignty in the 1990s came to be understood as un-hierarchical and decentralized, principles of "sovereignty and self-help" must not only apply to states. As the example of the EU shows, these principles can go "all the way up," to international organizations;³⁸⁸ but with regard to the rights of migrants and refugees, principles of sovereignty and self-help can also go "all the way down," to the actions of individuals.³⁸⁹ Stopping at any particular level of the ladder can be only a strategic and political choice; it is never a natural or analytically necessary choice.

"Radical disaggregation" therefore embraces transnationalism's normative aspirations, taking its networked structure to the logical extreme. It aims to disaggregate global power relations "all the way down," abolishing all distinctions between private and public power. While proponents of a "return to sovereignty" argue that we have seen too much disaggregation, proponents of this position say the problem is that disaggregation has not

385. See generally PATRICK WEIL, *THE SOVEREIGN CITIZEN: DENATURALIZATION AND THE ORIGINS OF THE AMERICAN REPUBLIC* (2012).

386. See generally James Der Derian, Michael W. Doyle, Jack L. Snyder and David Kennedy, *How Should Sovereignty be Defended?* in *POLITICS WITHOUT SOVEREIGNTY* 187 (Christopher J. Bickerton, Philip Cunliffe and Alexander Gourevitch eds., 2007).

387. Robert O. Keohane, *Reciprocity in International Relations*, 40 *INTERNATIONAL ORGANIZATION* 1, 1 (1986).

388. See Joined Cases C-402/05 & C-415/05, *Kadi v. Council of the European Union*, 2005 E.C.R. II-3533.

389. Roberto Unger's experimentalism can be understood as one such proposal. See generally ROBERTO UNGER, *WHAT SHOULD LEGAL ANALYSIS BECOME?* (1996).

gone far enough.³⁹⁰ *Radical disaggregation* takes the “anarchic structure” Keohane wrote about and claims it as its own.³⁹¹ It is the logical extension of the transnationalism Slaughter and Koh espoused, even if they did not anticipate it.

This approach has already been hinted at above, in the discussion of transnational human rights networks. Looking back at twenty years of transnationalism, one should ask whether there is anything in world politics other than endless intertwining networks. Slaughter’s answer was negative, yet she thought that transnationalism could have normative content. For that to be true, both a standard transcendent to politics and (presumably) an institution that upholds it are required. As we have seen, human rights rules furnished the former, but transnational courts failed to serve as the latter. *Radical disaggregation* holds that while human rights should be defended, this task is the burden of all networks at once. Transnational judiciaries are only one type of network among many. But how are we to judge whether a particular condition is an enforcement of rights or a violation of them?³⁹²

Like a return to sovereignty, *radical disaggregation* is an attempt to break free from the dialectic structure of transnationalism. But for people who adopt this approach, realizing the relentless power of disaggregation does not allow for a return to sovereignty. Reconstructing the democratic ideal of popular will as a privileged normative standpoint may no longer make sense. What remains of the question as to whether something violates or enforces a right is, above all else, a matter of one’s own judgment.³⁹³ Take a good look at the worst human rights violations you have access to, and decide which conditions are too evil for any human being to suffer; rely on yourself to know them when you see them. In a world in which no court or sovereign state has a real monopoly on violence—or on answering a question about the scope of absolute rights—the only tribunal that remains is that of the mind.

In the migration context, *radical disaggregation* is particularly interesting. It invites us to recognize that, overwhelmingly, not only governance but the movement of migrants and refugees too has been organized in networks.³⁹⁴

390. See, e.g., Rosa Ehrenreich Brooks, *Failed States, or the State as Failure?* 72 U. CHI. L. REV. 1159, 1192 (2005) (arguing that “nonstate” arrangements, including administration by a regional body such as the EU, the African Union, or the UN, are sometimes preferable to statehood for “failed states”).

391. From the start, a global anarchy and the hierarchies it creates were emphasized in transnational legal theory. Slaughter adopts in this context the idea of “negarchy,” originally coined by Daniel Deudney. See Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT’L L., 503, 535 (1995); Daniel Deudney, *The Philadelphian System: Sovereignty, Arms Control, and the Balance of Power in the American States-Union, circa 1781–1861*, 49 INT’L ORG. 191 (1995).

