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INTRODUCTION

Globalization and international ("global") governance are not new to international law. International lawyers have long recognized that the state is not impermeable and that the "intensification of world wide social relations . . . links distant localities in such a way that local happenings are shaped by events occurring many miles away and vice versa".[1] In a way, it is precisely the existence of territorially bounded, formally independent states in a transnational, interdependent world that defines the working field of international law. Similarly, the emergence of structures of international governance has already found its place in international parlance. Before the term "*governance without government*" was coined,[2] the significance of formal and informal policy networks, international organizations, non-governmental organizations, etc. was acknowledged in the study of international law and international relations.

Still, globalization and international governance constantly pose new questions and challenges to international law. This constant challenge can only be understood if one keeps in mind that globalization and international governance are not simple and linear developments, but rather complex and contradictory processes in which "homogenization goes hand in hand with differentiation, integration with fragmentation, centralization with decentralization, universalization with particularization".[3] Networks of international governance may thus take different forms and may focus on different places, areas and periods. An example of this can be found in Part IV of this book, where the role of non-governmental organizations in different periods and in different areas (international criminal law, environmental law and cyberspace) is examined. It is a truism that international law shapes and is being shaped by globalization and international governance; the interesting question is how this takes place in different times, places and areas.

1. A. Giddens, *The Consequences of Modernity* (Cambridge, Polity Press, 1990), p. 64.
2. J.N. Rosenau, E.-O. Czempiel (eds.), *Governance without Government: Order and Change in World Politics* (Cambridge, Cambridge University Press, 1992).
3. Susan Marks, *The Riddle of All Constitutions: International Law, Democracy and the Critique of Ideology* (Oxford, Oxford University Press, 2000), p. 78.

One of the ways in which international law is affected by the complex and contradictory nature of international governance is through the emergence of several overlapping and competing normative orders. Adopting the terminology of Hedley Bull, several scholars have raised the question whether contemporary international society can be characterized in terms of "new medievalism"; that is: in terms of a system where each ruler has to share authority with others and which is characterized by overlapping authority and multiple loyalty.[4] In more legal terms, this raises questions of "legal pluralism"; the situation where two or more normative orders overlap, supplement and compete with each other. In international law, the emergence of structures of international governance has given new impetus to some age-old debates. It has raised, for example, questions regarding the delimitation of the powers of international organizations and their relationship to overlapping legal orders (e.g. the domestic legal order). Moreover, it has raised questions concerning the role of the "international community": could this entity or idea take over the role previously played by the *imperium* and the *sacerdotium*, or should we be suspicious of anyone invoking universal terms like humanity or international community? Is the international community the authority that can uphold some basic universal values or is, in Carl Schimitt´s words, "whoever invokes humanity . . . a cheater"?[5]

Recently, the problem of legal pluralism has emerged in the context of the proliferation of international tribunals. Although the tribunals are generally welcomed as a further step in the development of the international rule of law, international lawyers also express their concerns about the possible adverse consequences for the unity and coherence of international law. At the practical level, this has led to discussions about the proper role of lawyers in dealing with competing norms and competences. Partly, this debate is an echo of some traditional debates in legal theory: how wide is the discretion of tribunals in balancing competing norms, what role should general principles and institutional morality play in legal decision-making,

4. H. Bull, *The Anarchical Society: A Study of Order in World Politics* (London and Basingstoke, Macmillan, 1977), p. 254. For recent applications of the concept see the contribution by Friedrichs in this volume (Chapter 1) and T. Akihiko, *The New Middle Age: the World System in the 21th Century* (Tokyo, 2002).

5. C. Schmitt, *Glossarium: Aufzeichnungen der Jahre 1947–1951* (Berlin, Duncker & Humblot, 1991). *Cf.* Panilo Zolo, *Invoking Humanity: War, Law and Global Order* (London and New York, Continuum International, 2000).

how to uphold the distinction between law and politics in a situation where judges need to apply underdetermined and conflicting norms?

Phenomena like globalization and international governance also give new impulses to another age-old debate: the debate on the proper function and meaning of state sovereignty in international law. It would be a great oversimplification to argue that globalization and international governance on the one hand and state sovereignty on the other hand are engaged in a *zero-sum* game; as if the rise of transborder transactions and non-state based forms of governance would automatically lead to a decrease of state sovereignty and *vice versa*. Rather than being a fixed state of affairs or a fixed norm, state sovereignty is an institution whose function and meaning are related to the development of international society (and international law). Changes in international society – e.g. the recognition of self-determination, different attitudes towards the use of force or the rise of international criminal law – are therefore reflected in the conception of sovereignty prevalent in a certain period. Rather than being a *zero-sum* game, there is a complex interpretative practice in which the discourse on global governance and the discourse on sovereign equality take place simultaneously. This creates new images of sovereignty and presses upon the academic community to rethink the political, legal and moral foundations of that concept.

This book discusses the above-mentioned topics from a multidisciplinary perspective. It combines insights from international relations theory, legal theory and international law in an attempt to clarify some issues of globalization, international governance and international law. The book has no pretension of being complete. It does hope, however, to cover some of the most important topics related to international governance and international law: the methodology and concepts used in the debate on globalization and international governance (Part I), the role of state sovereignty in contemporary international society (Part II), the role and position of international organizations (Part III), and the role of non-governmental organizations (Part IV).

Utrecht, October 2003 *Ige F. Dekker & Wouter G. Werner*

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This book has its origins in a *Round Table on Governance and International Legal Theory*, held at the Faculty of Law of the University of Utrecht from 2 till 4 July 2002. The main aim of the Round Table was to stimulate an ongoing discussion between scholars who are interested in theoretical aspects of international law and international politics. In pursuance of a call for papers, some thirty authors sent in a proposal, of which the convener of this Round Table – Wouter G. Werner – invited fifteen authors to send in their paper. Since the aim of the Round Table was to stimulate discussion about the papers (and not to be a forum of presentations), speakers were required to send in their papers in advance and to hold only short introductions to their papers. For each paper about one hour was available for discussion.

The editors would like to thank the twenty-two participants for their contributions to the very lively discussions at the Round Table. A report of the discussions was written by professor Catherine Kessedjian and published in the 4 *International Law Forum du droit international*, 2002, 176–179.

Of the fifteen papers discussed at the Round Table, thirteen are published in this volume. Before writing their definitive texts, the contributors had the opportunity to adapt their papers on the basis of the discussions held during the Round Table. The editors asked other scholars, who could not participate in the Round Table, to give their comments on certain papers. In this respect they would like to express their appreciation in particular to Deirdre Curtin, Harm Dotinga, Nigel White, Jaap de Wilde, and Bärbel Ziegler-Jung.

The Round Table formed part of the *6th Hague Joint Conference on Contemporary Issues of International Law: From Government to Governance? The Growing Impact of Non-State Actors on the International and European Legal System*, organized by the Stichting "The Hague Joint Conferences on International Law", the American Society of International Law, the Nederlandse Vereniging voor Internationaal Recht and the T.M.C. Asser Instituut. The conference was originally planned to be held in July 2002 but the conference was postponed to July 2003. However, it was decided to go through with the *Round Table on Governance and International Legal Theory* in 2002. A second meeting of the Round

Table was held from 1–3 July 2003, also at the Faculty of Law of the University of Utrecht, just before the 6th Hague Joint Conference, which took place from 3–5 July 2003, at the Steigenberger Kurhaus Hotel, The Hague, The Netherlands. The papers discussed during the second meeting will be published in the proceedings of the 6th Hague Joint Conference (forthcoming).

The editors would like to express their gratitude to the sponsors of the Round Table: the Stichting "The Hague Joint Conferences on International Law", and the Faculty of Law of the University of Utrecht, in particular the G.J. Wiarda Institute and the International Law Institute. Their support – financially and otherwise – made it possible that the Round Table took place in one of the historic buildings in the centre of Utrecht and that the discussions could go on during lunches and dinners. Their support contributed very much to the scientific success of the meeting and the publication of this book.

The editors also warm-heartedly thank Amy Wall, student-assistant at the International Law Institute of the University of Utrecht, whose patient assistance in the preparation of this book has been indispensable. Last but not least, we greatly appreciate the support given by Brill Academic Publishers for taking care of the work involved in this publication.

Utrecht, October 2003 *The Editors*

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LIST OF ABBREVIATIONS

AB	Appellate Body of World Trade Organizations
AJIL	American Journal of International Law
ASIL	American Society of International Law
BYIL	British Yearbook of International Law
CICC	Coalition for an International Criminal Court
COE	Council of Europe
CONGO	Conference of Non-governmental Organizations in Consultative Status with the United Nations
Doc.	Document
DSB	Dispute Settlement Body of the World Trade Organization
DSS	Dispute Settlement System of the World Trade Organization
DSU	Dispute Settlement Understanding of the World Trade Organization
EC	European Community
ECJ	European Court of Justice
EJIL	European Journal of International Law
EU	European Union
EuroISPA	European Internet Service Providers Association
FCCC	United Nations Framework Convention on Climate Change
GA	United Nations General Assembly
GATS	General Agreement on Trade in Services
GATT	General Agreement on Trade and Tariffs
GC	General Council
HRW	Human Rights Watch
ICC	International Criminal Court
ICJ	International Court of Justice
ICJ Reports	International Court of Justice Reports of Judgments, Advisory Opinions and Orders
ICLEI	International Coalition for Local Environmental Initiatives
ICTR	International Criminal Court for Rwanda
ICTY	International Criminal Court for the Former Yugoslavia
IGO	International Governmental Organization
ILA	International Law Association
ILC	United Nations International Law Commission

ILC Yearbook	Yearbook of the United Nations International Law Commission
ILM	International Legal Materials
IMF	International Monetary Fund
IPCC	Inter-governmental Panel on Climate Change
ISP	Internet Service Provider
ISPA	Internet Service Provider Association
LGO	Local Government Organization
LNTS	League of Nations Treaty Series
MC	Ministerial Conference
NATO	North Atlantic Treaty Organization
NGO	Non-governmental organization
NILR	Netherlands International Law Review
NPWJ	No Peace Without Justice
NYIL	Netherlands Yearbook of International Law
PCIJ	Permanent Court of International Justice
PrepCom	Preparatory Committee
RC	Receuil des Cours de l'Académie de droit international de La Haye
Res.	Resolution
SC	United Nations Security Council
SCM	Subsidies and Countervailing Measures Agreement
SUBSTA	Subsidiary Body on Scientific and Technological Advice
TEC	Treaty on the Establishment of the European Community
TEU	Treaty on European Union
TRIPS	Agreement on Trade Related Aspects of Intellectual Property Rights
WTO	World Trade Organization
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNTS	United Nations Treaty Series
US	United States
YUN	Yearbook of the United Nations
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

PART ONE

METHODOLOGY

CHAPTER ONE

THE NEOMEDIEVAL RENAISSANCE: GLOBAL GOVERNANCE AND INTERNATIONAL LAW IN THE NEW MIDDLE AGES

Jörg Friedrichs*

1. *Introduction*

Over the last ten years or so, *new medievalism* and *global governance* have become stylish expressions to characterize the ongoing transfiguration of the socio-cultural, socio-political and socio-economic world order. In social science in general, and in political science in particular, there has been a stream of publications about global governance and new medievalism, which are said to involve the local, national, regional, and global level.

After the modern era of sovereign statehood, as the story about new medievalism goes, we are experiencing a return to a situation where several authorities have overlapping and competing competencies, without the existence of a clear body of rules determining which set of prescriptions takes precedence over the rest. Legal pluralism is said to be the logical corollary of this situation. If that is correct, it is indeed tempting to go back to the pre-modern era in order to develop the conceptual equipment necessary for a better diagnosis of macro-sociological change in our highly complex and supposedly post-modern historical conjuncture. Harking back to earlier speculations in the 1960s and 1970s, social scientists and public writers have recently recovered new medievalism as a suggestive metaphor for of the apparent antinomies in the post-Westphalian world.[1]

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1. A. Wolfers, *Discord and Collaboration: Essays on International Politics* (Baltimore, John Hopkins University Press, 1962), pp. 141–142; H. Bull, *The Anarchical Society: A Study of Order in World Politics* (London, Macmillan, 1977), pp. 254–255, pp. 264–276; H. Bull, "The State's Positive Role in World Affairs", 108 *World Affairs*, 1979, 111–123; P. Hassner, "Nous Entrons dans un Nouveau Moyen Age", *Le Monde*, 27 October 1992, 2; G. Riva, M. Ventura, *Jugoslavia il Nuovo Medioevo: La guerra infinita e tutti i*

Another catchword for the emergence of a post-Westphalian world is global governance. Together with new medievalism, global governance sets another challenge to the traditional understanding of international relations as *politics among nations*. It contains the promise that, if successful, the cosmopolitan commitment of world citizens will rescue the planet from the threats posed by the crisis of government and by the negative externalities of the capitalist market economy. At any level, from the local to the global, and from the civic to the governmental, people are called to take over responsibility and to deal with the planet's most urgent problems of collective action. Over the last decade, speculations about the advent of global governance have become a cottage industry among social and political scientists.[2]

suoi perché (Milano, Mursia, 1992); A. Minc, *Le Nouveau Moyen Âge* (Paris, Gallimard, 1993); R.D. Kaplan, "The Coming Anarchy", 273 *The Atlantic Monthly*, No. 2, 1994, 44–76; D. Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Stanford, University Press, 1995), 137–140; A. Linklater, *The Transformation of Political Community: Ethical Foundations of the Post-Westphalian Era* (Columbia, University of South Carolina Press, 1998), pp. 193–198; P. Cerny, "Neomedievalism, Civil War and the New Security Dilemma: Globalisation as Durable Disorder", 1 *Civil Wars*, No. 1, 1998, 36–64; S.J. Kobrin, "Neomedievalism and the Postmodern Digital World Economy", in A. Prakash, J.A. Hart (eds.), *Globalization and Governance* (New York, Routledge, 1999), pp. 165–187; N.J. Rengger, "European Communities in a Neo-Medieval Global Polity: The Dilemmas of Fairyland?", in M. Kelstrup, M.C. Williams (eds.), *International Relations Theory and the Politics of European Integration: Power, Security and Community* (London, Routledge, 2000), pp. 51–71; R. Gilpin, *Global Political Economy: Understanding the International Economic Order* (Princeton, Univ. Pr., 2001), 264–276; J. Friedrichs, "The Meaning of New Medievalism", 7 *European Journal of International Relations*, No. 4, 2001, 475–502; F. Cardini, G. Lerner, *Martiri e assassini: Il nostro medioevo contemporaneo* (Milano, Rizzoli, 2001); M.E. Hoenicke Moore, "Euro-Medievalism: Modern Europe and the Medieval Past", 24 *Collegium*, Summer 2002, 67–79; A. Tanaka, *The New Middle Ages: The World System in the 21st Century* (Tokyo, International House of Japan, 2002). J. Friedrichs, "What's New about the New Middle Ages", 16 *Leiden Journal of International Law*, no. 3, 2003, 649–653; J. Friedrichs, *European Approaches to International Relations Theory: A House with Many Mansions* (London and New York, Routledge, 2004), Chapter 7.

2. J.N. Rosenau, E.-O. Czempiel (eds.), *Governance without Government: Order and Change in World Politics* (Cambridge, University Press, 1992); Commission for Global Governance, *Our Global Neighborhood* (Oxford, University Press, 1995); R. Falk, *On Humane Governance: Toward a New Global Politics – The World Order Models Project Report of the Global Civilization Initiative* (University Park, Pennsylvania State University Press, 1995); R.D. Lipschutz, *Global Civil Society and Global Environmental Governance: The Politics of Nature from Place to Planet* (New York, SUNY Press, 1996); D. Messner, F. Nuscheler, "Global Governance: Organisationselemente und Säulen einer Weltordnungspolitik", in D. Messner, F. Nuscheler (eds.), *Weltkonferenzen und Weltberichte: Ein Wegweiser durch die internationale Diskussion* (Bonn, Dietz, 1996), pp. 12–36; O.R. Young (ed.), *Global Governance: Drawing Insights from the Environmental Experience* (Cambridge, MIT Press,

Although the transformations associated with new medievalism and global governance concern the realm of international relations and world politics, international lawyers are nevertheless well advised to be vigilant in the face of these recent trends. If there really is a transformation of the world system underway, it will have its repercussions *on*, and sooner or later find its expression *in*, the legal superstructure. The present chapter aims to facilitate reflections about the repercussions of new medievalism and global governance on the theory and practice of international law. After a conceptual critique of new medievalism and global governance (section 2), I offer some conceptual clarifications in order to transcend the notoriously impressionistic use that has been made of the two concepts (section 3). This will make it possible to express some tentative thoughts about the proper place for international law in the post-Westphalian world order (section 4).

One proviso is in order right from the beginning. As a political scientist, I can provide a conceptual critique and some necessary clarifications about new medievalism and global governance.[3] My speculations concerning international law, by contrast, are inevitably amateurish and highly preliminary. At the end of the day it will be up to international lawyers, if they wish so, to sound out the legal corollaries of new medievalism and global governance.

1997); H. Mürle "Global Governance", in Institut für Entwicklung und Frieden (ed.), *INEF Report*, No. 32, 1998 (= <http://www.uni-duisburg.de/Institute/INEF/publist/report33.pdf>); M.-C. Smouts, "The Proper Use of Governance in International Relations", *International Social Science Journal*, No. 155, 1998, 81–89; W.H. Reinicke, *Global Public Policy: Governing Without Government* (Washington, Brookings, 1998); M. Hewson, T.J. Sinclair (eds.), *Approaches to Global Governance Theory* (New York, SUNY Press, 1999); M.J. Massicotte, "Global Governance and the Global Political Economy: Three Texts in Search of a Synthesis", 5 *Global Governance*, No. 1, 1999, 127–148; J.N. Rosenau, "Change, Complexity, and Governance in Globalizing Space", in J. Pierre (ed.), *Debating Governance* (Oxford, University Press, 2000), pp. 167–200; D. Drache (ed.), *The Market or the Public Domain? Global Governance and the Asymmetry of Power* (London, Routledge, 2001); G. Schröder, *Progressive Governance for the 21st Century* (München, Beck, 2002).

3. *Cf.* J. Friedrichs, "The Meaning of New Medievalism", 7 *European Journal of International Relations*, No. 4, 2001, 475–502; J. Friedrichs, *Global Governance as the Hegemonic Project of Transatlantic Civil Society* (forthcoming, 2004).

2. *Conceptual critique*

2.1 *New medievalism*

In Hedley Bull's *The Anarchical Society* of 1977 there are some very interesting speculations about new medievalism as a possible alternative to the modern state system.

> "It is (. . .) conceivable that sovereign states might disappear and be replaced not by a world government but by a modern and secular equivalent of the kind of universal political organization that existed in Western Christendom in the Middle Ages. In that system no ruler or state was sovereign in the sense of being supreme over a given territory and a given segment of the Christian population; each had to share authority with vassals beneath, and with the Pope and (in Germany and Italy) the Holy Roman Emperor above. The universal political order of Western Christendom represents an alternative to the system of states (. . .). All authority in medieval Christendom was thought to derive ultimately from God and the political system was basically theocratic. It might therefore seem fanciful to contemplate a return to the medieval model, but it is not fanciful to imagine that there might develop a modern and secular counterpart of it that embodies its central characteristic: a system of overlapping authority and multiple loyalty".[4]

Although Hedley Bull himself was well aware of medieval universalism, we shall see that his definition of medievalism as a "system of overlapping authority and multiple loyalty" carries the seeds of

4. H. Bull, *The Anarchical Society: A Study of Order in World Politics* (London and Basingstoke, Macmillan, 1977), p. 254. To give a flavour of what *"overlapping authority and multiple loyalty"* actually means in the life-world of the people concerned, it is illustrative to invoke the example of John Toul, who tried to balance rival obligations to four lords – Lord John of Arcis, Lord Enguerran of Coucy, the Count of Champagne, and the Count of Grandpré – with the latter two having equivalent status but precedence over the first two. "If it should happen that the count of Grandpré should be at war with the countess and count of Champagne for his own personal grievances, I will personally go to the assistance of the count of Grandpré and will send to the countess and count of Champagne, if they summon me, the knights I owe for the fief which I hold of them. But if the count of Grandpré shall make war on the countess and count of Champagne on behalf of his friends and not for his own personal grievances, I shall serve in person with the countess and count of Champagne and I will send one knight to the count of Grandpré to give the service owed from the fief which I hold of him. But I will not myself invade the territory of the count of Grandpré." See H. Spruyt, *The Sovereign State and its Competitors: An Analysis of Systems Change* (Princeton, University Press, 1994), p. 39. The parallels with the contemporary experience of multiple identities are obvious, although it is clear that, in the medieval world, the social role of the individual was much more preordained.

the later trivialization of the concept. I will return to this point, after a digression about the phenomenological aspects of new medievalism.

In order to establish whether the state system of the 1970s was moving towards new medievalism, Bull proposed the following five criteria of evaluation:

1. The regional integration of states.
2. The disintegration of states.
3. The restoration of private international violence.
4. The increased importance of transnational organizations.
5. The technological unification of the world.

After thorough examination, Bull came to the conclusion that, at the time when he was writing, i.e. in the mid-1970s, there were certain trends but no sufficient evidence for the emergence of new medievalism.

However, in the changed environment after the millennium's turn this appraisal has to be reassessed. There seems to be ever more regional integration, whether in Europe, Northern America, or elsewhere. At the same time there are more and more failed states, and it is indeed rather cumbersome to determine who is sovereign in every single fragment of Afghanistan, Somalia, and the like. Moreover, the world is experiencing the re-emergence of private international violence in the shape of organized crime, terrorism, and mercenary troops.[5] There is a proliferation, and apparently also an increasing significance, of non-governmental organizations, transnational corporations, and other trans-border entities.[6] All these developments are accompanied by the technological unification of the developed world, especially in the area of information technologies.

It is therefore possible to embed, at least preliminarily, the concept of both old and new medievalism into an historical narrative. The

5. There is not only a *de facto* privatization of violence, especially but not exclusively in the developing world, but private violence is also increasingly viewed as legitimate. This must be seen in the context of a long-term historical perspective, which focuses on the progressive monopolization and successive de-monopolization of the state monopoly on violence. See J.E. Thomson, *Mercenaries, Pirates and Sovereigns: State-building and Extraterritorial Violence in Early Modern Europe* (Princeton: University Press, 1994).

6. Concerning NGOs: According to the statistics published in the *Yearbook of International Organizations* and on the Internet (<*http://www.uia.org/uiastats/stybv296.htm*>), the total number of non-governmental organizations has starkly increased over the last few decades (1968: 741; 1977: 1076; 1981: 3836; 1988: 8579; 1992: 14733; 1996: 23135).

old medieval order in Western Christendom, understood as a system of overlapping authority and multiple loyalty, worked for centuries in an environment of precarious coexistence with other forms of political order, especially in Eastern Europe and the Islamic world. Subsequently, modern rationalization led to a reorganization of political order in the Western world and to the progressive evolution of the state system. In the modern state system, sovereign nation states claimed to hold the monopoly of legitimate political action *vis-à-vis* other actors. From early modernity to de-colonization, the system expanded territorially all over the globe and displaced competing conceptions of political order. However, in the changed environment of the contemporary world the hegemonic claim posed by the nation state system becomes again problematic. Other conceptions of political order along ethnic, cultural and religious lines begin to re-emerge, particularly in the periphery, but also in the Western world. The international system is moving towards a situation of new medievalism, i.e. a renewed system of overlapping authority and multiple loyalty.[7]

Which implications does this scenario have for the prospects of a peaceful world? Hedley Bull ultimately rejects new medievalism, since "there is no assurance that it would prove more orderly than the states system, rather than less. (. . .) [I]f it were anything like the precedent of Western Christendom, it would contain more ubiquitous and continuous violence and insecurity than does the modern states system."[8]

7. About medieval order: M. Wight, "De Systematibus Civitatum", in *Id., Systems of States* (Leicester, University Press, 1977), pp. 21–45; H. Spruyt, *The Sovereign State and its Competitors: An analysis of Systems Change* (Princeton: Princeton University Press, 1994), at pp. 34–47. About the transformation from medieval order to the modern system of sovereign states: F.H. Hinsley, *Sovereignty* (London, Watts, 1966); J.R. Strayer, *On the Medieval Origins of the Modern State* (Princeton, Princeton University Press, 1970); G. Poggi, *The Development of the Modern State: A Sociological Introduction* (Stanford, Univ. Pr., 1978); J.G. Ruggie, "Territoriality and Beyond: Problematizing Modernity in International Relations", 47 *International Organization*, No. 4, 1993, 139–174; H. Spruyt, "Institutional Selection in International Relations: State Anarchy as Order", 48 *International Organization*, No. 4, 1994, 527–557; R. Jackson, "Sovereignty in World Politics: A Glance at the Conceptual and Historical Landscape", 47 *Political Studies*, No. 3, 1999, 431–456, esp. 435–438. About the expansion of the modern state system: H. Bull, A. Watson (eds.), *The Expansion of International Society* (Oxford, Clarendon, 1984).

8. H. Bull, *The Anarchical Society: A Study of Order in World Politics* (London and Basingstoke, Macmillan, 1977), p. 255. In a similar vein, Bertrand Badie sees the nation state system as torn between globalization and fragmentation, either resisting or leaving space to disorder: B. Badie, *La fin des territoires: Essai sur le désordre international et sur l'utilité sociale du respect* (Paris, Fayard, 1995), p. 256.

In his provocative article *The Coming Anarchy*, the American author Robert D. Kaplan has told such a nightmare of the world returning to the Dark Ages. We are confronted with a horror scenario of post-modernity as the return to a pre-Westphalian state of violence and disorder, at best mitigated by some cosy strongholds of communitarian neighbourhood. Another horror scenario can be found in Alain Minc's bestseller *Le Nouveau Moyen Âge*. Without much hesitation, Minc uses the Middle Ages as a synonym for disorder. "The new Middle Ages, like the old ones, correspond to a mobile world without a centre, where nothing is definitively fixed." The Middle Ages are depicted as the Dark Ages, when reason had not yet illuminated mankind and life was brutish and nasty.[9]

As has been shown above, following the criteria set up by Hedley Bull there is some strong evidence that, at the millennium's turn, we are moving towards new medievalism. It is important to recall that Hedley Bull's criteria stress both integration and fragmentation. But although Bull himself was very well aware of the fundamental unity of the medieval world, his definition of medievalism as a "system of overlapping authority and multiple loyalty" gives a one-sided view of medievalism as the opposite of hierarchical order. This fatal one-sidedness becomes apparent in the use made of the concept by authors such as Robert Kaplan, Alain Minc, *et al.* In the face of this runaway trivialization, it must be admitted that Bull's definition is somewhat incomplete. Indeed, the understanding of medievalism as a "system of overlapping authority and multiple loyalty" is unable to do justice either to the Middle Ages as an historical epoch or to the neo-medieval world political conjuncture "after Westphalia".

On the one hand, it is wrong to understand the Middle Ages as plain fragmentation, i.e. a "world without a centre". In the Middle

9. R.D. Kaplan, "The Coming Anarchy", 273 *The Atlantic Monthly*, No. 2, 1994, 44–76; A. Minc, *Le Nouveau Moyen Âge* (Paris, Gallimard, 1993), 67, 203; A. Minc, *Le Nouveau Moyen Âge* (Paris, Gallimard, 1993); *cf.* J.-M. Guéhenno, *La fin de la démocratie* (Paris, Flammarion, 1993) [*id.*, *The End of the Nation State* (Minneapolis, University of Minnesota Press, 1995)]; *cf.* also the science-fiction classic by Walter M. Miller, Jr, *A Canticle for Leibowitz*, (Philadelphia, Lippincott, 1959); R. Vacca, *Il medioevo prossimo venturo* (Milano, Mondadori, 1971); U. Eco, F. Colombo, F. Alberoni, G. Sacco, *Documenti su il nuovo medioevo: La cultura, il potere, l'industria, le forme di vita nell'epoca neofeudale* (Milano, Bompiani, 1973); U. Eco, *Dalla periferia dell'impero: Cronache di un nuovo Medioevo* (Milano, Bompiani, 1977); for a critique of bleak scenarios *see* D. Bigo, J.-Y. Haine (eds.), *Troubler et inquiéter: Les discours du désordre international* (Paris, L'Harmattan, 1996).

Ages, feudalism and ecclesiastic hierarchy provided organizational modes that ensured a certain isomorphism among those units which tended to concentrate the means of coercion. At the ideological level, this was mirrored by the duality of *imperium* and *sacerdotium* as the ultimate sources of temporal and spiritual authority. It is simply mistaken to oppose medieval disorder and violence to an alleged modern world order; one does not have to know much about history to realize that an equation of the Middle Ages with the Hobbesian state of nature is bizarre.

On the other hand, it is even harder to imagine a reputedly neo-medieval "world without a centre". Just as medieval order would not have endured for centuries without the dual universalism embodied in the Empire and the Church, a neo-medieval world order will need something which holds it together. The very idea of centrifugality would lose its meaning without the notion of a centre. Without such a unifying centre (or, better, a duality of unifying centres), it is debatable whether new medievalism can be considered as an option for sustainable order in the first place. In the absence of some equivalent to the dual medieval universalism of *imperium* and *sacerdotium*, the neo-medieval analogy becomes questionable. A dream and fancy world as that of *Mad Max* has little to do with the real Middle Ages.

In sum, it is a gross simplification to elaborate a concept of medievalism that ignores the fundamental unity of the medieval world. Although Bull explicitly does recognize this unity, his definition of medievalism as a system of overlapping authority and multiple loyalty focuses too much on fragmentation. In reality, medieval order was not only fragmented into a plurality of decentralized authorities and allegiances. As a counterpoise to these centrifugal forces, the system was held together by Christian universalism, embodied by the pope as "the rock upon which the Church is constructed, entitled to bind and to solve all things in heaven and on earth".[10] From the 11th century onwards, ecclesiastical universalism was supplemented by a competing scheme of secular universalism, embodied by the Emperor of the Holy Roman Empire.[11] Moreover, both the catholic

10. Matthew 16:18–19; *cf.* W. Ullmann, *Principles of Government and Politics in the Middle Ages* (London, Methuen, 1961); W. Ullmann, *The Growth of Papal Government in the Middle Ages: A Study in the Ideological Relation of Clerical to Lay Power* (3rd ed., London, Methuen, 1970).

11. Of course the relationship between *imperium* and *sacerdotium* was an issue in political thought ever since Augustine's *"De Civitate Dei"* and the Gelasian doctrine

clergy and feudal nobility formed trans-territorial classes that preserved a considerable degree of uniformity across the system.

Behind many scenarios of new medievalism, there is a false dichotomy of modern order vs. (neo)medieval disorder. But what about such *modern* experiences as total warfare and mutual assured destruction? It is a sad truism that disorder and violence have walked along with history, and there are no signs that violence and disorder are going to pass away. The conventional understanding of new medievalism as the world going back to the Dark Ages implies the ontological prejudice of taking the modern system of sovereign nation states for the only possible guarantor of world political order. In the face of this prejudice, one should remember that in the Middle Ages, in addition to the centrifugal forces, there were strong countervailing forces of ecclesiastical and secular universalism that generated a considerable degree of cohesiveness. Thus understood, medievalism is a viable alternative to the modern state system and should be recognized as a possible foundation *for* and manifestation *of* order.

2.2 *Global governance*

If the conceptual contours of new medievalism are somewhat difficult to pin down, this is even worse for the concept of global governance. In 1992, a prominent group of international relations scholars around James Rosenau and Ernst-Otto Czempiel launched the first speculations about "governance without government".[12] Three years later, a group of senior statesmen gathered in the UN-funded Commission for Global Governance published their final report.[13]

of the two realms. It very much puzzled Charlemagne, and later the Saxon emperors in Holy Roman Empire. However, it was during the investiture dispute of the 11th and 12th centuries that the conflict became most virulent, and the problematic was amply discussed during the 13th and early 14th centuries by scholastic philosophers such as Thomas, Dante, Marsiglio and Ockham. Eventually, the contest between clerical and temporal power spilled over to the French Kingdom and to other European countries as well. Transformed into the contest about the separation of the Church and the State, the conflict remained on the political agenda well into modern times. *Cf.* J.B. Morall, *Political Thought in Medieval Times* (New York, Harper & Row, 1962).

12. J.N. Rosenau, E.-O. Czempiel (eds.), *Governance without Government: Order and Change in World Politics* (Cambridge, University Press, 1992).

13. Commission for Global Governance, *Our Global Neighborhood* (Oxford, University Press, 1995).

The conclusion basically was that, if the nation-state system is becoming unable to deal with the planet's most pressing problems such as market regulation and environmental degradation, transnational networks of good-willed people should work together to do the trick. In the same year, the review *Global Governance* was founded in close collaboration with the United Nations University. Recalling the hype of the globalization discourse in the mid-1990s, it is hardly surprising that global governance has become a hotly contested issue over the last ten years. Things are very much in a state of flux, however, and the rush for the new theoretical domain is still going on.[14] In the meantime, the conceptual wooliness of global governance has created tremendous confusion. Take for example the definition offered by the Commission for Global Governance:

> "Governance is the sum of the many ways individuals and institutions, public and private, manage their common affairs. It is a continuing process through which conflicting or diverse interests may be accommodated and co-operative action may be taken. It includes formal institutions and regimes empowered to enforce compliance, as well as informal arrangements that people and institutions either have agreed to or perceive to be in their interest".[15]

According to this vision, a multitude of actors and factors are contributing to global governance, such as intergovernmental and non-governmental organizations, civic movements, multinational corporations, the global capital market, and global mass media. In the briefest possible formula, global governance can be defined as "the ensemble of regulation mechanisms, formal and informal, that organize and coordinate socioeconomic relations, from the household and the family to governmental policies and international agreements".[16]

By this and similarly expansive definitions, the idea of global governance has become almost all-inclusive. It comes close to an empty formula that can take virtually any meaning, covering a vast conceptual space to be filled with content by those involved in the theory and practice of world affairs. Nevertheless, it is cold comfort to

14. *Cf.* the literature quoted above in footnote 2.

15. Commission for Global Governance (note 13), p. 2.

16. M.J. Massicotte, "Global Governance and the Global Political Economy: Three Texts in Search of a Synthesis", 5 *Global Governance*, No. 1, 1999, 139; cf. J.N. Rosenau, "Governance in the Twenty-first Century", 1 *Global Governance*, No. 1, 1995, 13; L.S. Finkelstein, "What Is Global Governance?", 1 *Global Governance*, No. 3, 1995, 369.

state that global governance is an "essentially contested concept". Since the theoretical field of world politics is a field where almost everything is contested, there is probably no need for a further proliferation of concepts to quarrel about. It *is* a problem that with regard to global governance there is so much conceptual eye-wash and normative self-deception underway. Notwithstanding, global governance is simply too interesting a theoretical development to be thrown into the theoretical dustbin. In order to rescue the concept from its inherent wooliness, it is all the more important to get it right by telling some very simple, and partly uncomfortable, truths that all too often go unsaid.

(1) *Global governance is mostly understood as an offspring of economic globalization*

In a time of borderless production and finance, the story goes, capital is increasingly endowed with an exit option *vis-à-vis* territorial statehood. Insofar as globalization leads to a retreat of the state, it generates the need for some functional equivalent to political government. This is where the idea of global governance steps in. To the extent that the state looses its capacity to perform as the regulating subject, the unregulated pluralism of civil society appears as an interesting alternative. To support this idea, it is assumed that economic globalization does not only lead to the retreat of the state but also to the formation of a global civil society. Not only does the retreat of the state create a demand for some surrogate to political government, but the advent of global civil society also creates the possibility for transnational co-ordination to perform as a substitute for inter-governmental regulation. The promise of global governance is that world society is in a position to fill the regulative gap created by economic globalization and the concomitant retreat of the state. Or, in a word: governance is supposed to take over where government has lost its steering capacity.[17]

17. A. Prakash, J.A. Hart (eds.), *Globalization and Governance* (London, Routledge, 1999). However it should be noted that, apart from its origins in the Anglo-Saxon globalization discourse, the concept of global governance has an alternative source in French and German regulation theory (*see International Social Science Journal*, No. 155, 1998, *passim*).

(2) *One should be careful not to romanticize civil society*

Unfortunately the high hopes set in global governance on some quarters (Commission for Global Governance and most contributors to the journal *Global Governance*) rest on a series of relatively naïve assumptions. In the first place, it is naïve to presume that global society is always or prevalently civil. It is not self-evident that global society consists only or primarily of good-willed and liberal-minded people. It should not be ignored that transnational terrorism and organized crime are also part of world society, whether civil or not. There is no reason why global society should be more immune from corruption by criminal elements than its domestic counterparts.[18] Let's face it: in some instances global governance is a good thing, while in other instances it will turn out to be a mess. In some instances the aggregation of particular interests into a global civic compact may be an option, while in other instances there is no alternative to politics as the authoritative allocation of values. In some instances global society is more democratic than national governments and morally superior to the market economy. In other instances global society is either completely indifferent to the most flagrant instantiations of injustice and human distress, or even corrupted by criminal elements. Global governance should be welcomed as a possible solution to some problems, but it is certainly no panacea.

(3) *Global governance has an Anglo-American cultural imprint*

It is hard to translate the word *governance* into languages other than English, where the Oxford English Dictionary traces the term back well into the 14th century. Thus, the French *gouvernance* is easily discernible as a loan translation. Whereas *governação* and *governança* have conquered a firm place in the Portuguese vocabulary, *gobernanza* still sounds odd to Spanish ears. The Italians have simply assimilated the English term into their domestic vocabularies, and so did the Germanic languages. Given the difficult translatability of global governance into languages other than English, it is reasonable to assume that the term is culturally not neutral. Indeed, the term *governance* in opposition to *government* seems to transport the typically Anglo-American optimism that good things will simply *happen* as the outcome of poly-

18. J.H. Mittelman, R. Johnston, "The Globalization of Organized Crime, The Courtesan State, and the Corruption of Civil Society", 5 *Global Governance*, No. 1, 1999, 103–126.

centric interaction, rather than being the result of hierarchical relationships (*cf.* the myth of the *invisible hand* in economics). With its adoption into other cultural and linguistic environments, global governance transports part of the semantic universe of English language in general, and of American social science in particular, into different cultural and academic contexts.

(4) *Global governance has a transatlantic organizational bias*

There is a broad consensus that, without a strong field of non-state actors, there is no "governance without government". Among the most important of these non-state actors in the societal realm are non-governmental organizations, which are unevenly distributed over the world. This can be easily demonstrated by statistical evidence. According to the 2002 edition of the *Yearbook of International Organizations*, 59 per cent of all non-governmental organizations have their headquarters in Europe. When adding the American percentage to the European share, the Western world scores 85 per cent of all NGOs worldwide. The Transatlantic bias of non-governmental organizations becomes even more evident if one compares the absolute numbers of NGO headquarters in different states. In 2002 there were 19873 non-governmental organizations, 3510 of which had their headquarters in the USA, 2012 in the UK, 1800 in France, 1028 in Germany, and 517 in Canada. By comparison, there were only 293 headquarters in Japan, 212 in India, 96 in Russia, 57 in Nigeria, and 42 in China.[19] One may deplore it, but the non-Western world in general and the Third World in particular are clearly not at centre stage of global governance. It therefore makes a lot of sense to talk about *transatlantic* rather than *global* civil society, and *transatlantic* rather than *global* governance.[20]

(5) *More often than not, there is an economistic bias in ideas about global governance*

As "governance without government", global governance hardly fits into the conventional image of politics as "the authoritative allocation

19. Union of International Associations (ed.), *Yearbook of International Organizations: Guide to Global Civil Society Networks*, 2002/2003, Vol. 2 (39th ed., München, Saur, 2002), appendix 3.3, pp. 1616–1621.

20. M.A. Pollak, G.C. Shaffer (eds.), *Transatlantic Governance in the Global Economy* (Lanham, Rowman and Littlefield, 2001).

of values".[21] Insofar as it is understood as a device to overcome market failures and collective action problems, global governance is closer to rational-choice institutionalism than to the logic of political action. To bring this home, it is useful to recall Richard Ashley's distinction of three modes of economism. First, *historical economism* means that the denationalization of the capitalist mode of production and trade is reified as a sort of historical necessity with no escape for political actors. Second, *logical economism* means that the commitment of political scientists to the tenets of rational choice reduces the logic of political behaviour to the behavioural characteristics of economic man. And third, *variable economism* means that the "realities" of the market are understood as the confining conditions (independent variables) that determine regularities in political behaviour (dependent variables). Roughly speaking, Ashley's three modes of economism are all present in the literature about global governance.[22]

3. *Conceptual clarifications*

3.1 *New medievalism*

It has been demonstrated in the last section that Hedley Bull's definition of medievalism as a "system of overlapping authority and multiple loyalty" is somewhat incomplete, since it neglects the profound unity of medieval order established by the dual universalism of the Empire and the Church. To accommodate the dual universalism of *imperium* and *sacerdotium* into the conceptual core of (neo-)medievalism, let me propose the following revised definition: "*A medievalist system is a system of overlapping authority and multiple loyalty, held together by a duality of competing universalistic claims.*"[23]

21. D. Easton, *The Political System: An Inquiry on the State of Political Science* (2nd ed., New York, Alfred A. Knopf, 1971).

22. R.K. Ashley, "Three Modes of Economism", 27 *International Studies Quarterly*, No. 4, 1983, 463–496.

23. This conception of medieval order dates ultimately back to Otto von Gierke, *Das deutsche Genossenschaftsrecht*, 3rd vol., *Die Staats- und Korporationslehre des Alterthums und des Mittelalters und ihre Aufnahme in Deutschland* (Berlin, Weidmannsche Buchhandlung, 1881; Graz, Akademische Druck- und Verlagsanstalt, 1954), pp. 502–644; English translation: idem, *Political Theories of the Middle Age* (Cambridge, University Press, 1987). For a completely different appraisal of new medievalism as the re-emergence of the pre- and early modern natural law tradition, *see* N. Tsagourias, "Humanitarian

If the revised definition is correct and if medieval order is to have an analogy in contemporary world politics, we would not only expect that the emergent neo-medieval system should be characterized by the demise of the nation-state as the constitutive unit of world politics. At the same time, we would expect that some functional equivalent to the ecclesiastical and secular universalism of the Middle Ages should hold the system together. Only if such an equivalent to medieval universalism can be identified, will it be justified to talk about new medievalism. This revised understanding of new medievalism will lead to a more comprehensive understanding of the neo-medieval analogy. It will also free us from the nightmare of the world going back to the Dark Ages, which is implicit in many other conceptualizations of new medievalism (as we have seen above).

In this context it is important to observe that the homogenizing role of the territorial state, which is particularistic in content but universalistic in form, is still an important ordering principle.[24] Along with the international system, the transnational market economy is another institutional form that generates a considerable degree of world-wide uniformity.[25] Together, the competing universal aspirations of the nation-state system and the transnational market economy can be paralleled with the dualism of secular and ecclesiastical universalism in the Middle Ages. Or, in other words: there is a striking similarity of the contemporary form of a dualistic universalism (the competing and sometimes conflicting duality of the international system and the transnational economy) with the antagonistic constellation of *imperium* vs. *sacerdotium* in the Middle Ages. At least at the level of ideological pretensions, but in part at the practical level as well, international politics and transnational business do hold the neo-medieval system of overlapping authority and multiple loyalty

Intervention after Kosovo and Legal Discourse: Self-Deception or Self-Consciousness", in 13 *Leiden Journal of International Law*, No. 1, 2000, 11–32.

24. C.L. McNeely, *Constructing the Nation-State: International Organization and Prescriptive Action* (Westport, Greenwood Press, 1995); M. Finnemore, "Norms, Culture, and World Politics: Insights from Sociology's Institutionalism", 50 *International Organization*, No. 2, 1996, 325–347; J. Boli, G.M. Thomas (eds.), *Constructing World Culture: International Nongovernmental Organizations since 1875* (Stanford, University Press, 1999).

25. J.M. Stopford, S. Strange, J.S. Henley, *Rival States, Rival Firms: Competition for World Market Shares* (Cambridge, University Press, 1991); S. Strange, *The Retreat of the State: The Diffusion of Power in the World Economy* (Cambridge, University Press, 1996); S. Strange, "Corporate Managers in World Politics", in M. Girard (ed.), *Individualism and World Politics* (Basingstoke, Macmillan, 1998), pp. 145–199.

together, just as the Empire and the Church did with feudal society in the Middle Ages.

For the sake of maximum clarity, the following matrix provides a schematic representation of the analogy between medievalism old and new.

The Middle Ages were characterized by a system of overlapping authority and multiple loyalty. These centrifugal forces were held together by two interdependent forms of universalism: the Empire with its claim for political legitimacy, and the Church with its transcendental claims.	Today we experience the re-emergence of overlapping authority and multiple loyalty. These centrifugal forces are held together by two interdependent forms of universalism: the state with its claim for sovereign actorhood, and the Market Economy with its claims for superior efficiency.
The social locus of secular universalism in the Middle Ages was formed by the dominant class of feudal aristocracy.	The social locus of modern political universalism is formed by an international class of policymakers and bureaucrats.
The social locus of religious universalism was the Catholic clergy. As a social class, the Catholic clergy was characterized by an extraordinary degree of spatial and social mobility.	The social locus of economic universalism is the transnational managerial class. Like its medieval counterpart, this class is characterized by an extraordinary degree of spatial and social mobility.
Religious universalism was supported by leading exponents of Catholic theology. Although to a lesser degree, even secular universalism had its organic intellectuals like Dante, Ockham and Marsiglio.	Both the nation-state system and the world market economy are supported by a knowledge-based elite, or epistemic community, of academic scientists, public intellectuals and public writers.
Religious and secular universalism raised competing claims to supremacy. However, in the end neither of the two prevailed. Both Empire and Church declined, and the modern nation-state system emerged.	Economic and political universalism raise competing claims to supremacy. For the time being, it is unclear how long this contest is going to last and which of the two (if any) is going to prevail.

The limitations of the neo-medieval analogy are obvious. Thus, the universalistic pretensions of the transnational market economy are different in kind from the universalistic pretensions of the Catholic Church in the Middle Ages. There is no clear analogy to medieval Papacy in the transnational market economy, nor is there an Emperor

in the nation-state system. The medieval system of overlapping authority and multiple loyalty was largely based on feudalism and kinship, whereas neo-medieval society is based more on links of culture and identity. The social identity of medieval man was preordained, whereas the opposite seems to be true for neo-medieval society. One could easily continue this list, but that would be somewhat unfair. The concept of new medievalism is based upon a *relational* analogy and not upon an *essentialist* comparison.[26] Neither will the discoveries of modern technology be undone, nor are the Knights of the Round Table going to reappear. The neo-medieval analogy does not imply that the true "spirit" of the Middle Ages shall be resurrected.[27] It simply points to a structural similarity between medieval order and the emergent post-Westphalian configuration.

Moreover, it must be understood that the neo-medieval analogy is first and foremost a heuristic device. To escape from the modernist fallacy according to which the world is necessarily structured around one and only one centre, it is helpful to turn to the Middle Ages as a world which was neither anarchic nor organized around one discursive and organizational centre. The Middle Ages certainly had its major crises (such as the Black Death, the Hundred Years' War, and the papal schism of the 14th century), but the system indisputably went along for centuries. The most important point in the present context is that, at least in principle, medievalism is a viable form of order. It can hardly be denied that the Middle Ages lasted for at least as many centuries as the Westphalian system of international relations. From the recognition of medievalism as a possible "state of the world", it is possible to draw important insights for a better understanding of the present historical transfiguration.

In a nutshell, the neo-medieval analogy presents world politics as the interaction of three distinct but interdependent realms: politics, economics, and society. Despite the fragmentation of neo-medieval

26. Maybe the title of this essay is somewhat misleading in that regard. However, the term "*neo-medieval renaissance*" is not meant to imply a revival of medieval man, medieval life-world, medieval spirituality, and the like.

27. I am deliberately leaving aside the speculative ideas in the wake of the Russian philosopher Nikolai Alexandrovich Berdyaev about the dawn of neo-medieval spirituality. *Cf.* N.A. Berdyaev, *Novoe Srednevekov'e* (Berlin, Obelisk, 1924) [= *id.*, *Das Neue Mittelalter: Betrachtungen über das Schicksal Rußlands und Europas* (Darmstadt, Reichl, 1927); *The End of Our Time* (London, Sheed & Ward, 1933)].

society, which comes close to a "system of overlapping authority and multiple loyalty", the neo-medieval world system is held together by the competing organizational modes of international politics on the one hand, and transnational economics on the other.[28]

The neo-medieval analogy thereby projects the well-known distinction between state, market and society to the global level. This time-honoured tradition of classical sociology goes back at least to Max Weber and allows an analysis of social systems in a fairly holistic way. Nevertheless, there is a serious problem with the symmetry that is suggested by the triangular constellation of state, market, and society. It should not escape our notice that each of the three spheres represents a fundamentally distinct form of legitimacy. The territorial state continues to be the only authority that is entitled to convey full legitimacy to collective decisions at the international level. At least in principle, no TNC, no NGO, and no religious movement can ever claim to speak for the People as nation-states can. The transnational market economy, by contrast, derives its legitimacy from the claim to superior efficiency. In the present ideological environment, it is difficult to deny that the market is more suitable for the allocation of certain values than the state.

Whereas the nation-state system and the transnational market economy can be described as two competing organizational modes, societal actors derive their legitimacy from the promotion of substantive values. Some of them raise claim to eminently political values (such as human rights, sustainable development, class emancipation, or true religion) and struggle to influence the world political process. No political and no economic actor can easily dismiss such claims if they are backed by sufficiently strong societal forces.

By their distinctive corporate nature, the nation-state system and the transnational market economy raise antagonistic claims to how the organizing principles of world politics should look like. Since nei-

28. It is rather important to note that in each of the three realms there is a distinct *"logic of appropriateness"* at work. This is also important for the way the system components relate to one another, e.g. transnational corporations behaving as if they were value-driven societal actors rather than utilitarian profit maximizers when acting in the game of global governance. About the concept of *"logic of appropriateness" see* J.G. March, J.P. Olsen, *Rediscovering Institutions: The Organizational Basis of Politics* (New York, Free Press, 1989); J.G. March, J.P. Olsen, "The Institutional Dynamics of International Political Orders", in 52 *International Organization*, No. 4, 1998, 943–969.

ther of the two is in a position to prevail against its rival, they will be forced to compete and to cooperate. Within this framework, the fragments that make up transnational society enjoy considerable freedom of action. Whether individuals or associations, and whether acting at the local, national, regional, or transnational level, societal actors increasingly elude the control of the state. World politics becomes the virtual place where the competing claims of the three realms (politics, market, society) intersect.