392. See also David Kennedy, *The Forgotten Politics of International Governance*, 2 E.H.R.L.R. 117 (2001).

393. Alvarez remarks on the way this individualism already exists in Slaughter’s theory. As he states it, Slaughter quite simply puts “individuals (along with other groups in society) in the place realists reserved for states.” However, as he emphasizes, Slaughter does not go all the way—her theory only “comes close to espousing liberalism freed of unitary state actors.” Alvarez, *supra* note 3, at 239.

394. Anthropologists and sociologists have shown this most effectively. See, e.g., SASKIA SASSEN, *TERRITORY, AUTHORITY, RIGHTS: FROM MEDIEVAL TO GLOBAL ASSEMBLAGES* 291–93 (2006); HANS LUCHT, *DARKNESS BEFORE DAYBREAK: AFRICAN MIGRANTS LIVING ON THE MARGINS IN SOUTHERN*

Like governance networks, migration networks are intertwined with other networks: smuggling and trafficking networks on the one hand, and policymaking and enforcement networks on the other.³⁹⁵ In a comprehensive account of the relevant networks, even Western Union should be considered. And if, as Koh says, “[i]nternational human rights law is enforced . . . not just by nation-states . . . but by people like us,”³⁹⁶ there is no analytic reason to think that the “us” includes only activists whose rights are relatively protected. To the contrary, it becomes necessary to consider that migrant and refugee networks, whether acting legally or illegally under domestic law, may be enforcing the human rights of their members. Think, in this context, of an Iranian asylum seeker who, during a recent criminal trial against them in an Australian court, thanked two Indonesian people smugglers for saving his family.³⁹⁷ If state violence is disaggregated, there is no longer any a priori distinction between state violence and the violence wielded by smuggling networks in terms of who enforces and who violates human rights. Realizing that all of these networks are ultimately bundled up in one web demands that we consider unauthorized migrants not merely as objects of human rights policy. They are actors participating in generating it.

In addition to the self-help of migrants and refugees seeking to enforce their own rights, think also of the refugees who may fall in *your own* personal jurisdiction. If you will not help enforce the rights of a refugee, it may be

ITALY TODAY (2012); Naor Ben-Yehoyada, *Mediterranean, Becoming and Unbecoming: Fishing, Smuggling, and Region Formation between Sicily and Tunisia since WWII* (March 22, 2011) (unpublished Ph.D. dissertation, Harvard Univ.).

395. Smuggling is particularly important in this context, because while it victimized migrants and refugees, it also at times supports them, and hence *enforces their rights*. Here is one quotation from Frontex’s website, reflecting how one rights group in Greece feels its efforts are in fact co-opted by smugglers: “‘We have become a tool of the smugglers and part of this game,’ EUObserver quoted Kenneth Brant Hansen from the Greek Council for Refugees in Athens as saying. ‘Of course we are not happy about this situation; on the other hand we cannot refuse to reunite families, especially when it involves minor children,’ he continued, going on to explain that the men involved were ‘professional Afghan smugglers.’” See *Four Seasons: The Changing Seasons of Migration*, FRONTEx, <http://frontex.europa.eu/feature-stories/four-seasons-Q2GtQL>. On the other hand, states too are often beneficiaries of smuggling networks, which compose an informal but important part of their economies while transgressing their laws. Hence, Simon Harvey can ask the “simple” question: “is smuggling oppositional to law?” Simon Harvey, *Smuggling the State into Transgression*, 2 *STATIC* 1, 2 (2006). As Harvey points out, it is “not just petrol, electronics and guns that are smuggled but also identity and voter registration cards, high school and university diplomas, and birth certificates: there is a thriving trade in identity shifting.” *Id.* at 5. The latter, as Frontex’s “language analysis” exposes, is particularly important for those hopelessly wanting to leave their own countries. Thus, “smuggling produces an organization that doesn’t so much transgress state power as contests its criteria of regulation.” *Id.* See also JANET MCGAFFEY, *THE REAL ECONOMY OF ZAIRE* (1991); Coluccello and Massey, *supra* note 102, at 81–82 (emphasizing the roles of migrant choices, as well as the relevance of age-old customary norms in the shaping of smuggling networks).