3.2 *Global governance*

If there ever was a primacy of politics in the international realm, with the end of the Cold War the world has entered into an era of increased complexity. Both economic and societal actors are bypassing their governments and challenge as much as they can the autonomy of political decision-making. This has led to a situation where there are as many as three hegemonic projects concerning world affairs.[29] At the political level, the Western model of the liberal constitutional state continues to challenge all other forms of political organization. At the economic level, transnational corporations have become the key actors in the global economy. At the societal level, mostly liberal non-governmental organizations and, although to a lesser extent, transnational social movements raise claims for superior moral authority.[30] Among each other, these three hegemonic

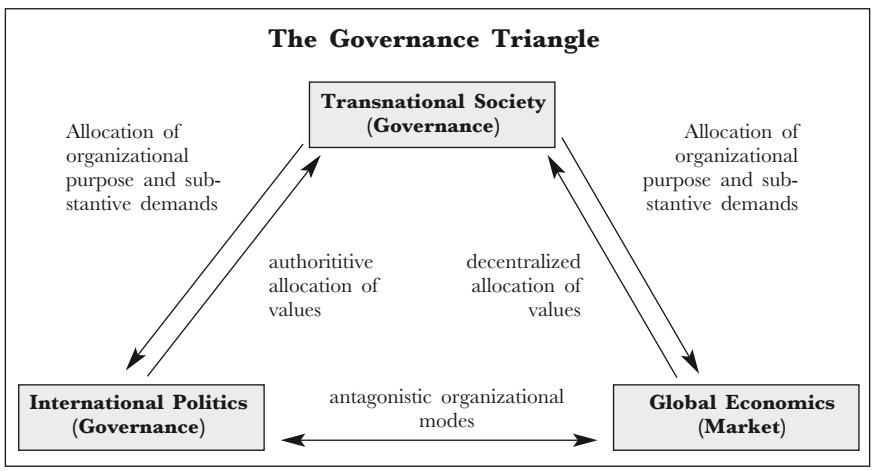
29. The term *"hegemonic project"* does not necessarily presuppose a group of persons who are willingly and knowingly intruding into the spheres of other people. Quite to the contrary, it is in the very nature of an hegemonic project that it tends to operate in a relatively impersonal way. Nevertheless, a hegemonic project always serves the real or perceived class interests of a social formation with sufficiently clear boundaries. *Cf.* the literature after Antonio Gramsci, as discussed in R. Bocock, *Hegemony* (Chichester, Ellis Horwood, 1986).

30. Anne-Marie Slaughter's "transgovernmentalism" is firmly within the domain of politics and therefore, strictly speaking, not part of global governance according to my understanding, but rather the result of a functional adaptation of politics to the requirements of economic globalisation and global governance. *See* A.-M. Slaughter, "The real New World Order", in 76 *Foreign Affairs*, No. 5, 1997, 183–197; A.-M. Slaughter, "Government networks: the heart of the liberal democratic order", in G.H. Fox, B.R. Roth (eds.), *Democratic Governance and International Law* (Cambridge, Univ. Pr., 2000), pp. 199–235; A.-M. Slaughter, "Governing the Global Economy through Government Networks", in M. Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford, University Press, 2000), pp. 177–205.

projects are involved into a set of sometimes cooperative, sometimes antagonistic relationships.

As we have seen above (p. 15), most non-governmental organizations are based in the highly industrialized countries of Western Europe and Northern America. Therefore, global governance can be identified as *the hegemonic project of transatlantic civil society*. The limitation of global governance to the societal sphere is heuristically useful since for the other two hegemonic projects the necessary conceptual equipment is already firmly in place, provided by the academic discipline of international relations and by the globalization discourse respectively. As I have argued in the first section, global governance is mostly understood as the societal corollary of economic globalization. Many authors exaggerate the problem-solving capacity of world society and underestimate its problematic features. Global governance is distinguished by an Anglo-American cultural imprint and by a transatlantic organizational bias. More often than not, there is an economistic bias inherent in the conceptualization of global governance. On a balanced account, global governance will therefore raise justified hopes in some quarters and justified preoccupations in some others.

In sum, there is an inbuilt liberal bias in the political agenda of global governance, and global governance is therefore best understood as *the hegemonic project of transatlantic civil society*. Having said that, and to clarify global governance both as a theoretical concept and as a hegemonic project, it is now possible to trace a "governance tri-



angle" with "international politics" and "global economics" at the basis, and "transnational society" at the apex.

The triangle could also take different forms, depending on whether one is inclined to privilege the hegemonic aspirations of international politics, global economics, or world society. According to the Hobbesian vision of international politics, only sovereign states are capable and entitled to determine the world political game. In this optic, the political and military interaction among governments and armies would be on top of the triangle.

This Hobbesian viewpoint can be challenged by the Cobdenite advocacy of unrestrained free trade. An extreme free trader would deny the need for either the state apparatus or an organized civil society to allocate organizational purpose and substantive demands to the market. By virtue of the reputed impartiality of the invisible hand, the market should be on top of the triangle, assigning to politics the role of providing law and order, and to society the role of consuming goods and providing labour.

The third possibility is the governance triangle as presented in the above figure. In this optic, world society is in a key position as the ultimate source of both organizational purpose and substantive values.[31]

This amounts to three hegemonic projects, depending on which of the three contenders is placed at the top of the triangle. To be sure, these three hegemonic projects in the post-Westphalian world order are abstractions or ideal types. In the real world, compromise is unavoidable. TNCs will sometimes undergo public-private partnerships in order to shape their socio-political environment. States will sometimes work together with NGOs and transnational social movements to hold in check TNCs. In other instances, human rights activists will try to convince TNCs that it is in their interest to outdo authoritarian states. An open clash between the three hegemonic projects will be the exception rather than the rule. Nevertheless it would be naïve to assume a stable harmony of interests among the hegemonic projects.

In a neo-medieval world, intrusions of one sphere into another are a constant possibility. For instance, the privatization of violence can be understood as an intrusion of international business into the vested

31. By virtue of the increasing functional differentiation at the global level, it is hardly surprising that the world looks different from each angle of the governance triangle. *Cf.* N. Luhmann, *Die Gesellschaft der Gesellschaft* (Frankfurt am Main, Suhrkamp, 1997).

domain of the state. In a similar vein, TNCs frequently act as if they were societal actors and thereby intrude into the realm of international civil society. There is a strong tradition of *Staatswirtschaft* and *Gesellschaftspolitik*, especially on the European continent. In some cases these intrusions pass uncontested, whereas at least in some other cases they are rebuffed. The neo-medieval analogy suggests that it is completely normal that each sphere raises imperialist claims and tries to colonize the others. At the same time, it is equally normal that each sphere tries to reject the attempts by another sphere to curtail its domain (compare the struggle between *imperium* and *sacerdotium* in the medieval world). In order to be competitive in this game, each realm must construct itself as an autonomous sphere of action, even if it is clear that functional autonomy is never attainable at the operational level. A stable, albeit potentially disruptive, setting of cooperative antagonism (or antagonistic co-operation) is the most likely outcome in the long run.

When looking at the post-Westphalian world order from the angle of transnational society, it is important to recall that the actors of civil society derive their legitimacy from the substance of the intersubjectively held values they represent. As has been argued above, societal actors are different from political and economic actors in that they derive their legitimacy from the substance of their normative claims rather than from the virtues of a specific organizational mode. Moreover, societal actors claim that they are logically and ontologically prior to the state and the market. They can point to the generally held belief that both the state and the market are there for society, and not the other way round. This purveys them an additional portion of legitimacy.

These are powerful normative arguments to support the hegemonic claims of transnational civil society. It is rather intuitive from the standpoint of "We the People(s)" that the primacy of politics or economics is not desirable either at the domestic or at the global level.[32] At the domestic level, the primacy of politics has led several times in the 20th century to the horrors of totalitarianism, whereas the primacy of the market engenders the alienation of human beings from their socio-cultural context and from their ecological environment. The flaws and failures of both totalitarian politics and the free

32. *Cf.* the strong rhetoric in Viviane Forrester's pamphlets *L'horreur économique* (Paris, Fayard, 1996), and *Une étrange dictature* (Paris, Fayard, 2000).

market doctrine can be turned into a powerful argument for the hegemonic project of transnational civil society.

On the other hand, societal actors lack the formal legitimacy of the state to speak on behalf of society as a whole. Moreover, they are less efficient than the capitalist market when it comes to the allocation of values. The fundamental difference between the substantive legitimacy of civil society on the one hand, and the organizational legitimacy of the state and the market on the other, is the source of both the strengths and weaknesses of societal actors in relationship to their political and economic counterparts. But be that as it may, in the present historical conjuncture global governance is rapidly becoming a (predominantly but not exclusively liberal) sphere of action in its own right, aiming at the self-organization of the public domain and the creation of sanctuaries outside political oppression and market logic.[33]

4. *International law*

After these conceptual clarifications, it is an interesting question to ask what might be the proper place for international law in the neomedieval order. In addition to politics, the market, and civil society, there are other social systems with an observable tendency towards self-organization such as law, science, and technology. Despite their apparent value-neutrality, these systems obviously *do* play an important role in the creation of generally accepted notions of legitimacy. In any social relationship whatsoever, it is difficult to take a stance that is legally indefensible, scientifically untenable, or technologically unfeasible. By contrast, there is a premium on standpoints that are legally sound, scientifically reasonable, and technologically feasible. In society at large, social systems such as law, science, and technology, which are different from politics, the market, and civil society, perform an important catalytic role as providers of legitimacy. Now the crunch question is how these social (sub)systems are to be related to the three hegemonic projects outlined above. As a complement to the above conceptual exploration about new medievalism and

33. D. Drache (ed.), *The Market or the Public Domain? Global Governance and the Asymmetry of Power* (London, Routledge, 2001).

global governance, this point may be exemplified by some tentative remarks about international law.

Both logically and practically, there are different ways for international lawyers to find their place in the emergent neo-medieval world of global governance. Although each of these possible strategies will seem attractive and viable to some individual practitioners and theoreticians of international law, the most important question in the present context is the following: Which route will international lawyers tend to choose as a professional group?

In the first place, international lawyers and international legal theorists (or international legal philosophers) might feel entitled to pursue *Law's Empire*, i.e. to set up a fourth hegemonic project in addition to the three hegemonic projects discussed above. As Ronald Dworkin said, "The courts are the capitals of law's empire, and judges are its princes, but not its seers and prophets. It falls to philosophers, if they are willing, to work out law's ambitions for itself, the purer form of law within and beyond the law we have".[34] Of course this vision sounds rather fancy to the political scientist, mainly due to the threat it poses to the values of democratic accountability and republican virtue. Nevertheless, some of the contributions to the present volume seem to point into the direction of international lawyers aspiring for an autonomous role as decision-makers beyond and maybe even above the public, private and societal sectors. It is certainly questionable whether international lawyers would ever get along with such a project, especially in absence of a constituency other than states to hold them accountable and to be represented by them. Nevertheless, international law is a powerful purveyor of procedural legitimacy, and there is indeed some evidence that *Law's Empire* might be (or become) another hegemonic project in the making.

Alternatively, one might suggest that in the new Middle Ages international law should aspire for a status beyond the governance triangle formed by civil society, the state, and the market. Thereby, international lawyers could strive for a status comparable to that of scholasticism in the Middle Ages, when the *disputatio* was the paradigmatic method of intellectual conflict resolution.[35] In this optic, the practice of international law would be understood as a method to

34. R. Dworkin, *Law's Empire* (Cambridge, Harvard University Press, 1986), p. 407.

35. J.W. Baldwin, *The Scholastic Culture of the Middle Ages, 1000–1300* (Lexington, Heath, 1971).

accommodate the conflicting claims within and across system boundaries. And indeed, this would make a lot of sense in the face of late-modern functional differentiation. In a world where international politics, global economics, and world society are becoming increasingly self-contained systems, there is a desperate need for inter-systemic linkage among the divergent functional realms. This could be nicely conceptualized by recourse to Niklas Luhmann's concept of "systemic coupling". Thus, international law could perform an important function in providing a transversal code to make the diverging functional systems compatible and translatable into each other. That will be all the more important if it is true that the functional systems in the late-modern configuration have a tendency to follow their own immanent logic and to close themselves off from the rest of society.[36]

Finally, there is still another venue which international law can take to accommodate the requirements of the post-Westphalian situation. Instead of pursuing still another hegemonic project or becoming an instrument of meta-systemic governance, international law could also mirror the fundamental cleavages of the neo-medieval order. Thus, international lawyers could increase their specialization into the sub-disciplines of inter-state law, international market law, and international society law.[37] Although initially an emanation from international public law, international market law (*lex mercatoria*) is already on the verge of becoming an independent subject area *vis-à-vis* inter-state law. It has not yet come to be conventional wisdom, but there is a consensus in the making that inter-state law and

36. N. Luhmann, *Die Gesellschaft der Gesellschaft* (Frankfurt am Main, Suhrkamp, 1997). Although inspired by Niklas Luhmann's multi-systems theory, Gunther Teubners speculations about a "*global Bukowina*" are relatively misleading, since their conceptual source, the *"living law"* of Eugen Ehrlich"s Bukowina, belongs to the societal realm, whereas the legal pluralism of Teubner"s global Bukowina is mainly a corollary of the "*lex mercatoria*" and stands firmly in the economic sphere. *See* G. Teubner, " 'Global Bukowina': Legal Pluralism in the World Society", in G. Teubner (ed.), *Global Law Without a State* (Aldershot, Dartmouth, 1997).

37. Of course it would be possible to propose a subdivision of international public law into a more diverse plurality of branches, as W. Friedmann has done as early as 1964 in his book *The Changing Structure of International Law* (London, Stevens & Sons, 1964), pp. 152–187, where he distinguished between international constitutional law, international administrative law, international labour law, international criminal law, international commercial law, international economic development law, international corporation law, international anti-trust law, and international tax law. Nothing, however, would prevent from accommodating these and similar subcategories into the triangular framework of inter-state law, international market law, and international society law.

international market law are sufficiently differentiated from each other to form a pair of relatively independent sub-disciplines. Although |this may not (yet) be the case for international society law, the piecemeal constitution of a third sub-discipline is an option in the long run.

The functional differentiation of international law into the sub-disciplines of inter-state law, international market law, and international society law sounds like a reasonable scenario. However, this would raise the problem of shifting referent objects. Traditionally international law is state law (including reference to how a state treats its civilians). International market law primarily refers to firms (including reference to employers and employed), while the hardly existing field of international society law would primarily refer to individuals (and notably the non-governmental associations formed by these individuals). These shifting referent objects may complicate the further evolution of international law as the mother discipline of inter-state law, international market law, and international society law. For example, the problems with the international criminal court seem to point into that direction. But be that as it may, the challenge is almost inevitable in the face of recent developments.[38]

Since international society law is the least established among the legal sub-disciplines, the rest of this section is dedicated to a brief discussion of international society law as a possible new legal sub-discipline. For obvious reasons, the development of international society law is particularly desirable from the normative standpoint of global governance as the hegemonic project of transatlantic civil society. For those who subscribe to the liberal values shared by the large majority of non-governmental organizations, there is indeed a strong interest in the development of a coherent body of international society law, which until now is mostly conspicuous by its absence.

To bring this home, it is worth recalling that international politics, global economics, and transnational society are all distinguished by a typical class of actors and a specific normative ethos. In the case of international politics and global economics, but not in the case of world society, this is mirrored by a particular organizational mode and a corresponding legal superstructure. As suggested by the chart inserted below, it would greatly enhance both the legitimacy and effectiveness of global governance if NGOs could subscribe to

38. I owe this observation to the anonymous reviewer of this essay.

a normative ethos, i.e. to a code of shared substantive values, and to a corresponding catalogue of organizational standards and an appropriate legal superstructure. Only thus, non-governmental organizations could attain to a status comparable to that of registered associations in the domestic context, thereby becoming international legal persons in the full right.

	International politics ≈ government	**Global economics ≈ market**	**Transnational society ≈ governance**
Hegemonic actors	Liberal constitutional states	TNCs	NGOs
Normative ethos	Claim to legitimate representation	Claim to superior efficiency	Claim to substantive values
Organizational mode	Authoritative allocation of values	Decentralized allocation of values	(*desideratum*)
Legal superstructure	Inter-state law	International market law	(*desideratum*)

Although the United Nations in general, and ECOSOC in particular, exercise some pressure on non-governmental organizations to comply with some minimal organizational standards, NGOs are still a far cry from organizational isomorphism.[39] There are hardly any binding organizational standards for NGOs, which are the most important players in international society. Accordingly, it comes as little surprise that there is no consolidated body of international society law. Nevertheless, non-governmental organizations clearly do have a strong interest in becoming recognized as actors in a transnational legal sphere in its own right.[40]

39. C. Alger, "The Emerging Roles of NGOs in the UN System: From Article 71 to a People's Millennium Assembly", 8 *Global Governance*, No. 1, 2002, 93–117; P. Willetts, "From 'Consultative Arrangements' to 'Partnership': The Changing Status of NGOs in Diplomacy at the UN", 6 *Global Governance*, No. 2, 2000, 191–212; M. Ottaway, "Corporatism Goes Global: International Organizations, Nongovernmental Organization Networks, and Transnational Business", 7 *Global Governance*, No. 3, 2001, 265–292.

40. To further these ends, it is certainly beneficial to the hegemonic project of transatlantic civil society if international lawyers become part of global governance networks. *Cf.* S.J. Toope, "Emerging Patterns of Governance and International Law", in M. Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford, University Press, 2000), pp. 104–108.

At present, the creation of international society law is clearly a *desideratum* rather than a *fait accompli*. But even if one assumes that international society law is already in the making, its advent will probably turn out to be an ambivalent issue.

On the one hand, international society law will contribute to the marginalization, and eventually even to the criminalization, of those societal actors who do not subscribe to liberal principles. That will be deplored by radical communitarians and by leftist transnational social activists, who will have a hard time in developing an agreed-upon standard for organizational statutes. They are at a clear disadvantage when it comes to the formulation of organizational principles and a legal superstructure. This means that global governance, which is *de facto* the hegemonic project of transatlantic civil society, does not come without a price. To the extent that non-liberal actors are excluded, they may develop violent counter-strategies. This will be particularly true for openly illiberal actors, such as religious fundamentalists, transnational terrorists, and organized crime. Criminal elements and backward ideologies, as well as transnational social movements, will constantly challenge the hegemonic pretensions of the liberal design.

On the other hand, the legalization and institutionalization of global governance can be welcomed as a matter of fairness. Of course, depending on one's own ideological standpoint one may either celebrate or deplore global governance as the hegemonic project of transatlantic civil society. But at present it is certainly one of the most serious problems with the legitimacy of global governance that NGOs are forming a sort of *nébuleuse* that is difficult to hold accountable and to pin down for those who are more sceptical of the liberal project. It is not sufficiently clear how a world societal actor must be constituted and what it can or cannot do. There are no clear standards against which to measure the performance of NGOs as to procedural correctness and democratic accountability. With a consolidated body of international society law, global governance would also become more accountable and less of a moving target. This would make it easier for all parties concerned to grasp global governance as what it actually is, namely the hegemonic project of transatlantic civil society.

5. *Conclusion*

Quite obviously, these are sketchy remarks. The author of this essay is a political scientist and not a specialist in international law. It will be up to the theoreticians and practitioners of international law themselves to establish the most likely consequences of new medievalism and global governance for their own discipline. In any case, international lawyers are well advised not to evade the challenges posed by new medievalism and global governance. Insofar as the diagnosis is correct, there will be no way for international lawyers to avoid taking a stance *vis-à-vis* the altered normative environment they will constantly have to deal with.

For example, one might debate the generally held belief that international criminal law is still within the framework of international law proper. On the one hand, it is still true that the prosecution of international crime depends on agreements among states to delegate criminal jurisdiction from the national to the international level. On the other hand, however, this is leading to a situation where individuals are held accountable by a supranational rather than by an international legal constituency. At least in the long run, international criminal law may therefore become a branch of the emergent international society law.

Another open question is whether and to what extent international society law is going to contain liberal substance. The answer is clearly affirmative in the case of human rights law, which is identifiable as an outgrowth of Western liberal constitutionalism. However, this will be less clear in the formulation of organizational standards for the actors of international civil society in general, and for NGOs in particular. These standards will be rather about statutes and procedures than about liberal substance. In the final analysis, however, the standards will privilege liberal actors, since they are going to enhance the legitimacy of (mostly liberal) non-governmental organizations to the detriment of (mostly rightist) organic communities on the one hand, and (mostly leftist) transnational social movements on the other.

Although these and other important questions are barely addressed in the present chapter, it was perhaps not quite unimportant to get the theoretical concepts right in the first place. Since their introduction into scientific discourse, the theoretical concepts of new

medievalism and global governance have suffered very much from an excessively impressionistic use. This has been so in social science in general and in political science in particular, and there might be an unfortunate contagion effect on international law and other disciplines of human science. Against that danger, the conceptual exploration undertaken in this essay is thought as an antidote. If legal scholars are going to use the concepts of new medievalism and global governance with an enhanced conceptual awareness, the present essay has been worth the effort.

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6. Postscriptum: *Co-operation and conflict among hegemonic projects*

When exposing these ideas to international lawyers, one aspect has often raised perplexities. Among each other the three hegemonic projects (the Western club of the democratic states at the centre of world politics, a TNC-driven transnational economy in the global market, and global governance by transatlantic civil society) are presented as inherently conflictive. Would not it be more fruitful to understand these projects as co-operating rather than conflicting, mutually co-existing rather than divergent, and interdependent rather than antagonistic?

Of course the three hegemonic projects are all of this at the same time, depending on the circumstances of a particular issue at stake, and depending on the particular viewpoint of the observer. It therefore makes a lot of sense to talk about antagonistic co-operation (or co-operative antagonism) among the three hegemonic projects. Nevertheless, this formula does not appear to be fully satisfactory to the international lawyer and/or legal scientist, insofar as the very foundations of his professional ethos are involved.

To the political scientist, co-operation and conflict are simply two modalities of human intercourse, and there is nothing wrong with a conceptualization that takes conflict as constitutive and co-operation as the challenge. To the international legal scientist, by contrast, conflict is the scandal, and a good part of his professional routine is dedicated to the effort of transcending apparent contradictions and harmonizing the dissonance that lies in different ways of acting and thinking. It is therefore not by accident that international lawyers instinctively dislike the idea of the three hegemonic projects being conflictive.

These perplexities notwithstanding, I would argue that a dialectical relationship of both co-operation *and* conflict is indeed at work

among the three hegemonic projects. To bring this home, I shall briefly discuss the relationship between global governance and international politics (One could also address the relationship between international politics and globalization, or between globalization and global governance. I have chosen the relationship between global governance and international politics, however, since global governance is often perceived to be less conflictual than traditional politics. Whether right or wrong, this belief may be one reason why global governance is so appealing to the legal scientist.).

Global governance is by definition different from government. It is generally understood as "governance without government" and thereby opposed to the traditional understanding of politics as government, i.e. "the authoritative allocation of values".[41] Does that mean that global governance is politically neutral? Against the assumption of the less political and therefore less conflictive nature of global governance, I will try to show that when you throw political conflict out of the door, it will turn back through the window. Politics may be disguised but is certainly not absent in global governance. It should not be forgotten that global governance is the hegemonic project of transatlantic civil society.

When looking at the practical and rhetorical use made of global governance, it is easy to make the following observation. Although not political in the traditional sense of the word, global governance is oscillating between two indirect ways of being political. On the one hand, it is *parapolitics* as the continuation of political activity beyond the organizational sphere of the state. On the other hand, it is *metapolitics* as the allocation of organizational purpose and substantive demands to political and economic actors.[42] (As a shortcut to illustrate what is meant by these terms, it is helpful to introduce the following two equations: military relates to paramilitary as politics to

41. D. Easton, *The Political System: An Inquiry on the State of Political Science* (2nd ed., New York, Alfred A. Knopf, 1971).

42. As parapolitics, global governance competes with international politics. As metapolitics it embraces, among many other things, political relations among governments. From a strictly logical viewpoint, this is a startling contradiction. It seems hard to conceptualize global governance as both beyond and above government. However, this logical contradiction becomes much less confusing as soon as global governance is understood as a hegemonic project. It turns out that, at least for practical purposes, the Janus-faced elusiveness of global governance is a strategic asset. To maximize the influence of global civil society, global governance is sometimes construed as *beyond* and sometimes as *above* politics.

parapolitics; theory relates to metatheory as politics to metapolitics.)

Global governance as *parapolitics* is the continuation of politics beyond the organizational sphere of the state. In this optic, governance has its organizational locus in the societal sphere as opposed to the political system, "The state is engaged in government; civil society, in governance".[43] And indeed, as every attentive observer of day-to-day politics will recognize, the settlement of political issues is often rather negotiated among societal actors than allocated by sovereign authority. Nevertheless, it would be naïve to presume a harmonious relationship between politics and parapolitics. Especially when it comes to the question of who is entitled to allocate which values, governance will often enter into acute competition with government. This is necessarily so, since governance clashes with the traditional understanding of politics, according to which the state is the paramount agency in charge with acting on behalf of the community. In this optic, politics is either done with the state as the final arbiter, or it is illegitimate. Just as paramilitary activities are highly problematic from the standpoint of the regular troops, parapolitics is ambivalent from the standpoint of the political establishment. At the international level, this is exasperated by the absence of a consolidated civil society and by the questionable democratic legitimacy of non-governmental organizations, transnational social movements, and other world societal actors.

At the same time, global governance is also about *metapolitics*. As argued above, global governance presumes a separation of the world system into three analytically distinct spheres of action: the state system, the global economy, and transnational society. This leads to the question of how these three spheres should be related to one another. Insofar as global governance tries to give an answer to this question, it is a *metapolitical* enterprise. But once again, this enterprise is far from being ideologically neutral. Global governance is committed to civil society, just as the discourse about economic globalization tends to emphasize the virtues of the global economy, and just as conventional ideas about the primacy of politics run counter to both global governance and economic globalization. Remember that the governance triangle, with civil society on top, and politics and eco-

43. R.D. Lipschutz, *Global Civil Society and Global Environmental Governance: The Politics of Nature from Place to Planet* (New York, SUNY Press, 1996), p. 249.

nomics at the base, is just one out of three possible representations of the neo-medieval conjuncture. To some enthusiastic adherents of global governance the post-Westphalian world order is the stage for global public policy networks, where governmental and non-governmental actors are working peacefully together in private-public partnerships.[44] But in the real world the quest for primacy seems to be almost inevitable in any partnership. It would therefore be unwise to presume a pre-ordained harmony of interests between the state, the economy, and society.

Even if global governance is not political in the traditional meaning of the word, it is political in the more indirect sense of *parapolitics* and *metapolitics*. Therefore, it would be inadequate to celebrate global governance as the apolitical and spontaneous self-regulation of the world by societal stakeholders. It is much more complicated than that. Even if we take global governance in the narrow sense of problem solving, it is still an eminently political task to figure out which problems should be decided at which level: political, societal, or economic? If, by contrast, we understand global governance in a broader sense, it comes close to a component of an *historical block* à la Gramsci. In this optic, global governance is a political project that wants to contribute to the "maintenance and reproduction of a hegemonic order, able to reach compliance without having to resort to force".[45] Global governance is more than just a problem-solving device, even if its political implications tend to be concealed.

Very similar arguments could be made about the relationship between politics and economic globalization. Even the relationship between economic globalization and global governance is more political than what it would appear. It would not be too difficult to extend the discussion to cover the whole triangle formed by global governance, international politics, and transnational economics. The advent of globalization and global governance does not imply the demise of politics, it rather means its displacement into a sphere where it is less tangible. Conflict within and among the hegemonic projects is a constant danger, and the exclusion of systemic alternatives further enhances the conflict potential. It would be interesting

44. W.H. Reinicke, *Global Public Policy: Governing Without Government* (Washington, Brookings, 1998).

45. M.J. Massicotte, "Global Governance and the Global Political Economy: Three Texts in Search of a Synthesis", 5 *Global Governance*, No. 1, 1999, 127–148, at 136.

to spell this out in further detail, but due to spatial limitations I have deliberately limited myself to the relationship between politics and global governance.

There is a strong case that the three hegemonic projects are ultimately contributing to one overarching hegemonic order (read: *transnational capitalism*). Nevertheless, it is fair to say that in some issue areas there are incentives for the three functional spheres to co-operate, whereas other issue areas are rather distinguished by latent or patent antagonism. Thus, states cannot allow for too much tax evasion by the market, and they cannot surrender minimal control over social deviance and migration flows. Firms have an interest in evading environmental standards dictated by the state, and in manipulating people's preferences and their consumptive behaviour. Society sometimes is subversive of public authority, and sometimes even of corporate power. In the neo-medieval conjuncture, inter-systemic conflict is constitutive and co-operation is the challenge. If one looks at the different normative goals and the distinct operational logic of each hegemonic project, it could hardly be otherwise.

But of course, there are strong incentives for co-operation and compromise among the hegemonic projects. TNCs will sometimes undergo public-private partnerships in order to shape their socio-political environment. States will sometimes work together with NGOs and transnational social movements to hold in check TNCs. In other instances, human rights activists will try to convince TNCs that it is in their interest to outdo authoritarian states. But despite latent antagonism, an open clash between the three hegemonic projects will be rather the exception than the rule. Ultimately, all three of the hegemonic projects tend to exclude systemic alternatives and are contributing to the *historical block* of transnational capitalism. Nevertheless, it would be naïve to assume a stable harmony of interests among the hegemonic projects. New medievalism is neither an end to "order" and "progress", nor is it the end of conflict and violence.

CHAPTER TWO

LAWYERS AND ANTHROPOLOGISTS: A LEGAL PLURALIST APPROACH TO GLOBAL GOVERNANCE

Gerhard Anders*

Like sailing, gardening, politics, and poetry, law and ethnography are crafts of place: they work by the light of local knowledge. The instant case, Palsgraff or the Charles River Bridge, provides for law not only the ground from which reflection departs but also the object toward which it tends; and for ethnography, the settled practice, potlatch or couvades, does the same. Whatever else anthropology, and jurisprudence may have in common – vagrant erudition and a fantastical air – they are alike absorbed with the artisan task of seeing broad principles in parochial facts. "Wisdom," as an African proverb has it, "comes out of an ant heap."

Given this similarity in cast of mind, a to-know-a-city-is-to-know-its-streets approach to things, one would imagine lawyers and anthropologists were made for each other and that the movement of ideas and arguments between them would proceed with exceptional ease. But a feel for immediacies divides as much as it connects, and though the yachtsman and the wine-grower may admire one another's sense of life it is not clear what they have to say to one another. The lawyer and the anthropologist, the both of them connoisseurs of cases in point, cognoscenti of matters at hand, are in the same position. It is their elective affinity that keeps them apart.

Clifford Geertz[1]

* Research Fellow, Department of International Law, Faculty of Law, Erasmus University Rotterdam. Most of the ideas expressed in this text have been published in somewhat different form elsewhere: one short article written in Dutch with the title "Rechtspluralisme in een internationale context" in: E. Hey, *et al.*, *Grensverkenningen in het recht* (2001), and an article with the title "Legal Pluralism in a Transnational Context: Where Disciplines Converge", 27 *Bulletin du Laboratoire d'Anthropologie Juridique Paris*, 2002. Thanks are due to Juan Amaya-Castro, Keebet von Benda-Beckmann, Ellen Hey, Miklos Redner, Sten Schaumburg-Müller and the participants of the round table on "Governance and International Legal Theory" held in Utrecht, 4–6 July 2002 who have read and commented on earlier versions of this text.

1. C. Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (London, Fontana Press, 1983), pp. 167–168.

1. *Introduction*

Clifford Geertz is an anthropologist who has left the ant heap far behind him; his eloquence and erudition have made him famous beyond the borders of his discipline. Therefore it is no surprise that he was able to link law and anthropology in this elegant and baroque manner in a lecture for law students at Yale Law School in 1981 from which the excerpt above is taken. He points out that law and anthropology have much in common but that the relation between the lawyer and the anthropologist is characterized by "ambivalence and hesitation" rather than convergence and exchange.[2] This chapter is an attempt to exploit the similarities mentioned by Geertz and to bridge this gap between the two disciplines in order to come to terms with the profound changes in the exercise of power since the end of the Cold War. It argues that the space in-between law and anthropology offers a promising angle for the discipline of international law to study governance at a global scale.[3]

Governance has emerged as a new buzzword in policy-making and research in the last decade of the 20th century. The word governance is widely used in the discourse on policy reforms of the state institutions and the market. For example, the World Bank, the IMF and other donor agencies promote "good governance" and "corporate governance" and demand compliance from governments and companies in recipient countries. In a parallel development, the use of the term has been increasing in various scientific disciplines such as economics, international relations and law.[4] The inflationary use of the term and the different meanings ascribed to it in policy-making and science have resulted in conceptual ambiguity and vagueness. Often it is less than clear what is meant by the word "governance" and what it refers to. Some authors in this volume, such as Friedrichs, argue that the use of the term creates more confusion and vagueness

2. Geertz (note 1), p. 169.

3. This objective does not imply that anthropology could not profit from this angle or from legal science in general. On the contrary, to be in-between implies cross-fertilization. However, this chapter is mainly addressed at lawyers and international lawyers. Therefore, I restrict my argument to the possible benefits for international law.

4. For an overview on literature on governance in various disciplines, *see* K. van Kersbergen, F. van Waarden, *Shifts in Governance: Problems of Legitimacy and Accountability* (The Hague, Social Science Research Council NWO, 2001).

and they doubt whether the term has any analytical added value. Despite these objections, from my point of view, governance is a very suitable term to denote the profound changes in the ways in which power, from the global down to the local scale, is exercised. In the seminal volume 'Governance without government' Rosenau defines governance in following words:

> [. . .] Governance is not synonymous with government. Both refer to purposive behaviour, to goal-oriented activities, to systems of rule; but government suggests activities that are backed by formal authority, by police powers to insure the implementation of duly constituted policies, whereas governance refers to activities backed by shared goals that may or may not derive from legal and formally prescribed responsibilities and that do not necessarily rely on police powers to overcome defiance and attain compliance. Governance, in other words, is a more encompassing phenomenon than government. It embraces governmental institutions, but it also subsumes informal, non-governmental mechanisms whereby those persons and organizations within its purview move ahead, satisfy their needs, and fulfil their wants.[5]

Other scholars have also drawn attention to the changed role of the state and the rise of other agents of governance in phrases such as "retreat of the state"[6] or "privatization of the state".[7] Several shifts in governance can be discerned: from national to international institutions, from executive and legislative institutions to judicial institutions, from public to semi-public organizations and governance, from public to private organizations, from decentralised markets to a concentration of markets and a shift towards a more network-type of organization in the private and the public sector.[8] To use the term governance instead of government or administration indicates that the state, or government, is only one of a multitude of agents exercising power from different sites and levels. Furthermore, neither government nor any other organization for that matter is a monolithic entity but rather a complex of different actors and forces that operate under the umbrella of "the state". In other words, the study of governance offers a possibility to disentangle the exercise of power from government,

5. J.N. Rosenau, E.-O. Czempiel, *Governance without Government: Order and Change in World Politics* (Cambridge, Cambridge University Press, 1992), p. 4.

6. S. Strange, *The Retreat of the State: The Diffusion of Power in the World Economy*, (Cambridge, Cambridge University Press, 1996).

7. B. Hibou, in Hibou (ed.), *La privatization des États* (Paris, Karthala, 1999).

8. Van Kersbergen, van Waarden (note 4), pp. 29–50.

on the one hand, and to disaggregate the exercise of power by government, on the other hand.

This chapter argues that the concept of legal pluralism as it has been developed in legal anthropology since the 1970s offers a new perspective for the analysis of these shifts in governance. Literally, the term legal pluralism does not mean more than the existence of more than one legal order which is hardly a groundbreaking idea for international lawyers who are used to the idea of the co-existence of states in their role of sovereign lawmakers. However, adopting this attitude would ignore the understanding of the term as it has been developed in legal anthropology. Therefore, it is necessary to explain what the concept means and how it is used before it can be applied to address the changes in global governance of the last decade. In my understanding, the concept of legal pluralism has three basic elements. First, state law is not the only form of regulating human interaction; other forms of ordering exist side by side with state law and should be treated equally in the analysis. Second, this interaction of different normative orders can be observed in a specific social space that forms the unit of analysis. Third, state law and the institutions of the state do not form a coherent system but are rather a patchwork of different elements thus resulting in internal legal pluralism within the state. In my point of view, these three key elements could be fruitful for the study of governance from a legal perspective.

My argument in favour of adopting a legal pluralist approach will be developed in several steps. Firstly, I address the shortcomings of a positivist approach to international law in the light of intensified globalization and the changes in global governance. Secondly, I distinguish the normative thinking of the lawyer from the anthropological reflective mode of thinking. The third section gives a cursory presentation of the concept of legal pluralism. Then I differentiate the transnational, the national and the local levels with regard to situations of legal pluralism, followed by the fifth section on the two approaches to legal pluralism, the "legal-political" and the "comparative-reflective". In conclusion I review recent work in order to identify avenues for the operationalization of the concept of legal pluralism in order to understand shifts in global governance.

2. *The blindness of legal science*

In the last two decades global interconnectedness and interdependence have intensified at an unprecedented pace: communication has been digitized and is faster than ever before, mobile telecommunications and internet are now accessible in many parts of the world that had hitherto only an ephemeral connection with the rest of the world, commodities and money are moved at a scale and speed as never before and the migratory movement of large numbers of people and environmental pollution transcend national borders and even continents. This trend is reflected by the global activities of commercial enterprises, networks of NGOs and interest groups and governmental and non-governmental organizations that interfere increasingly in a domain traditionally dominated by sovereign states. These developments that are usually lumped together under the label of globalization have resulted in shifts in global governance from formal authority exercised by governments to more complicated mixes of different sites from which power is exercised both formally and informally by a variety of different actors.[9]

These shifts in global governance have had their effects on international law which has become more complicated and fragmented. For example, many new international tribunals have been established resulting in a proliferation of dispute settlement bodies with often overlapping claims for jurisdiction. Furthermore, growing regulating activities can be observed outside the realm of conventional international law. Transnational corporations, NGOs, accountants and law firms are other actors that have gained more influence at the transnational level and operate often outside national and international law and even international organizations such as the World Bank and the International Monetary Fund (IMF) have developed their own rules and guidelines that often prevail over the universal norms of international law. Often, the policies of these transnational actors have considerable impact on the lives of individuals and groups

9. M. Castells, *The Rise of the Network Society* (Cambridge MA, Blackwell, 1996); M. Desai, P. Redfern (eds.), *Global Governance: Ethics and Economics of the World Order* (London, Pinter, 1995); Hibou (note 7); Rosenau, Czempiel (note 5); Strange (note 6); T.G. Weiss, L. Gordenker (eds.), *NGOs, the UN & Global Governance* (London, Lienne Rienner Publishers, 1996).

of individuals who have, in turn, more influence at the transnational level if they assemble in interest groups or social movements.[10]

From my point of view, neither the discipline of international law, nor any other legal sub-discipline dealing with the transnational dimension for that matter,[11] has addressed these developments in an adequate manner. Attempts to address these shifts in global governance resemble to often conventional and cherished doctrine, which is based on an image of rather idealized relations between sovereign nation-states that ought to take the form of legal formal agreements such as treaties and covenants, and fail therefore to capture transformed global governance.[12] For example, the importance of new "non-state actors" has been acknowledged but so far scholars have been essentially concentrated on the extension of legal doctrine rather than a real overhaul.[13] Forms of normative ordering below the level of formally recognized binding law such as the "proto-law" of the World Bank and the IMF,[14] "soft law" and the "project law" of development agencies, i.e. their terms of reference, mission statements and constitutions[15] are considered usually to be outside the scope of international law and attempts to include 'soft law' in international legal doctrine tend to fail to account for the proliferation and legitimacy of these various forms of "non-binding law".[16] To my mind this state of the

10. K. von Benda-Beckmann, "Legal Pluralism", Paper presented at the Conference on Customary Law in Buo Ma Thuot, Vietnam, 23–25 November 1999; B. de Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (New York/London, Routledge, 1995).

11. Comparative law and private international law. *See* K.Günther, S. Randeria, *Recht, Kultur und Gesellschaft im Prozeß der Globalisierung* (Bad Homburg, Werner Reimers Konferenzen, 2001).

12. I. Brownlie, *Principles of Public International Law*, 5th ed. (Oxford, Oxford University Press, 1998). A. Cassese, *International Law* (Oxford, Oxford University Press, 2001); P. Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th ed. (London, Routledge, 1997).

13. H. Hillgenberg, "A Fresh Look at Soft Law", 10/3 *European Journal of International Law*, 1999, 499–516. R. Hofmann (ed.), *Non-state Actors as New Subjects of International Law: International Law – from the Traditional State Order towards the Law of the Global Community* (Berlin, Duncker & Humblot, 1998).

14. S. Randeria, "Globalising Gujarat: Environmental Action in the Legal Arena – World Bank, NGOs and the State", in Rutten (ed.), *Festschrift for Professor Jan Breman* (Amsterdam and Dehli: forthcoming).

15. K. von Benda-Beckmann (note 10).

16. C.M. Chinkin, "The Challenge of Soft Law: Development and Change in International Law", 38 *International Comparative Law Quarterly*, 1989, pp. 850–866; Hillgenberg (note 13); J. Klabbers, "The Undesirability of Soft Law", 67 *Nordic Journal of International Law*, 1998, 381–391.

legal art fails to capture the proliferation of actors and changing patterns of ordering that have been characteristic for the shifts in governance in the last decade or so.

3. *The normative lawyer and the reflective anthropologist*

Among scholars of international law slowly the awareness has been growing that "genre-mixing", to use another of Geertz's phrases,[17] with social science disciplines such as international relations theory, sociology or anthropology could counter legal science's deficit with regard to social realities and is better suited to address the increasing transnational legal complexity and the effects of globalization.[18] Indeed, legal science does not have a method at its disposal to analyze "the real world", it is often based on highly abstract assumptions about reality such as the "reasonable man", "good faith", "best practices", etc. This unease with legal doctrine is shared by the so-called New Approaches to International Law (NAIL)[19] and is a recurrent theme since the advent of sociology of law in the beginning of the 20th century.[20]

Anthropology, on the other hand, is considered to be a discipline with a very empirical focus: knowledge is usually acquired through extended periods of fieldwork in a specific location where the researcher is expected to participate to a certain extent in and observe social life and how the "natives" themselves look at things. Rivers, one of the first professional anthropologists, wrote that ideally the researcher "lives for a year or more among a community of perhaps four or

17. Geertz (note 1).

18. A. Blackett, "Globalization and its Ambiguities: Implications for Law School Curricular Reform", 37 *Columbia Journal of Transnational Law*, 1998, 57–78; Günther and Randeria (note 11); A. Riles, "Representing In-between: Law, Anthropology, and the Rhetoric of Interdisciplinarity", *University of Illinois Law Review*, 1994, 597–650; A.-M. Slaughter, A. Tulumello, S. Wood, "International law and International Relations Theory: A New Generation of Interdisciplinary Scholarship", 92/3 *American Journal of International Law*, 1998, 367–401.

19. For overviews and bibliographies *see* D. Cass, "Navigating the Newstream: Recent Critical Scholarship in International Law", 65 *Nordic Journal of International Law*, 1996, 341–383; M. Koskenniemi, "Preface", 65 *Nordic Journal of International Law*, 1996, 337–340; T. Skouteris, O. Korhonen, "Under Rhodes' Eyes: the 'Old' and the 'New' International Law at Looking Distance", 11 *Leiden Journal of International Law*, 1998, 429–440.

20. E. Ehrlich, *Grundlegung der Soziologie des Rechts*, 4th ed. (Berlin, Duncker & Humblot, 1989/1913).

five hundred people and studies every detail of their life and culture; in which he comes to know every member of the community personally; in which he is not content with generalized information, but studies every feature of life and custom in concrete detail and by means of the vernacular language."[21] Of course this method has been subject to change, especially since globalization that has led to the adaptation of anthropological methodology.[22] However, the ideal of "going there", wherever it might be, has changed surprisingly little. The credo of the anthropologist is to proceed by the "inductive examination of facts carried out without any preconceived idea or ready-made definition" as one of the founding fathers who transformed anthropology into a scientific discipline has pointed out.[23] Indeed, fieldwork, the long protracted stay among the people under study, has been traditionally the primary research tool of the anthropologist. Clifford, for example, has gone so far to assert that the practice of doing fieldwork really defines the discipline.[24] The eye for detail, the constant switch between particular situation and broad principles, the "to-know-a-city-is-to-know-its-streets" approach should make exchange and communication easy according to Geertz. However, despite these similarities encounters between lawyers and anthropologists are often characterized by miscommunication and miscomprehension, which leave a taste of disappointment and futility in the mouth of those who try to bridge the divide between the two disciplines.

Unlike Geertz I do not think that it is the lawyer's and the anthropologist's "elective affinity" that keeps the them apart but rather a different mode of thinking and a different methodology. The lawyer has a "normative" mode of thinking and the anthropologist a "reflective"

21. Quoted in: A. Kuper, *Anthropology and Anthropologists: The Modern British School*, 3rd ed. (London/New York, Routledge, 1996).

22. For example, *see* the call to "study up" in the 1970s in L. Nader, "Up the Anthropologist – Perspectives gained from Studying Up", in Hymes (ed.), *Reinventing Anthropology* (New York, Pantheon Books, 1972), pp. 284–311; or more recently the concept of "ethnoscapes" in A. Appadurai, *Modernity at Large: Cultural Dimensions of Globalization* (Minneapolis, University of Minnesota Press, 1996). *See also* the concept of "multi-sited fieldwork": G.E. Marcus, "Ethnography in/of the World System: The Emergence of Multi-Sited Ethnography", 24 *Annual Review of Anthropology*, 1995, 95–117.

23. B. Malinowski, *Crime and Custom in Savage Society* (London, Routledge & Kegan Paul, 1926).

24. J. Clifford, *Routes: Travel and Translation in the Late Twentieth Century* (Cambridge, Harvard University Press, 1997).

mode of thinking.[25] In my point of view these are useful labels to characterize the different objectives and methods of the two disciplines. Lawyers are said to be more practical-minded, they are usually trained in one national legal system, they are rule-oriented and not empirical while anthropologists' work tends to be more of the pure research type rather than being applied, it is relativistic, holistic and comparative.[26] The normative approach tends to perceive of law as an object, as something that can be isolated from economic, social and political factors and has probably culminated in Kelsen's pure theory of law. Normativity, as I use the term here, has a twofold meaning: first, lawyers describe and analyze legal norms isolated from the social context and, second, they tend to have a more normative outlook on the real world – on how the law can and should affect reality.[27] The normativity of the lawyer's thinking is not limited to the law. Lawyers often seem to have a preference for clearly defined categories, which are rather essentialist and static.

In the eyes of an anthropologist, law is always embedded in social realities from which it cannot be isolated for analytical purposes. Since the linguistic turn anthropologists have become increasingly sceptical of essentialist and static concepts such as culture or race and have stressed the dynamic and multi-layered processes behind such normative concepts.[28] This difference does not imply that it is impossible to bridge the disciplinary divide. On the contrary, the movement between these "incommensurable modes of thinking about law"[29] can make interdisciplinary research in the space in-between anthropology and law so interesting and promising. To position oneself in the space in-between opens up narrow disciplinary boundaries, something which seems to be no longer a superfluous extravaganza but rather a necessity to be able to adequately address the consequences of globalization and its effects on legal ordering.

25. Riles (note 18).

26. See also stereotypes of "the lawyer" and "the anthropologist" in W. Twining, "Law and Anthropology: A Case Study in Interdisciplinary Collaboration", 7/4 *Law & Society Review*, 1973, 572–577.

27. I would like to thank Sten Schaumburg-Müller, Faculty of Law at Aarhus University, who made me aware of this differentiation.

28. J. Clifford, "Identity in Mashpee", in Clifford (ed.), *The Predicament of Culture: Twentieth-century Ethnography, Literature, and Art* (Cambridge, London, Harvard University Press, 1988), pp. 277–346. Clifford's famous account of the *Mashpee* case about the ambiguities and multiplicity of identity that criticises the static and essentialist legal definition of indigenous cultural identity.

29. Riles (note 18), p. 601.

4. *The potential of legal pluralism*

I argue that the concept of legal pluralism as it has been developed by legal anthropology since the 1970s has the potential to serve as a useful tool to overcome the shortcomings of legal science with regard to the transformation of international law from legally regulated agreements between sovereign nation-states into a more complex patchwork of different actors and different types of legal ordering or in other words the shift from government to governance. The concept of legal pluralism is a product of the space in-between legal science and anthropology and mirrors differences between the two disciplines sketched in the previous paragraph. Before I turn to different ways of looking at legal pluralism I will first give a brief overview of the development of the concept in legal anthropology. I have neither the space nor the intention to give an exhaustive overview of the historical development of legal anthropology in general.[30] It has to suffice here to say that after the focus of legal anthropology had slowly evolved from the study of "primitive" law in societies at an earlier evolutionary stage[31] to the rationality of "savage" or "tribal law" in isolation from the influence of the colonial state[32] the emphasis shifted in the 1970s to "the study of colonial societies in which an imperialist nation, equipped with a centralised and codified legal system, imposed this system on societies with far different legal systems, often unwritten and lacking formal structures for judging and punishing".[33] These situations were described as legal pluralism. Soon the scope was expanded beyond the traditional subjects of legal anthropology, the former colonies and customary law, to include complex societies in the West and elsewhere and other forms of "local law": Galanter, for example, studied disputes in the USA,[34]

30. J. Griffiths, "Recent Anthropology of Law in the Netherlands and its Historical Background", in Griffiths, Von Benda-Beckmann (eds.), *Anthropology of Law in the Netherlands* (Dordrecht, Foris Publications 1986) pp. 11–66; S.F. Moore, "Certainties Undone: Fifty Turbulent Years of Legal Anthropology 1949–1999", 7 *Journal of the Royal Anthropological Institute*, 2001, 95–116; and F. Snyder, *Law and Anthropology: a Review*, EUI Working Paper LAW No. 93/4 (Florence, European University Institute, 1993).

31. H. Maine, *Ancient Law: Its Connection with the Early History of Society and its Relation to Modern Ideas* (London, Murr, 1861).

32. Malinowski (note 23); E.A. Hoebel, K.N. Llewellyn, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (Norman: University of Oklahoma Press, 1941).

33. S.E. Merry, "Legal Pluralism", 22/5 *Law & Society Review*, 1988, 874.

34. M. Galanter, "Justice in Many Rooms", 19 *Journal of Legal Pluralism*, 1981, 1–47.

Moore the garment industry in New York[35] and de Sousa Santos a squatter neighbourhood in Brazil.[36]

This form of "new legal pluralism" was mainly developed by means of Moore's concept of the "semi-autonomous social field". She defines this field as follows:

> The small field observable to an anthropologist [. . .] can generate rules and customs and symbols internally, but [. . .] it is also vulnerable to rules and decisions and other forces emanating from the larger world by which it is surrounded. The semi-autonomous social field has rule-making capacities, and the means to induce or coerce compliance; but it is simultaneously set in a larger social matrix which can, and does, affect and invade it [. . .]. [. . .] The analytic problem of fields of autonomy exists in tribal society, but it is an even more central analytic issue in the social anthropology of complex societies. All the nation-states of the world, new and old, are complex societies in that sense. The analytic problem is ubiquitous.[37]

This constituted a break with legal anthropology as it had been practised before. Moore no longer limited herself to study "tribal law" in isolation as, for instance, Malinowski[38] had done but acknowledged the influence of the state and wider society on the social field. She also departed from the idea of studying legal pluralism in former colonial territories and expanded the scope to "modern" industrialized societies.

Legal pluralism has been defined variously as "l'existence, au sein d'une societé déterminée, de mécanismes juridiques différents s'appliquant à des situations identiques",[39] a "situation in which two or more laws interact"[40] the "state of affairs, for any social field, in which behaviour pursuant to more than one legal order occurs"[41] as

35. S.F. Moore, "Law and Social Change: The Semi-autonomous Social Field as an Appropriate Subject of Study", 7 *Law & Society Review*, 1973, 719–746.

36. B. de Sousa Santos, "The Law of the Oppressed: The Construction and Reproduction of Legality in Pasagarda", 12/1 *Law & Society Review*, 1977, 5–125. For detailed overviews with extensive references *see*, e.g., K. von Benda-Beckmann (note 10); Merry (note 33); Snyder (note 30), and G. Woodman, "Ideological Combat and Social Observation. Recent Debate about Legal Pluralism", 42 *Journal of Legal Pluralism*, 1998, 21–59.

37. Moore (note 35), 720.

38. Malinowski (note 23).

39. J. Vanderlinden, "Le pluralisme juridique: essai de synthèse", in Gilissen (ed.), *Le pluralisme juridique* (Brussels, Université de Bruxelles, 1971), p. 19.

40. M.B. Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-colonial Laws* (Oxford, Clarendon Press, 1975), p. 6.

41. J. Griffiths, "What is Legal Pluralism?", 24 *Journal of Legal Pluralism*, 1986, 2.

"different legal spaces operating simultaneously on different scales and from different interpretive standpoints"[42] or more lately as "the condition of the person who, in his daily life, is confronted in his behaviour with various, possibly conflicting, regulatory orders . . . emanating from the various social networks of which he is, voluntarily or not, a member".[43] Despite differences in emphasis of these different attempts to define legal pluralism all definitions seem to agree on several constitutive characteristics of the phenomenon. Woodman has pointed out that all definitions contain variations of the following elements: a) the category law includes non-state normative orders, b) legal pluralism can also be found within state law between different institutions and organizations, c) bodies of rules and norms called either "laws", "legal orders" or "self-regulating orders" are the constituent elements of legal pluralism and d) the locus of legal pluralism is a social setting that constitutes a distinguishable object of study whether it is called "une société déterminée", "semi-autonomous social field" or "social network".[44]

For a lawyer who is used to think of law or "the legal system" in the terms of court rulings, legislation, statutes and opinions of other lawyers it is difficult to accept the idea that there might exist other ways of regulating human interaction within a given social field, which deserve the label law. Lawyers tend to equate social order with "rule of law" ignoring the existing non-state regimes of order. This is not different for the international lawyer who usually thinks of international law as a systemic whole consisting of legal subjects whose relations are governed by the body of international law based on legally binding agreements between these subjects. To consider phenomena such as "soft law", the unofficial regulation of cyberspace, the gentlemen's agreements of arbiters of transnational commercial disputes and the rules of engagement of humanitarian NGOs, for example, within the same framework as an official agreement between states is not common among international lawyers, especially in the field of public international law. It could be easier for international private lawyers, who are used to consider something as *lex mercatoria*

42. B. De Sousa Santos, "Law: a Map of Misreading. Toward a Postmodern Conception of Law", 14/3 *Journal of Law and Society*, 1987, 279–302, at 288.

43. J. Vanderlinden, "Return to Legal Pluralism: Twenty Years Later", 28 *Journal of Legal Pluralism*, 1989, 149–157, at 153–154.

44. Woodman (note 36).

as law, to extend the category law beyond the boundaries of public international law. From my point of view the importance of these alternative forms of ordering would be a strong argument to have a closer look at them in their own right without perceiving them primarily as aberrations that have to be integrated into the law. By investigating situations of legal pluralism the lawyer could be provided with empirical knowledge about these other alternative forms of ordering.

The question whether normative orderings outside the realm of the state can be considered to be law has been one of the central debates in the field of legal anthropology. The debate has been long, fruitless and unresolved yet.[45] Some scholars prefer to reserve the term law for state law.[46] Instead of using the term "law" Moore, for example, proposes to use the term "reglementation" with regard to "law-like phenomena in modern complex societies".[47] Other scholars accept the possibility of the existence of non-state law and call these forms of ordering law. They do so in order to place non-state "law" at the same analytical level as state law.[48] To my mind, the central issue is not whether something is called law but the recognition of the importance of other non-state forms of regulation or "reglementation", which can be as important as or even more important than state law in the interaction of the various actors in a given social field. This argument denies implicitly that law has a special position in relation to these other forms of regulation; and indeed from a legal pluralist perspective state law is not qualitatively different from other forms of "reglementation" and should therefore not be treated differently in the analysis. This basic assumption could prove fruitful with regard to the emergent regime of governance in which non-state and informal sites of rulemaking and rule enforcing have become so important.

45. This problem is by no means unique to legal anthropology: for example, in legal philosophy a consensus on the definition of law has not been reached either, *see* H.L.A. Hart, *The Concept of Law* (Oxford, Clarendon Press, 1961), p. 1.

46. S.F. Moore, *Law as Process: An Anthropological Approach* (Hamburg and Oxford, LIT and James Currey, 2000/1978), pp. 17–30; S. Roberts, *Order and Dispute: An Introduction to Legal Anthropology* (Harmondsworth, Penguin Books, 1979); B.Z. Tamanaha, "The Folly of the 'Social-scientific' Concept of Legal Pluralism", 20 *Journal of Law & Society*, 1993, 192–217.

47. Moore (note 46), p. 18.

48. J. Griffiths, K. Von Benda-Beckmann (eds.), *Anthropology of Law in the Netherlands* (Dordrecht, Foris Publications, 1986); Griffiths (note 41), 1–55; L. Pospisil, *Anthropology of Law: A Comparative Theory* (New York, Harper & Row, 1971), pp. 97–126.

Furthermore, for an understanding of the concept of legal pluralism it is essential to bear in mind that the multiple "normative orderings" do not exist autonomously side by side, the social field is only semi-autonomous and therefore "vulnerable to rules and decisions and other forces emanating from the larger world by which it is surrounded".[49] In other words, the different normative orders "regulate or seem to regulate the same kind of social action".[50] The task of the researcher is to understand in what ways the different legal orders interact with each other and what are the effects of this interaction. De Sousa Santos, for example, has pointed out that "[m]ore important than the identification of the different legal orders is the tracing of the complex and changing relations among them".[51] All these elements match very well with the proliferation of various interactive normative orderings at the transnational level produced by states and non-state actors alike and the confusing plurality of actors exercising power and their relationships among each other that refuse easy incorporation into the conventional categories of international legal doctrine.

5. *Transnational – national – local*

Several scholars in the field have called for studies of legal processes and legal pluralism at a transnational or global level.[52] De Sousa Santos, for example, differentiates three "legal spaces": the transnational, the national and the local. To conceptualise different levels of law is certainly not new in legal anthropology and can be traced back to Pospisil's theory of "legal levels".[53] New, however, is the strong emphasis on the importance of the transnational sphere: "[T]he nation-state has been the most central time-space of law for the last two

49. Moore (note 35), 720.
50. De Sousa Santos (note 42), 287.
51. *Ibid.*
52. K. von Benda-Beckmann, "Transnational Dimensions of Legal Pluralism", Paper presented at the International Conference on "Folk Law and Legal Pluralism: Challenges of the third Millennium" of the Commission on Folk Law and Legal Pluralism, Arica, Chile, 13–17 March 2000; Günther, Randeria (note 11) 2001; S.E. Merry, "Anthropology, Law, and Transnational Processes", 21 *Annual Review of Anthropology*, 1992, 357–379; de Sousa Santos (note 10); de Sousa Santos, "Law: a Map of Misreading. Toward a Postmodern Conception of Law", 14/3 *Journal of Law and Society*, 1987, 279–302.
53. Pospisil (note 48), pp. 97–126.

hundred years, particularly in the core countries of the world system. However, its centrality only became possible because the two other time-spaces, the local and the transnational, were formally declared non-existent by the hegemonic liberal political theory."[54] This links up conveniently with the concept of multi-level governance as developed in international relations theory, political science and public administration, which is very similar in that it distinguishes the supranational, the national and the subnational level.[55]

Further, it is necessary to differentiate "legal spaces" or levels from forms of law that may also be denoted with the terms transnational, national and local. Transnational law includes conventional public international law, human rights law, environmental regulation, economic law and *lex mercatoria*. National law is made up of the laws and policies of the state, in itself not really coherent and systematic either but rather a mix of different elements.[56] Local law is the normative ordering or "reglementation" of semi-autonomous social fields at a sub-national level such as so-called customary law, indigenous law or the normative order emanating from a neighbourhood, a government department or a company.

Global governance is characterized by the rise of other actors such as transnational corporations, NGOs, accountants, insurance companies and law firms but also more autonomous activity by international organizations and branches of government. Many of these actors produce their own rules that govern themselves and their relationships with other actors. This increasing interaction at the transnational level can be conceptualized as semi-autonomous social fields. Social fields, the anthropologist's object of study, have been traditionally located at the national and the local level.[57] Despite the term's territorial connotations it is possible to identify social fields with their respective normative orders at each level or legal space that can be influenced by any of the three forms of law, transnational, national or local. Dezalay and Garth, for example, studied international commercial arbitration as a social field.[58] They conceptualize this field

54. De Sousa Santos (note 10), p. 111.
55. Van Kersbergen, van Waarden (note 4), pp. 25, 26.
56. Griffiths (note 41); De Sousa Santos (note 10), pp. 274–281.
57. Moore (note 30).
58. Y. Dezaly, B. Garth, "Merchants of Law as Moral Entrepreneurs: Constructing International Justice from the Competition for Transnational Business Disputes", 29/1 *Law & Society Review*, 1995, 27–64.

as "epistemic community" and "an extremely competitive market" "with its own networks, hierarchical relationships, and expertise, and more generally its own 'rules of the game' ".[59]

6. *Two approaches to legal pluralism*

Taking the risk of oversimplifying complex research agendas I distinguish two different styles of studying legal pluralism which reflect the tension between the lawyer's normative mode of thinking and the anthropologist's reflective mode of thinking. Keebet von Benda-Beckmann has labelled the first approach "legal-political" and the second one "comparative-analytical".[60] According to her the "legal-political" approach perceives of legal pluralism as "a result of recognition of one legal system by another legal system, usually that of the state," it "denotes a legal construction in which the dominant legal order implicitly or explicitly allows space for another kind of law, e.g. customary law or religious law". Hence, the "legal-political" approach studies whether the state recognizes, usually by way of legal regulation, the existence of these other legal orders and integrates them into the law of the state.[61] Due to this objective and method this approach has been labelled as "weak"[62] or "state law" pluralism.[63] This approach is normative since its object of study is legal doctrine or "the ought" of the idealist dichotomy and it often tends to address the question which law if any at all is best suited to accommodate the plurality of legal orders. It had been highly relevant during the colonial period when there was the need to codify customary law or at least what was perceived to be customary law.[64] Recently this approach has re-emerged with regard to issues such as the recognition of indigenous rights, the role of codified customary

59. Dezalay, Garth (note 58), at 32, 33.
60. Von Benda-Backmann (note 10).
61. *Ibid.*, at 5.
62. Griffiths (note 41). This categorization in "weak" versus "strong" is biased against the "legal-political" approach since it implies that weak is bad and strong is good. In the interest of scientific neutrality this categorization should be abandoned.
63. Woodman (note 36).
64. F. von Benda-Beckmann, "Law out of Context: A Comment on the Creation of Customary Law Discussion", 28 *Journal of African Law*, 1984, 28–33; M. Chanock, *Law, Custom and Social Order. The Colonial Experience in Malawi and Zambia* (Portsmouth, Heinemann, 1998/1985); Hooker (note 40).

law in present-day Africa or multi- and bilateral legal assistance programmes in "developing countries".[65]

The second approach to legal pluralism has been labelled "comparative-analytical" by her. In order to include more interpretive strands of anthropological thinking such as Geertz's, for example, I suggest replacing this term with the label "comparative-reflective". In any case this approach puts more emphasis on the empiricism of anthropology, the social context and the processes behind the rules. Its subject is "the is" rather than "the ought". The "comparative-reflective" or "strong" approach to legal pluralism perceives of the phenomenon as a social fact regardless of the recognition of other forms of law by state law and aims at "the analysis of an empirical state of affairs, namely the coexistence within a social group of legal orders which do not belong to a single 'system' " as opposed to the "legal-political" approach's focus on legal doctrine.[66] Scholars with a "comparative-reflective" style have become increasingly critical of the idea that law can be used as tool for "social engineering" and tend to avoid suggestions for legal or political reform with regard to the existence of legal pluralism.[67]

Admittedly this dichotomy is to some extent ideal-typical. Yet there is a distinct difference in objectives and styles, the former being closer to the lawyer's focus on rules of state law whereas the latter has more appeal to the anthropologist's relativist-reflective mode of thinking. Both approaches have advantages and disadvantages. The "legal-political" approach has the potential to gain relevance in legal-political debates. However, this approach runs the risk of oversimplifying complex patterns of interaction in social fields and to overestimate the influence of written rules and regulations while underestimating the impact of other factors. The "comparative-reflective" approach, on the other hand, avoids oversimplifications and often produces sound descriptions of people's actions within complex patchworks of normative orders and legal processes. Despite their potential to be used

65. On the latter *see* C.V. Rose, "The 'new' law and development movement in the post-cold war era: a Vietnam case study", 32/1 *Law & Society Review*, 1998, 93–140.

66. Griffiths (note 48), p. 8.

67. F. von Benda-Beckmann, "Scapegoat or Magic Charm: Law in Development Theory and Practice", 28 *Journal of Legal Pluralism*, 1989, 129–148; Galanter (note 34); M. Galanter, D. Trubek, "Scholars in Self-estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States", *Wisconsin Law Review*, 1974, 1062–1102; Rose (note 65).

as a basis for legal policy-making studies in the "comparative-reflective" style are often too detailed and localized to lend themselves easily for any application beyond academic comparison. And even academic comparison is often considered to be highly problematic because of the danger of "false comparisons" and ethnocentric categories of comparison.[68] Furthermore, due to the critical attitude of many scholars involvement in "dirty politics" is often rejected anyway. These differences between the normative "legal-political" and the "comparative-reflective" approach result in different perspectives from which to study legal pluralism.

7. *Conclusions: Possibilities and restrictions of a legal pluralist perspective*

In conclusion I would like to map the possibilities to apply the concept of legal pluralism in studies of global governance. I apply the differentiation sketched above between the normative "legal-political" and the "comparative-reflective" approach.[69] For example, with regard to normative ordering in the European Union there has been an attempt to establish the concept of "legal polycentricity" with regard to the plurality of European Union law and the national legal systems.[70] The contributions in Petersen's and Zahle's volume adopt the normative approach and are concerned with the question how to accommodate the pluralism within the European Union with legal doctrine. In his innovative contribution to this volume Voogsgeerd also adopts the "legal-political" approach to legal pluralism in the European Community or "juridical pluralism" as he refers to the phenome-

68. Only in recent years anthropology has been addressing the issue of comparability again after the poststructuralist and relativist onslaught of the 1980s. *See*, e.g., A. Gingrich, R.G. Fox (eds.), *Anthropology in Comparison* (London, Routledge, 2002).

69. Of course, this is not the only possible categorization of studies of legal pluralism. Other more thematic categories have been proposed. Günther and Randeria (note 11), for example, have suggested differentiating the fields of transnational economic regulation, environmental and developmental regulation, human rights and transnational criminal law and the actors such as law firms, legal consultants, NGOs and international organizations (pp. 34–81). Since this chapter is mainly concerned with objectives, methodology and epistemology I limit the presentation to the two styles of thinking I have outlined above.

70. H. Petersen, H. Zahle (eds.), *Legal Polycentricity: Consequences of Pluralism in Law* (Aldershot, Dartmouth, 1995).

non. He presents several cases that came before the European Court dealing with issues of the common market. By examining the case law of the European Court of Justice he highlights the interaction between Community law and the law of a member states, on the one hand, and the interaction between the legal orders of two member states on the other.

Further, there have been interesting empirical studies on tensions that arise from the interaction between human rights law, indigenous rights and cultural identities[71] and the encounter between environmental NGOs and the World Bank in India.[72] The fragmentation of state institutions and state law due to the influence of the World Bank has also been the subject of empirical research.[73] The empirical study of the ordering of social fields at the transnational level has been mainly focused on transnationally operating arbiters, lawyers and accountants.[74] Riles has recently published a stimulating study of transnational networks of NGOs and UN conferences in which conference documents are analyzed not as legal document but as anthropological artefacts (2001). In this volume Mifsud Bonnici and de Vey Mestdagh present an empirical study of the shifts of governance in cyberspace. Although they do not refer to the concept of legal pluralism explicitly their study of the interplay between international agreements, state legislation and the internal rules of Internet Service Providers is a fascinating example of the "comparative-reflective" approach.

Lex mercatoria, the transnational law of commercial transactions, has been the object of the attempt to develop a sociologically grounded theory of "global law without a state".[75] The volume edited by Teubner, for example, contains both, normative studies of multina-

71. R. Wilson (ed.), *Human Rights, Culture & Context. Anthropological Perspectives* (London/Chicago, Pluto Press, 1997).

72. Randeria (note 14).

73. G. Anders, "The 'Trickle-down' Effects of the Civil Service Reform in Malawi – Studying Up", Paper presented at the International Conference on "Legal Pluralism and Unofficial Law in Social, Economic and Political Development" of the Commission on Folk Law and Legal Pluralism, Chiang Mai, Thailand, 7–10 April 2002.

74. Dezalay, Garth (note 58); D. Trubek, Y. Dezalay, R. Buchanan, J. Davis, "The Future of the Legal Profession: Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas", 44 *Case Western Reserve Law Review*, 1994, 407–468.

75. G. Teubner, "Global Bukowina: Legal Pluralism in the World Society", in Teubner (ed.), *Global Law Without a State* (Aldershot, Dartmouth, 1997), pp. 3–28.

tional enterprises[76] and *lex mercatoria*[77] and an empirical study of informal rulemaking by transnational accountants and lawyers.[78] This list of studies is by no means exhaustive but indicates that research into legal complexity at the transnational level tends to adopt either the lawyer's normative perspective or the anthropologist's reflective perspective.

The distinction between the normative style and the reflective style is not limited to the field of legal anthropology. Rosenau draws a similar distinction between the normative mode and the analytical mode with regard to global governance when he underlines the necessity of distinguishing "order" as an analytical concept from "order" as a normative precept.[79] He states that "the transforming dynamics are bound to focus concern around the desirability of the emergent global arrangements *vis-à-vis* those they are replacing. That is, normative concerns are bound to intensify as questions about global order – about the fundamental arrangements for coping with conflicts and moving towards goals – surface in the political arena". However, the normative and the analytical have to be distinguished, "clearly there is a huge difference between empirically tracing the underlying arrangements and analysing their potential consequences on the one hand and judging the pros and cons of the arrangements on the other". He continues by stating that "[T]he problem of differentiating between empirical and normative orders can be nicely illustrated by the question of whether global arrangements marked by a high degree of disorder are to be considered a form of order". He argues that empirically there is a "vast array of diverse arrangements [that] can qualify as forms of order. From this follows that even arrangements characterised by conflict, war and disorder do constitute a form of order".[80]

76. P. Muchlinski, "Global Bukowina Examined: Viewing the Multinational Enterprise as a Transnational Law-making Community", in Teubner (ed.), *Global Law without a State* (Aldershot, Dartmouth, 1997), pp. 79–108.

77. H.J. Mertens, "Lex Mercatoria: A Self-applying System Beyond National Law?", in Teubner (ed.), *Global Law without a State* (Aldershot, Dartmouth, 1997), pp. 31–43.

78. J. Flood, E. Skordadi, "Normative Bricolage: Informal Rule-making by Accountants and Lawyers in Mega-insolvencies", in Teubner (ed.), *Global Law without a State* (Aldershot, Dartmouth, 1997), pp. 109–131.

79. Rosenau (note 5), pp. 9–11.

80. Rosenau (note 5), pp. 10–11.

Thus, clarity about the approach to legal pluralism and global governance is required to avoid confusion regarding the objective and the methodology. A normative "legal-political" study cannot replace a reflective account based on empirical research and *vice versa*. Of course both approaches might be combined: for example, a sound empirical analysis of a specific social field should form the basis for a "legal-political" study. Yet there should be no ambiguity about the approach, otherwise the all-to-familiar misunderstandings between the two modes of thinking will arise and turn the space in-between into an abyss. In my point of view both approaches could be combined to the benefit of a more comprehensive and empirically grounded understanding of changes in global governance that takes pluralistic rulemaking seriously.

This assessment has been recently challenged by Riles, a scholar whose theme used to be the space in-between.[81] She explicitly bids her farewell to approaches that "imagined a wide gulf between law and anthropology" and were "dedicated to exploiting a space between disciplines by imagining that the disciplines, their subject matter, or their component parts somehow needed to be 'related' to one another".[82] Maybe she is one step ahead of the thoughts expressed in this chapter and has indeed succeeded to move "beyond" with research that has "resonance for lawyers and anthropologists of law alike".[83] Actually I sincerely hope so since it would solve part of my problems as a lawyer who is engaged in anthropology and whose audience consists of lawyers and anthropologists alike. However, I keep being confronted by the two different styles, the normative and the reflective, in my encounters with different audiences and find it therefore difficult to be convinced of the irrelevance of this difference in the future.

Lawyers[84] tend to regard international law or the "rule of law" as a bulwark against "disorder", "chaos" and "anarchy". In their eyes

81. Riles (note 18).

82. A. Riles, *The Network Inside Out* (Ann Arbor, University of Michigan Press, 2001), XIII.

83. Riles (note 82).

84. No offence should be taken by lawyers who by the very nature of their vocation deal with the expansion of the "law's empire". Of course this does not apply to all lawyers, especially proponents of NAIL are very critical of the potential of international law to further global peace. I merely indicate a prominent tendency in academic discourse on international law, *see*, e.g., G.H. Fox, B.R. Roth (eds.), *Democratic Governance and International Law* (Cambridge, Cambridge University Press, 2000).

international law has to be expanded to guarantee peace and order. Therefore they often overlook regimes of governance outside the realm of international law. These forms of governance are not considered to be order; they are rather the opposite and perceived as a threat to the international legal order. In this regard the concept of legal pluralism could prove helpful for the international lawyer who tries to make sense of the cacophony of national governments, transnational human rights and environmental NGOs, transnational corporations, transnational lawyers, international organizations, donor agencies, etc. with their respective rules and procedures that often bear only little resemblance to traditional international legal doctrine. Legal pluralism is a concept that recognizes the possibility of non-state forms of ordering or "reglementation" which might co-exist and interact with regulation by the authority of government. Legal pluralism does not only recognize the plurality of various legal orders including state law but also explicitly recognizes pluralism within the state and state law. This makes legal pluralism, "legal-political" and "comparative-reflective", a useful tool for the study of changes in global governance that have not resulted in more chaos but rather in more complex patterns of ordering.

CHAPTER THREE

FROM TERRITORIALITY TO FUNCTIONALITY? TOWARDS A LEGAL METHODOLOGY OF GLOBALIZATION

Andreas L. Paulus*

1. *Introduction*

According to the German sociologist and philosopher Niklas Luhmann, globalization is characterized by a shift from territorial borders to functional boundaries.[1] Important issue areas[2] such as the market, environment, or human rights, have left territorial boundaries behind. Thus, the state has become unable to strike the balance between different values and interests associated with different issue areas. However, on the global scale, no mechanism is in place to substitute for this role of the territorial state.[3] In a "club model", different functionally defined "issue areas" could be separated in a way that the different professional "cells" administering the systems were not connected with each other.[4] With the expansion of the narrow schemes

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1. N. Luhmann, *Das Recht der Gesellschaft* (Frankfurt am Main, Suhrkamp Taschenbuch, 1995), pp. 571 *et seq.; id.*, *Die Gesellschaft der Gesellschaft* (Frankfurt am Main, Suhrkamp, 1997), vol. 1, pp. 158–160.

2. The term "issue area" is used here as a term for a subject matter which can be regulated by a set of rules which strives to cover the subject matter coherently and comprehensively. The term originates in the attempt of political science scholars to analyze subject matters beyond borders, both in their domestic as in their international aspects. *See*, e.g., D.W. Leebron, "Linkages", 96 AJIL, 2002, 5, at 6–10. As to the related term "regimes", it comprises both formal and informal institutional arrangements which relate to specific issue areas, cf. the now "classical" definition by S. Krasner, "Structural Causes and Regime Consequences: Regimes as Intervening Variables", in S. Krasner (ed.), *International Regimes* (Ithaca/London, Princeton University Press, 1983), p. 1, at 2. However, as Leebron does not fail to indicate (*ibid.*, at 9), the term is not clearly defined and lies square to legal terminology. Thus, it is used here with caution.

3. Similarly Leebron (note 2), 8.

4. *See* R. Keohane, J. Nye, "The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy", in R.B. Porter et al. (eds.), *Efficiency, Equity,*

to cover more and more ground, however, their self-sufficiency and lack of contact over both territorial and functional borders are becoming untenable.

Indeed, politics and law lag behind other issue areas in the process of institution building. There exists neither a clear hierarchy between different issue areas, nor a hierarchically superior institution which would be capable to coordinate and decide conflicts of values and norms. Whereas the ordinary domestic lawyer will have a place for these decisions in the domestic legal system – in courts or in political institutions acting within a hierarchy established by law – the international sphere lacks such hierarchies and sufficient rules for balancing the values involved. Several more or less institutionalized instances with overlapping competences decide conflicts of interests and values emanating from different issue areas. These instances being, in most cases, associated with one issue area rather than the other – such as the Tribunal of the Law of the Sea or the WTO Dispute Settlement Body – there is not a neutral or at least non-partisan body for deciding conflicts of norms. In the words of Leebron: "We inhabit a world of 'multi-multilateralism' – numerous multilateral regimes with sometimes overlapping, indeed sometimes conflicting, mandates."[5]

This contribution claims that the establishment of new hierarchies such as *ius cogens* or quasi-constitutional conflict of law rules such as Article 103 of the UN Charter do not alter this prospect in a decisive way. Complexity prevents clear-cut conflict rules. Instead, this contribution argues for a culture of mutual respect and accommodation between different issue areas which will not look for a "hierarchical" solution to value conflicts but will seek to find a practical solution in specific cases. This requires a readiness to dialogue and discourse to find practical *ad hoc* solutions for conflicts of interests and values. Thus, one may speak of a move from constitution to discourse[6] – away from formalized hierarchies towards a search for compromise in dialogue.

However, this contribution will also point to the problematic aspects of this development: in the lack of both hierarchies of applicable

and Legitimacy: The Multilateral Trading System at the Millennium (Washington, Brookings, 2001), p. 264, pp. 265–272.

5. Leebron (note 2), 17.

6. I owe this observation to David Kennedy.

norms or of implementing institutions that determine the outcome of legal analysis, the international lawyer is much less constrained by norms and processes. This is particularly the case when different normative systems, such as WTO law and the law on the environment, clash with each other. But this unconstrained exercise of power by lawyers raises questions of legitimacy. Why is it the lawyer's task to decide conflicts of values and interests? In the absence of an expression of the will of the community by determinate rules, the lawyer cannot easily point to another source to justify his authority. The reliance on democratic principles and the consent of the governed, which legitimize political decisions in the Western tradition, are of little help in international affairs. The "democratic deficit" of international organizations is a commonplace. Rather, the international lawyer must justify his authority by the acceptance of the results of his activity by his audience and addressees, in particular states, and increasingly non-governmental actors. Hence, "compliance" presupposes more than just formal authority – not only formal, but also substantive agreement. International decisions will only be implemented if the results are perceived as based on legal interpretation rather than translation of the lawyers' personal predispositions to claims of authority.

There is another argument which may complicate the task of the international lawyer: some, if not all nation-states can base their decisions on some "thick" consensus of interests and values between its members.[7] Some claim that in the absence of such a consensus, international law is condemned to irrelevance because divergences of interpretation cannot be bridged by pointing to a pre-established political consensus.[8] Others, among them the present author, have argued that there indeed exists a "thin" consensus on values which might be sufficient to establish a minimum of determinate answers.[9] In any

7. On the relationship between a "thick" consensus and domestic community, *see* M. Walzer, *Thick and Thin: Moral Argument at Home and Abroad* (Notre Dame/London, University of Notre Dame Press, 1994).

8. D. Kennedy, "These about International Law Discourse", 23 *German Yearbook of International Law*, 1980, 353, at 376; M. Koskenniemi, *From Apology to Utopia* (Helsinki, Lakimiesliiton Kustannus, 1989), p. 48. But *see* now D. Kennedy, "The Disciplines of International Law and Policy", 12 *Leiden Journal of International Law* 1999, at 133 (arguing for identity politics); M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press, 2002), pp. 504–509, advocating a "culture of formalism".

9. T. Franck, *Fairness in International Law and Institutions* (Oxford, Clarendon, 1995),

case, the pluralism within the international community is certainly greater than in domestic society, and a consensus on values and norms will be reached only with considerable difficulty. How then can the international judge, adjudicator, government official, or NGO activist cope with the "pluralistic" difficulty? Is the rejection of international law in favour of political debate and struggle, as advocated by some international lawyers close to the "new approaches" movement, the right answer?[10] In the conclusion to this contribution, the author will attempt to give some preliminary answers to this question.

2. *The "domestic analogy" and the community vision of international law*

In order to analyze the specificity of international law, let us first regard the domestic legal order. Even if one may reject the "domestic analogy" between law in the domestic and the international realm with regard to the "thinness" of the international value consensus,[11] the specificity of the international legal order can best be grasped if seen in relation to domestic legal orders which have also shaped conceptions of the international "legal" sphere.

The territorial state of the "constitutional" type has established several instances to cope with conflicts of interests and values. In the legal system, there are two hierarchically organized systems trying to generate acceptable solutions. On the one hand, the *Stufenbau der Rechtsordnung*, the "hierarchical structure of the legal system",[12] helps

pp. 3–24); A. Paulus, *Die internationale Gemeinschaft im Völkerrecht* (München, Beck, 2001), pp. 250–284; B. Simma, A. Paulus, "The International Community: Facing the Challenge of Globalization", 9 EJIL 1998, 266, at 272; C. Tomuschat, "International Law: Ensuring the Survival of Mankind on the Eve of a New Century", 281 *Recueil des Cours*, 1989, 55.

10. For a plea against the rejection of international law and against the subjectivism of alternative approaches *see* A. Paulus, "International Law After Postmodernism: Towards Renewal or Decline of International Law?", 14 *Leiden Journal of International Law*, 2001, 727–755.

11. *See*, e.g., M. Koskenniemi, "Solidarity Measures: State Responsibility as a New International Order", *British Yearbook of International Law* (forthcoming), manuscript in possession of the author.

12. A. Merkl, "Prolegomena zu einer Theorie des rechtlichen Stufenbaues", in *Gesellschaft, Staat und Recht. Untersuchungen zur Reinen Rechtslehre. Festschrift Hans Kelsen zum 50. Geburtstage* (Wien, Springer, 1931), p. 252, at 272–85; H. Kelsen, *Introduction to the Problems of Legal Theory. A Translation of the First Edition of the Reine Rechtslehre or*

to identify superior substantive values which trump "ordinary" norms and contain the guiding principles of government. This substantive hierarchy, as it were, is doubled by a procedural or institutional one. Ideally, for all conceivable cases, there exists a successive order of instances to decide on the balancing of the recognized norms and values involved. Thus, even if there may be no "right answer" in the material, substantive sense,[13] there will be a "final arbiter" of the legal problem at hand, either a court, or a legislature, or the people, or the executive branch.

When constructing an international community based on the "rule of law", why not reproduce the experience of domestic legal orders in international law? Indeed, there exist numerous attempts to introduce stricter hierarchies in international law and to arrive at an international system modelled after the domestic one. The first candidate for such a reproduction on the institutional side is the "world organization": The United Nations, with its Charter, attempts to establish a hierarchical structure within the international community in analogy to the domestic state. In substantive international law, *ius cogens* and obligations *erga omnes* are based on the idea of a hierarchy of norms which would place common or even "community" values over the individual and short-term self-interest of states, and which would allow individual states, even in the absence of institutional support, to implement community values.

2.1 *The Charter as a constitution of the international community?*

The UN Charter seems to closely reproduce the constitutional state with executive (the Security Council), legislative (the General Assembly) and judicial (the International Court of Justice) branches.[14] The Security Council may act against the consent of member states. Even non-members are addressed by it, and, after Switzerland's entry this year, the UN has reached true universality of membership. In its

Pure Theory of Law, B. Litschewski Paulson/S. Paulson trans. (Oxford, Clarendon Press, 1992), pp. 63–65 with n. 48; *id.*, *Pure Theory of Law. Translation from the Second Edition*, M. Knight trans. (Berkeley, University of California Press, 1967), pp. 221–22.

13. But *see* R. Dworkin, *Law's Empire* (Cambridge Mass., Harvard UP, 1986), pp. 239 *et seq.*

14. For a comparison between the UN Charter and a State constitution, *see* B. Simma, "From Bilateralism to Community Interest in International Law", 250 *Recueil des Cours* (1994), 217, at 258–283.

Article 103, the Charter claims precedence over any other norm of treaty law. The Statute of the International Court of Justice, which forms an integral part of the Charter (Article 92 Charter), contains the necessary rules for law-making (Article 38) and its adjudication. Articles 57 and 63 of the Charter regulate the coordination of different issue areas. Some have seen in this structure an incipient constitutionalization of the international community.[15]

However, when looking at the text and, even more so, the reality of the Charter, this analysis turns out to be a half-truth, at best. The Charter itself combines two approaches: a political realist approach, centring on the special responsibility of the great powers with veto power in the Security Council, and an idealist approach, making soft issues such as human rights and self-determination a cornerstone of the values of the new system.[16] As to the "executive" function of the Security Council, the United Nations possesses a monopoly of the legitimization of the use of force – except in cases of self-defence – but it does not have real forces at its disposal to control the implementation of this monopoly.[17] In practice, the powerful states do not act as if they were conscious of a monopoly of force by the Council. The current debate over the use of force against Iraq for the non-observance of the inspection regime imposed on it as part of the peace arrangements after the liberation of Kuwait[18] is a case in point: although the United States and the United Kingdom were trying to receive Council backing for action against Iraq, they made it clear from the outset that they considered SC authorization as welcome, but not as a necessary condition for taking military action against Iraq's non-compliance with United Nations peace resolutions.[19]

15. *See*, e.g., B. Fassbender, *UN Security Council Reform and the Right of Veto: A Constitutional Perspective* (Den Haag, Kluwer Law International, 1998), pp. 73–115 *et passim*. More circumspect Simma (note 14), p. 217, paras. 22 *et seq*. For a critique of Fassbender's views, *see* A. Paulus, "Book Review", 10 EJIL, 1999, 209.

16. For a more extensive analysis, *see* Paulus (note 9), pp. 284–318.

17. The special agreements between member States and the United Nations foreseen in Article 43 of the Charter for the provision of troops have never materialized, *see* J. Abr. Frowein, N. Krisch, "Article 43", MN 9–11, in Simma (ed.), *The Charter of the United Nations* (Oxford, Oxford University Press, 2nd edition, 2002).

18. *See*, e.g., SC Resolutions 687 (1991) and 1154 (1998). For details *see* M. Bothe, "Peace-keeping, MN 38–40", in Simma (note 17); A. Paulus, "Article 29", MN 38–47, *ibid.*

19. Note, however, that other UN members except the United Kingdom seem not to share this interpretation.

The veto power of the permanent members places them beyond the reach of law constraining unilateral violence, even if they pay, from time to time, lip service to the concept of collective security. In spite of more or less convincing attempts to bring it in line with Charter law,[20] the Kosovo intervention is another example for the unilateral use of force against a state which violates minority rights and, arguably, the right of the Kosovar people to some measure of self-determination.[21] Indeed, even if the present writer were of the opinion that the intervention was lawful, this interpretation would confirm rather than contradict the evaluation of the UN as an incomplete system of collective security.

The law-making rules of the Charter and, in particular, the Statute of the International Court of Justice do not recognize a truly legislative role for the General Assembly. Articles 10–13 confine the legislative functions of the General Assembly to non-binding recommendations[22] – and this limited function seems appropriate with regard to the doubtful representativeness of a body in which member states as different as India and Monaco have an equal vote. In spite of being the "principal judicial organ of the United Nations" (Article 92 of the Charter), the International Court of Justice needs the specific consent of each party to exercise jurisdiction (Article 36 of the ICJ Statute) and is thus often confined to an arbitral rather than judicial role. Its competencies as a constitutional check on the Security Council and the General Assembly are limited to Advisory Opinions given at the request of either the Council or the Assembly (Charter, Article 96, para. 1). Even in cases where it possesses jurisdiction, it will usually defer to the broad discretion of the Council, which can, in turn, rely on the prevalence of obligations arising

20. For an overview and evaluation of the different arguments, *see* A. Randelzhofer, in: "Article 2 (4)", MN 56, in Simma (note 17). For a convincing rejection of attempts to legally justify unilateral "humanitarian intervention", *see* B. Simma, "NATO, the UN and the Use of Force: Legal Aspects", 10 EJIL, 1999, 1. However, Simma accepts a moral justification for NATO action.

21. For the distinction between "internal" and "external" self-determination (minority rights vs. secession) *see* K. Doehring, in "Self-Determination", MN 32–40, in Simma (note 17), pp. 56–58. More skeptical D. Thürer, "Self-Determination", in Bernhardt (ed.), 4 *Encyclopedia of Public International Law* (2000), pp. 370–373. *See also* the decision of the Supreme Court of Canada, "Secession of Quebec", 37 *International Legal Materials*, 1998, 1340.

22. ICJ, *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)*, *ICJ Reports* (1996), pp. 254–5, para. 70, which binds the normative value of GA resolutions to the conditions of custom according to Article 38 para. 1 lit. (c) of the ICJ Statute.

under the Charter against all other international agreements (Article 103) – and probably beyond. In the *Lockerbie* case, the Security Council has even intervened in the functioning of the Court by adopting a binding resolution after the oral proceedings on provisional measures in order to prevent the Court from exercising any control over the lawfulness of SC measures.[23] A "Marbury moment",[24] in which the Court would avail itself of an unequivocal right of judicial review of Security Council decisions, would not only be hampered by problems of enforcement – after all, the only enforcer of ICJ judgments would be the Council itself[25] – but also revolutionize the consent-based jurisdiction of the International Court of Justice and would probably meet with resistance by most states.[26]

The provisions on the prevalence of Charter law (Article 103), universality (Article 2 para. 6), the amendment of the Charter (Article 108, 109) and non-intervention (Article 2 para. 7) may possess constitutional characteristics, but fall short of the standard of domestic constitutions. In particular, Article 103, which provides for the prevalence of the obligations under Charter over their obligations under other international agreements, constitutes a conflict-of-law rule rather than an all-out hierarchization of international law. A "constitutional"

23. ICJ, *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom) (Provisional Measures)*, Order of April 14, 1992, *ICJ Reports* (1992), p. 3, and SC Res. 748 (1992) of March 31, 1992.

24. *Marbury* v. *Madison*, 5 U.S. 137 (1803), 5 U.S. 137 (Cranch), where the US Supreme Court availed itself of the right of judicial (and constitutional) review of decisions of the executive branch. On the significance of "constitutional moments" for the development of constitutional law, *see* B. Ackerman, *We the People: Transformations* (Cambridge Mass./London, Belknap Press, 1998), pp. 409 *et passim*. *See also* A.-M. Slaughter, W. Burke-White, "An International Constitutional Moment", 43 *Harvard International Law Journal*, 2002, 1, who do not even mention a possible role for the Court. For a comparative analysis of judicial control in the international and domestic legal systems, see J. Alvarez, "Judging the Security Council", 90 AJIL, 1996, 1. For the requirement – and rejection – of a constitutional moment for the unification and hierarchization of present-day international law cf. J.P. Trachtman, "Institutional Linkage: Transcending 'Trade and . . .' ", 96 AJIL, 2002, 77, at 92.

25. According to Article 94, para. 2, of the UN Charter, the Security Council may, upon the request of one party to a case, decide on measures to give effect to the judgment. In the ICJ, *Military and Paramilitary Activities in and against Nicaragua*, *ICJ Reports* (1986), p. 14 – the only instance when Article 94 para. 2 was invoked so far, – a respective resolution failed due to a veto of the United States – which had been a party to the case. *See* H. Mosler, K. Oellers-Frahm, "Article 96", MN 13, in Simma (note 17).

26. Similarly Trachtman (note 24), 92.

interpretation of this provision runs therefore into some difficulty.[27]

Concerning the integration of different organizations into a single coherent system, Articles 57 and 63 of the Charter endow the United Nations with an oversight function for UN specialized agencies. Some of the most important organizations, such as the World Trade Organization (WTO) founded in 1995, did not even acquire (and did not wish to acquire) the status of a specialized agency.[28] Instead, its relationship with the United Nations is based on an Exchange of letters, in which the WTO Director-General and the UN Secretary-General have reached agreement "that a flexible framework for cooperation, liable to further review and adaptation in the light of developments and emerging requirements, is the most desirable course of action".[29] Thereby, the UN has implicitly reneged on its duty to bring the various specialized agencies "into relationship with the United Nations" by virtue of Articles 57 and 63 of the Charter.[30] But even with regard to specialized agencies in the proper sense of the term, Article 63 para. 2 of the Charter limits the competencies of the UN Economic and Social Council to consultation and recommendation.[31] Thus, the UN lacks real competencies of control in all fields except peace and security. In economic and social matters, the authority of the UN is considerably limited – other institutions such as the WTO and the Bretton Woods institutions seem far more powerful. Some even claim that the United Nations should develop along the lines of the WTO instead of overseeing it.[32]

Also in security matters, the primacy of the Security Council is subject to challenges by states acting unilaterally. As the Kosovo conflict demonstrates, the representation of the international community by the UN is challenged if and to the extent that the UN proves incapable of securing community values. For instance, when

27. R. Bernhardt, "Article 103", MN 6 ff., in Simma (note 17); M. Flory, in J.-P. Cot, A. Pellet, *La Charte des Nations Unies* (Paris, Economica, 2nd edition 1991), pp. 1381–1384, 1388–89.

28. W. Meng, "Article 57", MN 4, in Simma (note 17).

29. "Exchange of Letters constituting a global arrangement on cooperation", 29 Sep. 1995, 1889 *UNTS* 590.

30. On the ambiguous wording of Article 57, *see* W. Meng, "Article 57", MN 4–8, in Simma (note 17).

31. For more details *see* W. Meng, "Article 63", MN 38–39, in Simma (note 17).

32. E.U. Petersmann, "How to Reform the UN System? Constitutionalism, International Law, and International Organizations", 10 *Leiden Journal of International Law*, 1997, 421.

announcing the decision of NATO to attack the Federal Republic of Yugoslavia in spite of the absence of a respective UN Security Council resolution, Secretary-General Solana explained: "This military action is intended to support the political aims of the international community."[33] However, such individual action threatens the cohesion of the United Nations. NATO's claim did not remain unchallenged. As India's representative in the United Nations explained,

> [t]hose who continue to attack the Federal Republic of Yugoslavia profess to do so on behalf of the international community and on pressing humanitarian grounds. . . . NATO would have noted that China, Russia and India have all opposed the violence that it has unleashed. The international community can hardly be said to have endorsed their actions when already representatives of half of humanity have said that they do not agree with what they have done.[34]

Concerning the enforcement of the UN armistice resolutions with Iraq and the forcible removal of Saddam Hussein, the United States was putting pressure on the UN to authorize or at least acquiesce to unilateral US action[35] rather than the UN putting pressure on its member states to enforce its resolutions (and not to exercise unilateral pre-emptive self-defence unlawful under the Charter).[36] Where such superpower pressure is absent, however, the UN is incapable of taking meaningful action, as in the case of the Middle East conflict between Israel and the Palestinians. Thus, the claim of Charter prevalence in security matters may be watertight in theory, but is seldom executed in practice.

All-in-all, this rather cursory analysis shows that an overarching institutional setting of the international community does exist only in very rudimentary forms. With the exception of the ambiguous language of Article 103 of the UN Charter, a judicial hierarchy

33. Press Statement by Dr. Javier Solana, Secretary General of NATO, 23 March 1999, in M. Weller (ed.), 1 *International Documents & Analysis*, 1999, p. 495.

34. Security Council, Fifty-forth Year, 3989th mtg., 24 March 1999, UN Doc. S/PV 3989 (1999), p. 16; cf. V. Gowland-Debbas, "The Limits of Unilateral Enforcement of Community Objectives in the Framework of UN Peace Maintenance", 11 EJIL, 2000, 361, at 376–77.

35. *See* [United States] President's [George W. Bush's] Remarks at the United Nations General Assembly, 12 September 2002, available at <www.whitehouse.gov> (visited 28 October 2002).

36. *See* A. Randelzhofer, "Article 51", MN 39, in Simma (note 17), with further references. But *see*, more recently, the U.S. National Security Strategy, available at <www.whitehouse.gov/nsc/nss.html>, visited 28 October 2002, Chapter V.

between institutions regulating different issue areas is absent.[37] The weakness of the institutional structure of the UN thus prevents it from effectively fulfilling a quasi-constitutional mission. Instead of a hierarchy between the UN and other international organizations, we find a horizontal structure of several functional institutions. The decentralized structure of the international community means that it is the states members who are placed in the driving seat, and not a constitutionally backed bureaucracy.

In the absence of centralized decision-making, the balancing of interests and values cannot be performed in the same way as in the domestic legal system. There is no hierarchy between the World Organization with its general competence and the functionally limited international organizations such as the World Health Organization or the International Labour Organization, there exists no body with a "final" legal competence of interpretation and application of legal norms. Authoritative third party adjudication needs special acceptance by states which is more often than not absent. But where international adjudication exists, as in the case of the dispute settlement system of the WTO, it is also functionally fragmented. A "final arbiter" of disputes involving several issue areas (or the fabric of international law in general) does not exist. The general background rule, auto-interpretation by states, means that international law functions more often than not as an internalized means of self-evaluation rather than as an outside limitation on state discretion. In that regard, H.L.A. Hart's famous analysis that general international law lacks a coherent and complete system of "secondary" "rules of recognition, change and adjudication" has not lost its validity.[38] This is, however, not valid for many of the functional institutions which cover a limited issue area only.

2.2 *Substantive international law*

In the absence of a formalized hierarchy of authoritative decision-making, clear and unequivocal norms guiding both political decision-makers and eventual judges might still help in the search for clear solutions to value and norm clashes. In most of these cases, different

37. *See* Leebron (note 2), 20.

38. H.L.A. Hart, *The Concept of Law* (Oxford, Clarendon Press, 2nd edition 1994), pp. 214, 233 *et seq.*

institutional settings and different sub-systems of rules and principles will render difficult a decision based on "ordinary" primary rules. Thus, international law is in need of clear and unequivocal rules about the conflict of norms – rules which require the existence of some normative hierarchy between different substantive values. This is exactly what the introduction of *ius cogens* and obligations owed towards the international community (or *erga omnes*) into international law intended to achieve by the establishment of norms of a higher order which would not only trump conflicting norms but which would also allow each member of the international community, regardless of the existence of violations of its rights, to restore the international rule of law.

As is well known, Article 53 of the Vienna Convention on the Law of Treaties defines a "peremptory norm of general international law" (*ius cogens*) as "a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted . . ."[39] In its *Barcelona Traction* judgment, the ICJ opined that "an essential distinction should be drawn between the *obligations of a state towards the international community as a whole*, and those arising *vis-à-vis* another state in the field of diplomatic protection."[40] Even if the precise relationship between obligations towards the international community and *ius cogens* is difficult to determine, there seems to be general agreement that both terms designate an almost identical list of international norms.[41] The reasoning of the Court thus provides a rationale for the establishment of *ius cogens*: when the obligations flowing from *ius cogens*-norms are owed to the international community rather than to states *ut singuli*, two states alone cannot "opt out" of their obligations to the international community.

Nicholas Tsagourias has contributed a visionary chapter to this volume on the potential implications of making the will of the international

39. *UNTS* 1155, 331.

40. ICJ, *Barcelona Traction, Light and Power Company, Limited, ICJ Reports* (1970), p. 3, at p. 32, para. 33, my emphasis.

41. *See* International Law Commission (ILC), "Commentary to the Draft Articles on State Responsibility", Chapter III, before Article 40, para. 7, in J. Crawford (ed.), *The International Law Commission's Articles on State Responsibility* (Cambridge, Cambridge UP, 2002), pp. 244–45. The distinction of the ILC does not entirely correspond to the original separation of the two concepts. *See* A. de Hoogh, "The Relationship between Jus Cogens, Obligations *Erga Omnes* and International Crimes: Peremptory Norms in Perspective", 41 *Austrian Journal of Public International Law*, 1991, 183; Paulus (note 16), pp. 413–416 *et passim*; Simma, "From Bilateralism to Community Interest", (note 14), pp. 285–301, paras. 45–60.

community the source of this higher law.[42] This term seems, however, to have lost its clear meaning by the end of the Cold War – until then, this "community" was conceptualized as consisting of the First, Second and Third Worlds, that is, the capitalist west, the communist east and the developing south.[43] But in the one super-power reality of the contemporary world,[44] the contours of this community have become doubtful. As far as states are concerned, next to the single superpower, there is a Russia which has lost a great deal of its influence both in Central Europe and in Asia, there are economic giants but political dwarfs such as the European Union (in particular Germany) and Japan, there are the most populous, but still developing countries China and India, there are states struggling to leave developing status behind, such as South Korea or Brazil, and there is a "Fourth World" developing – or rather not developing – which seems to be marred in famine and war. Although organized in the General Assembly of the United Nations, the international community is not endowed with law-making power. How then is the international community able to designate certain norms as *ius cogens*? Whose consent to new norms of *ius cogens* is counted, whose opposition disregarded?

It is not even clear whether this community only consists of states or also of governmental or non-governmental organizations and other non-state entities, let alone individuals.[45] But do altruistic non-governmental organizations really have the legitimacy to make decisions binding on the world community at large, without having been elected or possessing control over territory? And what about terrorist or criminal organizations as part of the community? It seems that the advocates of an enlargement of the relevant community to non-state actors have not quite contemplated the consequences of their position. Nevertheless, non-state actors are of growing relevance in the

42. N. Tsagourias, Chapter 4 in this volume, pp. 97–121.

43. For a description of the "Cold War" international community in this vein, *see* A. Cassese, *International Law in a Divided World* (Oxford, Clarendon Press, 1986), pp. 32–33.

44. On the role of the United States as sole superpower and its effects on international law *see* M. Byers, G. Nolte (eds.), *United States Hegemony and the Foundations of International Law* (Cambridge, Cambridge University Press, 2003), forthcoming.

45. According to rumors, the ILC Drafting Committee "decided" by the margin of one single vote that the international community does not only consist of states. The "official" ILC Commentary to Article 25, para. 18, in Crawford (note 41), pp. 126–27, avoids rather than treats this issue. Needless to say, such "decisions" are of limited value.

age of globalization, from multinational enterprises to altruistic non-governmental organizations such as Amnesty International or Greenpeace, to terrorist actors such as Al-Qaida. Indeed, under Taliban rule, the state of Afghanistan seems to have depended more on Al-Qaida than *vice versa*.

Thus, it seems that the "international community as a whole" which is entitled to determine the content of *ius cogens* is still a community of states. Until 1986, this was also the opinion of the International Law Commission.[46] Among those states, it seems, there is no need for the consent of all states, but the great majority of them must have consented or acquiesced to the new status.[47] Thus, *ius cogens* introduces a small element of majority rule into international law, without any clear criteria which majority is required.

Another oddity of *ius cogens* in the Vienna Convention concerns the comparison of "ordinary" general international law with *ius cogens*. If the progressive view is correct that *ius cogens* may be created by the will of the international community even if no pre-existing rule of international law with identical content existed,[48] the question arises whether norms of a quasi-constitutional character can be created without even meeting the requirements for ordinary rules of international law, that is, the existence of positive state consent or at least acquiescence (customary law). A possible solution to this conundrum leads back to the "*pouvoir constituant*", the raison d'être of international law. The leading English textbook, Oppenheim's *International Law*, considers the international community itself as the final repository of international law: international law has come into existence because states prefer to belong to a system of rules than to live in a rule-less anarchy, and this choice is regarded as the acceptance of the basic values of this legal community.[49] However,

46. *See* the ILC commentary to the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, 2 *ILC Yearbook* (1982) 2, p. 56, Art. 53, note 3.

47. *See* the remarks of the Chairman of the Drafting Committee Yasseen, in *United Nations Conference on the Law of Treaties, Official Records, first session, 26 March–24 May 1968, Summary Records*, UN Doc. A/CONF.39/11, pp. 471–72, paras. 7, 12.