396. Koh, *supra* note 33, at 1417.

397. Rebecca Puddy, *Asylum-Seeker Thanks Accused at People-Smuggling Trial for Saving his Family*, THE AUSTRALIAN (Aug. 9, 2012), <http://www.theaustralian.com.au/national-affairs/immigration/asylum-seeker-thanks-accused-in-people-smuggling-trial-for-saving-his-family/story-fn9hmlgu-1226446257324>.

the case that no court or executive agency ever will. This is the kind of situation that rescuers of Jews during the Nazi regime in Germany had confronted.

The trouble with radical disaggregation is that, just like returning to sovereignty, it relinquishes the hope of making a universal normative claim. Individuals and social movements that forward their own interpretations of “human rights” do not purport to have binding force on others. An ongoing struggle between the strong and the weak is what remains. The weak are bound to lose.

3. *Critical absolutism*

Human rights practitioners and activists, well aware of the promises as well as the limitations of transnationalism, provide yet a third perspective. Rather than trying to eliminate or break free from transnationalism’s dynamics, many have attempted to work within its constraints. This means intervening in them strategically, while insisting—whenever intervention does occur—on a realization of the universal aspiration of human rights.

This strategy is a more modest version of *transnational legal process*. While responding to the perils of the transnational condition, it rejects the two other approaches proposed above. It stems from a belief that it is possible to study the structural blind spots of transnational judgments like *M.S.S.*, *Hirsi*, or *M-70/2011*, address them in ways that will successfully articulate a universal claim, and remain politically viable at the same time.³⁹⁸

Jurisdiction limitations necessarily prevent courts from introducing a universal revolution. But the fact that human rights law introduces legal obligations toward *all humans* is not to be taken lightly. Human rights can be useful in pushing courts and other networks to establish provisional, temporary articulations of an *ethics of conviction*. This can happen when precarious coordination is established between executive and judicial networks.

The basic premise of this approach is that “human rights,” at least as an abstract concept, are uncontroversial within transnational networks of judiciaries and executives alike. The idea that a finite list of rights is defined in absolute terms is something no one within these networks can openly refute.³⁹⁹ Even with respect to those who justify torture under certain circumstances, presumably there are certain policies they would *never* deem legal, for example, genocide, slavery, or the extra-judicial killing of non-citizens outside of a security or war-related context.

398. *Transnational public law litigation* is premised on the belief that “judicial victories will force amelioration of the harsh executive position” and that “legitimation of executive action” will only occur if courts “rebuff” transnational public lawsuits. Koh, *supra* note 62, at 1009. Recognizing *tragic dialectic repletion*, on the other hand, means considering precisely how such victories are often times part and parcel of such “legitimation” processes.

399. Think of the perhaps more familiar arguments about torture in the context of United States security; the position that torture is defined narrowly is heard much more often than the alternative idea that torture should be permitted.

This agreement on a premise that absolute prohibitions do exist (regardless of whether there is agreement on what they are) allows human rights to serve as a stepping-stone for discussion: what is the scope of such prohibitions? And which forum can adjudicate their violation? Once access is granted to corridors of power—whether through courts or other branches—there are always opportunities for persuasion, and there is always a possibility for surprise. As described above, however, there is also a second step in which violations can reappear somewhere else across the network;⁴⁰⁰ and in which a surprising success story can provoke an even more surprising backlash. *Critical absolutism* tries to take into account the possibility of both types of surprises.

Human rights law offers the language of conviction and the language of responsibility in one toolkit. In the first phase, we might try to foresee when pushing a court or another institution to uphold human rights will have, overall, results that may be helpful for those we aim to help. This phase is characterized by cost-benefit reasoning and a cold, realistic view toward the incentives of actors in the real world. It is an application of an *ethics of responsibility*.⁴⁰¹

Once cases are selected, particular aggregates of networks—judicial, executive, or other—may still be in the position both to recognize claims of conviction and to act upon them. The universal moral claim of human rights is articulated in order to create a disturbance in the ways in which violations are reproduced by networks.⁴⁰² The *dialectic of transnationalism*, which has so far looked like a gradual unfolding of a human rights crisis, may for a moment be reversed; with the mediation of the right transnational institution at the right time, it may, temporarily, transform into the unfolding of moral truth. If one were to challenge, for example, the bifurcation of executive and judicial networks upon which Frontex is premised, it would be necessary not only to point out its involvement in absolutely prohibited actions; before that, it would be important to consider what the political ramifications of a positive judgment would be, and to carefully decide how, where, and when to go forward.