48. B. Simma, "From Bilateralism to Community Interest" (note 14), pp. 291–93, para. 52–53; C. Tomuschat, "Obligations Arising For States with or against their Will", 241 *Recueil des Cours* (1993 IV), p. 307.

49. R. Jennings, A. Watts (eds.), *Oppenheim's International Law* (Harlow, Longman, 9th ed. 1992), p. 12, who argue that states derive their rights from the community and not *vice versa*. But *cf.* the famous *Lotus* case, *PCIJ Reports*, Series A, No 10, p. 18.

it is doubtful whether states will be compelled by such arguments without having given their specific consent to these norms.

In addition, there is an absolute lack of clarity of the legal effects of *ius cogens*. In addition to the nullity of treaties violating *ius cogens*, as provided for in the Vienna Convention on the Law of Treaties, some claim that all unilateral acts of states, including purely domestic ones, are to be considered null and void if in violation of these norms.[50] Others add that the violation of *ius cogens* norms triggers universal jurisdiction for the alleged individual perpetrators.[51] In its draft articles on state responsibility,[52] the International Law Commission, has introduced particular consequences for "serious breaches of obligations under peremptory norms of general international law".[53] This incremental introduction of *ius cogens* into the fabric of international law raises doubts concerning its effectiveness.

Thus, the best what can be said about *ius cogens* is that it is still developing. No clear content of the concept can be discerned, even if there seems to be some agreement on the content of this category, comprising the prohibition of aggression (but not its exact scope), the prohibition of genocide, crimes against humanity, and war crimes (not necessarily extending to the obligations of prevention or universal jurisdiction), some fundamental human rights such as the prohibition of slavery, and maybe a general duty not to severely and intentionally pollute the environment.[54] Nevertheless, instances of the application of the concept are rare. Thus, *ius cogens* will certainly nullify a treaty between secret services of several countries to maltreat or torture prisoners – such as the "Operation Condor" in South America in the 1970s. It might also help to decide questions of the primacy of multilateral obligations, such as the prohibition on the use of force, over bi- or even multilateral military alliances and

Jennings and Watts expressly distance themselves from *Lotus, see ibid.*, p. 12 n. 21. For the acceptance of the existing body of international law as a sort of "entry fee" to membership status in the international community, *see* T. Franck, *The Power of Legitimacy Among Nations* (Oxford, Oxford UP, 1990), pp. 185–87, p. 193.

50. *See*, e.g., the proposal of the Special Rapporteur of the International Law Commission on unilateral acts of States, V. Rodrígez Cedeño, "Fifth report on unilateral acts of States", 17 Apr. 2002, UN Doc. A/CN.4/525/Add.1, p. 10, para. 119, Article 5 (f).

51. *See*, in particular, ICTY, *Furundžija*, 38 ILM 1999, at 349–50, para. 155, 156.

52. *See* Crawford (note 41).

53. Chapter III, Art. 40, 42, ibid., p. 68.

54. For a list of candidates, *see* Paulus (note 9), p. 356, for further references.

troop deployment treaties. In any event, *ius cogens* does not dispose of most "ordinary" value conflicts, e.g. between the promotion of free trade and the protection of the environment.[55]

Thus, the "domestic analogy" between international and domestic law seems not to lead very far. International law lacks both centralized organizations and a developed constitutional structure which would preserve the unity of the law and its uniform application by states. Any international decision on the hierarchy of values is open to contestation. Indeed, international adjudicatory bodies may well feel obliged to return a question to the political sphere. However, such an outcome leaves the parties where they had been before resorting to judicial means of settlement: with the need to negotiate a political solution which they were unable or unwilling to find in the first place. If a "constitutional" solution of value conflicts appears impossible, the alternative might consist in the resort to a discursive analysis which pays due regard to all the values involved. How can the lawyer help to decide clashes of interests and values if the law does not give a clear answer or at least an indication of the solution? And what does the obvious element of arbitrariness or discretion mean for the authority of the international lawyer's judgment? That is the question to which we now turn.

3. *The unequal institutionalization of international society and its consequences for international law*

As it turns out, the success remains doubtful of all attempts of the unification of international law under the auspices of its "constitutionalization", both in terms of its institutional structures as in terms of substantive law. However, it can hardly be doubted that we have witnessed a remarkable progress in the establishment of international institutions in the course of "globalization". It is not so much the

55. *See* Report of the Study Group on Fragmentation of International Law, 1 Aug. 2002, UN Doc. A/CN.4/L.628, p. 4, para. 15: "There was also agreement that drawing analogies to the domestic legal system may not always be appropriate. It was thought that such analogies introduced a concept of hierarchy that is not present on the international legal plane, and should not be superimposed. It was suggested that there is no well-developed and authoritative hierarchy of values in international law. In addition, there is no hierarchy of systems represented by a final body to resolve conflicts."

United Nations, but rather more limited, functional organizations and institutions that have carried the day, such as, for instance, the World Trade Organization or the International Criminal Court. These institutions have only a limited scope but they are much more institutionalized than "ordinary" international organizations. For lawyers, the most exciting, sometimes also the most troubling aspect consists in their elaborate dispute settlement mechanisms of a judicial or para-judicial character.

By dealing with a clearly limited issue area, these institutions may develop a highly sophisticated jurisprudence. However, specialized judicial bodies have difficulty in balancing the values embodied in their statute with the values embodied in other institutions. This creates the danger of overreaching and of a biased approach to questions of clashes between different values and issue areas. Ultimately, the unity of international law seems to be at stake. The International Law Commission has thus recently initiated a study on the "[f]ragmentation of international law: difficulties arising from the diversification and expansion of international law."[56]

Why does the "diversification and expansion" of international law create problems? Should it not rather be subject to joy and celebration?[57] However, being not connected to a significant hierarchization and constitutionalization of international laws and institutions, the expansion of international law to diverse areas also leads to a lack of cohesion of international legal rules and concepts. That might be a problem only an international lawyer would worry about. However, the ensuing risks are considerable: in particular, the different issue areas of international law are unequally institutionalized: that is, some areas, in particular the law of trade and the law of the sea, have the benefit of highly organized and effective dispute settlement systems. Others, such as human rights or the protection of the environment, do not know a binding dispute settlement system and can only be implemented by decisions of individual state institutions or bargaining between states (and maybe other relevant actors). To

56. Summary of the Commission's work at its fifty-fourth session (Extracts from Chapter II of the Report of the International Law Commission – forthcoming), available at <www.un.org/law/ilc/sessions/54/54sess.htm> (visited 19 September 2002), *see infra*, note 75, and accompanying text.

57. Report of the Study Group on Fragmentation of International Law, 1 August 2002, UN Doc. A/CN.4/L.628, p. 3, para. 7: "For example, fragmentation can be seen as a sign of the vitality of international law."

cite Thomas Franck,[58] the "compliance pull" of trade law will be far greater, the rules being far more specific (and thus more determinate), the "pedigree" being tested more severely, and the "coherence" and "adherence" of the trade law system being preserved by quasi-judicial institutions. In this vein, one might thus conclude that trade law is "more" law than environmental law.

Such a finding has definitive consequences. The main area in which these consequences have materialized so far is the "trade and . . ." problematic: when a trade body decides conflicts between free trade and environmental protection or free trade and social rights, the guess is that trade will prevail. This is, however, probably a hierarchy of values which not every observer will share. The existence of institutional means for dispute settlement in one case and their absence in the other does not imply such a hierarchy of values. The argument that all agreements concerned are made by states does not solve the problem of priority either, because each treaty is as binding as the other. The classical later-in-time rule[59] does not solve the problem in its entirety: by its purely formal nature, it disregards the substantive value questions which were usually neither intended to be solved at the time of the conclusion of the later agreement nor even contemplated. But how to solve that conflict? Are trade lawyers entitled to defer to general international law instead of GATT or GATS? Or do they need to stick to the values of their system, regardless of the repercussions both in reality and in the fabric of general international law?

The attitude a panellist or Appellate Body Member will adopt will, in turn, also influence the way the person fulfils the task of balancing the laws of different issue areas. Two general approaches can be discerned. One opinion, only recently strongly advocated by Ulrich Petersmann,[60] views the juridification of WTO dispute settlement as the best chance ever to develop binding adjudication on international legal issues. Accordingly, the WTO panellists and Appellate Body members should adopt a broad view of their task and not shy away

58. T. Franck, *The Power of Legitimacy Among Nations* (Oxford, Oxford University Press, 1990), p. 49 *et passim*.

59. *See* Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS, p. 331, Article 30.

60. E.U. Petersmann, "Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration", 13 EJIL, 2002, 621.

from adjudicating issues of civil and social rights, health regulations or of the protection of the environment. In this view, a too narrow approach would prevent the dispute settlement body from dealing with all the legal norms involved and would not arrive at a comprehensive solution to the problem before it. Making that point even more sticking, one might imagine the WTO as an incipient world court with real power over international economic and social actors and issues.

However, there exists also strong opposition to that view, not the least because it shifts the balance between trade institutions and other bodies and refers non-trade issues to a trade body.[61] The WTO dispute settlement was not developed to serve as a world court substitute. It was supposed to centre on trade issues, and should preserve free trade among its member states, nothing more, but nothing less either. If human rights, social issues or the environment are finally adjudicated by a body of trade lawyers and practitioners, those issues might be submerged under the primordial considerations of trade. On top of this, the trade lawyer has no special competence to deal with these issues. Thus, there exists a considerable danger of "trade bias".[62] In particular regarding individual and social rights, the exclusivity of the traditional human rights bodies[63] serves a useful purpose (even if the lack of a single, comprehensive, and coherent international system for the protection of human rights remains a *desideratum*): specialized human rights bodies will protect human rights better than a generalized body which has to weigh all sorts of considerations of which human rights can only be one among others or a trade body with a built-in penchant towards free trade. Thus, the governments of the Group of Fifteen, which is comprised of 17 WTO members, issued a statement demanding the exclusion of "non-trade

61. For a strong critique of Petersmann, *see* P. Alston, "Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann", 13 EJIL, 2002, 815; R. Howse, "Human Rights in the WTO: Whose Rights, What Humanity?", 13 EJIL, 2002, 651; id., "From Politics to Technocracy – and Back Again: The Fate of the Multilateral Trade Regime", 96 AJIL, 2002, 94, at 105. For an economic argument against a fusion of trade and other policy issues, see K. Bagwell, P.C. Mavroidis, R.W. Staiger, "It's a Question of Market Access", 96 AJIL, 2002, 56, at 74–5 *et passim*.

62. Leebron (note 2), 22; J. Trachtman, "Institutional Linkage", 96 AJIL, 2002, 77, at 78.

63. E.g., the U.N. Human Rights Committee, the Commission on Human Rights, or regional systems such as the Inter-American and European Human Rights systems.

issues such as labour standards and environmental conditionalities" from the WTO agenda.[64]

Of course, the problem of a split between general international law and specific areas does normally not appear in such a clear-cut fashion. Most international instruments, such as the United Nations Convention on the Law of the Sea (UNCLOS),[65] the Statute of the International Criminal Court,[66] or, to a certain extent, GATT,[67] contain their own rules which determine their relationship with general international law. As we have seen, the question of whether the WTO Dispute Settlement Body may rely on general international law is hotly disputed.[68] Some of these disputes may be solved by ref-

64. Eleventh Summit of the Group of Fifteen, Jakarta, 25–31 May 2001, available at <www.dfa-deplu.go.id/world/multilateral/g15/summit.htm> (visited September 30, 2002), para. 17, also cited by S. Charnovitz, "Triangulating the World Trade Organization", 96 AJIL, 2002, 28.

65. United Nations Convention on the Law of the Sea, 30 April 1982, entry into force 16 November 1994, 1833 *UNTS* 3 [hereinafter UNCLOS], Art. 311 – which omits, however, customary international law.

66. Article 21 of the Rome Statute of the International Criminal Court, Jul 17, 1998, entry into force July 1, 2002, UN Doc. A/CONF.183/9*, reads, *inter alia*: "The Court shall apply: (a) In the first place, this Statute, elements of Crimes and its Rules of Procedure and Evidence; (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, . . ., . . .". Note that the hierarchy employed here gives precedence to the rules of the Court, not to general international law. *See* A. Pellet, "Applicable Law", in: A. Cassese, P. Gaeta, J. Jones, *The Rome Statute of the International Criminal Court* (Oxford, Oxford University Press, 2002) p. 1051, pp. 1067–1084; M. McAuliffe de Guzman, "Article 21", in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Baden-Baden, Nomos, 1999), paras. 1–7, 9–14; B. Simma, A. Paulus, "Le rôle relatif des différentes sources du droit international (dont les principes généraux de droit)", in: H. Ascensio, E. Decaux, A. Pellet (eds.), *Droit international pénal* (Paris, Pedone, 2000), pp. 56–57.

67. *See also* Articles 3.2 and 7 of the Understanding on Rules and Procedures Governing the Settlement of Disputes [hereinafter DSU], Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, Annex 2, 1869 *UNTS* 401, partly cited *infra*, note 69. *See also* Article 20 of the General Agreement on Tariffs and Trade (GATT 1994), Marrakesh Agreement Establishing the World Trade Organization, 15 Apr. 1994, Annex 1a, 1867 *UNTS*, pp. 4, 190, 33 ILM, 1994, p. 1154 (amending and novating the General Agreement on Tariffs and Trade (GATT 1947), 30 October 1947, 55 UNTS, p. 187, amended 278 UNTS, p. 168; 572 UNTS, p. 320), which deals with exceptions to the obligations under the GATT for the sake of (unilateral) domestic measures for the protection of other values than trade.

68. *See*, on the one hand, J. Pauwelyn, "The Role of Public International Law in the WTO: How Far Can We Go", 95 AJIL, 2001, 535, at 541–550; on the other J.P. Trachtman, "Institutional Linkage: Transcending 'Trade and . . .' ", 96 AJIL, 2002, 77, at 88, n. 28. Pauwelyn's assertion that Articles 3.2 and 7.1 DSU do not exclude the application of general international law is doubtful. As they empower the DSB to apply the relevant provisions in the "covered agreements"

erence to general rules of treaty interpretation, as incorporated by Article 3 para. 2 of the Dispute Settlement Understanding.[69] Thus, the later-in-time rule (*cf.* Article 30 of the Vienna Convention on the Law of Treaties)[70] or the rules regarding the relevance of subsequent practice of the parties (Article 31 para. 3 lit. (b) VCT)[71] and those regarding the importance of "any relevant rule of international law applicable in the relations between the parties" (Article 31 para. 3 lit. (c) VCT) may solve many apparent conflicts of norms.[72] Others are avoided by express recognition of the superiority of another treaty. For example, the GATT recognizes in Article XXI (c) the priority of obligations under the UN Charter for the maintenance of international peace and security under Charter Article 103.[73] In the absence of similar provisions concerning conflicts involving other normative systems, however, these rules will not always suffice to avoid clashes between different legal orders. Due to the lack of a clear hierarchy within general international law, the claim of the general applicability of general international law within specific systems – and thus the rejection of so-called "self-contained régimes" independent of the background norms of general international law[74] – does not help much.

only, this seems to exclude other rules (except the general rules of interpretation referred to in Articles 3.2 DSU, *see infra*, note 69). Trachtman's argument that the authority of the panels is limited to the WTO agreements (only) does not solve the problem how far these agreements are meant to defer to other rules of international law. Article 3.2 does not rule out the exercise of judicial restraint and deference to other regimes, especially in areas of overlap, *see, e.g.*, H.L. Schoemann, S. Ohlhoff, "'Constitutionalization' and Dispute Settlement in the WTO: National Security as an Issue of Competence", 93 AJIL, 1999, 424, at 424–5 (note 2).

69. The relevant phrase of Article 3 para. 2 DSU reads: "The Members recognize that [the WTO dispute settlement system] serves . . . to clarify the existing provisions of [the WTO] agreements in accordance with customary rules of interpretation of public international law."

70. Vienna Convention on the Law of Treaties, 23 May 1969, 1155 *UNTS*, p. 331, Article 31 para. 3 lit. c. Article 31 is considered as an expression of customary law on the matter, *see* ICJ, *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, *ICJ Reports* (1994), p. 21, para. 41.

71. Article 31 para. 2 lit (c) was apparently overlooked by the GATT 1947 Panel in the *Tuna/Dolphin* case, see *United States – Restrictions on Imports of Tuna*, GATT Doc. DS29/R (16 June 1994), reprinted in 33 ILM, 1994, 839 (unadopted), para. 5.19. However, this apparent mistake did not influence the Panel decision.

72. For a detailed analysis, *see* Pauwelyn (note 68), 545–47, 572–76.

73. For a detailed analysis, *see* Schloemann, Ohlhoff (note 68).

74. B. Simma, "Self-Contained Regimes", 16 *Netherlands Yearbook of International Law*, 1985, 111; specifically relating to GATT and the WTO *see*, P.J. Kuijper, "The Law of GATT as a Special Field of International Law", *Netherlands Yearbook of International Law*, 1994, 227; Pauwelyn (note 68).

Clashes of values and specialized legal system have an institutional component, too: whereas, in some cases, a specialized body is called upon to deal with other areas of law, in others, two bodies of different systems deal with identical problems, with the apparent danger of opposing conclusions. This is not the place for a comprehensive study.[75] In the following section, we will instead look at two examples in which the clash of legal systems has played a central role: the *Shrimp/Turtle* case, which dealt with a conflict between trade and animal protection, and the *Swordfish* case, which involved two different dispute settlement bodies, the WTO DSB and the Tribunal for the Law of the Sea.

3.1 *Value clash and unequal institutionalization: The example of the* Shrimp/Turtle *case*

The supervision of the prohibition on non-tariff barriers to trade belongs to the basic tasks of the World Trade Organization (WTO) under the 1947/1994 General Agreement on Tariffs and Trade (GATT).[76] GATT prohibits, *inter alia*, discrimination between domestic and foreign products (Articles III, XIII). However, these measures do not necessarily serve the protection of domestic industries but also unquestionable political goals such as social rights, health, or environment measures. The task of the WTO requires a delicate judgment concerning the purposes and effects of non-tariff measures which are acceptable only if they serve purposes permitted under the GATT and thus remain in the political discretion of each contracting state.

Since the establishment of the WTO in 1994, the GATT benefits from binding dispute settlement contained in the Dispute Settlement Understanding (DSU).[77] The most prominent example for value clashes in the jurisprudence of the WTO Dispute Settlement Body

75. *See* Report of the ILC Study Group on Fragmentation (note 57) at 5, para. 21; ILC, Report on the work of its fifty-fifth session, General Assembly, Official Records, Fifty-eighth Session, Suppl. No. 10 (A/58/10); and the previous study by G. Hafner, "Risks Ensuing From Fragmentation of International Law", in International Law Commission, Report on the work of its fifty-second session, General Assembly, Official Records, Fifty-fifth Session, Suppl. No. 10 (A/55/10), 321–330.

76. Marrakesh Agreement establishing the World Trade Organization, 15 April 1994, 1867 UNTS, pp. 4, 154.

77. *See* note 67.

(DSB) is the *Shrimp/Turtle* decision,[78] in which the DSB had to strike a balance between free trade and animal protection. The United States had unilaterally imposed an import ban on shrimp harvested with commercial fishing technology which may adversely affect sea turtles.[79] Only states requiring trawl vessels to use Turtle Excluder Devices (TED) or tow-time restrictions and adopting enforcement measures similar to the requirements of the US regulations should be spared.

On the one hand, free trade required admitting fish caught in any of the WTO member states with no environmental conditions attached, on the other hand, protection of animal life demanded that fish caught in violation of environmental and animal protection standards should be sanctioned rather than supported, for instance by barriers to free trade. The US measures unquestionably violated free trade rules, namely Article XI:1 of GATT 1947/1994, which prohibits the institution of import prohibitions or restrictions on goods other than duties. The other interest involved, animal protection, was only marginally present in the GATT, namely in Article XX, which reads:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries . . . or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: . . .
>
> (b) necessary to protect human, animal or plant life or health; . . .
>
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

First, Article XX contains a limited catalogue of interests or values which justify restrictions to trade, among them animal life and the conservation of exhaustible natural resources. Second, it requires a balancing act: those measures are only admissible if the restrictions

78. *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, AB-1998–4, Report of the Appellate Body, 12 October 1998, WTO Doc. WT/DS58/AB/R reproduced in: 38 ILM, 1999, 121.

79. Section 609 of Public Law 101–162, 16 United States Code (U.S.C.) § 1537, *see United States – Import Prohibition of Certain Shrimp and Shrimp Products*, AB-1998–4, Report of the Appellate Body, 12 October 1998, WTO Doc. WT/DS58/AB/R reproduced in: 38 ILM, 1999, 121, at 123–24, paras. 1–3.

of trade are necessary to the pursuit of the recognized goal. The chapeau (introduction) of Article XX requires an additional balancing between the necessity of the measure as such, on the one hand, and non-discrimination and trade-restricting effects on the other. As the Appellate Body put it in *United States – Gasoline*,

> [i]n order that the justifying protection of Article XX may be extended to it, the measure at issue must not only come under one or another of the particular exceptions – paragraphs (a) to (j) – listed under Article XX; it must also satisfy the requirements imposed by the opening clauses of Article XX. The analysis is, in other words, tow-tiered: first, provisional justification by reason of characterization of the measure under XX(g); second, further appraisal of the same measure under the introductory clauses of Article XX.[80]

Thus, the exception to free trade is narrowly circumscribed so that trade will usually carry the day. If otherwise, the trade regime would suffer from the invention of countless exceptions by states willing to impede free trade to their individual advantage. Thus, it is not surprising that both the original panel and the Appellate Body decided, as a result, in favour of trade and against the particular measure concerned which was meant to protect animal life.

But the outcome of the dispute settlement procedure shall not be the focus of this chapter. Rather, what is of particular interest here is the methodology by which the Appellate Body reached its decision. And it is this methodology, I claim, that may be more apt to solve clashes of values and interests than looking for hierarchical relationships. In interpreting Article XX, the WTO Appellate Body (AB) did not limit itself to the wording of the GATT in light of the purpose of the treaty and its drafting history. To the contrary, from the very beginning of its analysis, the AB took other values into account as they were understood by both authoritative and (only) persuasive, soft law interpretations. According to the preamble of the WTO Agreement, the parties to the agreement recognize that trade "should be conducted with a view to, *inter alia*, expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the

80. *United States – Gasoline*, adopted May 20, 1996, WTO doc. WT/DS2AB/R, p. 22; *see also US Import Prohibition on Shrimp, supra*, note 80, p. 152, para. 118. The Panel had disregarded this two-tiered approach.

environment". Article 3 DSU, paragraph 2, describes one of the tasks of the WTO dispute settlement system as the clarification of "the existing provisions of those agreements in accordance with customary rules of interpretation of public international law". As already mentioned, these rules are contained in Article 31 of the Vienna Convention on the Law of Treaties, which provides, in turn, for the taking into account, in the interpretation of treaties, of "any relevant rules of international law applicable in the relations between the parties".[81] Thus, the GATT 1994 is to be interpreted in the light of general international law applicable at the time of the dispute. In the words of the AB:

> The words of Article XX (g) . . . were actually crafted more than 50 years ago. They must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment.[82]

In order to find out whether living resources such as fish could be "natural resources" in the sense of Article XX (g), the AB also took account of the UN Convention on the Law of the Sea[83] and the Convention on Biological Diversity,[84] although some parties to the dispute had not subscribed to them.[85] Thus, the AB came to the conclusion that fish is also an exhaustible natural resource. This part of the decision is of particular interest because it seems that the AB was more concerned with the Conventions than with its own case law which had reached the same conclusion.[86] The AB pointed out that the incriminated US measure was related to the conservation of an exhaustible natural resource, and was made effective with similar

81. *See supra* note 70, also for the relationship of the Vienna Convention to general international law.

82. *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (note 79), para. 129.

83. *See supra* note 65.

84. Convention on Biological Diversity, 5 June 1992, *entry into force* 29 Dec. 1993, 1760 *UNTS*, p. 79, reproduced in: 31 ILM, 1992, 818.

85. *United States – Import Prohibition of Certain Shrimp and Shrimp Products, supra* note 79, para. 130.

86. *See ibid.*, para. 131, referring to two GATT 1947 panel reports which were adopted by the Contracting Parties, *United States – Gasoline*, 20 May 1996, WT/DS52/AB/R, p. 23; *Japan – Taxes on Alcoholic Beverages*, 1 Nov 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, p. 12; *United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*, 25 Feb. 1997, WT/DS24/AB/R, p. 16.

restrictions on domestic production or consumption.[87] In recent jurisprudence, the DSB has emphasized that the necessity requirements of Article XX – the quite loose term of a measure "in relation to" in Article XX (g) is a case in point – are subject to considerable discretion of the country concerned, especially if important values such as human life are at stake.[88] Article XX (g) being *lex specialis*, the AB had not to deal with Article XX (b).[89]

The *Chapeau* to Article XX contains three tests: (1) arbitrary or (2) unjustifiable discrimination between countries where the same conditions prevail, and (3) disguised restrictions on international trade. The AB describes the task of the application of the *Chapeau* as "essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception . . . and the rights of the other Members . . . so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations".[90] In the case at hand, the balancing concerned, on the one hand, the legitimate purpose of the United States to protect animal life at sea, and the right of shrimp importers to free trade with the US. Here, the AB found that the US requirements were to rigid and inflexible, because they demanded the adoption of measures largely identical to the ones in place in the US.[91] In addition, the formal certification of the identity of the measures, and not the substantive identity or the effect of the measures, was considered decisive. Any negotiated solution which would recognize similar regulatory schemes was not contemplated.[92] For the requirement of negotiation before the unilateral imposition of trade restrictions, the AB again cited the law on the environment, in particular Principle 11 of the Rio Declaration on Environment and

87. *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (note 79), paras. 142, 145.

88. *Korea – Measures Affecting Imports of Fresh, Chilled an Frozen Beef*, Report of the Appellate Body, Doc. WT/DS161, 169/AB/R, 11 December 2000, paras. 161–64; *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, Report of the Appellate Body, WT/DS135/AB/R, 12 March 2001, 40 ILM, 2001, 1193, paras. 167–168, 178; *cf.* R. Howse, *supra* note 61, at 657.

89. *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (note 79), para. 146.

90. *Ibid.*, paras. 159–60.

91. *Ibid.*, para. 164.

92. *Ibid.*, paras. 164–66.

Development[93] and the Agenda 21, but also, again, the Convention on Biological Diversity.[94] Finally, the AB stated that the US had engaged in an arbitrary fashion only in negotiations with some countries, but not with others, and did not have a fair procedure of certification.[95] Therefore, the AB held the US in breach of the GATT 1994 because of its discriminatory application of Article XX, not because of the general unjustifiability of restrictions of trade for animal protection. In the end, the case constituted the first example of the DSB considering the lawfulness of unilateral extraterritorial measures for the protection of universal values other than trade.

Accordingly, the US revised its guidelines and provided for "certification" of a shrimp exporting country when the country adopts "comparably effective" measures to protect sea turtles as the US.[96] In addition to the Inter-American Convention for the Protection and Conservation of Sea Turtles[97] adopted, but not in force when *Shrimp/Turtle* was originally decided, the US had negotiated a Memorandum of Understanding on the Conservation and Management of Marine Turtles and their Habitats of the Indian Ocean and South-East Asia.[98] The adoption of a legally binding document had apparently failed due to opposition of East-Asian states.[99] Thus, the Appellate Body now agreed to the Panel's finding that the US law on the protection of sea turtles was "now applied in a manner that no longer

93. Rio Declaration on Environment and Development, June 14, 1992, 31 ILM, 1992, 874.

94. *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (note 79), para. 168.

95. *Ibid.*, paras. 169–176.

96. *See* United States Department of State, Revised Guidelines for the Implementation of Section 609 of Public Law 101–162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations, 64 *Federal Register* (July 8 1999), p. 36946; WTO Appellate Body, *United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia*, 41 ILM, 2002, 150, at 151 para. 8. For a brief assessment, *see* L. de la Fayette, "Case Report: United States – Import Prohibition of Certain Shrimp and Shrimp Products (compliance)", 96 AJIL, 2002, 685.

97. Inter-American Convention for the Protection and Conservation of Sea Turtles, *opened for signature* December 1 1996, *entry into force* May 2001, S. Treaty Doc. No. 105–48, 1996 WL 33141597 (Treaty). See *United States – Import Prohibition of Certain Shrimp and Shrimp Products, supra*, note 79, paras. 167–172. The Appellate Body considered the differential treatment of American and other States *ibid.* discriminatory.

98. 14 July 2000, *entry into force* 1 September 2001, available at the Website of the Convention on Migratory Species, <www.unep-wcmc.org/cms> (visited November 4 2002).

99. *Shrimp, Recourse to Article 21.5*, note 96, at 173, para. 132 n. 93.

constitutes a means of unjustifiable or arbitrary discrimination".[100] In addition, both AB and Panel agreed that the US could demand the adoption of a turtle protection programme "comparable in effectiveness" with its own measures, but not, as previously, "essentially the same" programme.[101] Thus, the new guidelines were flexible enough to be justified under Article XX (g) GATT 1994.[102]

3.2 *The problem of overlapping jurisdiction*

However, the problem gets even more tricky if other decision-making bodies with a limited jurisdiction are involved. The *Swordfish* case has raised, for the first time, the spectre of two instances of international dispute settlement institutions confronting each other in the same case.[103] The case concerned Chilean measures against alleged over-fishing of swordfish in the High Seas by European Community fishers. Chile prohibited the landing of boats carrying swordfish in its ports. Both Chile and the European Communities are members of the WTO and parties to the United Nations Convention on the Law of the Sea (UNCLOS).[104]

From the standpoint of the European Communities, the Chilean measures violated both the freedom of transit pursuant to Article V paras. 1–3 GATT 1994 and the tariffs-only provision of Article XI para. 1 GATT prohibiting non-tariff barriers to trade.[105] Concerning Article XX GATT, the EU could argue that Chile had, at a minimum, violated the duty of cooperation enunciated by the *Shrimp/Turtle*

100. *Ibid.*, at 173, para. 134.
101. *Ibid.*, at 175, paras. 141–144.
102. *Ibid.*, at 177, para. 153.
103. Of course, different international courts or tribunals already had encountered differences of opinion about the meaning of international norms, *see*, e.g., the discussion of attribution of conduct of mercenaries to states between the ICJ, *Military and Paramilitary Activities in and against Nicaragua*, *ICJ Reports* (1986), p. 14, paras. 191, 228 ["Effective Control" required]; and the International Criminal Tribunal for the Former Yugoslavia (ICTY), see *Prosecutor* v. *Tadić*, July 15, 1999, IT-94-1-A, available at <www.un.org/icty>, visited 31 October 2002, paras. 88 ff. ["overall control" sufficient]. But they were not confronted with the identical case in two different fora of binding dispute settlement.
104. *See supra* note 65.
105. *Chile – Measures affecting the transit and importation of swordfish – Request for Consultations by the European Communities*, Apr. 26 2000, WTO Doc. WT/DS193/1; *Request for the Establishment of a Panel by the European Communities*, 7 Nov. 2000, WTO Doc. WT/DS193/2, available at <www.wto.org>.

AB decision.[106] The EU first requested formal consultations for the establishment of a DSB panel pursuant to Articles 4 and 6 DSU.[107]

The EU also relied on the right to fish on the high seas under Article 116 UNCLOS. Due to the detailed provisions of UNCLOS concerning the duty of states to adopt measures for the conservation of the living resources of the high seas as provided for by Articles 64 and 117 UNCLOS, Chile could expect more favourable treatment there. Thus, Chile requested arbitration pursuant to Article 287 para. 3 UNCLOS. Later on, the parties agreed on the referral of the case to a chamber of the International Tribunal for the Law of the Sea.[108]

In the end, however, both parties understood that two – maybe conflicting – dispute settlement decisions would not be helpful to fulfil the very purpose of both the DSU and the UNCLOS rules – dispute settlement, not continuation of the dispute by judicial means. Thus, they suspended both proceedings and agreed on negotiations on a framework for the conservation and management of swordfish in the South-East Pacific.[109] The case demonstrates that, in cases of a threatening clash of different jurisdictions at the international level, state parties must find a solution themselves rather than risking a lengthy dispute settlement process which leads to no practical result. Thus, jurisdictional overlap will sometimes not lead to more, but to less judicial third-party settlement.

On the other hand, one may imagine that the WTO and ITLOS would have been able to avoid such a conflict. The AB could have used the duties of cooperation contained in Articles 64 and 117 UNCLOS to underline its *Shrimp/Turtle* jurisprudence on the cooperation required under Article XX g. GATT. It could also have

106. *See supra* note 92 and accompanying text.

107. *See* the requests note 105.

108. International Tribunal for the Law of the Sea, *Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Community)*, Constitution of Chamber, 20 December 2000, Order 2000/3, Case No. 7, available at <http://www.itlos.org>, reproduced in: 40 ILM, 2001, 474.

109. *See* EU and Chile reach an amicable settlement to end WTO/ITLOS swordfish dispute, Doc. IP/01/116, 25 January 2001, available at <europa.eu.int/comm/trade/index_en.htm> (visited 3 October 2002); J. Neumann, "Die materielle und prozessuale Koordination völkerrechtlicher Ordnungen: Die Problematik paralleler Streitbeilegungsverfahren am Beispiel des Schwertfisch-Falls", 61 ZaöRV, 2001, 529; M. Orellana, "The EU and Chile Suspend the Swordfish Case Proceedings at the WTO and the International Tribunal of the Law of the Sea", *ASIL Insight*, February 2001, available at <www.asil.org/insights/insigh60.htm> (visited 4 November 2002).

referred to the recent Fishery Agreement.[110] It requires, in Arts. 7 and 23, an agreement of both fishing and coastal states for conservation measures, but also prescribes detailed standards and interim measures of protection through the Tribunal. Thus, there exists no real conflict between GATT and UNCLOS. The ITLOS, on the other hand, could have looked to the GATT for guidance how to fill the lack of concreteness in the provisions of UNCLOS, the fishery agreement being not in force between the parties.[111] Be that as it may, both institutions would have needed to look to the other for guidance. One might even consider some sort of informal coordination between the bodies.

3.3 *World trade and other values – integration or opposition?*

The *Shrimp/Turtle* case did of course not solve all "trade and . . ." problems. The decision could be based, for instance, on the express language of the GATT allowing for environmental exceptions. What would a panel do if a valid concern was not mentioned in Article XX and Article XXI? As the AB pointed out: "The words of Article XX (g) . . . were actually crafted more than 50 years ago".[112] This is of course also valid of the whole treaty. Thus, we find a provision on prison labour, but not on labour rights, on public morals and the protection of human life, but not on human rights and freedoms, on the UN Charter and the protection of essential security interests, but not on humanitarian intervention, etc. No wonder, then, that the current debate focuses on these issues. But there seems to be no clear cut "solution", as the weighing of circumstances will be different in each case.

How would a decision-maker decide without the benefit of explicit language in the treaty? Which criteria could he or she apply? Consider, for example, trade unions asking for the respect of the rights of their brethren, but in reality fearing for the jobs in their own country?

110. Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 2167 UNTS, p. 3, 34 ILM, 1995, 1569, *opened for signature* 4 August 1995, *entry into force* 11 December 2001, but neither for the European Community nor for Chile, which has not even signed. The European Community ratified on 19 December 2003.

111. For an extensive treatment, *see* Neumann (note 108).

112. *See supra* note 82 and accompanying text.

Are not most trade restrictions related to a public purpose which can be justified on these grounds? In each of these cases, the lawyers serving on the AB will be hard-pressed to decide those questions in favour of trade. After all, the protection of free trade is their expertise. The temptation is strong to regard most justifications of trade restrictions as a cynical circumvention of international rules for individual interests.[113] Jagdish Bhagwati fears the "threat posed to the trading system by lobbies (in the North, of course) seeking to impose their own 'trade-unrelated' agendas on the GATT (and later the WTO) by simply adding three words 'trade-related' before whatever these agendas were.'[114] Bhagwati thus reminds us of the so-called trade-related aspects of intellectual property integrated into the WTO by the TRIPs Agreements.[115] "By putting TRIPS into the WTO, in essence we legitimated the use of the WTO to extract royalty payments." Bhagwati continues:

> [T]he poor countries [which] have no lobbies anywhere like the sumptuous ones such as the Sierra Club and the AFL-CIO [the US trade union umbrella organization, A.P.] now find themselves at the receiving end of a growing list of lobbying demands that the northern politicians are ready to concede, cynically realizing that the bone thrown to these lobbies in their own political space is actually a bone down the gullets of the poor countries.[116]

Thus, nowadays, third world countries seem often to be the true champions of a purist trade agenda. And indeed, most states or lobbies will find one concern or the other which justifies trade restriction on "higher" grounds.

In the absence of a political consensus among WTO members, is the DSB entitled to go beyond the narrow confines of the WTO agreements towards other areas of law? It is not possible to give a simple answer to this question. In each case, the solution will be

113. For a description of the development of the "insider network" ideology on free trade, *see* R. Howse, "From Politics to Technocracy – and Back Again: The Fate of the Multilateral Trade Regime", 96 AJIL, 2002, 94.

114. J. Bhagwati, "Afterword: The Question of Linkage", 96 AJIL, 2002, 126, at 127.

115. Bhagwati, *ibid.*, referring to the Agreement on Trade-Related Aspects of Intellectual Rights [hereinafter TRIPS], in Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, Annex 1 C, 1869 UNTS 299.

116. *Ibid.*, pp. 127–8. *See also* the Third World Intellectuals and NGOs, Statement Against Linkage (15 November 1999) (TWIN-SAL), available at <cuts.org/twin-sal.htm> (visited 4 November 2002), signed by Bhagwati.

different. However, what makes the *Shrimp/Turtle* decision a laudable exercise is the attempt of the AB not to disregard the question by pretending that the WTO would exist in a legal vacuum, but to include other international instruments, even if not yet formally in force, to rely on an international consensus allowing for exceptions to free trade by domestic regulation. There is no doubt that such decisions between different legitimate concerns by weighing all circumstances, including the resort to legal and quasi-legal norms and broad principles, will empower the judge or panellist to justify almost any result. Yet, the AB did not act without legal guidance. It did not have to substitute its own political convictions for those expressed by the international community, but it integrated them into its own system.

There is, however, also a danger involved in this strategy. The controversy between Philip Alston and Ernst-Ulrich Petersmann on the inclusion of human rights in the WTO Dispute Settlement[117] is a case in point. Could the transformation of the WTO dispute settlement system from a trade body to a body of general international law destroy the specificity of human rights law? Alston speaks of the danger of a "merger & acquisition" of human rights by trade law. He particularly takes issue with the apparent conflation of economic freedoms with human rights in the proper sense of the term.[118] Indeed, Petersmann largely equates economic rights, in particular property rights, but also the market freedoms of the EC treaty, with human rights.[119] On the other hand, he is clearly not ignorant of the *problematique* involved:

> Given the widespread bias among human rights lawyers *vis-à-vis* economics and WTO law, and the agnostic attitude of many trade specialists *vis-à-vis* human rights, it is an important task of academics to

117. *See supra* note 60 and accompanying text.

118. P. Alston, "Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann", 13 EJIL, 2002, 815, at 823–828.

119. Petersmann (note 60), 636–7, 644 *et passim*; even more clearly *id.*, "The WTO Constitution and Human Rights", 19 *Journal of International Economic Law*, 2000, 23; *see also id., Constitutional Functions and Constitutional Problems of International Economic Law* (Fribourg, CH, University Press, 1991), pp. 402–403 (arguing for an individual right to free trade). *Cf.* Howse (note 61), 651: "[T]here are few who would disagree with Petersmann that the full realization of human rights is incompatible with ruthless suppression of market freedoms. Yet . . . the markets and trade are entwined with some of the most horrific human rights abuses, and on a massive scale." Against an individual right to free trade, *see* S. Peers, "Fundamental Right or Political Whim? WTO Law and the European Court of Justice", in G. de Burca, J. Scott (eds.), *The EU and the WTO* (Oxford, Hart, 2001), p. 111, at 129.

> promote more dialogue and better understanding among these different communities of trade specialists and human rights advocates so as to render both human rights law and WTO law more effective in reducing worldwide poverty and health and human rights problems.[120]

Nevertheless, the question arises whether Petersmann does not overload a trade dispute settlement procedure with other concerns. Being charged not only with promoting economic exchange, but also with the reduction of worldwide poverty, with health and human rights problems, the promise of free trade seems to be taken too far – let alone the question of whether these "rights" conform to the current state of human rights law.[121] In the words of Robert Howse, in the hierarchy of rights that Petermann is proposing,

> [s]ocial and other positive human rights may only be pursued by governments to the extent to which they can be shown as "necessary" limits on market freedoms. But why not the reverse? Why not subject *free trade rules* to strict scrutiny under a necessity test, where these rules make it more difficult for governments to engage in interventionist policies to protect *social* rights?[122]

Indeed, Petersmann criticizes traditional human rights doctrine for its blindness towards the liberating potential of free markets and sound competition laws.[123] But the extension of the WTO to the core of the political discourse puts the legitimacy of the project of free trade at risk.[124] In the words of Robert Howse:

> [I]f free trade is recast in terms of "rights", it must obviously be integrated or balanced somehow with other human rights, explicitly entrenched in international legal instruments. . . . Yet since these other rights are not substantively focused on trade, it is very unclear why the trading system itself or, more specifically, its juridical organs have the legitimacy to strike the balance (as opposed to the UN organs primarily seized of human rights questions), or indeed why it should not in the first instance be struck by democratic decision making within each polity.[125]

120. Petersmann (note 60), 643.
121. *Cf.* Alston (note 61).
122. Howse (note 61), 655.
123. Petersmann (note 60), 639.
124. This is the core of Alston's criticism (note 61). *See also* R. Howse, K. Nicolaïdis, "Legitimacy and Global Governance: Why Constitutionalizing the WTO Is a Step Too Far", in R.B. Porter *et al.* (eds.), *Efficiency, Equity, and Legitimacy: The Multilateral Trading System at the Millennium* (Washington, Brookings, 2001), p. 227, 235–239.
125. R. Howse, "From Politics to Technocracy – and Back Again: The Fate of the Multilateral Trade Regime", 96 AJIL, 2002, 94, at 105.

And yet, there is some truth to Petersmann's insistence that human rights and social concerns are often (ab)used as disguise for the pursuit of individual interests, and that trade restrictions will only rarely be an effective tool for reaching policy goals.[126] In addition, as Jagdish Bhagwati has remarked, unilateral trade restrictions for environmental or labour or human rights reasons are only an option, as a rule, to rich and powerful countries, not to small and weak ones.[127]

Nevertheless, more regard for conflicting policy goals might lead to a stricter check on the effects of trade-related measures for other human rights and values, such as development or the environment.[128] The present author agrees with Petersmann when he calls for a better awareness of human rights law, including social rights, in the interpretation of Article XX GATT.[129] However, such an approach would require a much bolder approach by the Dispute Settlement Body regarding the (re)interpretation of narrowly crafted exceptions.[130] The question remains of whether a body of trade experts and international lawyers constitutes the appropriate forum for such decisions rather than national regulators and parliaments, and whether and how they could face some sort of democratic or public control.[131] Thus, the DSB will continue to have to avoid the danger of abuse of trade issues for political advantage, in particular when extraterritorial enforcement is in question.[132] Nevertheless, confronting this issue

126. Petersmann (note 60), 645: "[T]rade restrictions are only rarely an efficient instrument for correcting 'market failures' and supplying 'public goods'."

127. Bhagwati (note 114), 133.

128. Howse (note 124), 245–46; Howse, Nicolaïdis (note 124), at 228.

129. Petersmann (note 60), 646 *et passim*.

130. Petersmann's suggestion that the relationship between human rights and the "public morals" exception in Article XX lit. a GATT 1994/47 should be clarified, *ibid*. Indeed, Article XX could serve the purpose of a much broader integration of human rights into the Article XX exceptions. On the same line S. Charnovitz, "The Moral Exception in Trade Policy", 38 *Virginia Journal of International Law*, 1998, 689.

131. Petersmann (note 60), 646; Howse (note 61), 658 (who remains skeptical). Even WTO practitioners do not understand their role that broadly, *see*, e.g., D.P. Steger, "Afterword: The 'Trade and . . .' Conundrum – A Commentary", 96 AJIL, 2002, 135, at 140.

132. The extraterritoriality of the United States measures to protect dolphins apparently was the main reason for one of the original GATT panel to reject the United States measures, see *United States – Restrictions on Imports of Tuna*, *supra* note 71, paras. 5.24–5.27, 5.37–5.39. For a suggestion to deal with this issue by applying the effects doctrine, *see* Bagwell, Mavroidis, Staiger (note 61) pp. 75–6. However, given the indeterminacy of this doctrine, this approach to extraterritorial rules does not much more than demanding a weighing of all circumstances in cases of extraterritorial application of domestic laws.

requires a weighing of a host of circumstances and values expressed in legal form, with no simple and one-fits-all solution in sight.

4. *Conclusion: From constitution to discourse?*

The analysis of the value clashes in the case of the WTO ended with the conclusion that, for better or worse, trade lawyers needed to look to other functional systems in order to delineate their system from them. But are lawyers the right persons to decide those issues? Should they not be left to the "international legislator", namely (ideally elected) governments?[133] However, this "hands off"-approach would lead to the conclusion that, for the time being, trade would prevail until the next trade round – which may take years. The parties in such a case can often not wait for the results of political processes such as the decade-long WTO policy rounds. They need a decision on their problem, here and now. This approach would also imply a shift from domestic to international, from democratic to inter-state decision-making, because all these decisions would be taken out of the domestic political process. Thus, waiting for the next treaty amendment might often amount to less democracy and flexibility. At times, however, legal problems of this kind may be "solved" by sending the parties to the dispute back to the negotiating table. The insistence of the AB in *Shrimp/Turtle* on the priority of negotiations to the unilateral imposition of sanctions demonstrates how a legal body may defer to political decisions without renouncing the claim to full compliance within the law. In cases involving difficult value problems which are not pre-ordained in WTO law or other international rules, a renvoi to the parties, with some guidance on the legal principles and issues involved, may thus be the best avenue to take.[134]

133. The first *Tuna/Dolphin* panel in the GATT 1947 argued for a referral of the matter to a political decision, see *United States – Restrictions on Imports of Tuna*, 16 August 1991, reprinted in 30 ILM (1991), 1594 (unadopted), paras. 6.3–6.4; see also *United States – Restrictions on Imports of Tuna*, June 1994 (note 71), para. 5.43. In that sense also Bhagwati, (note 114), at 134; Steger, (note 131), 140, 144.

134. The *Beef Hormone* case, *European Communities – Measures Concerning Meat and Meat Products* (Hormones), 13 February 1998, WT/DS48/AB/R. Howse and Nicolaïdes consider this case as a model for the future decision (or non-decision) of questions deemed too political, Howse/Nicolaïdes (note 124), 245. *See also* the ICJ, *Gabčíkovo-Nagymaros (Hungary* v. *Slovakia)*, *ICJ Reports* (1997), p. 7, which has, however, not yet lead to a successful settlement.

Adjudicating bodies such as WTO dispute settlement must forego the temptation to preserve the prime value of their system against others. Thus, they need to forego the attempt of hierarchization (trade trumps environment) to the benefit of delicate balancing acts paying due regard to other issue areas (such as the protection of the environment and animal life in *Shrimp/Turtle*). It is the task of international lawyers to further develop a methodology which allows for the respect for the values of other issue areas within institutional settings such as WTO dispute settlement. Thus, the advent of pluralist functionalism may indeed imply a shift from constitutional solutions relying on hierarchical decision-making by superior bodies to mutual accommodation of different functional systems, from constitution to discourse.

This development also involves the danger of "strong law", such as WTO law, getting the upper hand over "weak law" not equipped with a strong implementing mechanism, such as labour law or human rights law. Thus, for upholding the acceptance of their jurisprudence and decisions, strong implementing mechanisms must strive to accommodate the concerns of "weak" norms and interests. The most suitable legal methodology for approaching typical problems of functionalization thus consists of accommodating and balancing clashing values and interests and paying due regard to the decisions of other judicial and quasi-judicial mechanisms, rather than establishing hierarchical relationships between issue areas. The *Shrimp/Turtle* case is a case in point – both for the quest to strike that balance as for the failure to accommodate all actors involved.

However, this approach also gives an ever-larger margin of appreciation to lawyers. The lawyer ends up in a political role: The result of the application of abstract principles to the concrete circumstances of a specific case is not predetermined by legal rules. As one WTO practitioner has observed: "[T]he problems of scope and linkage are essentially political in nature. Therefore, the solutions will also be political".[135] But does the political (and therefore arbitrary) nature of the lawyer's choices delegitimize the lawyer or transform him into a political actor? Where do we find the specificity of judicial as opposed to purely political settlement? One answer to this concern can be found in both the procedure and the criteria used in a "legal"

135. Steger (note 131), 135. Similarly Trachtman (note 24), 77.

decision. The specificity of a legal decision on value clashes is the orientation towards values and principles, not political expediency or exchange of benefits. Here we find the argument for the use of the traditional means of treaty interpretation which might help to preserve the unity of international law in diversity:

> [T]he very decision to follow these general interpretive rules of public international law enhances the legitimacy of the dispute settlement organs in adjudicating competing values, because these norms are common to international law generally, including to regimes that give priority to very different values, and are not specific to a regime that has traditionally privileged a single value, that of free trade.[136]

The lawyer is not entitled to find an unprincipled, political "tit-for-tat" solution. He needs to refer to established rules and principles to reason his decision. Neither does he need to hide the ultimate value judgment, which will always be subject to doubt and contestation. Still, the very nature of decision-making will remain different.

The political nature of legal choices also means that the results of such legal balancing of values, norms and interests is open and subject to "political" critique. In the absence of unequivocal, clear rules for the decision of value conflicts or independent enforcement authority, international decisions ultimately depend – far stronger than political ones – on the social acceptance of the outcomes by the political community at large. Such acceptance will only be reached if the lawyer strives to take all relevant legal pronouncements of values into account. Thus, in the end, only by remaining within the professional realm the international lawyer will fulfil his mandate. Only the professional attitude of the lawyer as an intermediary between socially accepted values translated into legal norms, and an often confusing and confused reality, can fill the legitimacy void in the international realm. This requires both legal professionalism and judicial modesty.[137]

136. Howse, (note 125), 110.

137. The debate between O. Korhonen, "International Lawyer: Towards Conceptualization of the Changing World and Practice", in J. Drolshammer, M. Pfeifer, *The Internationalization of the Practice of Law* (The Hague, Kluwer Law International, 2001), p. 373, and the present writer, "The International Lawyer between Globalization and Postmodernity", *ibid.*, p. 385. *See also* Paulus (note 10), 737, 755.

CHAPTER FOUR

THE WILL OF THE INTERNATIONAL COMMUNITY AS A NORMATIVE SOURCE OF INTERNATIONAL LAW

Nicholas Tsagourias*

1. *Introduction*

The concept of an international community is often used in juridical and political thinking as an authoritative image without fully elaborating its normative or practical implications.[1] Sometimes it is only by implication that we are able to adumbrate its particular features. For instance, in Part I of his *International Law* treatise Professor Cassese discusses the "Origins and Foundations of the International Community" and opens the discussion on "[t]he main legal features of the international community" by warning us that "the features of the world (sic) community are unique"[2] whereas later he deals with the "traditional individualistic trends and emerging community obligations

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1. N.Q. Dinh, P. Daillier, A. Pellet, *Droit International Public*, 5e ed., (Paris, L.G.D.J., 1994), pp. 36–37 and 391–395; B. Simma, "From Bilaterism to Community Interest in International Law", 250 RC (1994), p. 217; Ch. Tomuschat, "Obligations Arising for States without or against their Will", 241 RC (1993), p. 209, in part. pp. 209–240; J.A. Frowein, "Reactions by not Directly Affected States to Breaches of Public International Law", 248 RC (1994), p. 345; M. Lachs, "Legal Framework of an International Community", 6 *Emory International Law Review*, 1992, 329; M. Lachs, "Quelques réflexions sur la communauté internationale", in *Le Droit International au service de la paix, de la justice et du développement: Mélanges Michel Virally* (Paris, Editions A. Pedone, 1991), p. 350; R.J. Dupuy, *La communauté internationale entre le mythe et l'histoire* (Paris, Economica, 1986); H. Mosler, *The International Society as a Legal Community* (Alphen aan den Rijn, Sijthoff, 1980); H. Mosler, "The International Society as a Legal Community", 140 RC (1974), p. 1; C. de Visscher, *Théories et Réalités en Droit International Public*, 4ème ed. (Paris, Editions A. Pedone, 1970), pp. 110–124; H. Lauterpacht, "International Law: Collected Papers", in Lauterpacht (ed.), *Vol. 1: The General Works* (Cambridge, Cambridge University Press, 1970), pp. 28–31; Lauterpacht, "International Law: Collected Papers", in Lauterpacht (ed.), *Vol. 2: The Law of Peace*, (Cambridge, Cambridge University Press, 1970), pp. 17–19.

2. A. Cassese, *International Law* (Oxford, Oxford University Press, 2001), p. 3.

and rights".[3] What one could infer from the above is an image of an international community that transcends the confines of state individualism towards a more inclusive and solidaristic accommodation. However, even in such a less impressionist usage of the concept of an international community, its jurisprudential character often remains unexplored and uncertain.[4]

International relations theorists and particularly theorists in the English School ponder the formation or the characteristics of an international *society*[5] whereas the consideration of the concept of an international community is rather weak.[6] Moreover, the different conceptualizations of international society peregrinating from a loose concept of society to one that contains common values thus closer to a community,[7] results in a certain intellectual ambivalence. For instance, the inclusion of values in Hedley Bull's definition of an international society brings it closer to the concept of a community.[8] However, this approach breaks down upon the realization that the

3. Cassese (note 2), p. 13.

4. In his *International Law in a Divided World*, Judge Cassese employs the concept of community to describe an aggregation of states. He identifies three segments within that community having distinct international norms: the universal which envelops all states; the general which refers to customary norms accepted by only two groups of states and, finally, the particular adhered to by one group of states. The attribution of community character to such an aggregation resides on the fact that membership is premised on statehood and not on its qualities. This may represent an objective criterion for constituting a community but it is not the defining one as the acknowledgment of sectoralization concedes. A. Cassese, *International Law in a Divided World* (Oxford, Clarendon Press, 1986), pp. 32–33.

5. M. Wight, "System of States", in Bull, Holbraad (eds.), *Power Politics* (Leicester, Leicester University Press, 1977); M. Wight, "International Theory: The Three Traditions", in Wight, Porter (eds.), *International theory: the three traditions* (Leicester, Leicester University Press, 1991); H. Bull, A. Watson, *The Expansion of International Society* (Oxford, Oxford University Press, 1984); T. Dunne, *Inventing International Society: A History of the English School* (London, Macmillan, 1998).

6. P. Woever, "Four Meanings of International Society: A Trans-Atlantic Dialogue", in Roberson, *International Society and the Development of International Relations Theory* (London, Pinter, 1998), p. 80; E.H. Carr, *The Twenty Years' Crisis 1919–1939* (Houndmills, Palgrave, 2001), pp. 147–153.

7. F. Tonnies, *Community and Association*, trans. C. Loomis (New York, Harper and Row, 1963), p. 35: ". . . Gemeinschaft should be understood as a living organization. Gesellschaft as a mechanical aggregate and artifact."

8. H. Bull, *The Anarchical Society: A Study of Order in World Politics*, 2nd ed. (Houndmills, Macmillan, 1995), p. 13: "A *society of states* (or international society) exists when a group of states, conscious of certain common interests and common values, form a society in the sense that they conceive themselves to be bound by a common set of rules in their relations with one another, and share in the working of common institutions."

referent values are particular to the international and indeed voluntarist in their character. In other words, the principles or values of the international do not transform the latter into a community if their existence simply suggests reciprocal and cooperative considerations of mutual benefit rooted exclusively on the international even if one could trace a certain sense of communal living.[9] Having said that, even these theoretical debates do not necessarily delve into enquiries relating to the personhood or the repository will of such a society or community or indeed how the latter is formed and exercised.

If this describes the present state of affairs, our enquiries will try to address the missing threads relating to the personhood of the international community and the manifestation of its will. Our enquiries into the concept of international community are also informed from what could be described as the peculiar aesthetic power that the world community exhibits. Community as a term or praxis from its localized origins to its international forms emits affable and desirable images of living in a context of meaningful relations. It envisions the repositioning of our individuality within a broader space, sometimes unspecified but noumenally real and rediscovers modes of living often beyond our immediate and specific legal or political circumstances.[10] This may as well explain its usage in every day political parlance as a *per se* legitimizing agent[11] which clothes with authority actions, decisions or rules that reproduce the essentials of the referent political order.[12]

9. H. Mosler, *The International Society as a Legal Community* (Alphen aan den Rijn, Sijthoff, 1980), p. 2: ". . . it can be concluded that two elements are necessary for the existence of an international legal community: the fact that a certain number of independent societies organized on a territorial basis exist side by side, and the psychological element in the form of a general conviction that all these units are partners mutually bound by reciprocal, generally applicable, rules granting rights, imposing obligations and distributing competences."

10. R. Rorty, "Solidarity or Objectivity?", in Rajchman, West (eds.), *Post-Analytic Philosophy* (New York, Columbia University Press, 1985), p. 3.

11. The British PM Tony Blair used the "doctrine of international community" in relation to the Kosovo crisis. Accordingly "[j]ust as within domestic politics, the notion of community – the belief that partnership and co-operation are essential to advance self-interest – is coming into its own; so it needs to find its international echo." <www.fco.gov.uk/news/speechtext.asp.2316>

12. R. Dworkin, *Law's Empire* (Cambridge Mass., Harvard University Press, 1986), pp. 178–202; T. Franck, *The Power of Legitimacy Among Nations* (Oxford, Oxford University Press, 1990), p. 16: ". . . *a property of a rule or rule-making institution which itself exerts a pull towards compliance on those addressed normatively*." [italics in the original]. *See also* Opening Speech by the Foreign Secretary, Jack Straw, at the Debate on Iraq,

Moreover, the mobilization of the concept in political or legal discourse endowed with a powerful and privileged meaning, is an indication that the idea is deeply rooted although it may be difficult to precisely locate its provenance or place. On the other hand, such usage is equivalent to a foundational act, it establishes the international community as a legal agent that is personified empirically in relevant decisions or actions. In effect, it contributes to the reification of such community. For instance, the legitimacy of the Iraqi regime and the threat that its nuclear and biological weapons pose are discussed in the framework of the values and rules of the international community and the need to respect its will.[13] Also, when Article 53 of the Vienna Convention on the Law of Treaties makes the *jus cogens* norms dependent upon their being accepted and recognized by the international community of states, this implies that the international community plays a normative but also empirically real constitutive function.[14]

House of Commons, London, Tuesday 24 September 2002: "Law, whatever domestic or international, fundamentally depends for its legitimacy on the values it reflects. Law without values is no law at all." <http://fco.gov.uk> (visited 01/10/02).

13. *See* statement by British PM Tony Blair in relation to Iraq: "If the international community having made the call for disarmament . . . shrugs its shoulders and walks away, he (Saddam) will draw the conclusions dictators faced with a weakening will always draw. That the international community will talk but not act." *The Times*, 25 September 2002. We should state here that this is an example of how the concept is loaded with legal significance although the identity of the international community may be contested as we shall see in this chapter.

14. *See also Legal Consequences for States f the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, ICJ Reports* (1971), p. 56, para. 127: ". . . the injured entity is a people which must look to the international community for assistance in its progress towards the goals for which the sacred trust was instituted." For a view that denies any personality to the international community *see* Judge Fitzmaurice's dissenting opinion: ". . . the so called organized world community is not a separate judicial entity with a personality over and above, and distinct from, the particular international organizations in which the idea of it may from time to find actual expression. The notion therefore of such a community as a sort of permanent separate residual source or repository of powers and functions, which are re-absorbed on the extinction of one international organization, and then, automatically and without special agreement, given out to, or taken over by a new one, is quite illusory." *Ibid.*, p. 241. *See also*, the Special Rapporteur's commentary on the ILC's Articles on State Responsibility. According to Article 48 (1) "[a]ny State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2, if . . . (b) the obligation breached is owed to the international community as a whole." According to Crawford, "[t]the formulation does not imply that there is a legal person, the international community. But it does suggest that especially these days, the international community is a more inclusive one." J. Crawford, *The International Commission's Articles on State*

In other words, the concept of an international community is a constructive abstraction.[15] These are mental constructions that acquire ontological existence only because of their effects on a theoretical or practical level. They define and reorder reality conceptually and practically because they enjoy a dialectic relation therewith. As a constructive abstraction, the concept of an international community is an ideational construct, which contains the reality of relations, behaviours and membership and provides a nucleus for analyzing and understanding empirical phenomena by projecting at the same time its intrinsic *telos* that is its particular vision of reality. Having this in mind, we shall examine in the following sections the international community *problematique*, in particular its jurisprudential personhood, by discussing its nature and its differences with other concepts such as that of an international society.

2. *Theoretical distinctions and articulations*

Since the term "international community" is often used concurrently or interchangeably with other concepts such as that of international society or world community,[16] it is necessary at the beginning to proceed by making certain theoretical distinctions. International society is a society of states connected by voluntary rules that regulate their mutual external interaction.[17] The concept of international society is

Responsibility: Introduction, Text and Commentaries (Cambridge, Cambridge University Press, 2002), pp. 40–41.

15. K. Mannheim, *Ideology and Utopia: An Introduction to the Sociology of Knowledge* (London, Routledge & Kegan Paul Ltd, 1960), *see* in particular Chapters IV and V.

16. P.E. Corbett, *Law and Society in the Relations of States* (New York, Harcourt, Brace and Company, 1951), pp. 36–52; A. Rivier, *Principes du droit des gens* (Paris, A. Rousseau, 1888), p. 8: "Entre ces nations [civilisées] . . . règne une communauté, une réciprocité des droits. . . . Elles forment ce que l'on peut appeler la Société ou même la Famille des Nations: beau nom, destine, on peut l'espérer, a devenir vrai de plus en plus." Also F. de Martens, *Traité de droit international* (Paris, 1883), Chapitre Premier: "Droit de la communauté internationale", p. 265, at p. 273: "La communauté internationale est un ordre juridique établi entre les nations, destine à sauvegarder la liberté d'action de chaque état. . . . Il ne faut pas voir en elle un pouvoir supérieur décidant du sort de nations et leur marquant leur route" and "[la communauté internationale] reste et doit rester une association libre des états indépendants, basée sur l'entier respect de la situation de chaque people, et déterminée par les principes du droit international; elle a pour fondement l'indépendance de ses membres, et pour organes les congres et les conférences."

17. *The Case of the S.S. Lotus (Turkey* v. *France)*, *PCIJ Reports*, Series A, No.10 (1927),

constructed upon the recognition of the pluralistic personality of its members and the rational necessity of regulating their relations. The character and constitution of the international society is identified by the boundaries of its member states. It reflects the situatedness of its components in space or time.[18] International community refers to a political unit of ideational substance, which includes states in their internal and external configuration and which has the authority to set operational and normative rules.[19] For a legal system to exist within such community we need something more than consent. We need a consensus arising from the communal principles.[20] The reference to states as the constituents of the international community does not preclude other actors, institutions or agents, from discharging the normative content that such a community adopts. From that it follows that the international community is purposive, dynamic and

p. 18: "International law governs relations between independent States. The rules of law binding upon States therefore emanate from their free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of states cannot therefore be presumed." *See also, Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), ICJ Reports* (1986), p. 14, at p. 135, para 289: "[I]n international law there are no rules, other than such rules as may be accepted by the State concerned by treaty or otherwise, . . . and this principle is valid for all States without exception."

18. J.L. Brierly, *The Outlook for International Law* (Oxford, Clarendon Press, 1944), p. 9. "[International law] tries to define or delimit the respective spheres within which each of the sixty odd states into which the world is divided for political purposes is entitled to exercise its authority." P. Allott, *Eunomia: New Order for a New World* (Oxford, Oxford University Press, 1990), p. 324: ". . . the function of an international law of such territorially-sovereign state-societies would have as its natural aim the regulation of the interaction of the exclusivities of the state-societies – the exclusivity of their constitutional authority within the society, the exclusivity of their territorial-holding in relation to other societies. . . . International law has been the minimal law necessary to enable state-societies to act as closed systems internally and to act as territory-owners in relation to each other."

19. R. Ago. "Science juridique et droit international", 90 RC (1956 II), p. 851, at p. 909. ". . . la Communauté internationale ne devrait donc pas être conçue comme une simple juxtaposition de membres, mais comme une "autorité" supérieure à ces derniers pris individuellement, comme "autorité superétatique" et le droit international serait du droit, au même titre que le droit national, en tant que volonté, que décision autoritaire du corps social." J. Stone, "Problems Confronting Sociological Enquiries Concerning International Law", 89 RC (1956 I), p. 59, at p. 130: "Even the acceptance among individuals of common goals or values will not warrant their being regarded as a 'community' unless their interaction is productive of rules accepted in common for the attainment of these common goals or values."

20. R. Dworkin, *Law's Empire* (Cambridge Mass., Harvard University Press, 1986), pp. 187–188.

expansive in contradistinction to the international society, which is value-neutral, static and inward looking.

"World community" refers to the whole of the mankind and to a wider membership that includes states, individuals and other actors at sub-state or supra-state level, and is built around the widest possible identification and mutual self-consciousness. Both international and world community imply strong ideological and moral bonds and solidarist ideas. Where they differ is on their scope with the international community representing a developmental stage towards a world community. Against the conditions of disinterest that characterize the international society, "international community" provides a framework of organization within which "world community" can be realized because it signals the transgression of specific boundaries and signifies potentiality as well as the reclamation of a sense of referential identity. Thus, "world community" is a prospective and engulfing concept which represents the realization of the *telos* of the international community and where the distinctions between international community or society are dissolved.

The threefold sketching of the international we have performed here is not chronological but relational. However, the difficulties in delineating the respective personalities of each domain remain, exemplified in their interchangeable usage. This is a familiar weakness of theoretical constructs, which becomes even more acute in the paradoxical conditions prevailing on the international field where traditional theories of international relations or law contain a combination of solidarist and pluralist elements. Grotius' solidarist theory or Vattel's pluralistic one is founded on the dualism of common values and rules of conduct. Where they differ is on their emphasis. Vattel is more explicit about the implications for international law of state sovereignty, although still "unable or unwilling to free himself from the traditional lore of the *jus naturale*".[21] The explanation for such intellectual ambivalence can be traced back to the theoretical conceptualization of the state and the emergence of the international as a separate lego-political domain. Theories of the state are constructed upon its personification. States enjoy the human attributes of body and mind. They are endowed with consciousness and capacity to reason and act in addition to their physical qualities. This delineates

21. P. Corbett, *Law and Society in the Relations of States* (New York, Harcourt, Brace and Company, 1951), p. 29.

their dual personality, physical and moral. Moreover, like human beings who share double identifications as individuals and as members of the human aggregation, they too identify themselves *qua* states and *qua* members of a large corporation of states. This defines for us the international as the arena of mutual state interaction with its own rules and norms. However, these rules and norms could be formulated either on the basis of physical coexistence or on the basis of standards. Thus the distinction between what we call *societas maxima* and the medieval *civitas maxima*.[22] It is on such reasoning that Vattel in his *Droit des Gens* introduced the international as a separate arena and made the distinction between the *voluntary* and the *necessary* law of nations.[23] The first is premised on state consent and generates consensual regulatory rules because states, like men, are free and equal.[24] The necessary law represents the substratum of immutable laws that mirror the moral premises of men or states. Consequently, the different legal orders which reflect the different standing of states within the sphere of the international delineate for the latter a domain of enveloping realms. The voluntary law represents the international society whereas the concept of an international community fills the void created by the demise of the medieval image of *civitas maxima*. The international community hence adopts an anthropomorphic and organic character with discernible constituents and an autonomous body of norms and rules premised on its idiosyncratic concept of international law.[25] Its legal personality

22. C. Wolff, "*Jus Gentium Methodo Scientifica Pertractatum*" (1741), trans. J.H. Drake, in *The Classics of International Law* (Oxford, Clarendon Press, 1934) paras. 4, 5, 8, 9; F. Suarez, "*De Triplici Virtute Theologica, Fide, Spe, et Charitate*" *(1621)*, in *The Classics of International Law*, (Oxford, Clarendon Press, 1944): *Treatise on Laws And God the Lawgiver*, Book II "On the Eternal Law, The Natural Law and the Jus Gentium", ch. XIX, para. 9, pp. 348–349: ". . . the human race . . . always preserves a certain unity, not only as a species, but also a moral and political unity . . . enjoyed by the natural precept of mutual love and mercy; a precept which applies to all, even to strangers of every nation. . . . each one of these states is also . . . a member of that universal society; . . . because also of some moral necessity or need. Consequently, such communities have need of some system of law."

23. E. Vattel, *Le Droit Des Gens ou Principes de la Loi Naturelle, appliqués à la Conduite et aux Affaires des Nations et des Sowerains*, trans. Ch.G. Fenwick, in *The Classics of International Law*, Book II, (Washington D.C, Carnegie Institution of Washington, 1916), p. xv.

24. Vattel, (note 23) p. lvi: "Nations, or sovereign sates, are to be considered as so many free persons living together in a state of nature."

25. For a fierce critique of this thesis, *see* C. Schmitt, *Die Wendung zum Diskriminierenden Kriegsbegriff*, p. 15, in C. Mouffe (ed.), *The Challenge of Carl Schmitt*, (London, Verso, 1999), p. 60.

and normative will are actualized as expressions of mutual concern, solidarity, constraint or enforcement.[26] *Au contraire*, the international society and its "equatorial" concept of law is identified with "state libertarianism" where "it exclusively belongs to each nation to form its own judgment of what her conscience demands of her, of what she can and cannot do as well as what is proper or improper for her to do; and of course it rests solely with her to examine and determine whether she can perform any office of humanity without neglecting the duty which she owes to herself".[27]

Although the medieval writers subscribe to a segmentary international order encompassing different rights, obligations and responsibilities as a result of the division of the international arena,[28] there is a contemporary trend to consider the common practices of the international society as the foundations of an international community. For instance, Thomas Franck resorts to the same conceptual

26. Vattel rejects Wollf's *civitas maxima* on the basis that ". . . nor do I think the fiction of such republic either admissible in itself, or capable of affording sufficiently solid grounds on which to build the rules of the universal law of nations, which shall necessarily claim the obedient acquaintance of sovereign states. . . . Nothing of this kind can be conceived or supposed to subsist between nations. Each sovereign claims, and actually possesses an absolute independence of all the others." Vattel (note 23), p. xiii.

27. Vattel, (note 23) p. lxi. For a critique of this view *see* J.L. Brierly, *The Law of Nations*, 6th ed. rev. by C.H.M. Waldock, (Oxford, Clarendon Press, 1963), p. 40. "By teaching that the 'natural' state of nations is an independence which does not admit the existence of a social bond between them, he makes it impossible to explain or justify their subjection to law . . . by cutting the frail moorings which bound international law to any sound principle of obligation he did it an injury which has not yet been repaired."

28. According to Vattel (note 23), paras. 8 and 56, "since every Nation is free, independent, and sovereign in its acts, it is for each to decide whether it is in a position to ask or to grant anything in that respect." According to the Necessary Law, when people defend their liberties against an oppressor "to give help . . . is only the part of justice and generosity. Hence, whenever such dissension reaches the state of civil war, foreign Nations may assist that one of the two parties which seems to have justice on its side. But to assist a detestable tyrant, or to come out in favour of an unjust and rebellious people would certainly be a violation of duty." However, "since both are independent of all foreign authority, no one has the right to judge them. Hence, by virtue of the Voluntary Law of Nations, the two parties must be allowed to act as if possessed of equal right, and to be treated accordingly, until the affair is decided." *See also* the distinction between power law, law of reciprocity and law of coordination in G. Schwarzenberger, *The Frontiers of International Law* (London, Stevens & Sons, 1962). Also W. Friedmann, *The Changing Structure of International Law* (London, Stevens & Sons, 1964), pp. 60–71 and "General Course in Public International Law", 127 RC (1969), p. 39 at pp. 229–243, where he makes the distinction between the law of coexistence and the law of cooperation.

mélange by considering the contractual rules of a society of states as gaining their legitimacy from procedural rules of right process which are established through accepted principles, thus transforming the international society into a community.[29] This alludes to Dworkin's community categorizations. In *Law's Empire*,[30] Dworkin introduces three models of political community with different degrees of legal authority. The "de facto community" is an accidental juxtaposition of people, the "rulebook community" contains contractual rules negotiated by its members whereas in the "community of principle" its members accept the principles which the rules come to endorse. From this it follows that international society falls within the second definitional categorization whereas the international community we have described here satisfies the criteria of the third one. It then follows that Dworkin's community of principle or for our purposes an ideational one requires deeper associational ties than those that procedural rules can offer.[31] As a matter of fact, Franck does not cross the threshold towards a community of principle but he settles with a "mature voluntarist community" which is somewhere in between.[32]

29. T. Franck, *The Power of Legitimacy Among Nations*, (Oxford, Oxford University Press, 1990), pp. 194–207 and p. 203: "What a rule community, a community of principle, does is to validate behaviour in accordance with rules that conform principled coherence rather than acknowledging only the power of power. . . . Finally, a community accepts its most basic (ultimate) secondary rules of recognition not consensually, but as an inherent concomitant of membership status." Also *see Legality of the Threat or use of Nuclear Weapons Advisory Opinion of July 1996*, *ICJ Reports* (1996), para. 12, p. 270, where Judge Bedjaoui expresses a conceptual mélange in his dissenting opinion. He characterizes the *Lotus* case as expressing the "*spirit of the times*, the spirit of an international society . . . governed by an international law of strict coexistence, itself a reflection of the vigour of the principle of state sovereignty." And he continues: "[T]he gradual substitution of an international law of cooperation for the traditional international law of coexistence, the emergence of the concept of 'international community' and its sometimes successful attempts at subjectivization . . . the resolutely positivist, voluntarist approach to international law has been replaced by an objective conception of international law, a law more readily seeking to reflect a collective juridical conscience and respond to the social necessities of states organized as a community . . ." *Ibid.*, para. 13, pp. 270–271.

30. Dworkin (note 20), pp. 208–215.

31. Dworkin (note 20), p. 211: "Members of a society of principle accept that their political rights and duties are not exhausted by the particular decisions their political institutions have reached, but depend, more generally, on the scheme of principles those decisions presuppose and endorse."

32. Franck (note 29), p. 193. Also *see* T.M. Franck, *Fairness in International Law and Institutions* (Oxford, Oxford University Press, 1995), p. 12. "[S]uch a rule community has two attributes. It must have agreed on a core of reciprocally applicable rules and it must also have agreed on a process for making and applying rules and resolving disputes about their meaning." H. Mosler, "The International Society

3. *The concept of international community*

Community is one of those mystifying concepts which can adopt a variety of meanings in political discourse. It can be a noumenal phenomenon but at the same time it can become empirical or acquire a territorial basis. The territorial rooting is not a condition for the formation or existence of the community because the focal point is its normative substance which transcends territorial borders and provides a sense of affiliation even among territorially dispersed units. Hence, community is defined by systems of beliefs and practices. The requisites for community building are the congruence of values and mutual responsiveness. The latter is the result of mutual identifications and common behavioural orientations that designate the community's external or internal behaviour as, for instance, in controlling choices, rationalizing actions and anticipating results. The international community thus describes an edifice of intimate values, understandings, interests and relationships transpiring the relations of its members with each other as well as their internal order.[33] In contradistinction, the characteristics of the international society are moral fragmentation, alienation and disengagement that reflect its pluralistic constituency and the individuality and uniqueness attributed to its members, the states.[34] Its legal order is consequently a

as a Legal Community", 140 RC (1974 IV), p. 1, at 33. "[I]n any legal community there must be a minimum of uniformity in maintaining the community. This uniformity may relate to legal values which are considered to be the goal of the community or it may be found in legal principles which it is the duty of all members to realize. It may relate to legal rules which are binding within the community. The whole of this minimum can be called a common public order. The international community cannot dispense with this minimum . . . as without that it would not exist."

33. The European Union is such a community founded according to Article 6 TEU on the principles of democracy, fundamental rights and the rule of law. The European Union constitutes a component of the international community on the basis of normative linkages where the referent values permeate the domestic, regional and international domain.

34. The characteristics of a moral community are identification, moral unity, involvement, wholeness whereas the characteristics of mass society are alienation, moral fragmentation, disengagement and segmentation. D.E. Poplin, *Communities: A Survey of Theories and Methods of Research* (New York, Macmillan Company, 1972) in particular Chapter 1 "The Concept of Community". Commenting on Tonnies" distinction between Gemeinschaft and Gesellschaft, he says "[I]n Gesellschaft-like relationships, the participating individuals are separated rather than united and individualism reaches its zenith." *Ibid.*, p. 117. Although the international society is not a mass society and membership is rather limited, the effects are the same. The

deliberate exercise compared to that of an international community which is normatively grounded.

Those shared values that underpin the community evolve in accordance with particular historical, political or social circumstances and offer explanation, regulation and orientation within the referent political, social or legal space they apply. The repository values then play the role of coalescing facility against the threat of inner fragmentation and encourage commitment and conformity. Moreover, they afford the members of the international community a sense of security and protection against external threats. External threats are not necessarily prerequisites for building commitments but may represent an important factor in forging and reaffirming such a community in the same way that they contributed to the formation of the state. From that we can infer that distinctions based on inclusion or exclusion are always present. It is only at the threshold of exclusion that we can define the referent community, otherwise any concept of community may become mystified in its looseness. The occasional invoking of the threat that "barbarians" pose, particularly during events such as the Gulf War, the Yugoslav wars or Afghanistan,[35] not only reinforces identifications but also serves as a means of legitimizing the pursued action even in its ferocity since "barbarity" is presented as an existential threat to our community.[36]

recognition of the individuality of the state has far more serious repercussions than the individuality of human beings. The law in the former case is formed on the basis of differences whereas in the latter on the basis of identifications. D. Schindler, "Contribution à l'étude des facteurs sociologiques et psychologiques du droit international", 46 RC (1933), p. 229, at p. 265: ". . . au sein de la Société des Etats l'individualité de chacun d'entre eux est beaucoup plus importante que l'individualité des différentes personnes au sein de l'Etat."

35. The justification offered is based, variably, on the tetralogy of democracy–human rights–freedom–civilization. President Bush in his speech before the German Parliament and trying to unite the allies behind his war on terrorism declared that "we are defending civilization itself". *The Times*, 24 May 2002, p. 16.

36. "It is always possible to bind together a considerable number of people in love, so long as there are other people left over to receive the manifestations of their aggressiveness." D. Bell, "Ethnicity and Social Change" cited by D.P. Moynihan, *Pandemonium: Ethnicity in International Politics* (New York, Oxford University Press, 1993), p. 61. On the same point Carl Schmitt argues that the demise of the traditional sovereign-contractual international legal order and its constitutionalization transforms anyone who disputes the "ideological-universalist" point of view into "enemy of humanity" against whom a war of annihilation is waged. As he says "[J]ustified from a ideological-universalist point of view, a war of annihilation, precisely because of its ecumenical aspirations, first deprives the state of the nature of the order it had hitherto; it transforms a war between states into an international

Consequently, the concept of international community has profound implications for the reading and explanation of international relations, political or legal. First, its scope is enveloping. It embraces both the national and international arenas. The domestic political culture exists in a state of cross-reference and fertilization with that of the international community.[37] Such interlocking assists in maintaining a certain "way of life" nationally or internationally[38] and explains the formation of rules and the issue of compliance or correction. In a nutshell, it refers to a dialectic process of internalising or externalising norms and rules and where international rules or causes for violating international law can be of domestic origin and claims can be international.[39] This is most aptly expressed in the

civil war . . .; as a result, it deprives the concepts of war and the enemy of their dignity and honour, making war conducted "justly" the application [of a sanction] or a health measure, while one conducted "unjustly" becomes the illegal and immoral resistance of a few delinquents, troublemakers, pirates and gangsters." C. Schmitt, *Die Wendung zum Diskriminierenden Kriegsbegriff*, in Mouffe (ed.), *The Challenge of Carl Schmitt*, (London, Verso, 1999), pp. 60–61. C.W. Kegley Jr., E.R. Wittkopf, *World Politics*, 7th ed. (Basingston, St Martin Press, 1999), p. 88. "[All ideological systems of belief] exclude the idea of coexistence. How can one coexist with evil? It holds out no prospect but opposition with all might, war to the death." [quoting A. Schlessinger Jr. in Wall Street Journal (1983)].

37. F. Halliday, "International Society as Homogeneity", in Halliday (ed.), *Rethinking International Relations* (Basingstoke, Macmillan, 1994), p. 112. ". . . relations between states rest above all not on the conduct of foreign policy in the narrow sense, but on convergence and similitude in domestic arrangements . . . for any international order to maintain peace it needs not only to evolve norms of inter-state behaviour, but to produce a community of states with broadly similar internal constitutions." Paraphrasing Edmund Burke. E. Burke, "First Letter on a Regicide Peace", in McDowell (ed.), *The Writings and Speeches of Edmund Burke, Vol. IX* (Oxford, Oxford University Press, 1991), p. 247. "Men are not tied to one another by papers and seals. They are led to associate by resemblances, by conformities, by sympathies. It is with nations as with individuals. Nothing is so strong a tie of amity between nation and nation as correspondence in laws, customs, manners, and habits of life. They have more than the force of treaties in themselves. They are obligations written in the heart." R.J. Vincent, "Edmund Burke and the theory of international relations", 10 *Review of International Studies*, 1984, 205; R.J. Vincent, "The Factor of Culture in Global International Order", 34 *The Yearbook of World Affairs*, 1980, 252.

38. K. Deutsch, *Political Community and the North Atlantic Area* (Princeton, Princeton University Press, 1957), p. 47. He also speaks of: ". . . mutual sympathy and loyalties; of a 'we feeling', trust, and mutual consideration; of partial identification in terms of self-images and interests; of mutually successful predictions of behaviour . . ." *Ibid.* p. 36.

39. H. Lauterpacht, *Private Law Sources and Analogies of International Law* (London, Steven & Sons, 1927), where he advocates for the integration of the domestic and international realm to facilitate justice and progress. Allott (note 18), p. 248: ". . . internal law is intrinsically isolated form international law. . . . The result being that governments and the human beings who compose them, are able to will and act

human rights discourse where the configuration of rights and their meaning or redress trail through many domains, external or internal. *Au contraire*, international society is based on the disruption of such links and the insulation of domains.

Moreover, the normative claims that the international community poses result in prescriptive membership. The international society operates membership criteria too but these refer to neutral criteria for attributing statehood such as the existence of population, territory or an effective government.[40] Consequently, the concept of international community reorders the international sphere on the basis of gravitational centres, each having different normative and empirical implications. At the centre is the international community as a purposive association. International society is at the periphery. It is a practical association, containing rules of conduct suitable for a diverse and pluralistic membership.[41] Membership to the peripheral does not guarantee membership to the inner circle whereas those in the inner circle enjoy dual membership. Thus, a state that abides by the rules of conduct in its external relations does not become member of the international community unless it satisfies its normative criteria. Furthermore, there is antagonism or conflict between the centre and the periphery because the former is purposively expansive and thus conflict for the international community presents a mode of socialization and outward integration.[42] Thus, the rules of equality and respect do not apply in the relations between the mem-

internationally in ways that they would be morally restrained from willing and acting internally . . . Interstatal unsociety is a realm of unmorality."

40. 1933 Modevideo Convention on the Rights and Duties of States, 165 LNTS 19

41. For purposive and practical associations *see* T. Nardin, *Law, Morality and the Relations of States* (Princeton, Princeton University Press, 1983), p. 9: "Those who are associated in a cooperative enterprise to promote shared values, beliefs, or interests are united by their convergent desires for the realization of a certain outcome that constitutes the good they have come together to obtain. Association of this kind is . . . [a] 'purposive association'. . . . Practical association is a relationship among those who are engaged in the pursuit of different and possibly incompatible purposes, and who are associated with one another, if at all, only in respecting certain restrictions on how each may pursue his own purposes." And "The values of practical association. . . . are those appropriate to the relations among persons who are not necessarily engaged in any common pursuit but who nevertheless have to get along with one another. They are the very essence of a way of life based on mutual restraint and toleration of diversity." *Ibid.*, p. 12.

42. L. Coser, *The Functions of Social Conflict*, (New York, Free Press, 1956), p. 128; J. Chavret, "The Idea of an International Ethical Order", 1 *Studies in Political Thought* 1992, 59, at 65.

bers of the international community and the members of the international society. Having said that, also relations within the international community can be differentiated. First, the genesis and evolution of the international community is not self-determined. It is a historical process of successive constitutive acts by certain pioneering states. Second, membership is a subjective process of peer review by the existing members.[43] In past eras it was the standard of civilization as interpreted and enforced by European states which guaranteed inclusion within the ambit of the *jus publicum europeanum*,[44] whereas currently they are the liberal-democratic standards. Such differentiated relations are explained by the theoretical tradition of attributing person-like qualities to states[45] or for that reason to the international community. Grotius applies the Aristotelian theory of *oikos* and defines the state as the association of fathers of families united into a single people.[46] Differentiated relations within the state are hence accepted on the basis of father-family relations or because the body is the servant of the mind.[47] By the same token, the "fathers" of the international community enjoy similar privileges in their respective domain and, subsequently, the international community in relation to the international society because the former represents the mind within the sphere of the international whereas the latter represents the body. The question that one may ask is whether such relations are capable

43. P. Weil, "Towards Relative Normativity in International Law?", 77 AJIL, 1983, 413, in particular at 426–429.

44. J.B. Moore, *A Digest of International Law*, vol. I (Washington, Government Printing Office, 1906), p. 10: "Every nation, on being received, at her own request, into the circles of civilized governments, must understand that she not only attains rights of sovereignty and the dignity of national character, but that she binds herself also to the strict and faithful observance of all those principles, laws and usages which have obtained currency among civilized states. . . .". W.E. Hall, *International Law* (Oxford, Oxford University Press, 1880), pp. 34–35: ". . . states outside European civilization . . . [to] formally enter into the circle of law governed countries . . . [and to] do something with the acquiescence of the latter, or of some of them, which. . . . [amounted] to an acceptance of the law in its entirety beyond all possibility of misconstruction."

45. Article 1 of Montevideo Convention on the Rights and Duties of States (1933): "A State as a person in international law should possess the following qualifications . . .".

46. H. Grotius, "*De Jure Belli ac Pacis*", II, Libri Tres, in *The Classics of International Law*, ed. J.B. Scott (Washington, Carnegie Endowment for International Peace, 1995), Book II, v, 23.

47. H. Grotius, "*De Jure Praedae Commentarius*", in *Classics of International Law*, (Washington D.C., Carnegie Institution of Washington, 1964), Book II, p. 62: "Thus a household consists, as it were, in a multitude of bodies, directed by one mind."

of tainting the image of an international community. Here we must reject a certain historiographical narrative of the development of international law and relations that focuses on the different means and methods – peaceful or coercive – of diffusing and accepting values. What is of interest in the present juncture is how these values, irrespective of their provenance or the way they were diffused, explain and re-ordain the international space by offering a distinct stipulation of relations.[48] Even if the role that power plays raises suspicions, we should recognize that power in its wider meaning as material and spiritual resources always acts as a "magnet" for organising wider spaces and for realising the concomitant values and practices.[49]

This brings us to a third point, according to which the concept of the international community constitutes a form of governance. Although the organization of such community can be formalized through institutions and legal rules capable of exerting authority and legitimate coercion, a community can also exist by tacit agreement of its members. Such model of governance includes both the internal and external behaviour of its members, since their external behaviour reflects the internal governance structures. Governance in this case encompasses the values, habits and structures which "may or may not derive from legally and formally prescribed responsibilities and that do not necessarily rely on police powers to overcome defiance and attain compliance."[50] On the other hand, they may rely for compliance on acceptance and identification, or authoritative imposition as a last resort. What becomes evident is that the concept of an international community vies to shape and structure others' behav-

48. Dworkin (note 20), p. 211: "So each member accepts that others have rights and that he has duties flowing from that scheme, even though these have never been formally identified or declared. Nor does he suppose that these further rights and duties are conditional on his wholehearted approval of that scheme; these obligations arise from the historical fact that his community had adopted that scheme, which is then special to it, not the assumption that it would have chosen it were the choice entirely his. In short, ach accepts political integrity as a distinct political ideal and treats the general acceptance of that ideal, even among people who otherwise disagree about political morality, as constitutive of political community."

49. E. Alder, "Imagined (Security) Communities: Cognitive Regions in International Relations", 26 *Millenium*, 1997, 49, at 262.

50. J.N. Rosenau, "Governance, order, and change in world politics", in Rosenau, Czempiel (eds.), *Governance without Government: Order and Change in World Politics* (Cambridge, Cambridge University Press, 1992), p. 1, at 4: "Governance is thus a system of rule that is as dependent on intersubjective meanings as on formally sanctioned constitutions and charters."

iours.[51] Thus, viewing the international community as a form of international governance corresponds to the role we ascribed to her in the preceding paragraphs of disseminating and enforcing its norms/values. In other words, the concept of international community becomes the motor for organizing the international sphere by providing a perspective and a process for becoming. It is in recognition of such power that Dupuy characterizes the concept of the international community a "mythe" that is, a mythical *telos* for attaining humanity.[52] And although the international community we have presented here is far from being democratic and participatory in the process of becoming, it is hoped that its realization as a world community will satisfy the democratic credentials.

In this section we considered the physiognomy of the international community and what its position is within the sphere of the international. However, the ontological question of its existence and of its legal personality remains open. In other words, how, according to some, a noumenal edifice or a fictitious community[53] becomes an entity real in time and space. This happens through actions and behaviours attributed to her as expressions of her will. Thus, the concept of international community adopts an explanatory and empirical content. It does not only contain a description of a corpus of values, but also how the latter are employed in everyday transactions at national or international level.

4. *The nature of the will of the international community*

When we refer to the will of the international community the question one can immediately ask is whether the latter is capable of having or manifesting a will. In order to say that such will exists, we need to transgress the positivist "will theory", which is confined to

51. For instance *see* Tony Blair's answers to questions on Iraq at the Labour Conference (29 September 2002): "The international community said you must get rid of these weapons. Get rid of them or we will make you do so." <fco.gov.uk>

52. Dupuy (note 1), pp. 179–182. He concludes by saying, "[r]ien ne peut interrompre la pulsion mythique qui anime son avance dans l'histoire."

53. C. de Visscher, "Positivisme et « jus cogens »" 75 RGDIP, 1971, 5, at 8: "Cette entité reste sans signification définie en droit positif; la communauté . . . est un ordre en puissance dans l'esprit des homes; dans les réalités de la vie internationale, elle en est encore a se chercher, elle ne correspond pas a un ordre effectivement établi."

fragmented and individualized expressions of will lacking any overarching aim and leading to accumulation of parallel wills.[54] We need to espouse the communal one according to which there is a certain internal and normative identification by members of an aggregation whose will embodies the content of the referent normative environment. In other words, "will" here means the volition to realize the essentials of such normative environment.[55] Therefore it acquires a prescriptive and purposive content because of the purposive character of the international community. On the other hand, in international society "will" is an expression of calculated consent to the necessities of coexistence. Being identifiable with the aggregation, the will of the international community is also expressed in a manner that distinguishes it from that of its constituents. Although the individual and communal wills may coexist and co-evolve, the crucial issue is the extent to which its particular expression in the domestic or international arena identifies different agents claiming different authority. Such expression of will plays the role of establishing the international community empirically as a corpus of values, meanings and understandings with a distinct and visible personality. Its legal personality and existence is confirmed *post festum*. More specifically, it can take the form of restraint and normative imposition. In this case, the enmeshment of normative beliefs at inter- and intra-state/community level creates a sense of obligation and responsibility. This process could be described under the rubric of authority where individual and communal authority are interwoven relying on the same normative grounds. Or it can take the form of actual enforcement internal or external. In this case

54. D. Anzilotti, *Cours de droit international* (Paris, Recueil Sirey, 1929), pp. 338–345. According to Kaufman "on risque de tomber dans un nihilisme ou un anarchisme sans fond." E. Kaufmann, "Règles générales du droit de la paix", 54 RC (1935 IV), p. 307, at p. 318.

55. E. Kaufmann, "Règles générales du droit de la paix", 54 RC (1935 IV), p. 307, at pp. 555: "Toutes les communautés particulières ont un dehors duquel elles se distinguent. . . . Et, pour autant qu'il s'agit de collectivités appelées à vouloir et à agir dans le monde, en vue d'y réaliser les buts qui leur sont propres, elles mènent une vie tant intérieure qu'extérieure, elles sont données a ces fins d'une organization qui les habilite à former une volonté collective et à l'exécuter dans leur vie intérieure et extérieure." C.W. Jenks, "The Will of the World Community as the Basis of Obligation in International Law", in *Hommage d'une Génération de Juristes au Président Basdevant*, (Paris, Editions A. Pedone, 1960), p. 280, at p. 288: "The will of the world community is the sociological background of which the law is the expression." In relation to the US action in Afghanistan, President Bush said on 7 October 2001 that "we are supported by the collective will of the word". *Keesing's* (2001), p. 44392.

the international community acts through its members who speak or act for her. States or other representative organs embody, personify and actualize the will of the international community to the extent that their actions reflect and correspond to the community's normative fabric.[56] In such cases, they express their affiliations at individual and community level performing at the same time a normative and operational fusion of functions. Their role is dual. They represent their domestic constituency but also their international[57] and thus they become organs of the incipient governance that the international community represents.[58]

To give one example, studying intervention is a useful means of identifying such community. In the first place, intervention within the international society is impermissible because the latter is premised on the equality of its members and its legal structure guarantees individual autonomy. Moreover, there are no overarching purposes beyond those that safeguard and guarantee the existence of such society translated in negative duties.[59] In contrast, the international community being purposive contains pervasive norms that guide action and therefore it is outward looking and expansive. Consequently, intervention is considered to be legitimate when it is premised on those fundamental values that exemplify and define the referent community. Intervention in this case also asserts the international community as an autonomous actor, empirically relevant. It has an ontological function of postulating

56. Lauterpacht (note 1) vol. 2, p. 17: ". . . the will of international community is deducted from the mere fact of its existence, i.e. from "the reason of the thing", the organs of the formation of the will of the international community are in default of an international legislature, states themselves."

57. H. Kelsen, *Law and Peace in International Relations* (Cambridge Mass., Harvard University Press, 1942), p. 57: "The state acts as an organ of the international community. Put in another way, it is the international legal community itself that reacts against the violator of the law through the medium of the state resorting to reprisals or waging a just war."

58. "Attorney General of the Government of Israel v. Adolf Eichmann", Supreme Court, Judgment of May 29, 1962, 36 ILR, 1968, p. 277 at p. 304: "Not only do all the crimes attributed to the appellant bear an international character, but their harmful and murderous effects were so embracing and widespread as to shake the international community to its very foundations. The state of Israel therefore was entitled, pursuant to the principle of universal jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement, to try the appellant."

59. According to Bull, the goals of the society of states are among others the preservation of the system and the society of states itself, the maintenance of the independence or external sovereignty of individual states and peace. Bull (note 8), pp. 16–19.

what is considered to be a noumenal community into a real one.

Having said that, we need to consider at this juncture certain issues that relate to the nature of such community. The first is whether the international community, having a distinct personality from that of its members, can act against them in the international and/or domestic sphere. The second is whether the international community can act only in a centralized manner.

The answer to the first question depends on whether there is clear delineation between the international and the domestic sphere. As we said above, the international community encapsulates both domains, international and national, therefore its competence extends to both areas. They are seen as particles in a process of continuous interaction. However, it is maintained that the concept of community by itself assures self-compliance and that the sheer need of enforcement may be an indication that such community is a chimera.[60] This is quite erroneous. Community does not mean pure and total conformity. Disagreements or infringement of the rules are not unusual as, for example, the politics of the European Union reveal. What is important though is the extent to which infractions or subsequent corrective actions are recognized as such because of the expectations of the community; that is, whether they conform or not to the principles a particular community came to recognize as theirs. Concerning the second point, there is a widely shared belief that the concept of community implies a centralized, institutionalized mode of decision-making and action. It is thus claimed that decentralized action raises important questions that affect the identification and personhood of the international community as such and the normativity of its will. According to our definition of community, centralization in decision-making or in enforcement is not a prerequisite for community building although it may form part of the community organization. On the contrary, community is often identified with self regulation including decentralized and unstructured mechanisms for decision-making and enforcement. Such less formal and institutionalized modes are however based on the members' informal and tacit consent even if they

60. A. Zimmern, "International Law and Social Consciousness", *Transactions: Grotius Society of International Law*, 1934, 25, at 27–28: "Men obey the law because they respect it, and they respect it because they associate themselves with the object of the law-giver or law-making authority, which is to promote the purpose of their community and, through it of their own individual lives."

appear to be individualistic in their external manifestations. Indeed, decentralized ways of decision-making and action have already been acknowledged. For example, when the ICJ in the *Barcelona* case introduced the *erga omnes* obligations which are owed to the international community as a whole,[61] it implied that any state, not only the interested parties, could avenge their violation. Moreover, the insistence on the need for centralization emanates from an erroneous construction of the international according to which the international community is identified with the methods and processes of the international society. For instance, the United Nations mechanisms have been seen as symbolizing the transformation of the international society into a community, particularly when the Security Council delegates its powers or authorizes states to act in the area of peace and security.[62] This has become a central tenet of the debate on Iraq and of the need or not for another resolution authorizing the use of force. In this debate, the frequently used concept of international community is synonymous to the United Nations Organization.

However, this is an erroneous consequence of blurring the boundaries and thresholds between international community and society, and of failing to articulate the political and legal implications of the two models. As we have argued here, international society and international community represent distinct spaces. Centralization for the former is formal and contractual and, all being equal, an indispensable procedural guarantee against the threat of unilateral action. In that context, decentralized actions may spoil the spirit of a "mature" and functioning society. For the latter, actions acquire meaning and are attributed to the community because they are described and understood as such by the criteria that identify the community whereas this is not the case for the international society where actions are attributed to her because of recognizable procedural criteria. This is exemplified by the recent Iraqi crisis. The form and character of the promised reconstruction of the country reflect the particular values of the international community, whereas a decision by the Security Council authorizing the use of force reaffirms the procedural safeguards

61. *Barcelona Traction, Light and Power Company, Limited, ICJ Reports* (1970), p. 3, at paras. 33, 35.

62. Chapter VII of the United Nations Charter. B. Fassbender, "The United Nations Charter as Constitution of the International Community", 36 *Columbia J Trans. Law*, 1998, 529.

of the international society based on Iraq's breach of its negative duty not to threaten the other members of the international society.[63]

Having said that, the actualization of its will by organs that act as agents for the international community may have ontological implications, in particular where chequered and inconsistent manifestations of its will succeed in beclouding its normative force and destabilize the solidity of its personhood. Such discrepancy is caused by the multiple demarcation of its membership. For example, states have values and interests which are national and/or international. Not all national values or interests are international and their scope and intensity also varies. National interests strictly defined may sometimes clash with societal or communal interests and this may engender disagreements or parochial actions.[64] Thus, where the interlocking of interests and values is weak, it may produce variations in the manifestation of the community's will. As a matter of fact, we express our will when we care about something and the more intense such concerns are the more powerful the will becomes. As Hume said, "reason alone can never be a motive to any action of the will".[65] Such care then adopts a moral import which is expressed in a quantitatively and qualitatively differentiated manner. Its scope or intensity is looser at the outer circles of concern; however, it negates the sense of communal responsiveness only when the individualistic or particularistic interests become exclusive.[66]

Therefore, the critical issue is the transfusion of values and interests; that is, their interchangeability, and the moulding of self-interests with community ones. For example, humanitarian interventions

63. Written Ministerial Statement by the Foreign Secretary, Jack Straw, Tuesday 7 January 2003, <www.fco.gov.uk>. According to Paul Wolfowitz, Deputy US Secretary of Defence: "[W]e may some day look back on this moment in history as the time when the West defined itself for the 21st century, not in terms of geography or race or religion or culture or language, but in terms of values – the values of freedom and democracy. The future does not belong to tyrants and terrorists." *The Sunday Times*, 9 February 2003.

64. Vattel (note 23), p. 140.

65. D. Hume, *A Treatise of Human Nature*, L.A. Selby-Bigge (ed.), 2nd ed. (Oxford, Clarendon Press, 1978), Book II, part III, para. 3, p. 413.

66. C.R. Beitz, "Cosmopolitan Ideals and National Sentiment", 80 *Journal of Philosophy*, 1983, 591; C.R. Beitz *et al.* (eds.), *International Ethics* (Princeton, Princeton University Press, 1985); T. Nagel, *The View from Nowhere* (New York, Oxford University Press, 1986); G. Abi-Saab, "Wither the International Community?", 9 EJIL, 1998, 248, at 249.

such as those in Rwanda or Kosovo[67] were premised on strong normative identifications, grounded on the interplay between internal and external standards. Even when states appear to be free agents acting on the basis of their own preferences, these preferences are cognitively framed by the shared understandings of the community.[68] Moreover, since legitimacy and authority merge at the national and international level and the authority of the state stretches from its territorial borders to that of the international community,[69] there is close proximity and identification of wills. Take for example the politics of reconstruction of failed states after interventions by the international community. Political, social or economic reconstruction is premised on values and ideas that define the acting community and may at the same time satisfy particularistic state interests.[70] However, the pattern of such actions is premised on a communality of interests and orientations. To this we should add that the concept of international community is not an arithmetic exercise of counting acts and behaviours and adding them up but a synthetic process of evaluation and deduction.[71] In this context, we should also consider another variable which refers to the impression the manifestations of its will exert on their recipients. That is, whether they recognize such actions as authoritative expressions of the community's authority and its commitment to its values. Even if we take the negative example of condemnations and criticisms against actions pursued by the international community, this immediately identifies the referent community. For example interventions by the international community in Kosovo or Afghanistan among others have been criticized as

67. N. Tsagourias, *Jurisprudence of International Law: The Humanitarian Dimension* (Manchester, Manchester University Press, 2000), pp. 100–110.

68. E. Alder, "Imagined (Security) Communities: Cognitive Regions in International Relations", 26 *Millenium*, 1997, 49, at 266.

69. Adler (note 68) "states can express their agency insofar as they meet and reproduce the epistemic and normative expectations of the community."

70. Reconstruction requires establishing conditions for democracy, human rights, the rule of law and market economy. For example *see* SC Res. 1203 (1998) in relation to Kosovo and SC Res. 1378 (2001) in relation to Afghanistan. This is spelled out clearly in the politics of European enlargement where, according to the Copenhagen criteria, the candidate state should achieve "stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functions market economy . . .". *Presidency Conclusions: Copenhagen European Council* (June, 1993).

71. L.F. Bravo, "Méthodes de recherche de la coutume internationale dans la pratique des états", 192 RC (1985 III), p. 233.

ideologically tainted or as promoting western liberal ideals. By default, there is recognition in such denunciations that the international community exists and that its representatives act according to their common values and that they attempt to reorder certain situations according to these values.