400. This sense of tragedy does appear to some extent in Koh's descriptions of *transnational public law litigation*, but my proposal here is to more fully theorize it into a general account of the transnational condition. Koh's more personal account of tragedy is expressed in paragraphs like this one: "As our plane left Guantanamo after each visit, I had silently asked that I would never have to go back again But now, more than a year later, tents housing more than 16,000 Haitians stretched as far as the eye could see on the Guantanamo airstrip. As the plane landed, my head filled with grim thoughts of *Sisyphus and his boulder, back at the bottom of the mountain*." Koh, *supra* note 62, at 1007–08 (emphasis added).

401. David Kennedy believes that such cost-benefit reasoning should be all that human rights should offer. By endorsing an ethics of responsibility all the way through, he relinquishes human rights as an ethics of conviction. See David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 15 HARV. HUM. RTS. J. 99, 102 (2001).

402. Cf. Mann, *supra* note 55 (proposing two-tiered test with respect to international criminal jurisdiction).

But there is also another *ironic* form in which this juxtaposition of conviction and responsibility can be employed politically. Athenian lawyer Elektra Koutra initiated an amusing example of such irony, illustrating some of the most poignant aspects of *critical absolutism*. After *M.S.S.* was released, Koutra visited all of Athens's major European embassies with her clients, asylum seekers from Afghanistan. Once in the embassies, they argued that the asylum seekers had the right to stay there until the respective countries processed their asylum claims.⁴⁰³ The action relies on the old international legal custom according to which embassies are outside of the jurisdiction of the state they are in and can therefore be places of asylum.⁴⁰⁴

When Koutra argued that sending her clients out of the embassies would potentially expose them to inhumane and degrading treatment, she challenged the bifurcation between judiciaries and executives in Europe. If European countries "used" Greece for the purposes of border enforcement (with the Dublin II Regulation), asylum seekers should also have access to European countries. This challenge would not have been possible if it were not for the way that ECtHR promoted disaggregation in *M.S.S.* But it also demanded an additional act of imagination.⁴⁰⁵

If, as one commentator recently said, what is sometimes most distressing in the U.S. immigration debate is "the failure of any participant in the argument, justice or advocate for either side, to affirm the simple humanity of Arizona's several hundred thousand undocumented residents,"⁴⁰⁶ that can only be because *there is* room for arguments stemming from obligations toward all humans in the United States, too.

Transnational executives reiterate that they are entitled to close borders so long as they protect human rights. The approach that this Article contemplates, however, turns on the premise that in current global conditions, that task just might be impossible. It therefore identifies opportunities for challenging policymakers, leaving them with two options: either treat people as humans and risk changing who you are (in terms of the composition of the population) or give up human rights and risk changing who you are (in terms of constitutive commitments). The first path is the one *critical absolutism* tries to lead us in. The second is the path transnationalism took in the history outlined above, from *Sale* to *M70/2011*. A very thin line cuts between them.

403. See *EU Embassies Activism for Asylum Seekers in Athens Greece 26/01/11*, YOUTUBE, <http://www.youtube.com/watch?v=0JtweUbrAhY> (Jan. 30, 2011).

404. This is still a matter of doctrinal debate. See generally Gregor Noll, *Seeking Asylum at Embassies: A Right to Entry Under International Law?* 17 INT'L J. REFUGEE L. 542 (2005).

405. The Afghan asylum seekers were sent out of the embassies, but their asylum requests were accepted. See *EU Embassies Activism for Asylum Seekers in Athens Greece 26/01/11*, *supra* note 403. Although an attempt like this is unlikely to bear fruit in terms of remedies for the clients, it is effective in exposing the inconsistencies between coexisting governmental networks.

406. Linda Greenhouse, *The Lower Floor*, N.Y. TIMES (May 2, 2012).

This existential challenge is not available in the vocabularies of a “return to sovereignty” or “radical disaggregation.” These approaches abrogate a claim for universality by positing the will and judgment of particular communities as the final benchmark for what “human rights” might mean. Practitioners provoking this challenge take a risk. They rely on both options as being equally undesirable.