Finally, in relation to what appears as chequered expressions of will, we should say that will is not always translated into material action because the capacity of producing will and the capability of exercising it are not always conterminous. Hence, the will of the international community can appear in a normative or operational form. The normative refers to the capacity and the compulsion of will. The operational refers to its manifestation in time and space. However, the latter can be circumscribed due to more practical considerations. Thus, as we argue here, in addition to explicit manifestations, one has to acknowledge other less visible methods of instrumentalizing the will of the international community.

5. *Conclusion*

The concept of the international community is presented here as a constructive abstraction, that is, an authoritative image that describes and explains the nature of membership and relations in the international domain but also induces and pre-empts such relations. It abstracts from real situations but also re-ordains them by attributing significance and organizing our thinking and action towards its goals. With the same token, its will is normative as a feeling of compulsion but also operational and real when it manifests itself in space and time.

The concept of international community redefines our understanding of the international and the interface of law and values. Thus, our exposition includes a description of the organization of the international which is segmented and which embraces both stability based on mutual disinterest and potentiality based on affective unity. However, we should admit that the concept remains contested because its dynamism threatens stability. This provokes antipathy, dissatisfaction, even open hostility.

Having said that, we cannot deny the fact that the image of an international community contains an integral vision that facilitates the re-imagining of our social environment and the repositioning of

local or public spaces, national or international. Although it may appear as being aspirational and indeed inspirational,[72] we should remind ourselves that we organize our spaces on the basis of imagined communities, local or international, where "in the mind of each lives the image of the communion".[73] This is probably even more relevant today where the reorganization of the international under the thrust of globalization has made the concept of an international society and its desegregation redundant. As Prosper Weil observes:

> la communauté internationale tend à substituer à la société internationale atomisée et fractionnée . . . la vision d'une communauté unie et solidaire. [L]a communauté internationale . . . met l'accent sur ce qui rassemble plutôt que sur ce qui sépare. La référence à la communauté internationale dépasse l'effet de style et de mode: derrière le glissement sematique se profile une évolution dans le conception même du système internationale.[74]

72. P. Weil, "Le droit international en quête de son identité", 237 RC (1992 VI), p. 9, at p. 310: "[La communauté internationale] représente un idéal, une aspiration en même temps qu'une inspiration. Lorsqu'ils évoquent la communauté international, ils entendent moins décrire une réalité concrète déjà présente dans les faits, qu'une vision de caractère quelque peu utopique, voir même messianique."

73. B. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, (London, Verso, 1983), p. 15; M. Virally, "Panorama du droit international contemporain", 183 RC (1983 V), p. 1, at p. 27. Virally describes the concept of an international community as being "evocatrice".

74. P. Weil, "Le droit international en quête de son identité", 237 RC (1992 VI), p. 9, at p. 309.

PART II

STATE SOVEREIGNTY

CHAPTER FIVE

STATE SOVEREIGNTY AND INTERNATIONAL LEGAL DISCOURSE

Wouter G. Werner*

1. *Introduction*

The post-Cold War era has witnessed renewed debates on the nature, function and meaning of state sovereignty. Phenomena like global capitalism, international governance and the fragmentation of states have given rise to claims that state sovereignty is "in decline"[1] or even "diminished".[2] Others have argued that the institutionalization of human rights and humanitarian law should be regarded as a "move along a trajectory to global humanity"[3] and as a "globalized discourse".[4] Yet others have questioned the analytical value of the concept of state sovereignty as such: the meaning of "sovereignty" would be so underdetermined that it can be used to justify or criticize almost any action. Globalization, international governance as well as the fragmentation and integration of states thus raise fundamental questions for international legal theory. The state is, after all,

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1. For this claim *see* M. van Creveld, *The Rise and Decline of the State* (Cambridge, Cambridge University Press, 1999), pp. 336–421. *See* for a discussion also S. Rosenau, *Turbulence in World Politics. A Theory of Change and Continuity* (New York, Princeton University Press, 1990); K. Ohmae, *The End of the Nation State. The Rise of Regional Economics* (New York, Free Press, 1995). Similar claims are being discussed by O. Schachter, "The Decline of the Nation-State and Its Implications for International Law", 36 *Colombia Journal of Transnational Law*, 1997, 7–23.

2. V. Cable, *The Diminished Nation-State: A Study in the Loss of Economic Power* (Daedalus, 1995).

3. R. Robertson, *Globalization: Social Theory and Global Culture* (London, Sage, 1992), p. 134.

4. Günther Teubner, "The King's Many Bodies: The Self-Destruction of Law's Hierarchy", 31 *Law and Society Review*, 1997, 763–787, at 770. For an analysis of the role of the state and of non-state actors in relation to the International Criminal Court *see* the Chapters 6, 7 and 12 of Jensen, Amman and Struett in this volume.

still widely regarded as the primary subject of international law, while the institution of state sovereignty is held to be one of the cornerstones of the international legal order. The aim of this chapter is to take up and discuss some of the above-mentioned challenges to the concept of state sovereignty and so to contribute to a better understanding of the meaning and function of state sovereignty in contemporary international law.

Section 1 of this chapter argues that many of the empirical, analytical and moral criticisms that have been brought forward against the concept of state sovereignty are unable to account for two important facts: (1) the endurance of state sovereignty in international legal discourse, notwithstanding several fundamental changes in international society since the 17th century; (2) the fact that, throughout history, state sovereignty has been used to justify mutually exclusive norms and *yet* remains one of the cornerstones of international law. Apparently, if one wants to understand the enduring importance of state sovereignty, it is necessary to accept its contested and flexible nature. In general terms, state sovereignty stands for the independence of states. It is a truism that there have been – and currently are – different conceptions of what this "sovereignty" or "independence" requires: does it legitimize or prohibit intervention on invitation of a government?; does it forbid or allow the exercise of universal jurisdiction in absentia?; does it require recognition of states? etc. However, as long as there is basic agreement that these controversies are about the most appropriate way to interpret the "sovereignty" or "independence" of states, state sovereignty as a discursive practice flourishes. Moreover, it is possible to detect some recurring patterns in the controversies about state sovereignty. In this chapter, one recurring pattern will be given special attention: the debate between, on the one hand, the conception of sovereignty as an institution which gives states a freedom *to* act and, on the other hand, the conception of sovereignty as an institution which protects the freedom of states against the actions of other states; as an institution which gives states a freedom *from* actions of others.

Section 2 examines the structural similarities between the notion of state sovereignty in the international context and the notion of individual liberty in the national context. More specifically, it criticizes the idea that state sovereignty would be a purely egoistic concept, that would place states outside the framework of international

law and international society. On the basis of an examination of the "Westphalian international society" and the *Island of Palmas* case it argues that there is an intrinsic relation between state sovereignty and the responsibility to carry out the obligations of states under international law. This relation between state sovereignty and the duty to carry out international legal obligations implies that the meaning and scope of state sovereignty is also dependent on the evolution of international law as a whole. This relationship between state sovereignty and the evolution of international law is further illustrated by an analysis of the obligations *erga omnes* and by an analysis of the development of new criteria for sovereign statehood in international law.

Several theories of law have recognized the dependency of state sovereignty on the development of international law. Some of these theories (e.g. Kelsen's pure theory of law or Ross' legal realism) have concluded from this dependency that sovereignty is nothing but an abstraction from a number of legal rules or a shorthand for a bundle of rights, duties and competences. On the basis of this interpretation of sovereignty, these theories conclude that sovereignty, from an analytical point of view, is a redundant concept; a concept without independent meaning. Section three discusses these interpretations of sovereignty and attempts to refute them on the basis of insights borrowed from interpretive theories of law, modern legal positivism and legal semiotics.

Section four, finally, illustrates the theoretical insights of the preceding sections by means of an analysis of what has been called the corollary of state sovereignty: the principle of non-intervention. It demonstrates that the relationship between sovereignty and non-intervention is by no means given or unproblematic. In the 19th century, for example, international law regarded to right to use force as "inherent" in the concept of state sovereignty. In current international law, the concept of sovereignty is still important, but in a diametrically opposed way: the prohibition to use force is now regarded as "included" in the concept of state sovereignty. A concept which has been able to survive such fundamental changes in international society is not likely to disappear easily.

2. *Some challenges to state sovereignty examined*

2.1 *State sovereignty criticized*

The challenges to state sovereignty come from different sources.[5] As far as global capitalism is concerned, it has been argued that the end of the Cold War has removed economic barriers and expanded integrative forces in world economy to such an extent that even concerted state action is unable to control it.[6] In this "borderless world"[7] states would be less and less capable to act as autonomous gatekeepers and are unable to protect what by some scholars is regarded as the hall-mark of state sovereignty: the impermeability of national borders.[8] Echoing the older Marxist and liberal expectations, some post-Cold War globalists argue that the Westphalian state system will wither away and will be replaced by a global system of governance where economics prevails over security issues and national politics.[9] Others argue that globalization, or "globality" would have led to a different way of thinking in which the ideas of sovereignty and territoriality are peripheral to the conduct of business, trade, politics or social relations.[10]

A second development which would threaten state sovereignty is the emergence of new structures of decision- and policy-making in the international arena. In response to the globalization of the economy, the increasing importance of universal values as well as the internationalization of problems like security, environmental pollution or migration, new forms of policy-making ("governance") have emerged. These forms of policy-making are not necessarily state-centred and often consist of networks in which states, international organizations, individuals and representatives of (international) civil

5. *See also* notes 1 and 2.

6. E. Yardeni, "The Economic Consequences of the Peace", in Mueller (ed.), *The Political Economy of Global Interdependence*. (Colorado, Westview Press, 2000), pp. 91–109. V. Cable (note 2), p. 241.

7. K. Ohmae, *The Borderless World* (New York, Harper, 1991).

8. J.H. Herz, *International Politics in the Atomic Age* (New York, Columbia University Press, 1959), p. 40.

9. For similar arguments *see* Ohmae (note 7), pp. 13, 14. For an overview of some of the arguments regarding the end of the Westphalian state *see* A. Prakash, J.A. Hart, "Globalization and governance: an introduction", in Prakash, Hart (eds.), *Globalization and Governance* (London, Routledge, 1999).

10. For a discussion of this point, *see* J.A. Scholte, *Globalization: a critical introduction* (Basingstoke, Macmillan, 2000).

society play a role. It has been claimed that in certain fields the transfer of powers from the state to these new forms of decision-making has resulted in governance *beyond* the state[11] as well as in a blurring of the distinction between internal and external affairs.[12] In other fields, like international criminal law, it has been argued that the emergence of international judicial bodies has undermined the Westphalian state system and the idea of the sovereignty of states.

Thirdly, it has been argued that state sovereignty is threatened from *within*. This threat to state sovereignty is visible in so-called "failed states" (where central governmental authority has broken down and state functions have collapsed)[13] or "quasi-states" (where the central government is structurally dependent on foreign aid and international institutions).[14] In these states, the central government is unable to uphold what is sometimes defined as the "essence of a state":[15] the control of territory. It has been suggested that these types of states are sovereign in name only; that they lack real, empirical sovereignty.[16] The internal threat to state authority, however, is not restricted to failed states or quasi-states only. As – amongst others – Van Creveld has pointed out, the state's monopoly on the legitimate use of force is challenged in Western states as well.[17] Here,

11. M. Jachtenfuchs, "Conceptualizing European Governance", in Joergenson (ed.), *Reflective Approaches to European Governance* (London, MacMillan, 1997), pp. 39–50.

12. In the field of (European) security this blurring of the distinction between internal and external affairs has been set out by, amongst others, M. Anderson, *Policing the European Union* (Oxford, Clarendon Press, 1995); D. Bigo, "When Two Become One: Internal and External Securitizations in Europe", in Kelstrup, Williams (eds.), *International Relations Theory and the Politics of European Integration* (Routledge, London-New York, 2000), pp. 171–204.

13. For an analysis of failed states in international law *see* D. Thürer, "The 'failed State' and international law", *Revue internationale de la Croix-Rogue* (Genève, Comité International de la Croix-Rouge, 1999), p. 731; Wallace-Bruce, N. Lante, "Of Collapsed, Dysfunctional and Disoriented States: Challenges to International Law", 47 *Netherlands International Law Review*, 2000, 53; M. Herdegen, "Der Wegfall effektiver Staatsgewalt im Völkerrecht", *Berichte der Deutschen Gesellschaft für Völkerrecht* (Heildelberg, Müller, 1996), 68.

14. For the term "quasi-state" *see* R.H. Jackson, *Quasi-States: Sovereignty, International Relations and the Third World* (Cambridge, Cambridge University Press, 1990). *See also* R.H. Jackson, "Juridical Statehood In Sub-Saharan Africa", *Journal of Modern Africa Studies*, 1992, pp. 1–16.

15. M.N. Shaw, "Territory in International Law", 13 *Netherlands Yearbook of International Law*, 1982, 61–91.

16. *See* R.H. Jackson (note 14). For a criticism on the distinction between empirical and juridical sovereignty *see* W.G. Werner, J.H. de Wilde, "The Endurance of Sovereignty", *European Journal of International Relations*, 2001, 283–315.

17. Van Creveld (note 1), pp. 336–421.

the threat to state sovereignty would consist in the privatization of the use of force. In the UK, for example, there are currently most probably more private guards than uniformed active state troops, whereas in the US the private security sector in the 1970s already had almost twice as many employees and 1.5 times the budget of all local, state and federal police forces combined.[18] These figures, it is argued, are indicative of a general trend which points at a decline of the state's monopoly of the legitimate use of force.

In addition to these empirically oriented criticisms, state sovereignty is also criticized from the perspective of legal theory; on *analytical* and *moral* grounds. It has been argued that state sovereignty is an "ambiguous concept" which is almost impossible to define.[19] Others have stated that the term "state sovereignty" should be replaced by other, more precise terms or should be banned altogether from our vocabulary.[20] Henkin, for example, has denounced sovereignty as a "bad word" which should be replaced by the term "autonomy", whereas Malanczuk (Akehurst) characterizes sovereignty as a "wholly emotive term" which has led to "intellectual confusion and international lawlessness" and which should be replaced by the term "independence".[21] In similar fashion, Lauterpacht has argued that "sovereignty" is a word which has an "emotive quality lacking meaningful specific content".[22] In analytical legal theory, several authors have argued that the concept of state sovereignty merely denotes a set of rights,

18. Van Creveld (note 1), p. 404. Van Creveld bases his argument on N. South, *Policing for Profit: the Private Security Sector* (London, Sage, 1989) and J.S. Kakalik and S. Wildhorn, *The Private Police: Security and Danger* (New York, Crane Russak, 1977).

19. S.I. Benn, "The Uses of Sovereignty", 3 *Political Studies*, no. 2, 1955, 122. J. Miller, *The World of States* (London, Croom Helm, 1981). For a discussion of the several meanings attached to the concept of sovereignty *see also* Fowler, M.R. and J.M. Bunck, *Law Power and the Sovereign State; The Evolution and Application of the Concept of Sovereignty* (University Park, PA, Pennsylvania State University Press, 1995).

20. For the latter *see* especially Kelsen's moral call to abandon the use of state sovereignty: "Die Souveränitätsvorstellung freilich muß radikal verdrängt werden. Diese Revolutionierung des Kulturbewußtseins tut vor allem not! . . . Denn die Vostellung von der Souveränität des eigenes Staates it bisher . . . allem im Wege gestanden was auf . . . die Weiterentwicklung der Völkerrechtsgemeinschaft aus ihrem Zustande der Primitivität zu einer civitas maxima . . . abziet. Als unendliche Aufgabe aber muß solcher Weltstaat als Weltorganization allem politischen Streben gesetzt sein". Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (Tübingen, 1920), p. 320.

21. L. Henkin, International Law: Politics, Values, Functions, 216 *Recueil des Cours* (1990), pp. 24, 25. P. Malanczuk, *Akehurst's Modern Intoduction to International Law* (London, Routledge, 1997), pp. 17, 18.

22. E. Lauterpacht, "Sovereignty – Myth or Reality?", *International Affairs*, 1997, 137–150 at 141.

duties and competences valid under international law.[23] Ultimately, this approach towards sovereignty renders the concept without independent meaning. As has been pointed out by Koskenniemi, under this interpretation of sovereignty, ". . . to speak of 'sovereignty' at all is merely superfluous or, at best, a description of the norms whose normative force is in their being incorporated in some legal act, not in their being inherent in statehood".[24]

2.2 *The endurance of state sovereignty as a discursive practice*

Notwithstanding the widespread criticisms state sovereignty still figures prominently in international legal discourse. The alleged loss of effective control of states has not led to a denunciation of the concept of state sovereignty in international practice: even failed states or states that have handed over considerable powers to international institutions successfully claim a sovereign status. State sovereignty continues to be, as is set out in Article 2(1) of the UN Charter, one of the cornerstones of the international legal order.[25] Illustrative in this respect is the reassurance of the "sovereignty" and "independence" of Iraq in UN Resolutions since Resolution 686 of 2 March 1991. Although the Security Council placed considerable restrictions on Iraq's freedom to act, it took pains to emphasize the legitimate concerns of Iraq regarding its "national security, sovereignty and dignity".[26] Recently, Schrijver has demonstrated the enduring importance of the concept of state sovereignty in the fields of arms control and disarmament, the regulation of the economy, foreign investment regulation and peace and security.[27] Moreover, in several cases before the International Court of Justice states heavily rely on arguments which are directly or indirectly related to the concept of state sovereignty. An example is the case of the *Congo* v. *Belgium*, where both

23. For an overview of writers adopting the view that sovereignty is merely a shorthand for a bundle of rights and competences under international law *see* M. Koskenniemi, *From Apology to Utopia, The Structure of International Legal Argument* (Helsinki, Finnish Lawyer's Publishing Company, 1989), p. 197 and p. 212. *See also* the position of Ross (sovereignty as a tû-tû concept) referred to by Koskenniemi at p. 202, footnote 38.

24. *Idem*, p. 198.

25. *See also* the importance attached to state sovereignty in UN resolutions like the Friendly Relations Resolution (Resolution 2625 (XXV) of 24 October 1970).

26. The abovementioned examples are discussed by N.J. Schrijver, "The Changing Nature of Sovereignty", *British Yearbook of International Law*, 1999, 65–98 at 85. Note that this chapter was written before the 2003–2004 military interventions in Iraq.

27. N. Schrijver (note 26), 65–98.

states relied on state sovereignty and the *Lotus* doctrine to underpin their arguments regarding the (il)legality of the exercise of universal jurisdiction *in absentia*. (*see also* section 3 of this Article).[28] Another indication of the continued importance of state sovereignty in international practice is the desire of many separatist groups to form their own sovereign states. Apparently, the status of sovereign statehood is still something worth fighting for. Finally, the concept of state sovereignty still plays an important role in legal doctrine. Examples can be found in the work of Higgins, who has argued that state sovereignty is the core of the international system, or in the work of Brownlie who states that: "The sovereignty and equality of states represents the basic constitutional doctrine of the law of nations, which governs a community consisting primarily of states having a uniform legal personality".[29]

To a limited extent, the continued use of the concept of state sovereignty can be explained by the considerable power still left to the state. Several authors have pointed out that, despite the growing importance of global capitalism and international governance, many states are still able to exercise control over their territory, whereas the nationality link is still important for many multinational enterprises.[30] Others have argued that states are still able to control cross-border interaction to a considerable degree.[31]

It would be unsatisfactorily, however, to explain the endurance of sovereignty by measuring the power left to the state. Apart from the problem of measuring power in the first place, this approach would

28. *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment of 14 February 2002, *ICJ Reports* (2000), p. 3. A clear example of a case where the ICJ discussed the meaning of sovereignty in international law is *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment of 27 June 1986, *ICJ Reports* (1986), p. 14.

29. Higgins, *International Law and the Reasonable Need of Governments to Govern* (London, 1982), p. 3. I. Brownlie, *Principles of Public International Law* (Oxford, Clarendon Press, 1995), p. 278. *See also* Bleckmann, *Grundprobleme und Methoden des Völkerrechts, Freibur* (München, 1982), p. 84.

30. For an overview *see* M. Carnoy, M. Castels, S. Cohen and F. Cardoso (eds.), *The New Global Economy in the Information Age* (Pennsylvania State University Press, 1993). L. Pauly and S. Reich, "National Structures and Multinational Corporate Behaviour: Enduring Differences in the Age of Globalization", 51 *International Organization*, 1, 1997, 1–30. *See also* G. Soerensen, "Sovereignty: Continuity and Change in a Fundamental Institution", in R.H. Jackson (ed.), *Sovereignty at the Millenium* (Oxford, Blackwell, 1999), pp. 168–182.

31. S. Krasner, *Sovereignty: Organized Hypocrisy* (New York, Princeton University Press, 1999).

seriously misinterpret the nature of state sovereignty in international law. State sovereignty is not a descriptive concept which stands for ("mirrors") a pre-given state of affairs and which can be measured and counted in an objective way. The very fact that collapsed states still count as sovereign states in international law suggests otherwise. Rather than being a representation of a state of affairs, state sovereignty is a *claim to authority*; a claim which has been institutionalized, defined and redefined within the framework of international law. Challenges to the power of the state, therefore, do not necessarily lead to a decline of sovereignty. It might very well be the case that such challenges reinforce claims to state sovereignty. After all, it makes little sense to claim authority if one already has unquestioned absolute power. It is not accidental that many theories of absolute sovereignty (like the theories of Bodin, Hobbes or Schmitt) have been formulated against the background of civil war and civil strife; that is against the background of serious challenges to central authority.[32]

This chapter argues that, in order to be able to understand the endurance of state sovereignty, it is necessary to reject the idea that sovereignty is a descriptive or empirical category which antedates international law. Sovereignty is neither outside international law[33] nor a "political fact for which no legal authority can be constituted".[34] Consequently, it is not fruitful to present international law and state sovereignty as opposite categories, as if an increase in international rules would automatically imply a decrease in state sovereignty and *vice versa*.[35] This way of presenting the relation between international law and state sovereignty runs the risk of taking the meaning of sovereignty as given and unchangeable; as if, as some authors have

32. For this argument *see also* Werner & de Wilde (note 16).

33. As is the claim of A. James who argues that "International law may and does give rise to what are called sovereign rights, but these are rights given to sovereign states, that is, states which are already sovereign. The position of international law in relation to sovereignty is that it presupposes it. International law makes sense only on the assumption that there are sovereign states to which it can be applied." A. James, *Sovereign Statehood, The Basis of International Society* (London, Allen & Unwin, 1986), p. 40.

34. Canadian Supreme Court in the case regarding the secession of Quebec, quoting from H.W.R. Wade, "The Basis of Sovereignty", *Cambridge Law Journal*, 1955, 196.

35. An example of this can be found in Berman's article on self-determination: "Very different conceptions of international society result depending on whether, and to what extent, law or sovereignty is granted ultimate primacy". N. Berman, "Sovereignty In Abeyance, Self-Determination and International Law", 7 *Wisconsin International Law Journal*, 1986, no 1, 390–443.

suggested, the legal meaning of sovereignty is not or is only marginally subject to change.[36] As will be set out in the next sections, this is not the case: changes in international society have led to fundamentally different – and sometimes mutually exclusive – interpretations of the meaning of state sovereignty. This indicates that sovereignty does not antedate international law, but that its scope and meaning are constituted and regulated by international legal discourse.[37]

In this chapter, therefore, state sovereignty will be regarded as a normative institution whose rules are not regarded as a taboo which cannot be questioned or changed. Members of the international society take a so-called "interpretive attitude" towards the institution of sovereignty; an attitude which has two components:[38]

- The first is that the members act upon the belief that the institution "does not simply exist but as value, that is serves some interest or purpose or enforces some principle – in short, that is has some point- that can be stated independently of just describing the rules that make up the practice."
- The second is that the rules of the institution, what the institution requires, "are not necessarily or exclusively what they have always been taken to be but are instead sensitive to its point, so that the strict rules must be understood or applied or modified or qualified or limited by that point".

State sovereignty, therefore, is a dynamic concept too: interpreters consider the institution in the context of its point or purpose and restructure the rules of the institution in the light of that purpose and meaning. This means that the concept of sovereignty can survive fundamental changes in a society. An example of this is the survival of the concept of state sovereignty in international society despite the fundamental transformation from dynastical legitimacy to

36. S. Barkin, B. Cronin, "The State and the Nation: Changing Norms and the Rules of Sovereignty in International Relations", in R. Beck, T. Ambrosio (eds.), *International Law and the Rise of Nations* (New York, Chatham House, 2002), p. 61.

37. In this sense, my argument is related to the tradition of social constructivism in IR-theory. Social constructivism does not take sovereignty as externally given, but rather examines the social practices in which the concept of sovereignty is constructed and reconstructed. For the outlines of the social constructivist argument regarding sovereignty *see* A. Wendt, "Anarchy is What States Make of It: The Social Construction of Power Politics", *International Organization*, 1992, 391–425; A. Wendt, *A Social Theory of International Politics* (Cambridge, Cambridge University Press, 1999).

38. R. Dworkin, *Law's Empire* (Oxford, Hart, 1986), p. 47.

popular self-determination as one of the guiding principles of international legitimacy.[39] In the next sections, this notion of state sovereignty will be further explained and refined. To that end, it is first of all necessary to take a closer look at the relation between state sovereignty and the Westphalian international society.

3. *Sovereignty and international society*

3.1 *Sovereignty and the "Westphalian society"*

Before the birth of the modern state system, the concept of sovereignty was not unknown to European politics. It played an important role in the medieval *Respublica Christiana*, based as it was on the claims of temporal leadership of the Emperor and spiritual leadership of the Pope. Within the *Respublica Christiana*, the Church claimed sovereign authority to legitimate rule; a claim which aimed to supersede competing claims by other agents (especially the Emperor).[40] Traditionally, the 1648 Westphalian Peace Treaties are regarded as the transformation of the locus of sovereignty: sovereignty was no longer used to emphasize the unity of the Christian community under leadership of the Church, but to stress the diversity of autonomous political communities ("sovereign states"). The *Respublica* would have given way to a decentralized, horizontal system of sovereign states. The Westphalian Peace Treaties thus symbolize the "disregard of the international authority of the Papacy"[41] and the birth of a system of sovereign political entities which did not recognize a higher authority.[42]

It is beyond doubt that the 1648 Westphalian Peace Treaties constitute a strong symbol of the decline of the empire and the rise of a horizontal system of sovereign states. One should be careful, however, not to read too much into the Westphalian Peace Treaties. The treaties themselves were still formulated in terms of universal,

39. For this *see* W.G. Werner, "Self-Determination and Civil War", *Journal of Conflict and Security Law*, 2001, 171–190.

40. R.H. Jackson, "Sovereignty in World Politics", *Political Studies*, 1999, 13–16.

41. "Out of a loose band of irregular entities, it was set to create a horizontal order of independent, sovereign states which most emphatically rejected any superior power . . ." A. de Zayas, "Westphalia, Peace of 1648", in Bernhardt (ed.), *Encyclopaedia of Public International Law* (1984), p. 537.

42. A. Eyffinger, "Europe in Balance: An Appraisal of the Westphalian System", 45 *Netherlands International Law Review*, 1998, 178.

Christian language[43] and were to a large extent about practicalities and about internal affairs of the Holy Roman Empire.[44] Two issues which did come close to the recognition of sovereignty were the provisions dealing with the position of Swiss cantons and the Dutch Republic. The Westphalian Peace Treaties confirmed the immunity of the Swiss cantons from jurisdiction of the empire as well as their autonomy. Historians, however, have pointed out that this provision was not regarded as a break with the past and that the Swiss still regarded themselves as associated with the empire.[45] The independence of the Netherlands was mainly an issue between the new Republic and Spain. This issue was formally settled in the Treaty of Münster of January 1648; a treaty which – strictly speaking – is no part of the Westphalian Peace Treaties of October 1648.[46] Article 1 of the Treaty of Münster states that the King of Spain recognizes the United Netherlands as "free and sovereign states, provinces and lands on which he, the King, does not lay and shall not lay in the future any claim for himself, his successors nor his heirs."

Moreover, it should be kept in mind that many of the characteristics of the modern, sovereign state-like delimited borders, separate administrative structures for internal and external affairs and the monopolization of the use of force – were developed only after the 17th century. Due to – among other things- the growing role of technology (e.g. cartography) and the growing bureaucracy, states were able to delimitate borders in a far more precise way than before

43. *See* for this argument also R.H. Jackson (note 40). An example of the Christian, universal language is the Preamble and the first Article of the Treaty of Westphalia of 24 October 1648 between the Emperor and the King of France. The opening words state that the Treaty is concluded "In the name of the most holy and individual trinity", whereas the first Article declares that "there shall be a Christian and Universal peace . . .".

44. A. Osiander, "Sovereignty, International Relations and the Westphalian Myth", 55 *International Organization*, 2, 2001, 251–287.

45. F. Egger, "Johann Rudolf Wettstein und die internationale Anerkennung der Schweiz als ëuropäischer Staat", in K. Bussmann, H. Schilling, *1648: Krieg und Frieden in Europa, Textband I: Politik, Recht und Gesellschaft* (München, Bruckmann, 1998), pp. 423–432. *See also* Article LXII of the Treaty of 24 October 1648, which *confirms* the liberty of the Swiss cantons and their exemption from the empire.

46. Strictly speaking, the Westphalian Peace Treaties consist of the two treaties signed on 24 October 1648: the Treaty of Münster between the Emperor and the King of France and the Treaty of Osnabrück between the Emperor and the queen of Sweden. For a discussion of the negotiations and the peace treaties *see* A. Osiander, *The States System of Europe, 1640–1990: Peacemaking and the Conditions of International Stability* (Oxford, Clarendon Press, 1994).

and proved to be able to control the lives of their citizens in an unprecedented way.[47] This rise of state power contributed to the further development of the idea of the state as an abstract entity, comprising both ruler and ruled and yet distinct from both. This "artificial man"[48] rather than the person of the ruler became the bearer of sovereignty; the *suprema potestas* which does not recognize any higher central authority.

It is also this sovereign state which is embedded in international society. The fact that the state as an abstract person which does not recognize any higher, central authority is only one side of the story; equally important is that it operates in an international society where the state and its fellow sovereigns have agreed to accept each other's independence. This mutual recognition of each other's sovereignty (independence) reflects one of the most important aspects of what retrospectively has been named the Westphalian system; it is a system which is not solely based on *de facto* effective control, but first and foremost on a shared set of identities, rules and principles. As Osiander rightly concludes, the European state system constituted a regime where " 'sovereignty' or rather actorhood was based not on power but on mutual convention".[49] In this sense, it is more appropriate to speak of the Westphalian international *society* than of the Westphalian *system*. It is in this society that sovereignty as a discursive practice could develop.

The embeddedness of state sovereignty in the normative framework of international society – and especially in the framework of international law – is also reflected in the frequently used definition of sovereignty as "independence". This "independence" of states refers to their formal status under international law; not to their *de facto* independence or autonomy. As was recognized in the case regarding the *Customs Regime Between Germany and Austria*, sovereignty or –

47. For a description of this process, *see* Van Creveld (note 1). For an analysis of one of the aspects of the monopolization of force *see also*: M. Foucault, *Discipline and Punish: The Birth of Prison* (London, Penguin Books, 1979).

48. In the *Leviathan*, Hobbes introduced the state as an "artificial man" who is distinct from the person of the ruler. *See also* P. King, *The Ideology of Order: A Comparative Analysis of Jean Bodin and Thomas Hobbes* (London, Alan and Urwin, London, 1974).

49. Osiander (note 44), p. 278. *See also* Ruggie's interpretation of the persistence of weak actors in the European state system in J.G. Ruggie, *Winning the Peace: America and World Order in the New Era* (New York, Columbia University Press, 1996) and J.G. Ruggie, *Constructing World Polity, Essays on International Institutionalization* (London, Routledge, 1998).

independence – means freedom from the control of other states, within the framework of international law. The mutual recognition of sovereignty, in other words, takes place within the context of an overarching normative framework which defines and redefines the scope and meaning of sovereignty:

> Independence . . . is really no more than the normal condition of States according to international law; it may also be described as sovereignty (*suprema potestat*), or external sovereignty, by which is meant that the State has over it no authority than that of international law.[50]

3.2 *Sovereignty and international responsibility*

Within the framework of international law, the concept of state sovereignty is used in two interrelated ways. In the first place, state sovereignty is used to describe the status of a political community (the status of "sovereign" or "independent" statehood). Secondly, the concept of state sovereignty is used to endow states with certain fundamental rights, powers and duties (their "sovereign rights"). Among these powers is the power to create new rules by means of their expressed free will.

State sovereignty in international life, therefore, performs functions which are akin to the functions performed by the concept of individual liberty in the national context. Both the individual liberty and the state sovereignty argument take as their starting point the existence of independent ("free" or "sovereign") agents who are equal by nature, endowed with a minimum core of fundamental rights and whose freely expressed consent forms the basis order and society. This parallel between state sovereignty and individual liberty can be witnessed in the work Vattel who argues that:

> Since men are by nature equal and their individual rights and obligations the same, as coming equally from nature, Nations, which are composed of men and may be regarded as so many free persons living together in a state of nature, are by nature equal and hold from nature the same obligations and the same rights. Strength or weakness, in this case,

50. *Customs Regime Between Germany and Austria*, Advisory Opinion, 5 September 1931, *PCIJ Reports*, Series A/B, no. 41, p. 57. *See also* the approach towards independence in the *Aaland Island* case, Report of International Commission of Jurists, *League of Nations Official Journal* (1920), Special Supplement no. 3, p. 3 or the approach in the *Wimbledon* case, *PCIJ Series A* (1923), no. 1, p. 25. *See also* the *Island of Palmas* case, discussed below (note 56 *infra*).

> counts for nothing. A dwarf is as much a man as a giant is; a small republic is no less a sovereign State than the most powerful Kingdom.[51]

The parallels between individual liberalism and state sovereignty cannot only be found in classical writings. Modern theories of international law too have based their arguments on a similarity between domestic society and the society of sovereign states.[52] As Koskenniemi has summarized this analogy between individual liberalism and state sovereignty:

> Both characterize the social world in descriptive and normative terms. They describe social life in terms of the activities of individual agents ("legal subjects", citizens, Sates) and set down the basic conditions within which the relations between these agents should be conducted.[53]

The notions of state sovereignty and individual liberty are easily misunderstood as being purely individualistic and anti-social. The institution of state sovereignty has been qualified as a variant of "possessive individualism",[54] whereas sovereign states have been presented as essentially outside international society: "As possessive individualists, sovereign states owe apparently nothing to international society, the same way Locke's and Hume's possessive individualists owe apparently nothing to society".[55]

This way of discussing state sovereignty, however, neglects an important aspect of both individual liberty and state sovereignty: state sovereignty and individual liberty not only legitimize a sphere of freedom; they also function as methods of holding persons ("agents") accountable. As far as state sovereignty is concerned, this bond with (international) responsibility became particularly clear in one of the classical cases on the concept of state sovereignty in international law: the *Island of Palmas* case (1928). In this case, arbiter Huber decided that the island of Palmas belonged to the Netherlands, since this state had exercised effective and peaceful control over the island for centuries. Huber based his decision *inter alia* on a theory regarding

51. E. de Vattel, *The Law of Nations or the Principles of Natural Law*, (Washington, 1758, 1916), Introduction, para. 18.

52. *See* e.g. J. Rawls, *The Law of Peoples* (Boston, Harvard University Press, 1999).

53. Koskenniemi (note 23), p. 192.

54. *See* J.G. Ruggie, "Continuity and Transformation in the World Polity, Towards a Neorealist Synthesis", *World Politics*, 1983, 276–279.

55. H. Patomäki, "State is Not a Person: On the Theoretical and Practical Consequences of State-Antropomorphism", paper for the 43 *Annual International Studies Association*, New Orleans, 2002.

the nature and function of sovereignty in international affairs. He stated that sovereignty not only gives states the right to exercise jurisdiction over their territories, but also puts them under an obligation to respect the rights of other states:

> Territorial sovereignty . . . involves the exclusive right to display the activities of a State. This right has as a corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and war, together with the rights which each State may claim for its nationals in foreign territory. Without manifesting its territorial sovereignty in a manner corresponding to the circumstances, the State cannot fulfil this duty.[56]

This bond between state sovereignty and international responsibility also played a significant role in the 19th and early 20th century policy of recognition of new states. As Fowler and Bunck conclude:

> For their part nineteenth-century Europeans did not simply countenance the recognition of the sovereign status of distant states. Rather, they frequently encouraged it and did so without the discrimination on religious, cultural, or racial grounds that one might have expected in this age. One important reason . . . was that the term sovereignty, in both internal and external dimensions, had long connoted duties as well as rights. As Sun Yat-sen, Provisional President of China declared in 1912: "We will try our best to carry out the duties of a civilized nation so as to obtain the rights of a civilized nation".[57]

As the decision in the *Island of Palmas* case clearly indicates, sovereignty is a specific way of organizing international responsibility. This also explains why, nowadays, the presence of effective control is generally regarded as the one of the most important factors that has to be taken into account in determining the emergence of a new state. Effective control over a population living on a defined territory is not simply an empirical fact that has to be taken into account for its own sake. Neither is the importance of effective control as criterion for the emergence of a new state an example of the thesis that "might makes right". Rather, effective control is one of the cornerstones of the theory of international responsibility. Where effective

56. *Island of Palmas* case (*Netherlands* v. *United States*), Permanent Court of Arbitration (Huber), 2 *Reports of International Arbitral Awards* (1928), p. 829.

57. M. Foweler and J. Bunck, "The Nation Neglected: The Organization of International Life in the Classical State Sovereignty Period", in R. Beck and T. Ambrosio (eds.), *International Law and the Rise of Nations* (New York, Chatham House Publishers, 2002), pp. 38–60 at 43.

control over a territory is lacking, for example in times of civil war or in so-called "failed states", it has proven to be much more difficult to hold states accountable for violations of international rules than in times of normalcy.[58]

The relation between state sovereignty and the responsibility to carry out obligations under international law can also be found in the 1949 ILC Draft Declaration on the Rights and Duties of States.[59] Article 13 of this Declaration states that "Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law". The relation between state sovereignty and the duty to carry out international obligations implies that changing norms and values in international society will affect the position of sovereign states in international law. An illustration of this is the development of the so-called obligations *erga omnes*. In the *Island of Palmas* case (1928), the focus of the state's international responsibility was the rights of other states "in particular their right to integrity and inviolability" as well as the protection of the nationals of another state (*see* above). Nowadays, the rights of other states comprise more than just their own integrity and the (limited) rights of their nationals. As has been recognized by the International Court of Justice in 1970 (and has been confirmed since then), in contemporary society there is a small core of obligations which have an "*erga omnes*" character; a core of obligations that are considered to be so important that their violation is regarded as an offence not only against the state directly affected by the violation, but also against all members of the international community.[60] Examples of obligations *erga*

58. The crucial role of effective control does not mean, of course, that sovereignty and effective control can be regarded as synonyms. Effective control is an important factor that has to be taken into account in determining the coming into existence of a state. There are, however, many examples of states where the government has lost effective control and who yet remain members of the community of sovereign states (e.g. Lebanon in the 1980s or some African states in the 1990s). These examples indicate that, although effective control is the normal context in which the concept of state sovereignty is applied, sovereignty is a scheme of interpretation which can also be used in exceptional situations like civil war, foreign occupation and collapse of central authority. In these situations, the concept of state sovereignty is used to uphold the *status quo* and to prevent the termination of one of the members of the society of sovereign states. *See* for this argument also Werner & de Wilde (note 16), 283–313.

59. *Yearbook of the United Nations*, 1948–1949, p. 948.

60. *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgment of 5 February 1970, *ICJ Reports* (1970), p. 3, at paras. 33, 35. *See also* the recognition

omnes are the duty to respect the right to self-determination, the duty to refrain from acts of aggression or the duty to respect the basic rights of individuals. The exact legal implications of the recognition of *erga omnes* obligations are still far from clear. In the *Barcelona Traction* case, the International Court of Justice held that instruments which embody human rights "do not confer on States the capacity to protect victims of infringements of such rights irrespective of their nationality".[61] In later cases, the Court refrained from indicating the possible allowed reactions of states to a violation of an obligation *erga omnes*.[62] Notwithstanding the uncertainties surrounding the concept of *erga omnes*, however, the introduction of this concept has led to a redefinition of what counts as a "legal interest" of states under international law. The growing importance of notions like obligations *erga omnes* cannot be interpreted as an indication that state sovereignty is in decline. Sovereignty does not stand for an unrestricted freedom of an individual state on its own territory and *vis-à-vis* its own citizens. If sovereignty is understood as a way of organizing international responsibility, the emergence of obligations *erga omnes* indicates a change in the position of states under international law rather than a decrease of the importance of sovereignty. The fact that a state has been put under an obligation to respect fundamental norms is just one side of the story; equally relevant is the fact that other states have gained a (legal) interest in the protection of these norms.

The changing norms connected with sovereign statehood can also be witnessed in the criteria that are used to determine whether a new sovereign state has emerged. Under current international law, the existence of an independent and effective government is still one

respect for self-determination as an *erga omnes* obligation in *East Timor (Portugal v. Australia)*, Judgment of 30 June 1995, *ICJ Reports* (1995) p. 90.

61. *Barcelona Traction* (note 60), p. 91.

62. *See* Malanczuk (note 21), p. 59. For a more detailed analysis of obligations *erga omnes see* C. Annacker, *Die Durchsetzung von* erga omnes *Verpflichtungen vor dem Internationalen Gerichtshof* (Hamburg, Kova, 1994). A.J. de Hoogh, *Obligations* Erga Omnes *and International Crimes: A Theoretical Inquiry into the Implementation and Enforcement of the International Responsibility of States* (Dordrecht, Kluwer, 1996); W. Czaplinski, "Concepts of *jus cogens* and Obligations *erga omnes* in International Law in the Light of Recent Developments", *Polish Yearbook of International Law*, 1997/1998, 87; O. Pegna, "Counterclaims and Obligations Erga Omnes before the International Court of Justice", 9 *European Journal of International Law* 1998, 724; M. Byers, "Conceptualizing the Relationship between 'Jus Cogens' and 'Erga Omnes' Rules", *Nordic Journal of International Law*, 1997, 211.

of the most important considerations that has to be taken into account when it comes to the emergence of a new state. As was set out above, however, this criterion is not something which has to be taken into account for its own sake. The existence of an effective and independent government is important because it guarantees the state's capability to live up to its international obligations. It is, therefore, not surprising that changing international norms and values have affected the criteria of what counts as a sovereign state under international law. One of the most important developments in this respect has been the evolution of the right of self-determination of peoples. During the process of decolonization in Asia and Africa, the recognition of the right of external self-determination of colonized peoples has affected the criteria for statehood in two fundamental ways. In the first place, in cases of decolonization, the international community proved willing to accept a lower degree of effective control than the traditional criteria for statehood required. This was the case with the Congo in 1960, which was admitted as a sovereign state to the United Nations, notwithstanding the virtual breakdown of the central government at the very same time. Another example is the 1973 General Assembly Resolution 3061 (XXVIII) which recognized Guinea-Bissau as a sovereign state although the new government did not control the majority of the population nor the major cities.[63] In the second place, the development of the right to self-determination resulted in an additional criterion for statehood. This became clear in the cases of Rhodesia and the South-African homelands. Rhodesia's declaration of independence (1965) was regarded as a nullity by UN organs and by all individual states, even though the white minority regime exercised effective control over territory. The reason for the denial of sovereign statehood was the racist character of the new regime, which affected the legal validity of the declaration of independence.[64]

63. Resolution 3061 (XXVIII), 2 November 1973, *Yearbook of the United Nations*, 1973, 143–147. *See also* M.N. Shaw, *International Law* (Cambridge, Cambridge University Press, 1997), pp. 144, 145. Note, however, that the requirement of effectiveness has also been applied less strictly outside colonial contexts. An example is the acceptance of Bosnia-Herzegovina as an independent state although even President Izetbegovic admitted that Bosnia-Herzegovina "could not protect its independence without foreign military aid". *See* Roland Rich, "Recognition of States: The Collapse of Yugoslavia and the Soviet Union", 4 *European Journal of International Law*, 1993, 36–65.

64. *See inter alia* Security Council Resolutions 217 (1965) and 217 (1966), General Assembly Resolutions 2024 (XX) and 2151 (XXI). For a more general discussion

The racist character of the new regime led to a denial of sovereignty of Rhodesia. As the Dutch government declared:

> In the Government's opinion the United Kingdom still exercises sovereignty over Southern Rhodesia. The Proclamation of the Republic of Rhodesia did not alter this fact (*sic*) any more than did the unilateral declaration of independence by the Smith regime in 1965.[65]

In the same fashion, UN organs as well as individual states (except South-Africa) regarded the creation of the "independent" homelands by South Africa since 1976 as legally invalid. The homelands were regarded as part of the policy of apartheid, which constituted a violation of the principle of self-determination.[66] The denial of statehood to Rhodesia and the homelands indicates an important shift in the criteria that are used for the determination of the existence of a new state: respect for self-determination now constitutes an "additional criterion of statehood, denial of which would obviate statehood".[67]

The impact of the right to self-determination on the criteria for statehood confirms the interpretive nature of the concept of state sovereignty: state sovereignty is not taken for granted, but interpreted in the light of its point or purpose.

4. *The reversibility thesis and the difference between concepts and conceptions*

4.1 *The two faces of sovereignty: Freedom to act and freedom from interference*

Once a political community has acquired the status of a sovereign state under international law, it is entitled and bound to the so-called "fundamental rights and duties of states". The idea of fundamental rights and duties of states has been laid down in several international documents like the 1933 Montevideo Convention on the Rights

on the position of Rhodesia *see* J. Crawford, *The Creation of States under International Law* (Oxford, Clarendon Press, 1979).

65. *Netherlands Yearbook of International Law*, 1971, 141.

66. *See*, *inter alia*, General Assembly Resolution 34/93, *UN Chronicle*, January 1980, 26. *See also* Crawford (note 64), pp. 103–106 and 219–227.

67. Shaw (note 63), p. 145.

and Duties of States,[68] the Charter of the Organization of American States (Articles 10–23)[69] as well as in the 1949 Draft Declaration on the Rights and Duties of States.[70] In legal doctrine, the notion of the fundamental rights and duties of states has been developed on the basis of the abovementioned documents as well as on other sources like state practice, UN Resolutions and jurisprudence.[71] It is, given the parallels between the principles of individual liberty and state sovereignty, not surprising that the rights and duties set out in these documents can be summarized in terms akin to the principles of liberty, equality and fraternity as developed in the national context. The fundamental rights and duties of states recognized by international law are generally summarized as follows: the right to independence and equality, the duty of peaceful co-existence as well as the duty to carry out in good faith obligations under international law.

Just like the principles of liberty, equality and fraternity in the national context, the fundamental rights and duties connected with sovereign statehood are ambiguous and underdetermined. This ambiguous character becomes particularly clear when, in a dispute, two states or two different schools both rely on the concept of sovereignty (on "sovereign rights"). Koskenniemi has given several examples of disputes where two states or two competing approaches both rely on sovereignty in order to underpin mutually exclusive claims.[72] In territorial disputes, for example, both parties often rely on their sovereignty as ground for their territorial claims. In the *Rights of Passage* case,[73] Portugal claimed a right to move goods from its colony Damaõ to its enclaves located

68. 165 LNTS, 19.

69. *Department of State Publications*, 3263 (1948), p. 169.

70. *Yearbook of the United Nations*, 1948–1949, p. 948.

71. Shaw (note 63), pp. 149–155, for example, discusses the fundamental rights and duties of states *inter alia* on the basis of the Declaration on Principles of International Law (General Assembly Resolution 2625 (XXV), 24 October 1970), as well as on the following cases: *Lotus* (1927), *Island of Palmas* (1928), *Corfu Channel* (1949), *Nicaragua* (1986) and *Nuclear Weapons* (1996).

72. M. Koskenniemi (note 23), pp. 206–261. *See also* the examples given by D. Kennedy, "Theses about International Law Discourse", *German Yearbook of International Law*, 1980, 353–391. *See also* D. Kennedy, *International Legal Structures* (Baden-Baden, Nomos, 1987). Some of the other examples mentioned by Koskenniemi are: the *Customs Regime Between Germany and Austria* case (1931), the *Asylum* case (1950) the *Nuclear Tests case* (1974) as well as the problem of trans-border pollution, where one state's the sovereign right to use one natural resources is countered by another state's sovereign right to decide what takes place on its territory.

73. *Right of Passage over Indian Territory*, Merits, Judgment of 12 April 1960, *ICJ Reports* (1960), p. 6.

deep into Indian territory. Portugal claimed that this right of passage was inherent (*une nécessité logique*) in its territorial sovereignty. India, however, equally relied on its sovereignty and argued that the "alleged rights of passage must evidently impinge upon and derogate from India's sovereign rights over the territory concerned".[74] Another example is the scholarly dispute about the legal nature of recognition of states. According to the constitutive theory of recognition – which dominated (parts of) the 19th century – a political community does not count as a state under international law until it has been recognized as such by the existing members of the international legal community. In his examination of the legitimist theory of statehood promoted by the Holy Alliance, Alexandrowicz concludes that an entity could be considered as a state "irrespective of the compelling force of facts".[75] During the 20th century, this view on the creation of states was replaced by its opposite: the so-called declaratory theory. According to this view, the creation of states is primarily a matter of fact (effective government over a territory and a population) and, consequently, recognition of a state by the existing states is without legal effects. The growing importance of the declaratory view did not affect, however, the importance of the notion of state sovereignty as such. Both the constitutive theory and the declaratory theory of recognition have been justified on the basis of the concept of state sovereignty. The constitutive theory emphasizes the consequences of the creation of a new state for the existing states: since the creation of a new state leads to changing international obligations for the existing states, it would be a violation of their sovereign rights if the creation of new states took place without their prior consent. The declaratory theory emphasizes the position of the newcomer: it would be a violation of its sovereign independence if its existence would be dependent on prior recognition by the existing states.

Recently, the concept of sovereignty ("sovereign rights") played an important role in the arguments brought forward in the case between the Congo and Belgium.[76] In its application, the Congo argued *inter alia* that the universal jurisdiction that Belgium had claimed constituted a violation of the principle of sovereign equality as laid down

74. *Ibid.*

75. C.H. Alexandrowicz, "The Theory of Recognition in Fieri", 34 *British Yearbook of International Law*, 1958, p. 176.

76. *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment of 14 February 2002, *ICJ Reports* (2002), p. 3.

in Article 2(1) of the UN Charter. This Charter provision, the Congo argued, should be read as a confirmation of the *Lotus* judgment (1927) which held that a state may not exercise its authority on the territory of another state.[77] The Congo, in other words, relied on the concept of sovereignty and the *Lotus* case as a foundation of its right to *freedom from* outside interference. Belgium, however, equally relied on the *Lotus* case and on the concept freedom of states set out in this case. By contrast to the Congo, Belgium did not use the *Lotus* case as a foundation of a right to freedom from outside interference; rather it used the Lotus case as a foundation of its *freedom to* act.[78] The issue of universal jurisdiction discussed in the dispute between the Congo and Belgium, therefore, nicely illustrates the two competing sides of the sovereignty argument. On the one hand, sovereignty functions as a legitimation of state action; it justifies a freedom to act. On the other hand, sovereignty functions as a protective principle: it protects the state's freedom from actions of other states.

4.2 *The concept and the conceptions of sovereignty*

The two faces of sovereignty make it difficult to decide cases in which two states both rely on their sovereignty. In such circumstances, it is often necessary to reformulate claims based on sovereignty into claims based on specific rights, duties and powers valid under international law. As Koskenniemi has pointed out, this is what happened in the *Rights of Passage* case, in the *Nuclear Tests* case, in the *Asylum* case and in the *Corfu Channel* case:

> In these cases . . . what are originally presented as claims about sovereignty turn out as disputes about the existence of certain individual rights, liberties and competences. Moreover, disputes in which both parties base their arguments on sovereignty would seem capable of solution *only* if they are so treated.[79]

A similar tendency can be witnessed in discussions about the "domestic jurisdiction clause" of Article 2(7) of the UN Charter.[80] The

77. *Ibid.*, Application, pp. 7, 9.

78. *Ibid.*, Counter Memorial of the Kingdom of Belgium, 28 September 2001, para. 3.3.29. *See also* the oral pleadings on Thursday 23 November 2000 CR 2000/35, para. 3.

79. M. Koskenniemi (note 23), pp. 213–214.

80. Article 2(7) reads as follows: "Nothing contained in the present Charter shall

domestic jurisdiction clause was originally included to protect the independence and freedom of states. Since the term "domestic jurisdiction" has no inherent or fixed meaning, however, its importance for individual cases could only be determined by looking at specific international legal rules. In other words: the meaning of "domestic sphere", just like the meaning of "sovereignty", is dependent on the development of international legal rules. International practice has shown that pleas based on domestic jurisdiction have seldom been successful and that "what really does, or does not, fall under national jurisdiction is a relative question that can vary with time and with the development of international relations and international law".[81]

The dependency of sovereignty on the international legal order has led some authors to conclude that to derive international norms from the concept of sovereignty is "is to invert the order in which questions must be considered".[82] Others went a step further and argued that sovereignty is nothing but "an abstraction from a number of relevant rules"[83] and that the concept of sovereignty has no independent meaning of its own. As was mentioned in section 2, this argument ultimately boils down to the claim that sovereignty can be reduced to a set of rights, duties and competences valid under international law.[84] "Sovereignty" would then be nothing but a shorthand for a collection of norms of conduct and norms of competence and, from an analytical point of view, would be a superfluous, redundant concept.[85]

This conclusion, however, is based on a peculiar assumption: the assumption that the legal system consists of norms of conduct and norms of competence only. Indeed, this is the claim that Kelsen – one of the most fundamental critics of the concept of sovereignty-

authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII." The domestic jurisdiction clause was also included in the Covenant of the League of Nations, Article 15(8).

81. *See* Schrijver (note 26), 75.

82. H.L.A. Hart, *The Concept of Law* (Oxford, Clarendon, 1961), p. 218.

83. G. Schwarzenberger, E. Brown, *Manual of International Law* (London, Stevens, 1976), p. 52.

84. *See* for this argument H. Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (Tübingen, Mohr, 1920) and H. Kelsen, *Principles of International Law*, 2nd ed. (New York, Holt, Rinehart and Winston, 1966).

85. A. Ross, *A Textbook of International Law, General Part* (London, Longman, 1947), p. 13.

explicitly makes: his pure theory of law is based on the assumption that all the elements of the legal system are reducible to norms of conduct.[86] The consequences of acceptance of such an approach to the legal order would be farreaching: all institutions like ownership, marriage, legal persons etc. would in the end be nothing but collections of rights, duties and competences.[87] At the international level, to declare a concept like sovereignty redundant would be to deny of one of the organizing principles of international law and result in a picture of international law as "consisting of a few scattered . . . individual rules".[88] One can legitimately wonder whether defining away concepts which are constantly used in legal practice helps us in understanding the nature of (international) law. Rather, it seems to be an example of an approach that has to pay "distortion as the price of uniformity".[89]

Fortunately, therefore, there is no reason to restrict the possible content of the legal order to norms of conduct and norms of competence only. Several contemporary schools of legal theory, varying from legal positivism to legal semiotics or the interpretive school, have pointed out that the legal system consists of more than just norms of conduct and norms of competence.[90] The legal system also contains elements like general principles, purposes, representations of identities, non-binding advisory opinions or institutions (like "sovereign statehood") and institutional legal facts (like the sovereign state of Ghana).[91] These elements play a crucial role in legal argumentation

86. Kelsen, *Reine Rechtslehre* (Wien, Deuticke, 1960), especially Chapter 1. H. Kelsen, *General Theory of Norms* (Oxford, Clarendon Press, 1991), p. 2 (translation of the *Allgemeine Theorie der Normen* by Michael Hartney).

87. For such an analysis of legal institutions *see* A. Ross, "Tû-tû", 70 *Harvard Law Review*, 1957, 812–825.

88. Koskenniemi (note 23), p. 218. Koskenniemi here sketches the consequences of the "legal" or reductionistic approach towards sovereignty.

89. Hart (note 82), p. 38.

90. For legal positivism *see* D.N. MacCormick, O. Weinberger, *An Institutional Theory of Law* (Dordrecht, Kluwer, 1986); D.W.P. Ruiter, *Institutional Legal Facts, Legal Powers and Their Effects* (Dordrecht, Kluwer, 1993) and D.W. P. Ruiter, *Legal Institutions* (Dordrecht, Kluwer, 2002). *See* for legal semiotics B. Jackson, *Law, Fact and Narrative Coherence* (Merseyside, Deborah Charles Publications, 1988). For the interpretive school *see* R. Dworkin (note 38). For an example of the use of a broader conception of the legal order in international law *see* Jose Alvarez, "Judging the Security Council", 90 *American Journal of International Law*, 1996, 31 (on the expressive function of the International Court of Justice).

91. For the notion of institutions and institutional facts *see* J.R. Searle, *Speech Acts* (Cambridge University Press, 1990), 175–198 (reprint from the 1969 edition). For an application of this notion to legal theory *see* especially Ruiter 1993 and 2002 (note 90).

and to deconstruct or denounce them would give a distorted picture of the interpretive practices in which they are used. If the international system is not regarded as a system of norms and rules only, if it is accepted that it is an interpretive practice too, the role and endurance of institutions like sovereignty can be better understood.

As was set out in section 2, the institution of sovereignty is not reducible to merely a bundle of rights, duties and competencies. Sovereignty also consists of a more general point which guides the interpretation and application of the norms connected with sovereign statehood. It is not necessary that all the members of the international society agree on the application of the institution of sovereignty to particular cases. They might very well disagree on what the institution requires in a particular situation without undermining the status or importance of the institution itself. As long as they (implicitly or explicitly) agree on the most general and abstract propositions about the institution, they share a background which makes genuine disagreement on the requirements and scope of an institution meaningful. Although I have no intention here of developing an interpretation of sovereignty along the lines of Dworkin's "law as integrity" approach, it can be helpful to recall in this context his distinction between "concept" and "conception". In order to illustrate this distinction Dworkin uses the example of the institution of courtesy in an imaginary community.[92] In this community, people share the concept of courtesy and agree, at the most general level, that courtesy stands for "respect". There are major differences of opinion, however, about the correct interpretation of what respect requires in different circumstances (does it mean showing respect to people of a higher rank or does it require a more egalitarian interpretation, does it require a different treatment of man and women or does it require an equal treatment of both etc.). There are, in other words, different conceptions of the institution or concept of courtesy. The parallels between Dworkins's example and the concept of sovereignty are clear: there is, at the most general level, agreement that sovereignty stands for "independence" (and "equality" and "freedom"). If it comes to the application of these general notions, however, there are completely different conceptions of what the concept of sovereignty requires in individual cases. Interpretations of sovereignty con-

92. Dworkin (note 38), pp. 90–96.

stantly oscillate between the factual and the normative aspects of sovereignty as well as between the idea that states are free *to* act and the idea that states have a protected freedom *from* actions of other states. In order to decide which of the competing conceptions of sovereignty is correct in a concrete case, it is necessary to rely on specific rules and principles valid under international law. This does not mean, however, that sovereignty is thereby reduced to these rules and principles. It remains relevant as a general concept which structures legal discourse and which, in its turn, is kept alive by the enduring legal disputes about its proper meaning.

5. *Sovereignty and non-intervention: the regulation of the use of force*

The principle of non-intervention is generally regarded as the logical counterpart of the concept of state sovereignty. It would indeed be difficult to make sense of concepts like "sovereignty" or "independence" if these were not accompanied by some idea of the illegality of violations of this independence; by the notion that intervention in internal affairs is prohibited. The naturalistic school, therefore, has argued that the principle of non-intervention is a dictate of right reason as well as an *a priori* without which an international society of sovereign states would be impossible.[93] In the same fashion, Vattel argued that:

> It clearly follows from the liberty and independence of Nations that each has the right to govern itself as it thinks proper, and that none of them has the least right to interfere in the government of another. Of all the rights possessed by a Nation, that of sovereignty is doubtless the most important . . .[94]

93. R. Vincent, *Non-Intervention and International Order* (Princeton, Princeton University Press, 1974), p. 22. Note, however, that Grotius did not have a separate concept of intervention, apart from a concept of war. For a general discussion of the evolution of the term "intervention" *see* P. Winfield, "The History of Intervention in International Law", *British Yearbook of International Law*, 1922–1923, 130–149. *See also* Ann Van Wijnen Thomas, A.J. Thomas, *Non-Intervention, The Law and Its Import in the Americas* (Dallas, Southern Methodist University Press, 1956); A. Carty, *The Decay of International Law? A reappraisal of the limits of legal imagination in international affairs* (Manchester, 1986).

94. E. de Vattel, *The Law of Nations or the Principles of Natural Law* (1758), translation in *The Classics of International Law*, (Washington D.C., Carnegie Institution of Washington, 1916), Book II, Chapter IV, para. 54.

In more recent times, the International Court of Justice has reaffirmed the relation between state sovereignty and the principle of non-intervention. In the *Nicaragua* case, the Court stated that that "the principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference". Moreover, the Court argued that the principle of non-intervention is part of customary law and that a prohibited intervention "must be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely . . ."[95]

The fact that non-intervention can be regarded the corollary of state sovereignty does not mean that the prohibition of intervention can be used to fix the meaning of sovereignty; as if sovereignty could be defined in terms of a given, clear rule of non-intervention. The concept of non-intervention is – no less than the concept of sovereignty – a contested concept. In his study on the history of intervention in international law, Winfield characterizes the subject of intervention as "one of the vaguest branches of international law. We are told that intervention is a right; that it is a crime; that it is the rule; that it is the exception; that it is never permissible at all."[96]

To a considerable extent, the fluidity of the concept of intervention is the result of the fact that non-intervention is so closely bound up with the concept of sovereignty. In the foregoing sections, it has been argued that the concept of sovereignty has (at least) two faces. On the one hand, it is a principle justifying state action; it gives states a legitimate freedom to act. On the other hand, sovereignty functions as a safeguard against actions of other states; it gives states a legitimate claim to freedom from actions of others. These two interpretations of sovereignty have had a significant impact on the understanding of the concept of intervention throughout history.

An illustration of this impact is the development of the regime regulating intervention by means of armed force.[97] In the 18th and 19th century, the right to use force was considered to be an attribute of state sovereignty; a right which is *inherent* in the concept of sov-

95. *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits), *ICJ Reports* (1986), p. 14.

96. Winfield (note 93), 130.

97. Partly, this form of intervention overlaps with the term "dictatorial intervention": intervention which involves the threat or use of force "in case the dictates of the intervening power are disregarded". T.J. Lawrence, *Principles of International Law* (London, MacMillan, 1913), p. 124.

ereignty. Consequently, acquisition of territory by means of conquest constituted a valid title to territory in international law.[98] The "inherent right" of sovereign states did not mean that no possible justifications for – and limitations on – the use of force were formulated in legal doctrine or state practice. In legal doctrine, limits on the right to use force were based on natural law or on the "inherent rights' of states. Sometimes this led to statements which are, for modern readers at least, difficult to reconcile. Von Martens, for example, declared that states have an inherent right to territorial sovereignty, while "foreign nations have not the least right to interfere in arrangements which are purely domestic".[99] At the same time, however, he recognized a natural right to augment the power of the state by external aggrandizement,[100] a right of states to intervene on the just side in civil wars, and the right to intervene on grounds of self-preservation.[101] In international practice, governments generally refrained from relying on an unrestricted right to use force. Rather, they attempted to justify the use of force on grounds like self-preservation, necessity, national security, the balance of power or the failure of pacific means of dispute settlement.[102] These grounds, however, were very broad, while it was left to the state resorting to force to determine whether they applied in a particular case. None of these grounds superseded the idea that the decision to resort to armed force is the prerogative of the sovereign state.

The attitude towards the legality of the use of force changed significantly after the First World War. The destructiveness of modern wars and their impact on society,[103] the growing importance of constitutional democracy and the free press as well as the emergence of the principle of popular self-determination contributed to the development of a norm prohibiting the use of force in international

98. *See* for an analysis of the doctrines in the 18th and 19th century especially: I. Brownlie, *International Law and the Use of Force by States* (Oxford, Clarendon, 1991), pp. 14–51. *See also* P. Malanczuk, *Humanitarian Intervention and the Legitimacy of the Use of Force* (Amsterdam, Spinhuis, 1993).

99. G.F. von Martens, *The Law of Nations: Being the Science of National Law, Covenants, Power &c, Founded upon the Treaties and Customs of Modern Nations in Europe* (London, Cobbett, 1829), Book III, Chapter II, section 1.

100. *Ibid.*, Book VI, Chapter VIII, section 1.

101. *Ibid.*, Book III, Chapter II, section 1.

102. *See* Brownlie (note 98), pp. 14–51.

103. For an analysis of the transformation war after 1900 *see* K.J. Holsti, *The State, War and the State of War* (Cambridge, Cambridge University Press 1996).

relations. It is not necessary to discuss this development in detail here.[104] Neither is it necessary to discuss here the exceptions on the prohibition on the use of force, the widely accepted exceptions of self-defence and authorization by the Security Council or the controversial exception of humanitarian intervention. For the purposes of this chapter, it is sufficient to recall that a prohibition on the use of force developed in the period 1928–1939,[105] was laid down in Article 2(4) of the UN Charter and has been confirmed in customary law, UN Resolutions as well as international jurisprudence.[106] In current international law, the norm prohibiting the use of force in international relations has acquired the status of a *ius cogens* norm: a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is possible.[107]

However, the fundamental change from an international society which recognizes the inherent right of states to wage war to an international society which recognizes the prohibition on the use of force as a peremptory norm did not reflect a decline of the concept of

104. For an analysis *see* Brownlie (note 98); H. McCoubrey, N.D. White, *International Law and Armed Conflict* (Dartmouth, Aldershot, 1992).

105. The prohibition on the use of force was laid down in Article 1 of the Kellogg-Briand Pact which condemned recourse to war and renounced it as an instrument of national policy (*United States Statutes at Large*, Vol. 46, Part 2, p. 2343). The prohibition could also be derived from the practice of states as Brownlie (note 98, p. 108) concludes: "If the legal materials and especially the diplomatic correspondence of the years between 1928 and 1939 are examined, it becomes clear that nearly every government in existence had at some time estopped itself from denying the illegality of resort to force except in self-defence".

106. Article 2(4) UN Charter determines that "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations". Among the several UN Resolutions dealing with the threat or use of force the following are especially worth mentioning: Declaration on Principles of International Law, GA Resolution 2625 (XXV), UN Doc. A/5217 (1970); Declaration on the Inadmissibility of Intervention in Domestic Affairs and Protection of their Independence and Sovereignty, GA Resolution 2131 (XX), 21 December 1965; Resolution on the Definition of Aggression, GA Resolution 3314 (XXIX), 1974. In the *Nicaragua* case, the International Court of Justice recognized the prohibition on the use of force as a norm of international customary law and concluded moreover that GA Resolutions 2625 (XXV) and 3314 (XXIX) reflect valid customary international law. *See Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *ICJ Reports* (1986), paras. 187 to 201.

107. This formulation of a *jus cogens* norm is derived from Article 53 of the Vienna Convention on the Law of Treaties (*International legal Materials*, 8, 1969, p. 679. For a discussion of the *jus coges* status of the prohibition of the threat or use of force *see* A. Cassese, *International Law in a Divided World* (Oxford, Clarendon Press, 1990).

state sovereignty. On the contrary, documents like the UN Charter or Resolution 2625 (reflecting customary law)[108] not only formulate the prohibition on the use of force, but also stress that the basis of this norm is the principle of sovereign equality. Resolution 2625 explicitly states that the inviolability of the territorial integrity and the political independence (and thus the right to be free from outside armed intervention) is *included* in the notion of state sovereignty. Where 19th century doctrine regarded the *right* to use force as inherent in the concept of state sovereignty, contemporary international law holds that the *prohibition* to use force is included in the concept of state sovereignty. This shift in international law demonstrates the close relation between conceptions of state sovereignty and conceptions of lawful intervention: a more "protective" interpretation of state sovereignty increases the number of actions that count as illegal intervention.

6. *Epilogue*

One of the greatest transformations in (Western) political thought has been the development of the idea of the state as an abstract (legal) person, comprising both ruler and ruled and yet distinct from them.[109] The abstract nature of the state makes it difficult, if not impossible, to answer the question what state sovereignty *is*. There is not something in reality simply corresponding with sovereignty; something which is so to say mirrored by the concept of sovereignty. Rather than a concept describing a pre-existing reality, sovereignty is a scheme of interpretation, used to organize and structure our understanding of political life. Instead of looking for a corresponding reality, therefore, it is more fruitful to reconstruct the use and function of the concept of state sovereignty in international (legal) discourse.

In this chapter, two main uses or functions of sovereignty have been discussed. The concept of sovereignty is used to attribute a status (the status of "sovereign and independent statehood") and to endow entities with this status with certain basic rights and powers (their "sovereign rights"). In this respect, the concept of state sovereignty

108. *See supra* note 105.
109. Van Creveld (note 1).

in international life is akin to the concept of individual liberty in the domestic context: both take as their starting point the existence of independent and equal agents possessing certain basic rights, and able to create new rules through their own free will. The similarities between state sovereignty and individual liberty cannot be used, however, as an argument that state sovereignty is an anti-social concept which places states outside international law and international society. State sovereignty does not only endow states with certain rights and powers, but also puts them under an obligation to respect the rights and powers of other states. The scope and meaning of state sovereignty, therefore, is bound up with the development of international law as a whole.

Just like the concept of individual liberty, state sovereignty has two sides: it legitimizes freedom of action (it gives a right to act) and simultaneously limits the freedom of action (it puts states under an obligation to respect the rights of other states). The two faces of sovereignty have led to continuing debates on the question what the institution of sovereignty requires in particular circumstances. In section three and four of this chapter, several examples of these continuing debates have been discussed: the debates on recognition of states, the discussion on the right to use force and the discussion on the exercise of universal jurisdiction. The recurring controversies should not be interpreted as an illustration of the uselessness or redundancy of the concept of sovereignty. On the contrary, the debates concerning the proper interpretation of sovereignty demonstrate its enduring importance. As long as the participants in international legal discourse agree that they are arguing about the most appropriate way to interpret the concept of sovereignty (or "independence"), the concept of sovereignty flourishes.

The emphasis on the endurance of sovereignty as an interpretive concept is not meant as a denial of the importance of developments like globalization, international (global) governance or the fragmentation of states. It is beyond doubt that these developments have a profound impact on international society and have led to discourses which compete with the state sovereignty discourse.[110] These developments have not (yet) led, however, to the complete irrelevance of the sovereignty discourse. Rather, many of the developments have

110. *See* for a discussion of this point e.g. Scholte (note 10).

led to renewed debates on the most appropriate way to understand "state sovereignty" and thus contributed to its endurance. Examples can be found in the current debates about universal jurisdiction and state immunity, about humanitarian intervention[111] or about the scope of self-defence against terrorist attacks (the "inherent" right to defend a sovereign state vs. the "inherent" right of sovereign states to territorial integrity and political independence). Other examples are the debates on the proper function of states in international organizations[112] or the renewed debates on the criteria for sovereign statehood and the juridical significance of recognition of states.[113] In all these examples non-state actors and universal values play an important role. This indicates that phenomena like globalization, the articulation of universal values or international governance have not only given rise to alternative (and important) discourses. They have also given new impetus to the age-old debate on the question what it is to be a sovereign state.

111. In this context, the much debated report of the International Commission on Intervention and State Sovereignty is worth mentioning. The Report was titled "The Responsibility to Protect" and emphasized that sovereignty implies responsibility and that the primary responsibility for the protection of human rights lies with the state itself.

112. In this context Schrijver (note 26), 96, has referred to the 1997 *World Bank World Development Report* (Washington, 1997) which explicitly recognizes the central role of the state in social and economic development.

113. Sean Murphy, "Democratic Legitimacy and the Recognition of States and Governments", 48 *The International and Comparative Law Quarterly*, 1999, 545; C. Hillgruber, "The Admission of New States to the International Community", 9 *European Journal of International Law*, 1998, 491; A. Cassese, *Self-determination of peoples, a legal reappraisal* (Cambridge, Cambridge University Press, 1995).

CHAPTER SIX

GLOBALIZATION AND THE INTERNATIONAL CRIMINAL COURT: ACCOUNTABILITY AND A NEW CONCEPTION OF STATE

Rod Jensen*

1. *Introduction*

Much scholarship has taken place in the field of international relations theory directed at identifying and understanding the impact of expanded global interrelations in the modern era. The emergence of phenomena such as "globalization" and "global governance" has excited areas of intensive study, providing new conceptual frameworks through which to explore international relations.

These frameworks challenge assumptions made in international law about the nature of the state and its location in the contemporary world. They invite international lawyers and those interested in international law to critique their assumptions about the state and to ultimately "develop different conceptions of state",[1] conceptions that might provide a richer understanding of the normative relationship between international law and the sovereign state.

In this regard, international law has traditionally been viewed as a study of the relationship between states. Therefore, over time international law has developed in accordance with a state-centric model, creating principles like sovereign equality, sovereign immunity and the principle of non-intervention, to accommodate and protect the

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1. A. Slaughter *et al.*, "International Law And International Relations Theory: A New Generation Of Interdisciplinary Scholarship", 92 AJIL, 1998, 378.

sovereign interests of states. However, international relations theorists have questioned the appropriateness of an ongoing commitment to a state-centric model. They argue that a more fluid conception is required in order to recognize the existence of other important actors on the stage of international relations and to locate those actors in the business of international affairs.

Through the state-centric model states have long been able to control developments in international law and the norms and rules associated with those developments. Where developments in international law have challenged the state-centric model, states have been able to control the practical implementation of those developments. For example, developments in international criminal, humanitarian and human rights law over the course of the last century placed an increasing importance upon the individual as a subject of international law. States controlled these developments by making commitments to the individual at an international level through conventions, treaties and international agreements, which could be tolerated but not necessarily honoured at a national level. The consequence was that even the most egregious violations of international criminal, humanitarian and human rights law often went unpunished.

However, as the 20th Century progressed, the world community sought greater accountability for such violations. New ideals such as "global governance" and "global democracy" formed the backdrop to the creation of the International Criminal Court (ICC), the world's first permanent international criminal court, capable of bringing to justice to the perpetrators of the most serious crimes of international concern where states are unwilling or unable to do so.

The creation of a permanent international criminal court had been debated in the early years after the Second World War and the idea remained alive after that time but it suffered at the hands of the Cold War, failing to break through the bipolar interests of the permanent members of the United Nations Security Council. In the 1990s the Security Council, responding to humanitarian crises arising from conflicts in the Former Yugoslavia and Rwanda, established two separate *ad hoc* tribunals, whose mandate was to try those alleged to have committed grave breaches of humanitarian law during the course of those conflicts.[2] Despite being specific, *ad hoc* responses, the

2. S.R. Ratner, J.S. Abrams, *Accountability For Human Rights Atrocities In International Law* (Oxford, Clarendon Press, 1997), pp. 165–167.

creation of these tribunals served as a catalyst, reinvigorating the call for a permanent international criminal court. At a conference in Rome in 1998 states debated the possible establishment of a permanent international criminal court.[3] On 17 July 1998 the Conference adopted the Rome Statute of the International Criminal Court.[4] In accordance with Article 126, the Statute entered into force on 1 July 2002 and formally established the ICC.[5]

This chapter examines the creation of the ICC in the light of insights offered by international relations theory. It argues that the creation of the ICC at this point in history can be accounted for, in part, by the processes of globalization, which effectively set the stage for the creation of a new conception of state, a conception in which states might be willing to expose their domestic criminal justice systems to external review and intervention by the ICC.

The chapter advances through four parts. First, the concept of sovereignty is examined from the perspective of international relations theory. This examination traces the origins of the sovereign state and serves to introduce part two, which is an examination of the process of globalization from the perspective of international relations theory. Taking this treatment into account, part three argues that international law has itself been evolving over the course of the last century through the agency of developments in international criminal, humanitarian and human rights law. For practical reasons these developments failed to bring accountability to many of the perpetrators of humanitarian and human rights violations. Part three goes on to examine the reasons for that failure and to identify how the

3. United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, Italy, 15 June to 17 July 1998.

4. The Rome Statute of the International Criminal Court is a multilateral treaty; *see* UN Doc. A/CONF.183/9 (1998) [hereinafter "Rome Statute" or "Statute"]. A complete, corrected text of the Rome Statute can be viewed at <http://www.un.org/law/icc/statute/romefra.htm>. For detailed commentary on the conference and the Statute *see* R.S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (The Hague, Kluwer, 1999) and O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers Notes, Article by Article* (Baden-Baden, Nomos Verlagsgesellschaft, 1999).

5. The crimes within the subject-matter jurisdiction of the ICC are the crime of genocide, crimes against humanity, war crimes and the crime of aggression; *see* Rome Statute, Article 5, paragraph 1 (a)–(d). However, the ICC will not exercise jurisdiction over the crime of aggression until ". . . a provision is adopted . . . defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime." (Rome Statute, Article 5 (2)).

processes of globalization have provided for the possibility of overcoming it. Finally, in part four, the ICC is situated in these developments and an examination is made of the potential of the ICC to bring accountability to the perpetrators of the most serious crimes of international concern.

2. *The sovereign state*

The origin of the sovereign state is commonly associated with the signing of the treaties of Westphalia in 1648, which marked the formal end of the religious Thirty Year War in Europe.[6] To many, the significance of this moment in history is that it set the stage for the emergence of a system of independent, sovereign states, known in both international relations theory and international law as the Westphalian system. Many argue that the peace secured by the treaties of Westphalia provided a platform for a modified form of relations between states. Put succinctly, by "asserting the prerogatives of the German princes against the Holy Roman Emperor, and of secular rulers in general against the interference of the Catholic Church, it registered a heavy decline of the hierarchical and "transnational" principles which had been central to the medieval geopolitical organization of Christendom".[7] This decline of hierarchical and transnational principles allowed for a process of change in which the secular interests of states could inform the state's existence without reference to the Church. As a consequence, a transition was made from "Christendom to reason of state and balance of power as the basic cognitive conceptualizations informing the actual behaviour of European rulers".[8]

This was not an instantaneous process. The treaties of Westphalia mark a significant point in the process of change but they do not necessarily mark the moment of transformation. While the treaties of Westphalia are often given "iconic significance",[9] it is apparent

6. M. Mozaffari, "Mega Civilization: Global Capital and the New Standard of Civilization", in Krishna-Hensel, (ed.), *The New Millennium: Challenges and Strategies For A Globalizing World* (Aldershot, Ashgate Publishing, 2000), p. 37.

7. J. Rosenburg, *The Follies of Globalization Theory* (London, Verso, 2000), p. 28.

8. S.D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton, Princeton University Press, 1999), p. 82.

9. Rosenburg (note 7), p. 28.

that arguments can be found "for pushing the key date of transformation backwards or forwards a century or so".[10] However, while not everyone agrees about the significance that ought to attach to the transformational qualities of the treaties themselves, it is generally agreed that the period surrounding the treaties is associated with a major transformation in the European international system. At the heart of this transformation was a shift from religious authority to secular authority.

The consequences of this shift inform the very nature of the state itself. In the absence of religious authority the sovereign can claim the moral and political authority to rule the people within the territory of a given state. In addition, the sovereign becomes responsible for the well-being of the nationals within the territory and for their protection.[11] Through this process each separate state becomes insulated from the states surrounding it, creating its own national identity in pursuance of its own interests. The wider ramification of this process of insulation is that in "the absence of some transnational, mutually agreed set of moral principles of the sort characterized by Christendom in the medieval world", there no longer exists any moral basis for the intervention of one state in the domestic affairs of another.[12] As a consequence, over the course of the seventeenth and eighteenth centuries a system of states began to develop in which there was a mutual recognition between states, so that for the purposes of international relations "each state was the sole political authority with exclusive possession of a defined territory".[13]

The political structure of this system was "necessarily anarchic"[14] because each state claimed independence from others. There existed no central repository of authority between the states and each was free to pursue its own national interests within the confines of its own territory. As a consequence, this approach created a world "organized and divided into domestic and foreign realms – the "inner

10. B. Buzan, R. Little, "Beyond Westphalia? Capitalism after the 'Fall' ", 25 *Review International Studies* (Special Issue), 1999, 89.

11. M. Wind, "Legal Globalization and the New Human Rights Regime: Human Rights in a Post-Sovereign World", in Krishna-Hensel (note 6), p. 270.

12. R. Plant, "Rights, Rules and World Order", in Desai, Redfern, (eds.), *Global Governance: Ethics And Economics Of The World Order* (London, Pinter, 1995), p. 192.

13. P. Hirst, G. Thompson, *Globalization in Question* (Cambridge, Polity Press, 1996), p. 171.

14. Buzan, Little (note 10), 90.

world" of territorially bounded national politics and the "outer world" of diplomatic, military and security affairs".[15] Indeed, it has been observed that by the early nineteenth century this system of states had been fully articulated such that "territorial sovereignty, the formal equality of states, non-intervention in the domestic affairs of other recognized states and state consent as the basis of international legal obligations became the core principles of international society".[16]

This approach allowed states to exercise full authority over activities occurring within their own borders and to structure their relationships with their citizens independent of outside forces.[17] This led to the recognition that the autonomy of the state is a precondition for "an effective monopoly of power within".[18] This monopoly of power informs the relationship between the ruler and the ruled within the state by removing from consideration any policies or beliefs that are external to the state. Even in the modern democratic state it is recognized that "state autonomy refers to the capacity of state representatives, managers and agencies to articulate and pursue their policy preferences even though these may on occasion clash with the dictates of domestic and international social forces and conditions".[19]

In this model each state has a separate sovereign existence in the sense that each is independent of other states within the system. This independence has many concomitants. Among them is state autonomy, which recognizes the entitlement of the political authority within the state to achieve its policy objectives free from external intervention within the confines of a bounded territory.[20] So while state sovereignty and state autonomy are related, they are not at all the same thing.

International law has developed in a manner that acknowledges and respects the difference between state sovereignty and state autonomy. Over time, international law has reified the state by seeing it as a "thing" capable of interaction with other states. This process of reification is demonstrated by the existence of a series of qualifications that a state must possess before it can be successfully recognized as a state in international law. While some debate still exists over the

15. D. Held *et al.*, *Global Transformations: Politics, Economics and Culture* (Cambridge, Polity Press, 1999), p. 32.
16. Held *et al.* (note 15), p. 37.
17. *See* generally, Krasner (note 8), p. 73.
18. Hirst, Thompson (note 13), p. 172.
19. Held *et al.* (note 15), p. 29.
20. Hirst, Thompson (note 13).

exact nature and extent of these qualifications, international practice suggests that a state must possess at least the following qualifications in order to be recognized as a state in international law: a permanent population, a defined territory and a government (that can exercise effective control over the territory and population).[21] If the state possesses these qualifications then it follows, pursuant to the declaratory theory, that the entity "is a state with all international rights and duties and other states are obliged to treat it as such".[22]

This approach does not encroach upon state autonomy because it does not call for any assessment to be made of the quality of power that is being exercised within the territorial boundaries of the state. Each of the qualifications relates to objective, factual matters and these do not compel an examination of the internal political machinations of the state. The only requirement is that the qualifications exist. If they do then the state is capable of being recognized, under the prevailing theory of international law, as a state that is both sovereign and autonomous.

The challenge that the processes of globalization present to this model of statehood can be seen in the following comment. It has been observed that:

> Today, virtually all nation-states have gradually become enmeshed in and functionally part of a larger pattern of global transformations and global flows. Transnational networks and relations have developed across virtually all areas of human activity. Goods, capital, people, knowledge, communications and weapons, as well as crime, pollutants, fashions and beliefs, rapidly move across territorial boundaries. Far from being a world of "discrete civilizations", or simply an international society of states, it has become a fundamentally interconnected global order, marked by intense patterns of exchange as well as by clear patterns of power, hierarchy and unevenness.[23]

The "interconnected global order" contemplated by this observation must be reconciled with the existence of the sovereign and autonomous

21. P. Malanczuk (ed.), *Akehurst's Modern Introduction To International Law*, 7th ed. (London, Routledge, 1997), p. 75. The Montevideo Convention on Rights and Duties of States, from which Malanczuk's list is drawn, adds a fourth qualification: the capacity to enter into relations with other states, however, as Malanczuk observes, this qualification is not generally accepted as necessary (p. 79).

22. Malanczuk (note 21), p. 83: the declaratory theory holds that "the existence of a state or government is a question of pure fact, and recognition is merely an acknowledgement of the facts". Malanczuk notes that the prevailing view in international law is that "recognition is declaratory" (p. 84).

23. Held *et al.* (note 15), p. 49.

state that emerged as the child of the Westphalian system. The reconciliation of these two apparently distinct paradigms is the challenge that has invited recent speculation about the impact and consequences of the processes of globalization.

3. *The processes of globalization*

The Westphalian system has created a vision of states that revolves around state sovereignty and concomitantly, state autonomy. Attending this vision is an emphasis on territorial exclusivity and a desire to reify the state in order to acknowledge its ability to engage in relations with other states. This vision and its attendant characteristics create a picture of the state as a "closed-system".[24] Consequently, any external process or influence that interacts with the state will be seen to be in someway impinging upon it. This is the difficulty that the processes of globalization bring to the conception of state brought about by the Westphalian system. Globalization recognizes the existence of processes that demonstrate a growing interconnectedness. These processes arise from the interaction of a diverse collection of transnational networks and relations involving governments, corporations, organizations, groups and people. This in turn has the potential to influence economic, social, political and cultural identities by presenting new patterns and possibilities of association between these networks and among these relations. Through this interconnectedness, forces are created that threaten the power of states to maintain their traditional sovereign and autonomous existence. The extent to which these forces will create changes in the conceptual identity of states is the essence of the globalization debate. In this regard, three distinct views can be discerned.

First, for some international relations theorists, globalization is primarily an economic phenomenon, giving rise to an increasingly integrated global economy.[25] According to this view, the state is in a period of decline because its ability to affect outcomes in a manner that reflects its preferences is being lost to the impersonal forces of

24. C. Ansell, S. Webber, "Organizing International Politics: Sovereignty and Open Systems", 20 *International Political Science Review*, 1999, 73, at 74.
25. Held *et al.* (note 15), p. 4.

world markets.[26] These markets create their own mechanisms of authority, which leave the state as "just one source of authority among several, with limited powers and resources".[27] Within this view it becomes essential to look beyond the state in order to identify the allocation and sources of power that are affecting outcomes. For this reason the reification of the state serves as an impediment to the globalization debate because it disguizes the identity of those actors within the state who are allocating values and taking political decisions.

A second view argues that the external environment induced by the global economy through international markets and actors in those markets, like transnational corporations and international financiers, does not in fact represent a threat to the existence of the state. This view argues that national governments (or political leaders, or rulers) remain free to choose how they will respond to the environment induced by the global economy. Changes in the global economy are viewed as external to the state and while they may constrain the choices that the rulers of states make, they do not remove the ability of the rulers to exercise choice.[28]

According to this realist perspective it is the decisions of rulers within states that dictate the nature and extent to which those states will respond to opportunities and choices presented by the emerging forces of globalization. This perspective maintains that there "is no evidence that globalization has systematically undermined state control or led to the homogenization of policies and structures. In fact, globalization and state activity have moved in tandem".[29] The conceptual foundation for this perspective rests on an understanding that sovereignty should be viewed not as an indivisible whole but rather, as a gathering of rules and characteristics that can be "unbundled".[30] Once unbundled a landscape is revealed in which it is the rulers of states who choose whether to obey or contravene conventional international norms and rules. The foundation for their choice is the optimal policy in any given situation based on an assessment of the degree to which that policy will secure for them "resources

26. S. Strange, *The Retreat of the State* (Cambridge, Cambridge University Press, 1998), p. 4.
27. Strange (note 26), p. 73.
28. S.D. Krasner, "Problematic Sovereignty", in S.D. Krasner (ed.), *Problematic Sovereignty* (New York, Columbia University Press, 1999), p. 11.
29. Krasner (note 8), p. 223.
30. Krasner (note 28), p. 6.

and support (both material and ideational)", which in turn will enhance their chances of remaining in power.[31] With the authority structure of the state so firmly tied to the choices made by rulers, the practice of international relations therefore becomes a form of "organized hypocrisy" because rulers are free to compromise the principles and norms associated with the Westphalian system in order to pursue their own policy preferences.[32]

This view of the effects of globalization differs from the first view. In the second view, the autonomy of national governments and the sovereignty of the state remain strong, and therefore resistant, to the effects of economic internationalization.[33] However, both views share the common goal of seeking to understand the allocation and sources of power within the state and to this extent each challenges the reified vision of state that has emerged from the Westphalian system.

Alongside these two distinct views of the effects of globalization can be placed a third. This view seeks to move the state beyond traditional conceptions that label it as a closed-system, by exploring the extent to which globalization presents an opportunity to and reinvigorate the contemporary political terrain.[34] Put succinctly this view argues that globalization "has encouraged a spectrum of adjustment strategies and, in certain respects, a more activist state. Accordingly, the power of national governments is not necessarily diminished by globalization but on the contrary is being reconstituted and restructured in response to the growing complexities of processes of governance in a more interconnected world".[35] At the heart of this claim is a challenge to the implicit assumption, common to the other views, that there must exist "a zero-sum relationship between states and globalization – that what global processes gain, the state necessarily loses".[36] Such an assumption is founded upon a traditionally Westphalian appreciation of the system of states being an anarchic constellation of exclusively sovereign, autonomous bodies lacking any legitimate forms of central governance.[37]

31. Krasner (note 8), p. 24.
32. *Ibid.*, p. 5.
33. Held *et al.* (note 15), p. 6.
34. D. Held, A. McGrew, "The End of the World Order? Globalization and the Prospects for World Order", 24 *Review International Studies* (Special Issue), 1998, 243.
35. Held *et al.* (note 15), p. 9.
36. Ansell, Webber (note 24), p. 75.
37. *Ibid.*, p. 74.

By applying an open-system approach to this model some commentators argue that the state can be understood less in terms of possessing a territorially defined border and more in terms of possessing multi-dimensional boundaries that permit the simultaneous existence of different levels of power and authority. Within these levels, power and authority is shared among public and private agencies at the local, national, regional and global levels, with the state responding to the challenges this presents by developing adjustment strategies.[38] Compared with the other views, this open-systems analysis argues as follows:

> From an open-systems point of view, new forms of international cooperation do not imply the erosion of sovereignty. Realists, of course, make such an argument, but their conception of sovereignty forces them to argue at the same time that states control international organizations. In contrast, the open-system view suggests that sovereignty may remain a basic structural principle around which the international system evolves, though it is likely to recede in importance relative to other principles of structuring international relations. We can expect the role and meaning of sovereignty to evolve, but that doesn"t mean it will erode.[39]

At stake in this approach is the importance of sovereignty as a "structural principle" around which the emerging international system will evolve. If the temptation to apply a zero-sum equation to the relationship between states and globalization is avoided it remains possible, within this model, to envisage a world in which sovereignty remains an important feature of the state, albeit in a modified or evolved form. An important aspect of each of the three outlined views is the conceptualization of how power is allocated within the state and further, the effects of globalization on that allocation. Each view is grappling with the same issue and yet each view appears to arrive at a different conclusion.

It was earlier observed that in the period surrounding the treaties of Westphalia there was a tangible shift in the recognition of the source of power within the state, from the Church to a secular system emphasizing the "reason of state". Over time, this allowed a system of states to evolve that did not require states to undertake a detailed examination of the internal political machinations of other states in order to interact with them. As a consequence attitudes towards the

38. Held *et al.* (note 15), p. 9.
39. Ansell, Webber (note 24), p. 86.

sovereignty of states gave rise to strong presumptions in relation to the autonomy of states and in particular, the autonomy of governments within states to articulate and implement their own political objectives, without, for the most part, any threat of external intervention.

The practical consequences of this development can seen in the treatment of human rights over the course of the last century. The development of the principle of non-intervention, as part of the evolving articulation of the properties of the Westphalian system, sits in contradistinction to rules in international law relating to the protection of human rights, which invite all states to recognize certain universally shared fundamental principles of human dignity. The two have co-existed since the evolution of human rights standards in the period post-1945, yet since that time situations have often arisen that have required some measure of protection to be afforded to human rights that are being violated by the actions of a state or states. In many of these situations the principle of non-intervention has stood in the way of the formulation of an adequate international or national response to the violation. States external to the violation have resisted intervening on the basis that they do not want to be seen to be offending the principle of non-intervention, while the violating state has engaged in the violation despite its signaled commitment to a universal standard of human rights.

For the purposes of this observation, the very existence of universal human rights standards challenges the sovereignty of states because the standards claim to apply across all territorial borders. States that commit to these standards, through the United Nations system, for example, are compromising their sovereignty by acknowledging the existence of these standards. However, by so doing they do not necessarily preclude the ability to violate their commitment at some future point in time. While the state's sovereignty is compromised, its autonomy to instigate, permit or encourage human rights contraventions rests unchallenged. As a consequence, human rights abuses have often been tolerated and even ignored at an international level. The impact of the existence of the human rights standards on the state's sovereignty is met without any net effect on its autonomy to act in a manner inconsistent with those standards.

International relations theorists have opined that the lack of any net effect is attributable to an absence of authority structures at an international level capable of enforcing human rights standards in a manner that could challenge the autonomy of states to act contrary

to those standards.[40] Recent years however have witnessed an increasing trend at an international level to challenge the paradigm of non-intervention. The formation of the international criminal tribunals to try alleged breaches of humanitarian law arising from conflicts in the former Yugoslavia and Rwanda, collective international military action in response to allegations of widespread breaches of humanitarian law in various parts of the globe and even an attempt to extradite a former head of state from one foreign jurisdiction to another to face allegations of having committed crimes against humanity (the matter of Pinochet) are all examples of such challenges. So too is the formation of the ICC, which purports to be an authority structure at an international level capable of enforcing international criminal rules developed in relation to the crime of genocide, crimes against humanity, war crimes and the crime of aggression.

Developments like these coincide with the globalization debate and therefore invite the suggestion that they are a response to it. However, before locating these developments in the globalization debate it is necessary first to locate them more generally in the area of developments in international criminal, humanitarian and human rights law over the course of the last century.

4. *Developments in international criminal, humanitarian and human rights law*

Traditionally, international law has been concerned with governing relations between states. As a consequence, individuals within the territorial boundaries of states enjoyed only such protection as the state of their nationality was willing to extend to them and they had neither rights nor recourse on an international plane against abuses committed upon them by their own governments.[41]

Over time, through social struggles like the American and French Revolutions, constitutional limitations on the absolute authority of rulers within states over their subjects or citizens developed. A significant aspect of this development was that it associated the state

40. Krasner (note 8) p. 6; Held *et al.* (note 15), p. 442.

41. T. Buergenthal, "International Human Rights in an Historical Perspective", in Symonides (ed.), *Human Rights: Concepts and Standards* (Aldershot, Dartmouth Publishing, 2000), p. 5.

with the individual by making a direct connection between the sovereign and the people, which connection was founded upon the existence of certain inalienable rights.[42] As a consequence, national governments assumed responsibility for preventing the violations of these rights and also for punishing those who committed such violations within their territory. However, while constitutional limitations afforded individuals within certain jurisdictions a degree of protection against arbitrary state action, they did not necessarily offer any wider protection to the individual at an international level. As a consequence, until the conclusion of the Second World War in 1945, the only active subjects of international law were states.[43]

This perception changed with the advent of the international military tribunal sitting at Nuremberg, which was formed to try the major war criminals of the European Axis. The individual became a subject of international law through the tribunal's observation that individuals could be held accountable for crimes against international law and could be punished accordingly.[44] This observation raised the profile of the individual as a subject of international law and provided a springboard for the development of international human rights law, as "much of the international community came to conclude that a state's treatment of its citizens in peacetime was appropriate for general international regulation".[45]

Further developments in international law in the post-war years built upon the principle of individual accountability that had emerged from the Nuremberg trials. The principle was utilized in treaties that dealt with humanitarian law and some areas of human rights law. For example, the Geneva Conventions, dealing with humanitarian law, and the Genocide Convention, dealing with human rights law, both established individual international criminal responsibility for violations of their provisions.[46] This further cleared the way for individuals to be held accountable at an international level for violations

42. R. Falk, *Human Rights Horizons* (New York, Routledge, 2000), pp. 68–72.

43. N.H. Jorgensen, *The Responsibility of States for International Crimes* (Oxford, Oxford University Press, 2000), p. 139.

44. *See* generally G. Triggs, "National Prosecutions of War Crimes and the Rule of Law", in Durham, McCormack (eds.), *The Changing Face of Conflict and the Efficacy of International Humanitarian Law* (The Hague, Kluwer Law International, 1999), p. 176.

45. Ratner, Abrams (note 2), p. 6.

46. *Ibid.*, pp. 20–21. The Genocide Convention contemplated, in Article 6, the creation of an international penal tribunal to try allegations of genocide but such a tribunal was never formed.

of humanitarian and human rights law that occurred within the territory of states.

However, despite these developments efforts to enforce violations of humanitarian and human rights law focused mainly on the behaviour and obligations of governments.[47] State sovereignty and state autonomy continued to offer, in the absence of any effective international enforcement mechanism, a shield behind which states and individual perpetrators could find protection and hide their misdeeds. Within this system "order and not justice" remained at the centre of attention in relations between states.[48] Within this climate states were able to make outward commitments to humanitarian and human rights standards but were not compelled to honour these standards internally. International relations theory has offered an explanation for the existence of this dichotomy.

According to Krasner, the state is free to choose whether it enters into treaties and agreements that contain human rights standards. This may in turn have the potential to impugn both the sovereignty and autonomy of the state but that is a matter that can only be determined by examining subsequent behaviour within the state. It does not arise by simply looking at the terms of the agreement.[49] After entering into a treaty or agreement a state can still choose whether it will adhere to or ignore, either wholly or in part, the terms of a treaty or agreement, even despite its outward commitment to these terms. In the absence of enforcement procedures it does not necessarily follow that a state's commitment to a human rights accord will secure support from the national structures of authority.[50] In this regard, enforcement procedures can take many forms, from bodies capable of adjudication to bodies capable of monitoring and reporting violations of the standards, but their primary importance in terms of enforcement is that they are capable of changing the attitudes and behaviour of state government officials and private citizens within the state.[51]

In *Global Transformations*,[52] the authors argue that the sovereignty of an individual nation-state is eroded when forms of authority that

47. Ratner, Abrams (note 2), pp. 20–21.
48. Wind (note 11), p. 265.
49. Krasner (note 8), pp. 25–32.
50. *Ibid.*, pp. 113–120.
51. *See* generally Krasner (note 8), p. 120.
52. Held *et al.* (note 15).

curtail the rightful basis of decision-making within that national framework displace it. These forms of authority challenge the entitlement of the state to rule over a bounded territory by encroaching upon the political authority within the community to govern according to the framework of rules, regulations and policies determined by it.[53] Human rights standards may encroach upon this aspect of sovereignty but they do not necessarily encroach upon the state's autonomy to articulate its own policy goals independently. The distinction is an important one because it explains how states can, in practice, make a commitment to human rights standards at an international level and yet avoid implementing those standards at a national level. State sovereignty is encroached upon but in the absence of the state directly adopting the standards at a national level or being compelled to honour the standards through the presence of some meaningful enforcement mechanism, state autonomy remains unaffected.

Developing a meaningful enforcement mechanism in this environment is a difficult process because any such mechanism must be capable of bringing about a change in the attitudes and behaviours of the state, through its government officials or its private citizens or both, in order for it to effect a change in the way the state views its commitment to the standard. The challenge of developing such a mechanism is made apparent in the observation that throughout the 1960's and 1970's studies that were critical of human rights violations were considered by many states to be an "unacceptable interference in domestic affairs".[54]

However, during the period of the 1960s and 1970s many states demonstrated an ongoing commitment in the rights set out in the Universal Declaration of Human Rights. In 1966 both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights were adopted by member states of the United Nations. These covenants elaborated and refined the rights contained in the Universal Declaration but unlike the Declaration they were expressed in the form of legally binding treaties, which entered into force in 1976.[55]

An important consequence of these treaties was that they provided legitimacy to the human rights standards contained in both their

53. *Ibid.*, p. 52.
54. Wind, *supra* note 11, p. 273.
55. *See* generally Falk (note 42), p. 8.

own text and the text of the Universal Declaration, upon which they were based.[56] This legitimacy formed the foundation for the development of various committees at an international level whose function was to monitor and report upon violations of the standards. The existence of these mechanisms made the domestic conduct of states increasingly subject to international appraisal, so that the governments of states often "found themselves in the awkward position of having to account for their failures to live up to standards that they had themselves articulated and affirmed".[57]

Another feature of the increased monitoring and reporting of human rights violations over this period was the gradual emergence of a proliferation of both international governmental organizations (IGOs), comprised by nation-states, and international non-governmental organizations (INGOs or NGOs), constituted by private associations or groups of individuals.[58] The origins of IGOs and NGOs can be traced to the nineteenth century but the later part of the twentieth century saw a marked increase in both their number and their influence. At an international level these organizations began to have a significant influence over the decision-making structures of world politics, giving rise to new forms of multilateral and multinational politics.[59]

IGOs extend the interests of national governments beyond their own borders, encouraging states to participate in new forms of intergovernmental cooperation and responsibility, while NGOs provide a voice through which people can challenge governmental policies at an international level and so influence the decision-making authority of national governments at all levels of society, from the international to the local.

The responsibility, in the human rights arena particularly, for bringing about increasing changes in the way governments perceive their obligation to honour international commitments has often been attributed to the actions of NGOs. Through monitoring and publicizing violations of human rights NGOs have succeeded in goading governments to become more conscious of their obligations under these commitments. This success is attributable to increased public

56. Falk (note 42), p. 59.
57. *Ibid.*, p. 59.
58. *See* generally A.D. Efram, *Sovereign (In)Equality in International Organizations* (The Hague, Kluwer Law International, 2000), p. 5.
59. Held *et al.* (note 15), p. 53.

awareness of violations of human rights brought about not only by the publication of instances of violations but also by advancements in the sophisticated use of communications technology. This technology has allowed members of the global community to experience violations as a personal affront to their own sensibilities despite spatial dislocation from the actual location of the violations. At a local level NGOs and private interest groups can bring pressure to bear on national governments to intervene in these violations at an international level in a manner that was never before possible or acceptable.

Additionally, this technology has allowed NGOs to campaign at an international level on specific issues, allowing their voice to be heard by IGOs and national governments. This level of interaction with decision-making authorities permits NGOs to have an influence on the choices exercised by these authorities. In this regard, it has been observed that human rights NGOs:

> can operate transnationally with the consequence that they are able to bypass governments and establish vigorous global or regional networks of activists. In effect, these human rights NGO's represent a distinctive kind of transnational social movement which in many national contexts is regarded as radical both in terms of its espousal of individual rights and in its claim to defend the autonomy of civil society against the possible dictates of the state.[60]

This observation reveals that NGOs can be viewed as a source of power capable of existing both inside and outside the traditional territorial borders of states. NGOs are capable of delivering their message to the international community across borders by bypassing national governments. By assuming this transnational existence NGOs create the ability for individuals within states to become involved in social movements that do not rely on national identity for their authenticity. Opportunities are created for these individuals or groups of individuals to participate in a global community, characterized by a shared commitment to ideals and beliefs that exist beyond the borders of states. To the extent that these ideals and beliefs compete with those authored by the authority structures within the state, a tension is created that has the potential to bring about changes within the state itself.[61]

60. *Ibid.*, p. 67.