Indeed, this phenomenology of danger is an inherent part of an *ethics of conviction*. It is implicit in the way ECtHR interpreted absolute prohibitions under Article 3 ECHR: “even in the event of a public emergency threatening the life of the nation,” no justification, exception or balancing test is permitted.⁴⁰⁷ The relevant doctrine holds that a law-abiding nation should die—whatever that may mean—rather than resort to inhumane practices. *Critical absolutism* tries to push nations to prove the veracity of such promises, while keeping in mind how incongruent such a promise is with the self-preserving nature of political power.

Rules that one must die rather than violate are familiar from religious contexts.⁴⁰⁸ This imagination of absolute imperatives is planted in the midst of a transnational legal structure that—as Jessup knew—collapses the private/public and domestic/international divides.⁴⁰⁹ Within the endless movement in an intertwined network of treaties, agreements, and institutions, *critical absolutism* requires us to stop. It upholds rules that are thought to be at the top of a normative pyramid, just to jump from there right back into the thoroughly networked, globalized politics, which is the only politics we now have. It aims to provide a point of view from which one can critically assess the structure as a whole, while still acting in it.

VII. CONCLUSION

Contrary to what Koh thought in the wake of *Sale*, transnational law has made it more difficult, rather than easier, to adhere to Blackmun’s call and to hear the voices of refugees. Contrary to Slaughter’s idea of harmonious global cooperation, transnational law has grown into a headless body, many organs of which it is almost impossible to see; they are webs of overlapping

407. Cf. Kahn, *supra* note 52, at 274–75 (explaining that in Abraham Lincoln’s Gettysburg Address, “The life of the nation—the popular sovereign—is maintained through the death of the individual.”) See also PAUL KAHN, *PUTTING LIBERALISM IN ITS PLACE* (2008) (providing a more general theory of sacrifice in the context of American constitutional culture, where the demand of self-sacrifice is often the way in which law bestows meaning to the life of those bound by it.)

408. In the Jewish religion, these are rules that are backed by the command “Yehareg Ve’Al Yaavor” (One should “get killed rather than transgress”). See MOSHE HALBERTAL, *ON SACRIFICE* 58 (2012). See also Martti Koskeniemi, *The Fate of Public International Law: Between Technique and Politics*, 70(1) *MOD. L. REV.* 1, 30 (2007) (“I often think of international law as a kind of secular faith. When powerful states engage in imperial wars, globalisation dislocates communities or transnational companies wreck havoc on the environment, and where national governments show themselves corrupt or ineffective, one often hears an appeal to international law.”).

409. JESSUP, *supra* note 21, at 2, 26.

jurisdictions and contradictory obligations. At the fault lines between the developing and the developed world, this body of law produces a global human rights crisis, while proclaiming a commitment to human rights.

The distinction between domestic and international law has long been displaced, and visions of a world court or constitution remain as far as ever from realization. In this context, transnationalism has adopted a thoroughly pragmatist orientation. By doing that, it relinquishes the idea that some law should rest on a universal standard. With no identifiable hierarchy between transnational branches of government, it may seem that there is no normative measure for assessing a commitment to human rights.

If there is a normative measure for the most fundamental commitments of law, it can only be one that would apply equally to all humans. From 1993 to 2013, unauthorized migrants and refugees have embodied such a measure. Their continued demand to be heard confronts policymakers, judges, and citizens of the world with an unavoidable question: what are the rights that accrue to all humans? With that, they redefine human rights law as a global *Grundnorm*.⁴¹⁰

Critical absolutism, the approach identified in this Article as a way of upholding such a global norm, has complicated relationships with the two other responses to the failures of transnationalism: the *return to sovereignty* and *radical disaggregation*. On the one hand, *critical absolutism* might look like one institutional articulation of radical disaggregation; it is only because of processes of disaggregation that one can voice claims beyond the purview of political membership. On the other hand, it might seem parasitic upon a return to sovereignty: only when absolute rules comport with constitutional rules and popular political commitments will the auspicious moments for change occur. Only then will such interventions have real effects on the ground, and grant remedies to those who need them.

Both of these points are valid. *Critical absolutism* is, among other things, a realization that in the contemporary moment we may very well be caught between these two options.

410. On the apparent lack of a *Grundnorm* in contemporary international law, see generally Andreas Fischer-Lescano and Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT'L L. 999 (2004).