61. For example, the chapter by Joyeeta Gupta in this volume acknowledges the role of non-state actors in the arena of international environmental law. (See, Chapter 11, pp. 297–320).

Realists would argue that whether such changes are actually effected is still a matter for decision by the state, so the autonomy of the state is preserved.[62] However, to the extent that NGOs, which do not have governmental authority, can influence developments in international criminal, humanitarian and human rights laws that do impose a greater degree of accountability on the actions of states and individuals within those states, it would appear that states are now competing with new sources of power, which exist beyond the traditional state-centric international system and with which they have not otherwise had to compete.

Examples of recent developments in international criminal, humanitarian and human rights laws that impose a greater degree of accountability on the actions of states and individuals within those states include the Ottawa Treaty on Land Mines (Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-personnel Mines and on their Destruction) and the Rome Statute, establishing the ICC. In relation to each of these it has been observed that the active participation of NGOs in the treaty-making process contributed to their accelerated adoption at an international level.[63]

The participation of NGOs and other transnational organizations, like multi-national corporations, alongside institutions of state in the decision-making processes that inform transnational rule and authority, has led some to conclude that the world is witnessing the emergence of a new system of "global governance".[64] This is not the same as claiming the emergence of a new system of global government. Governance is a much wider concept in that it refers to the ability to "control an activity by some means such that a range of desired outcomes is attained . . .".[65] At an international level the regulation of activity between states was once the sole province of states themselves but more recently it has become a function that "can be performed by a wide variety of public and private, state and non-state, national and international institutions and practices".[66] This observation recognizes that the processes of globalization have brought challenges to

62. Krasner (note 8), p. 119.

63. E. McWhinney, *The United Nations And A New World Order For A New Millennium: Self-determination, State Succession, and Humanitarian Intervention* (The Hague, Kluwer Law International, 2000), p. 21 and *see* Chapter 12 of Michael Struett in this volume (pp. 321–354).

64. Held *et al.* (note 15), p. 50.

65. Hirst, Thompson (note 13), p. 184.

66. *Ibid.*, p. 184.

the traditional power structure informing relations between states. The emergence of the individual as a subject in international law in the early part of the last century presaged these processes by emphasizing the presence of other actors on the stage of international relations.

Gaining a voice on that stage has been a difficult process because of the omnipotence of the state-centric paradigm that has informed global politics under the Westphalian system. As a consequence of this omnipotence there have existed few mechanisms at an international level through which the power of states to act autonomously, in disregard of international commitments to the contrary, could be challenged. The processes of globalization, arising from the interaction of a diverse group of transnational networks and relations, have demonstrated a growing interconnectedness at the global level of society. This in turn has presented opportunities to develop mechanisms at an international level that are capable of challenging the authority of states to act autonomously in a manner that is contrary to the interests of this global society. The creation of the ICC is an example of such a development.

5. *The creation of the ICC*

The ICC has been created to exercise jurisdiction over the most serious crimes of international concern. The subject-matter jurisdiction of the ICC therefore extends to the crime of genocide, crimes against humanity, war crimes and the crime of aggression.[67] International law has long recognized that each of these crimes is so serious that it warrants the universal condemnation of all members of the global community and consequently, all states have a shared interest in ensuring that the perpetrators of them are brought to justice.

In this regard, all states have the ability to exercise universal jurisdiction over the commission of these crimes, meaning that they can utilize their domestic criminal justice systems to investigate and prosecute the alleged perpetrators regardless of the connection of those perpetrators to the prosecuting state. This is a broad jurisdictional base, which serves to underscore the seriousness with which the international community regards these crimes. In addition, many states have committed to treaties and other international agreements that

67. Although, in relation to the crime of aggression (*see* note 5).

place obligations upon them at an international level to utilize their criminal justice systems to prosecute allegations of the commission of these crimes.

However, despite the existence of universal jurisdiction and obligations arising from international instruments, history has demonstrated reluctance on the part of states to engage in prosecutions of the perpetrators of these crimes. This reluctance is mostly attributable to factors of "realpolitik", which operate to obscure the importance of accountability among a web of political considerations at both a national and international level. Past efforts to overcome the lack of accountability generated by these factors have met with difficulty because of the ability of states to invoke the principle of non-intervention and claim a trespass on both their sovereignty and autonomy.

If the ICC is to succeed in bringing accountability to the perpetrators of the crimes within its subject-matter jurisdiction it will have to overcome the difficulties that have prevented such accountability in the past. As one commentator has observed, the challenge will be to see "whether it becomes possible to establish a permanent international criminal court free from loopholes and with a sufficient independence from geopolitical oversight to make the venture jurisprudentially credible".[68]

One feature of the ICC that will assist in this regard is the principle of complementarity. This principle, which is a cornerstone to the Rome Statute, maintains that the ICC will exist only to complement national criminal justice systems, so that States and not the ICC will bear the primary responsibility of investigating and prosecuting those alleged to have committed crimes within the jurisdiction of the ICC.[69] Only if a state is unwilling or unable genuinely to carry out the investigation or prosecution will the ICC be able to intervene. In order to ensure that states will not shield perpetrators from investigation or prosecution either domestically or before the ICC, the Rome Statute gives the ICC the power to examine the "*bona fides*" of the state's unwillingness to investigate or prosecute,[70] and in circumstances where a trial has already taken place at a national level, the *bona fides* of that proceeding.[71] In addition,

68. Falk (note 42), p. 9.
69. Rome Statute, Art. 17.
70. Rome Statute, Art. 17, paragraph 2.
71. Rome Statute, Art. 17, paragraph 1 (c) and Article 20, paragraph 3.

the ICC has the power to determine, through an application of criteria contained in the Rome Statute, whether a matter should be referred to the ICC because a state is unable genuinely to carry out an investigation or prosecution.[72]

These provisions are designed to ensure that the ICC will be able to penetrate the shield of impunity that has often been used by states to protect the perpetrators of humanitarian and human rights violations but at the same time the provisions respect the prerogative rights of states, under international law, to exercise police power and penal law through their own systems of law enforcement and national courts. This balance is ostensibly a concession to the sovereign interests of states because it maintains the centrality of the criminal justice systems of states in the investigation and prosecution of the crimes falling within the jurisdiction of the ICC. However, based on the analysis of international relations theory presented above this concession will serve to strengthen, rather than weaken, the role of the ICC in the enforcement of international criminal justice. The reasons for this are threefold.

First, history has demonstrated that states have been able to make commitments to international agreements that were not honoured at a national level. In the absence of suitable enforcement mechanisms at an international level states were able to exercise autonomy in choosing whether to adhere to or ignore the commitment. IGOs and NGOs and other monitoring and reporting bodies could only go so far in forcing states to honour the commitments they had made because they lacked any means to compel performance. If a state makes a commitment to the Rome Statute, the principle of complementarity generates an implicit commitment on the part of the state to investigate and, if necessary, prosecute those suspected of committing the crimes that fall within the subject-matter jurisdiction of the ICC. If the state does not honour this implicit commitment, the ICC can assume jurisdiction over the matter and through the Office of the Prosecutor, investigate and, if necessary, prosecute it as a consequence of the state's unwillingness or inability to do so. This method of compelling state performance has never before existed in international criminal law and represents both a major international initiative and a source of strength for the ICC.

Secondly, states that become parties to the Rome Statute auto-

72. Rome Statute, Art. 17, paragraph 3.

matically accept the jurisdiction of the ICC in respect to the crimes referred to in the statute.[73] This acceptance is necessarily subject to the principle of complementarity, so that the state party retains the primary responsibility for investigating and prosecuting allegations of crimes that fall within subject-matter jurisdiction of the ICC. In order for a state party to ensure that it is capable of carrying out this responsibility the state party must incorporate into its domestic penal system laws that establish criminal liability for these crimes at a national level. If it does not and a matter later arises that falls within the subject-matter jurisdiction of the ICC, the state's omission would invite the attention of the ICC and may form the foundation of a finding of unwillingness or inability.[74] States are therefore compelled, by reason of their participation in the ICC, to implement at a national level, the standards contained in the Rome Statute relating the crimes within its subject-matter jurisdiction. This development has enormous normative potential from the point of view of international criminal law because it encourages the existence of a global, uniform standard.

Thirdly, the principle of complementarity provides for the first time in history an element of deterrence to would-be perpetrators of the crimes that fall within the subject-matter jurisdiction of the ICC. The ability of states in the past to protect perpetrators from liability for these crimes by raising the shield of sovereignty and autonomy, has given way to a system that provides a meaningful enforcement mechanism to bring accountability. While some question the deterrent effect that this will have, it should nevertheless be acknowledged that the potential at a global level is there, for the first time in history.[75] The existence of the ICC as a meaningful enforcement mechanism for international criminal justice has, through this deterrent effect, the ability to bring about a change in the attitudes and behaviours of states by effecting a change in the attitudes and behaviours of its government officials and its citizens. Such a possibility has never before existed at a truly global level in the realm of international criminal justice.

The ICC has not been constructed as a supranational judicial body whose function is to impose international criminal justice on

73. Rome Statute, Art. 12.

74. *See* generally K.L. Doherty, T.L. McCormack, "'Complementarity' As A Catalyst For Comprehensive Domestic Penal Legislation", 5 *U.C. Davis Journal of International Law & Policy*, 1999, 152.

75. C. Douzinas, *The End of Human Rights* (Oxford, Hart Publishing, 2000), p. 121.

the states of the world. Rather, it has been constructed as a resource to which the global community can have access in order to overcome the lack of accountability that has arisen as a by-product of the state-centric Westphalian system. An essential feature of this resource is its commitment to allowing states the opportunity to first investigate and prosecute cases that fall within the subject-matter jurisdiction of the ICC. The existence of this feature mirrors the distinction between "global governance" and "global government". A commitment to global government would have envisaged the ICC as a stand-alone institution capable of asserting exclusive jurisdiction over all matters that fell within its subject-matter jurisdiction, regardless of efforts or processes undertaken at a national level. However, this is not the way in which the ICC has been envisaged. Through the presence of the principle of complementarity the ICC represents a commitment to global governance. By this it is meant that the ICC exists primarily as a control mechanism, influencing the activity of states by encouraging them to make a genuine and tangible commitment to ensuring that the perpetrators of the most serious crimes of international concern are brought to account. Only if states are unwilling or unable genuinely to honour this commitment will the ICC consider intervening. This is a much wider view of the role of the ICC because it focuses on encouraging states to make their own commitment, at a domestic level, to ending the impunity that has been enjoyed by the perpetrators of the most serious crimes of international concern.

The creation of the ICC in this form and at this point in history suggests that states continue to be a significant location of authority and power at a global level. The use of this authority and power is however subject to increasing levels of scrutiny. In the area of human rights this increase has been especially brought about by both the evolution of humanitarian and human rights standards over the course of the last century and the recent proliferation of NGOs capable of not only scrutinizing but also influencing the manner in which states engage in both international and domestic affairs. This scrutiny has compelled states to consider the manner in which they exercise their authority and power, which in turn has led to the remarkable possibility of developments like the ICC.

6. *Conclusion*

By becoming parties to the Rome Statute states commit to a new level of accountability at an international level. This level of accountability challenges both their sovereignty and their autonomy because it not only dictates standards that purport to operate across borders but it also exposes the internal policy choices of states to external review and comment. In this regard it is noted that, following the Nuremberg model, the Rome Statute assigns criminal responsibility for the commission of crimes within the subject-matter jurisdiction of the ICC to individuals rather than states.[76] However, this will not prevent the internal policy choices of states being made the subject of review and comment if crimes within the subject-matter jurisdiction of the ICC are committed in pursuance of state policy or with the active support of state machinery.[77]

For this reason, many states are still considering whether to make a commitment to the ICC by ratifying the Rome Statute. Central to their concerns about how the ICC will operate are fears that the ICC represents too great a challenge to their traditional conceptions of sovereignty and autonomy. Through the lens of international relations theory it is possible to understand not only how this concern arises but also, more importantly, what informs it. By making a commitment to the ICC states risk having their autonomy to make choices about the extent to which they comply with the standards of international criminal justice contained in the Rome Statute challenged and for some this is too great a challenge to bear.

However, the fact that a large number of states have been willing to make this commitment despite its intrusion upon their sovereignty and autonomy bears witness to the beginning of a new era in international relations. With their commitment and with ongoing vigilance from the myriad of actors who now fill the global stage, it is possible that the curtain will finally fall on the impunity that has for so long shielded the perpetrators of the most serious crimes of international concern.

76. Rome Statute, Art. 25, paragraphs 1 and 2 (note 4).

77. D.D. Nsereko, "The International Criminal Court: Jurisdictional And Related Issues", 10 *Criminal Law Forum*, 1999, 97.

CHAPTER SEVEN

THE INTERNATIONAL CRIMINAL COURT AND THE SOVEREIGN STATE

Diane Marie Amann*

On ne doute jamais trop, quand il s'agit de l'État.
Pierre Bourdieu[1]

1. *Introduction*

Terrorism, drug trafficking, and internecine conflict spurred revival in 1989 of a decades-old proposal for an international court to judge persons accused of the world's worst crimes. Within years the Security Council of the United Nations established *ad hoc* tribunals for Rwanda and the former Yugoslavia, amid negotiations for a permanent tribunal with broader jurisdiction. Diplomats produced a statute for the International Criminal Court at a conference in Rome in 1998.[2] A majority of the world's states welcomed the institution the statute envisioned, so much so that the treaty bearing the statute took effect

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1. "One can never harbour too much doubt in matters concerning the State". P. Bourdieu, "Esprits d'État. Genèse et structure du champ bureaucratique", in Bourdieu, *Raisons pratiques: Sur la théorie de l'action* (Paris, Éditions du Seuil, 1994), p. 102. All translations of French texts are by the author.

2. Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9 (1998) [hereinafter ICC Statute].

a scant four years later. A few states nonetheless voiced opposition. Unremitting resistance has come from the United States. US critics variously have said that the ICC Statute: contains a provision "contrary to the most fundamental principles of treaty law";[3] suffers from a "deep democratic defect";[4] and is "a fundamental threat to American sovereignty".[5] Examination of such complaints, cloaked as they are in certain notions of sovereignty and the role of the nation-state, may contribute to a larger understanding of the contemporary challenges of global governance.

To a great extent the evolution of the ICC conformed to a familiar, consent-driven model of international interaction. Not only did states eschew Security Council mandate in favour of multilateral compact, but also they infused the ICC Statute with the principle of complementarity, which prefers national criminal investigation and adjudication in all but a few, specified instances. Yet in one respect states departed radically from the conventional model: Article 12(2) of the statute authorizes trial of a national of a non-party state – a soldier, a general, even a president or monarch – without the non-party state's consent. It was this non-consensual jurisdiction provision that provoked many critics to see the ICC Statute as an assault on state sovereignty and on settled principles of international law and democratic governance. For the most part ICC proponents cast these arguments aside, sometimes with passing mention of international law. Neither stance is satisfactory.

The innovative, even revolutionary, nature of nonconsensual jurisdiction deserves both acknowledgement and analysis. That it could result in assertion of jurisdiction over an individual despite objection by the state to which the individual belongs does not render the provision unjust; however, justification needs to be demonstrated, not simply assumed based on yet unsettled legal premises. This chapter looks beyond international law and toward social science in order to develop a theoretical framework for this novel provision. It finds a

3. UN International Criminal Court, Hearing on the International Criminal Court before the International Operations Subcommittee of the US Senate Foreign Relations Committee (23 July 1998) (statement of David J. Scheffer), available at 1998 WL 12762512.

4. M. Morris, "The Disturbing Democratic Defect of the International Criminal Court", 12 *Finnish Yearbook of International Law*, forthcoming 2003.

5. L.E. Craig, "Under the UN Gavel", *Washington Post*, 22 Aug. 2001, p. A19.

framework not in a traditional view of the state – the realist premise – but rather in a newer, constructivist view – the relational response.

2. *Evolution of the International Criminal Court*

The history of the International Criminal Court follows a tradition of conditioning multilateral cooperation on consent of the states concerned.[6] In one respect, however, it breaks from this tradition.

2.1 *Following tradition: Securing sovereign consent*

A new milieu for interstate relations emerged after World War II. At its centre was the United Nations, designed to promote peaceful interaction. Key to this design was the Security Council, a body – five permanent members with the power to veto proposals and ten additional UN member states – that was given wide-ranging power to act to maintain peace.[7] Various other UN organs were charged with investigating complaints and making resolutions, with drafting agreements for multilateral cooperation, and with adjudicating disputes between states.

Other international entities were suggested, among them a permanent court that would hear criminal cases like those then before the International Military Tribunals at Nürnberg and Tokyo.[8] A request in 1989 from a representative of Trinidad and Tobago concerned about terrorism and drug trafficking led to renewal of that proposal.[9] Preliminary talks took place the following decade, even as the Security Council established two *ad hoc* international criminal tribunals, the

6. Reflecting this tradition are Articles 34–38 of the Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331 (entered into force 27 Jan. 1980) – a treaty widely considered to reflect customary international law – by which a non-party state is not obligated to obey a treaty unless it agrees so to obligate itself.

7. UN Charter, Arts. 23–32, 39–51.

8. Draft Proposal for the Establishment of an International Court of Criminal Jurisdiction, UN Doc. A/AC.10/21 (1947) (submitted by Henri Donnedieu de Vabres, French delegate to the General Assembly's Committee on the Progressive Development of International Law and its Codification, and formerly the French judge on the International Military Tribunal at Nürnberg).

9. Letter from the Permanent Representative of Trinidad and Tobago to the United Nations addressed to the Secretary-General, UNGAOR, 44th Sess., UN Doc. A/44/195 (1989).

first since the Nürnberg era.[10] In 1998, diplomats from more than 150 states came together in Rome to consider a heavily bracketed draft statute for an International Criminal Court. Members of shifting coalitions engaged in five weeks of intense negotiation. In the end 120 states endorsed a treaty containing the ICC Statute, and agreed to additional preparatory sessions on unresolved matters. As of the deadline signature date of 31 December 2000, 139 states had signed.

The ICC treaty attained the requisite 60 ratifications in the spring of 2002, fewer than four years after the Rome conference and far earlier than initial estimates of ten years or more. By early 2003 89 states, including 36 in Europe, 21 in Africa, 19 in the Americas, and 12 in Asia and Oceania, had joined.[11] The treaty entered into force on 1 July 2002, and ICC judges were elected seven months later. The court's officers then began operations at The Hague.

The ICC Statute reflects the process that produced it, a struggle by states to secure individual concessions even as they sought collective agreement. The statute thus would permit the ICC to intervene, but only if a state fails properly to exercise its own domestic jurisdiction,[12] and only with respect to genocide, crimes against humanity, or war crimes.[13] Other reprehensible crimes, such as the use of weapons of mass destruction, were left out of the statute by decision of a majority of the states.[14] Moreover the statute, supplemented by Elements of Crimes forged in subsequent negotiations, defines offences in accordance with states' demands – at times, more narrowly than

10. Statute of the International Criminal Tribunal for the Former Yugoslavia, Art. 4, SC Res. 827, UNSCOR, 48th Sess., 3217th mtg., Annex, UN Doc. S/RES/827 (1993); Statute of the International Criminal Tribunal for Rwanda, Art. 2, SC Res. 955, UNSCOR, 49th Sess., 3453d mtg., Annex, UN Doc. S/RES/955 (1994).

11. "Rome Statute of the International Criminal Court", <untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp> (visited 14 February 2003) [hereinafter UN treaty database].

12. ICC Statute (note 2), Art. 17(1)(a) (stating that a case under national investigation shall be inadmissible "unless the State is unwilling or unable genuinely to carry out the investigation or prosecution").

13. *Id.*, Art. 5 (limiting jurisdiction to these three categories, yet stating that aggression eventually may fall within the ICC jurisdiction, but only after agreement on definition). Although terrorism and drug trafficking were not included, they could be added at some future date. *See* Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, UN Doc. A/CONF.183/10* (17 July 1998), annex I.

14. V. Muntarbhorn, "Overcoming reticence on International Criminal Court", *Nation*, 5 May 1999, available at 1999 WL 15653415 (citing complaints about such omissions from India, Singapore, Sri Lanka, and Turkey).

customary international law might allow.[15] Adoption of these Elements and of the Rules of Procedure and Evidence required approval by a supermajority of the Assembly of States Parties.[16] The same will be true for all "matters of substance", including election of judges and amendment to the statute.[17] Only states parties are bound to obey ICC requests for evidence, witnesses, or suspects.[18] In short, although the ICC Statute posits a new mode of cooperation, it is based on an established model, which requires consent before an international organization may exert control over a sovereign state.

2.2 *Breaking with tradition: Conferring non-consensual jurisdiction*

Consent likewise provides the basis for nearly all provisions governing exercise of jurisdiction. Article 12 of the ICC Statute, which sets out preconditions for such exercise, makes clear that each state party will have accepted ICC jurisdiction by dint of ratification.[19] Article

15. ICC Statute (note 2), Arts. 6–8; Finalized Draft Text of Elements of Crimes, PCNICC/2000/1/Add. 2 [hereinafter ICC Elements].

16. ICC Statute (note 2), Arts. 9, 51; Finalized Draft Text of Rules of Procedure and Evidence, PCNICC/2000/1/Add.1. Both these rules and the Elements were adopted by consensus in September 2002. *See* "Rome Statute of the International Criminal Court", Assembly of States Parties, First Session, 3–10 September 2002, <www.un.org/law/icc/aspfra.htm> (visited 8 October 2002). In deciding themselves to set ICC procedural rules themselves, states exercised a greater degree of control than is common in such international bodies. *See* H. Ruiz Fabri, "La convention de Rome créant la Cour pénale internationale. Questions de ratification", 54 *Revue internationale de droit comparé*, 2002, 441, 443 & n. 11 (citing as counterexamples the International Court of Justice and the European Court of Human Rights).

17. ICC Statute (note 2), Art. 112(7)(a); *see also* Arts. 6(a), 121.

18. ICC Statute (note 2), Art. 86.

19. ICC Statute (note 2), Art. 12(1). In full, this article states:

Article 12 Preconditions to the Exercise of Jurisdiction

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.

2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:

(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;

(b) The State of which the person accused of the crime is a national.

3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

13 further authorizes the ICC to intervene in any case referred by the Security Council, itself acting pursuant to the Charter of the United Nations, to which all ICC states parties belong.[20] As for cases opened on a state party's referral or on the prosecutor's own initiative, the ICC may intervene if it secures agreement either from the state on whose territory the conduct occurred or from the state of nationality of an accused individual.[21] Article 12(2) thus permits a case to go forward whenever the territorial state agrees, whether or not the national state accedes. By authorizing the ICC to investigate, prosecute, and punish a national of a state over the objections of that state, this provision breaks from the model of consent.

3. *Conventional justifications for non-consensual jurisdiction*

The potential for exercise of non-consensual jurisdiction provoked considerable debate. The United States, which signed the ICC treaty at the close of a Democratic administration, then renounced it in the middle of a Republican one, contended most vocally that the provision would trounce on state sovereignty.[22] Other hostile states, few in number but including China and India, echoed this argument.[23] Some in the United States, including one jurist who supported other international criminal justice projects, maintained that the ICC's departure from the consent model augured an insufficiently democratic court.[24]

20. ICC Statute (note 2), Art. 13.

21. ICC Statute (note 2), Arts. 12(2), 13(a), (c). A non-party state may give such consent with respect to the particular case at issue. If it does so, it is obligated to cooperate with the ICC's investigation and prosecution of the case. *See* ICC Statute (note 2), Art. 12(3).

22. Letter of John R. Bolton, Under Secretary of State for Arms Control and International Security, to UN Secretary General Kofi Annan, 6 May 2002, available at <www.state.gov/r/pa/prs/ps/2002/9968.htm> (visited 7 May 2002) (stating "that the United States does not intend to become a party" to the ICC treaty and that it thus "has no legal obligations arising from its signature" of 31 Dec. 2000); D.M. Amann, M.N.S. Sellers, "The United States of America and the International Criminal Court", 50 *American Journal of Comparative Law (Supplement)*, 2002, 381, 382–391 (quoting opponents and setting forth history of US-ICC relations).

23. Muntarbhorn (note 14); *see also* D.M. Amann, "Harmonic Convergence? Constitutional Criminal Procedure in an International Context", 75 *Indiana Law Journal*, 2000, 809, 862–869 (discussing states' sovereignty concerns with respect to the ICC).

24. Morris (note 4); M. Morris, "High Crimes and Misconceptions: The ICC and Non-Party States", 64 *Law & Contemporary Problems*, 2001, 13; D. Forsythe, "The

Proponents of the ICC tended to dismiss such complaints. It was said that because the court would exercise jurisdiction over individuals rather than states themselves, the provision did not implicate state sovereignty.[25] In any event, supporters argued, the process of negotiation and ratification by states rendered the ICC more legitimate than the *ad hoc* tribunals, which had been established by the will of the few permanent members of the Security Council,[26] even though some of the states most concerned did not consent.[27] Others justified Article 12(2) by citing two international law principles: first, that a territorial state may delegate its power to prosecute;[28] and second, that any state has the power to prosecute and punish a person for a universally condemned crime.[29] Seriatim consideration reveals that although each asserted justification may offer some support, none fully secures non-consensual jurisdiction a place within the contemporary framework of interstate interaction.

United States and International Criminal Justice", 24 *Human Rights Quarterly*, 2002, 974, 986 (predicting that more in the United States eventually will voice this concern). The complaint echoes concerns about a "democratic deficit" in supranational institutions within Europe. *See*, e.g., C. Joerges, " 'Deliberative Supranationalism' – Two Defences", 8 *European Law Journal*, 2002, 133.

25. Among those putting forward this argument were participants at a conference entitled "Combating Impunity: Stakes and Perspectives", 11–13 March 2002, in Brussels, Belgium, in which the author participated.

26. P. Kirsch, "La Cour pénale internationale face à la souveraineté des États", in Cassese, Delmas-Marty (eds.), *Crimes internationaux et juridictions internationales* (Paris, Presses Universitaires de France, 2002), pp. 34–35 (discussing maintenance of this argument by states not permanent members of the Security Council); M.J. Struett, "NGOs, the International Criminal Court, and the Politics of Writing International Law", in this volume (relating role of non-governmental organizations in advancing this argument).

27. M.P. Scharf, "The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position", 64 *Law & Contemporary Problems*, 2001, p. 67, pp. 109–110 (discussing outsider status of Federal Republic of Yugoslavia); W.A. Schabas, "Justice, Democracy, and Impunity in Post-genocide Rwanda: Searching for Solutions to Impossible Problems", 7 *Criminal Law Forum*, 1996, pp. 523, 555 (noting that Security Council established International Criminal Tribunal for Rwanda despite opposition of Rwandan government, which had insisted in vain on the possibility of capital punishment of those convicted).

28. A Belgian scholar captured this argument succinctly: «Pourquoi des États ne pourraient-ils pas faire ensemble ce que chacun d'eux est en droit de faire isolément, et notamment de juger une personne qui est tenue par chacun d'eux pour étrangère?» J. Verhoeven, "Vers un ordre répressif universel? Quelques observations", 45 *Annuaire français de droit international*, 1999, pp. 54, 64 ("Why can't states do together what each of them has the right to do alone; notably, to judge a person who is a foreigner to each of them?'). *See also* Scharf (note 27), pp. 98–117.

29. *See*, e.g., L.N. Sadat, "Redefining Universal Jurisdiction", 35 *New England Law Review* 2001, 241, 250–253; Scharf (note 27), pp. 76–98.

This is surely the case with the contention that because the ICC is designed to punish individuals its actions will not affect states. In affirmance of the individual responsibility principle enshrined in the first Nürnberg judgement, the ICC Statute does pertain only to natural persons.[30] But the offences at issue – genocide, crimes against humanity, war crimes – often will have been committed by agents of a state, often in furtherance of the policy of a state.[31] Trial of the lowest-ranking soldier thus could implicate the behaviour of a state; surely trial of an incumbent president or monarch, the human embodiment of a state, would do so.

Similarly implicated is internal enforcement of the law, a core attribute of a sovereign state.[32] The ICC Statute mandates that a state party not only order its police to collect evidence on behalf of the court, but also acquiesce to certain ICC investigations conducted without the state's authorization.[33] The *Conseil constitutionnel* judged the latter requirement in conflict with "conditions essentielles d'exercice de la souveraineté nationale", so that France had to amend its Constitution before ratifying the ICC treaty.[34] Other states' Constitutions

30. *Judgment of the International Military Tribunal*, 30 September–1 October 1946, reprinted in vol. 22, *Trial of the Major War Criminals before the International Military Tribunal*, 1948, pp. 411, 465–467; ICC Statute (note 2), Art. 27.

31. Conviction for a crime against humanity requires proof that the act occurred "as part of a widespread or systematic attack directed against any civilian population"; that is, that it took place "pursuant to or in furtherance of a State or organizational policy to commit an attack". ICC Statute (note 2), Art. 7(1), (2)(a). As for war crimes, ICC jurisdiction will lie "in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes". ICC Statute (note 2), Art. 8(1). The Elements of Crimes likewise require that genocide "took place in the context of a manifest pattern of similar conduct". . . . *See* ICC Elements (note 12), Art. 6(a)(4), (b)(4), (c)(5), (d)(5), (e)(7). In many cases states will have promoted or ordered such plans, policies, and patterns of conduct.

32. Ruiz Fabri (note 16), p. 441 (describing territorialism of criminal law as emblem of sovereignty); H. Jung, "Criminal Justice: A European Perspective", 1993, *Criminal Law Review*, 237 (stating that "traditionally criminal law and criminal justice are symbols of state sovereignty, so to speak its very core and centrepiece").

33. ICC Statute (note 2), Arts. 86, 93, 99(4).

34. Conseil constitutionnel, Decision No. 98–408 DC, 1999 *Journal officiel* 1317 (judging ICC investigative provisions contrary to "conditions essential to the exercise of national sovereignty", and further finding incompatibility between ICC Statute's denial of immunity for heads of state and immunity guarantees in French Constitution); Fr. Const., Art. 53–2 (amending Constitution via one sentence permitting France to recognize ICC jurisdiction).

may permit a state to cede such police powers to an ICC prosecutor.[35] But in exercising such investigative power, no less than in judging an individual who acted pursuant to a state's order, the ICC would assume a traditional prerogative of a sovereign state.[36] To a great extent ICC appropriation of state power depends on state consent: only states that have agreed, by ratification of the treaty or by *pro hac vice* acceptance, must comply with ICC demands.[37] Article 12(2), which allows the ICC to assert jurisdiction over nationals of non-consenting, non-party states, is the exception.

3.2 *Enhanced legitimacy*

The conclusion that the ICC in fact will judge state actions not infrequently prompts a second response in support of Article 12(2). The treaty-making process out of which the permanent court emerged, it is said, was superior to the Security Council process that created the *ad hoc* tribunals; therefore, the ICC enjoys enhanced legitimacy. This contention has a surface appeal. Establishment of an international institution by representatives of 150 or so states, each with a single vote, seems preferable to establishment by delegates from just 15 states, five of which have permanent status and veto power that add weight to their votes. But deeper consideration recalls that the latter arrangement is mandated by the Charter of the United Nations, adopted in 1945 following a multilateral conference, and joined by nearly every new nation-state to have been formed since that date. That the contemporary wisdom of the Security Council arrangement may be contested does not mean that the arrangement itself is illegitimate. Nor should the fact that two affected states objected to establishment of the *ad hoc* tribunals; Chapter VII of the UN Charter, pursuant to which the tribunals were established, envisions that the international community will impose peace-making measures on recalcitrant states.

35. This would seem to be the case, for example, with the United States. *See* Amann, Sellers (note 22), p. 392.

36. In recognition of this tension, Professor Antonio Cassese, the first President of the International Criminal Tribunal for the former Yugoslavia, has advocated investing national judges with greater power to hear cases that otherwise might come before the ICC. A. Cassese, "Y-a-t-il un conflit insurmontable entre souveraineté des États et justice pénale internationale?", in Cassese, Delmas-Marty (note 26), pp. 18–29.

37. ICC Statute (note 2), Art. 12(3).

In any event, raised as a defence to Article 12(2), the expression of concerns about the Security Council amounts to a *tu quoque* argument. To say that ICC exercise of non-consensual jurisdiction should be excused because a larger number of states have voted in support of the ICC than voted for the *ad hoc* tribunals does little to justify exercise of such jurisdiction. Nor does the magnitude of ICC support yet overwhelm. At this writing 89 states have joined the ICC; therefore, non-party states whose nationals the ICC is authorized to pursue constitute the majority of the United Nations' 191 members. This ratio will change, of course, with each additional ratification. Nevertheless, until a greater portion of states joins the treaty, imprudent use of Article 12(2) would expose the ICC to criticism that its action lacks sufficient multistate consent.

3.3 *Transfer of territorial jurisdiction*

Justification for Article 12(2) often is grounded in the notion of conferred territorial jurisdiction. It is said that a state on whose territory a crime occurred may cede its power to prosecute to the ICC simply because that state can cede such power to another state. Yet even with regard to offences that have no link to official policy such transfers are rare. European measures permitting transnational transfers of prosecution have not won wide acceptance; even in this relatively integrated region, differences in penal philosophy and concerns about sovereignty deter states from handing over the task of prosecution.[38] State practice thus belies the seeming ease of claiming conferred jurisdiction as the foundation for non-consensual jurisdiction.

The claim errs further in its necessary premise; that is, that the ICC is just like a state. The ICC is an independent international personality, a product of multistate cooperation. Its powers do not mirror those of a sovereign state. With respect to jurisdiction, ICC powers fall short of those of a state: whereas a sovereign state enjoys plenary power to prescribe, investigate, prosecute, and punish offences within its borders, the ICC may act only with regard to the few offences on which states agreed at Rome, and it must adhere to the territorial and other conditions those states set.

38. J. Seguin, "The Case for Transferring Territorial Jurisdiction in the European Union", 12 *Criminal Law Forum*, 2001, 247 (discussing states' reluctance with regard to transfer-of-prosecution measures in Council of Europe and European Union).

With respect to lawmaking, in contrast, the ICC likely will have power greater than that of any single state. Out of necessity provisions of the ICC Statute – even as amplified by the Elements of Crimes – leave room for interpretation. The Appeals Chamber for the Yugoslavia Tribunal wrote that the crime of persecution has a "nebulous character", and the same might be said of additional ICC crimes, such as "inhumane acts" or "outrages upon personal dignity".[39] In interpreting such terms, the ICC will make international criminal law, just as the Rwanda Tribunal did when it determined that "sexual violence", a term not included in its statute, is an offence over which an international tribunal may exercise jurisdiction.[40] Although ICC rulings will not bind states as a formal matter, as a practical matter such rulings often will control. Rulings of the *ad hoc* tribunals already have affected decisions in national courts.[41] Those of the ICC, a permanent body of greater scope, will have even greater influence. Indeed, the structure of the ICC Statute encourages this: states that wish to exploit complementarity and thus deflect ICC scrutiny will have to proscribe behaviour defined as criminal in the ICC statute, as that statute is interpreted by ICC judges. Deviations from those interpretations could invite ICC intervention, enforced not by the haphazard state-to-state links that characterize extradition proceedings, but rather by a mandatory, global web of surrender and cooperation to a single international entity.

States that disagree with ICC actions, moreover, will have few means to register their discontent. Common state-to-state avenues, such as suspension of diplomatic relations or withholding of trade benefits, will be unavailable. A state party could leave the treaty

39. *Prosecutor* v. *Kupreškic*, para. 98, Case No. IT-95-16-A, Appeals Chamber Judgement (23 Oct. 2001) (in reversing convictions, states that "[p]ersecution cannot, because of its nebulous character, be used as a catch-all charge"); *see* ICC Statute (note 2), Art. 7(1)(h), (2)(g) (proscribing persecution); *see also* Art. 7(1)(k) (naming as crimes against humanity "[o]ther inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health"); ICC Statute (note 2), Art. 8(2)(b)(xxi), (c)(ii) (defining "outrages upon personal dignity, in particular humiliating and degrading treatment", as war crimes).

40. D.M. Amann, "International Decisions: Prosecutor v. Akayesu", 93 *American Journal of International Law*, 1999, 195, 197, 199 (discussing ruling to this effect in *Prosecutor* v. *Akayesu*, Case No. ICTR-96-4-T, Trial Chamber I, Judgement (2 Sept. 1998)).

41. E.g., *Doe I* v. *Unocal Corp.*, F.3d, 2002 WL 31063976 (9th Cir. 19 Sept. 2002) (adopting, despite strong dissent from one judge on three-member panel, "aiding and abetting" standard of *ad hoc* tribunals, in lawsuit seeking civil damages for alleged human rights violations committed by US corporation operating overseas).

regime, but the process is cumbersome,[42] and, because of Article 12(2), withdrawal would not exempt the state's nationals from the reach of the court. An ICC decision could be reversed by statutory amendment, but the supermajority requirement makes it unlikely that one state, or even a handful of states, could alter the course of the court. The ICC, in short, differs qualitatively from an individual state. In some respects its powers are less than those of a state; in others, however, it has a supranational character.[43] This fact too weakens the delegation rationale, which equates state-to-state transfer of territorial jurisdiction with states' allocation of power to the ICC.

3.4 *Universal jurisdiction*

The contention that the international law principle of universal jurisdiction justifies Article 12(2) also falters. In theory, the universality principle is unassailable: certain crimes are so heinous that they are condemned and punishable by all states.[44] In practice, definition of such crimes may prove difficult. Universality derives from the seventeenth century writings of Hugo Grotius, who, as Professor Antonio Cassese put it, "défendit avec ferveur le principe d'une répression universelle des crimes graves, car il croyait au droit naturel".[45] Yet the concept of natural law long has been criticized on the ground that what is deemed "natural" may in fact be determined by, and specific to, a particular culture.[46] Opponents of natural law theory tended to prefer positively enacted law and to link jurisdiction to territoriality. Horror at twentieth century atrocities, Cassese observed,

42. *Id.*, Art. 127 (allowing withdrawal one year after receipt of written notice, yet specifying that state would remain liable for ICC obligations accrued until that date).

43. Morris (note 4).

44. *Congo* v. *Belgium*, <www.icj_cij.org/icjwww/idocket/iCOBE/iCOBEframe.htm> (visited 6 March 2002) *Congo* v. *Belgium*; para. 5 (Dissenting Opinion of Judge Van den Wyngaert). In exercising universal jurisdiction, states have been said to act as "agents" of the international community. ICJ, "Congo v. Belgium", *ICJ Reports*, 2002, para. 51 (Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal).

45. "Grotius fervidly defended the principle of universal repression of serious crimes because he believed in natural law". Cassese (note 36), p. 20 (citing H. Grotius, *De jure belli ac pacis (Le droit de la guerre et de la paix)* (J. Barbeyrac trans., Amsterdam, 1729) (orig. pub. 1624)).

46. *See* Bourdieu (note 1), pp. 115–116 (contending that French claims to a "universal" culture mask "des formes très perverses d'impérialisme et de nationalisme internationaliste"; that is, "very perverse forms of imperialism and of an internationalist nationalism'); *see also* pp. 44, 127–132.

has given rise to a novel natural law, one that is expressed by means of positive law.[47] The more that such natural-positive law reflects broadly shared views, the more it will approach the ideal of universality.

On this count the ICC treaty largely succeeds. It codifies three categories of heinous offences, deemed punishable by international tribunals since the trials at Nürnberg. Nonetheless, states at Rome backed away from a proposal to ground all ICC offences in universal jurisdiction.[48] Article 12(2) of the ICC Statute instead derives from a counterproposal by Korea, which reasoned that "the rule of complementarity makes the jurisdictional link based on State consent indispensable".[49] The choice doubtless reflected many states' lingering uncertainty regarding application of the universality principle – an uncertainty evident in subsequent state practice. Nearly a year after the Rome Conference the British House of Lords declined to approve extradition of former Chilean dictator Augusto Pinochet to Spain on the principle of universality alone,[50] and even today, few states besides Belgium[51] yet exercise universal criminal jurisdiction.[52]

47. Cassese (note 36), p. 20.

48. W.A. Schabas, "International Criminal Court: The Secret of Its Success", 12 *Criminal Law Forum*, 2001, 415, 418 (describing compromise that led to rejection of German proposal); *see also* Ruiz Fabri (note 16), p. 442 (linking France's acceptance of narrower basis for jurisdiction to concerns about how ICC might affect military personnel).

49. "Proposal Submitted by the Republic of Korea for Articles 6 [9], * 7 [6] AND 8 [7]", para. 2, 18 June 1998, A/CONF.183/C.1/L.6. Article 12(2), which requires consent of either the state where the crime occurred or the state of which the suspect was a national, is in fact more stringent than the Korean proposal, which also would have permitted jurisdiction based consent of either the state that had custody of the suspect or the state of which the victim was a national. *Id.*, para. 4(b).

50. *Regina* v. *Bow Street Stipendiary Magistrate*, ex parte *Pinochet* (H.L. 1999), reprinted in 199 *International Law Reports* (2002), 136 permitting extradition pursuant to treaty provision, but declining to embrace one Lord's opinion grounding extradition on international custom regarding universal jurisdiction).

51. Compare Cour de Cassation de Belgique, Case No. P.02.1139.F, Arrêt, 12 février 2003 (in case challenging 1982 actions by Israeli officials in Palestinian refugee camps, permitting criminal prosecutions based on genocide, crimes against humanity, or war crimes to go forward even if suspect not present in Belgium) with *Congo* v. *Belgium* (note 44), para. 12 (Separate Opinion of President Guillaume) (stating that "international law knows only one true case of universal jurisdiction: piracy", and thus concluding that "[u]niversal jurisdiction *in absentia* as applied in the present case is unknown to international law").

52. For example, though the United States aggressively has asserted extraterritorial jurisdiction in recent years, it seldom has based such jurisdiction on universality alone. *See United States* v. *Yunis*, 924 F.2d 1086, 1090–1091 (D.C. Cir. 1991) (mentioning universality in course of permitting jurisdiction in hostage-taking case, yet basing decision on US nationality of victims); Genocide Convention Implementation

Even absent this reluctance, universality would not justify all ICC exercise of jurisdiction, for the simple reason that not all offences that the ICC Statute enumerates were subject to universal jurisdiction before 1998. The inclusion of crimes occurring during internal conflicts, for example, pushed past the bounds of international custom.[53] Certain definitions within the three categories, moreover, have sustained attack. Some have questioned whether transfer of civilians by an occupying power was universally recognized as a war crime before adoption of the statute.[54] No less a figure than UN Secretary General Kofi Annan raised a similar concern with regard to the statute's prohibition against conscripting children to become soldiers.[55] With respect to disputed definitions, there remains the possibility that the ICC might call an individual to account for conduct not universally seen as criminal. The individual well might have followed the policy of a non-party, non-consenting state. In such a case the ICC, devoid of universality's protective cloak, would in effect challenge conduct traditionally within the exclusive jurisdiction of the sovereign state.

Act of 1987, 18 USC. § 1091(d) (2000) (limiting national jurisdiction over genocide to cases in which accused is US national or offence occurred on US territory).

53. ICC Statute (note 2), Art. 8(2)(c)–(f); P. Kirsch, "Keynote Address", 32 *Cornell International Law Journal*, 1999, 437, 438.

54. Article 8(1)(viii) of the ICC Statute, supra note 2, proscribes "[t]he transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory". Israel, an ICC signatory, announced that it would not join the court on account of this provision. "Israel will not ratify international court treaty", *Agence France-Presse*, 12 June 2002, available at 2002 WL 2428696. For other criticism of this proscription, *see* Statement of John R. Bolton before the US Senate Committee on Foreign Relations, 23 July 1998, *Federal Document Clearing House*, available at 1998 WL 12763220; "Panel Discussion: Association of American Law Schools Panel on the International Criminal Court", 36 *American Criminal Law Review*, 1999, 223, 233–234, 263 (remarks by Professor Malvina Halberstam).

55. Article 8(2)(b)(xxvi) of the ICC Statute (note 2), proscribes as a war crime "[c]onscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities". In his 2000 draft statute for the Special Court for Sierra Leone, Annan indicated that customary international law might not yet bar non-forcible recruitment of children; however, at the insistence of the Security Council, the definition in the final statute tracks that of the ICC Statute. *See* D.M. Amann, "Calling Children to Account: The Proposal for a Juvenile Chamber in the Special Court for Sierra Leone", 29 *Pepperdine Law Review*, 2002, 167, 175, n. 54.

4. *Non-consensual jurisdiction and theories of the state*

The risk of ICC encroachment on state sovereignty is, as opponents insist, real. So too is the risk that the ICC will act in spite of resistance from a non-party state. Neither risk, however, compels the conclusion that the ICC Statute is a menace to governance among states. Consideration of social science theories – here called "the realist premise" and "the relational response" – illustrates this point. Each label subsumes a cluster of theories; namely, realism and constructivism. Within each cluster are many variations, some contradicting others, some finding support in the opposite cluster. The aim of this chapter is not to resolve these inconsistencies.[56] It is, rather, to accent the polar tension between each cluster in order to elucidate the contemporary dispute about the role of the state, particularly in relation to multi-state institutions like the ICC.

4.1 *The realist premise*

Sovereigntist opposition to the International Criminal Court subscribes to a realist premise, a worldview analogous to the state of nature that social compact theorists posited in the seventeenth and eighteenth centuries.[57] This view sees a state as a wholly independent being, an individual. The state is described by the metonym of the human prince or the superhuman leviathan. In keeping with an ideal sometimes attributed to the 1648 Peace of Westphalia,[58] within its own sphere the state is sovereign; that is, free to act at will and without external scrutiny. States exist in a global space so vast that each

56. For examinations of the complexities within these theoretical clusters, *see* J. Goldsmith, "Sovereignty, International Relations Theory, and International Law", 52 *Stanford Law Review*, 2000, 959 (reviewing S.D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton, Princeton University Press, 1999)); P.A. Karber, " 'Constructivism' as a Method in International Law", 94 *American Society of International Law Proceedings*, 2000, 189; J.M. Grieco, "Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism", 42 *International Organization*, 1988, 485; A. Wendt, "Anarchy Is What States Make of It", 46 *International Organization*, 1992, 391.

57. W.G. Werner, "State Sovereignty as an Interpretive Concept", in this volume (discussing notion of sovereignty developed by theorists like Hobbes and Locke); Wendt (note 56), p. 395 (writing that "[c]lassical realists such as Thomas Hobbes, Reinhold Niebuhr, and Hans Morgenthau attributed egoism and power politics primarily to human nature").

58. N. Schrijver, "The Changing Nature of State Sovereignty", *British Yearbook of International Law*, 1999, 66–69 (tracing development of Westphalian model).

state enjoys sufficient room to choose whether to cooperate, or not, with another. A state thus has power to act unilaterally. Interference with prerogative conduct of a state constitutes war.

Corollary to this view are those advanced by the realist school of international relations. Describing practice labelled *Realpolitik*, realists maintain that states will seek to act in service of perceived national interests – interests largely defined in terms of territory and power. Anticipating that all will act similarly in the anarchical international arena, states distrust one another, and act defensively to maintain competitive advantage.[59] Often a state will do so through unilateral action. Recognition of interdependence may lead to cooperation; however, cooperation is closely cabined and contingent on state consent. A state thus might endorse a multilateral human rights instrument only after assuring that its contents are aspirational, not enforceable.[60] Even instruments acknowledged as enforceable frequently would admit deviation by self-interested states, via reservations, derogations, optional protocols, and margins of appreciation.[61] Realists discredit as irrational, or worse, state or interstate action that runs counter to *Realpolitik*.[62]

The attractiveness to states of the realist premise is obvious. Sketched here in broad strokes, realism invites a state first to consolidate economic and political power, then to exercise it selfishly, and finally to spurn outside scrutiny of its actions. Yet its empirical value is in doubt: realism seems less and less to reflect reality.

59. Grieco (note 56), pp. 488, 497–502; *see also* Goldsmith (note 56), p. 964.

60. H.A. Kissinger, "The Pitfalls of Universal Jurisdiction", *Foreign Affairs*, July-August 2001, 86 (arguing that states did not intend current efforts to enforce Universal Declaration of Human Rights, the Helsinki Final Act, and the Convention on the Prevention and Punishment of the Crime of Genocide).

61. The system administering the European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 Nov. 1950, 213 UNTS 222 (entered into force 3 September 1953), exemplifies the use of such mechanisms. *See* M. Delmas-Marty, "Le rôle du juge européen dans la renaissance du *jus commune*", in *Protections des droits de l'homme: la perspective européenne: Mélanges à la mémoire de Rolv Ryssdal* (Cologne-Berlin-Bonn-Münich, Carl Heymanns Verlag KG, 2000), pp. 397–414; R.St,J. Macdonald, "The Margin of Appreciation", in Macdonald *et al.* (eds.), *The European System for the Protection of Human Rights* (Boston; Dordrecht, Martinus Nijhoff, 1993), p. 83.

62. K. Raustiala, "Strengthening Sovereignty through International Economic Institutions", manuscript on file with author (observing that according to realist premise, "[a] state would never agree to institutions that diminish its sovereignty – truly diminish, in the sense of irrevocably shifting power – unless some overwhelming power compels it to").

4.2 *The relational response*

"Le réel est relationnel".[63] This aphorism from the late French sociologist Pierre Bourdieu captures a critique of the realist premise. Compelling this critique is "doute radical", deep-seated scepticism regarding the presuppositions on which the realist state is founded.[64] The very act of questioning, Bourdieu pointed out, undermines those suppositions.[65] The state thus is stripped of human, or natural, pretence, and revealed as an artefact, as one means of organizing individuals and territories.[66] The independent state, always an ideal type, does not exist. The world is not a state of nature, in which each state may exist in isolation. Crop blight may shift farming patterns in South America, eventually changing food prices in Europe and law enforcement priorities in the United States. Telecasts of mayhem in Africa may prompt humanitarian intervention from abroad. Unrest in the Middle East may lead to assaults on the Eastern Seaboard and heightened security measures across the globe. Interdependence cannot be contained; rather, it requires genuine entry into a state of civil society, in which inevitably overlapping actors work together toward some mode of accommodation.[67]

This view corresponds with the constructivist school,[68] which

63. "The real is relational". P. Bourdieu, "Espace social et espace symbolique", in Bourdieu, *Raisons pratiques: Sur la théorie de l'action* (Paris, Éditions du Seuil, 1994), p. 17.

64. Bourdieu (note 1), pp. 102, 104.

65. *Ibid.*, p. 101 («Entreprendre de penser l'État, c'est s'exposer à reprendre à son compte une pensée d'État, à appliquer à l'État des catégories de pensée produites et garanties par l'État, donc à méconnaître la vérité la plus fondamentale de l'État.») ("To undertake to think about the state is to lay oneself open to think again about the state, to apply to the state the categories of thought produced and guaranteed by the state, and so to be mistaken about the most fundamental truths about the state".).

66. Bourdieu (note 1), p. 107 (observing that once the state is instituted both in the structure of society and that of those who adapt to these structures, "l'institution instituée fait oublier qu'elle est issue d'une longue série d'actes d'institution et se présente avec toutes les apparences du *nature*"; that is, "this institution makes one forget that it has issued from a long series of acts that led to it, and so seems by all appearances *natural*") (emphasis in original); p. 112 (exposing the power-consolidation process that leads to establishment of a king as the "*corps fictif*", the fictional embodiment, of the state).

67. *See* Bourdieu (note 1), pp. 110, 114, Bourdieu noted that this process occurs both within the state, as various groups struggle for power, and outside the state, as the state itself struggles to affirm its power *vis-à-vis* other states.

68. Karber (note 56), p. 189 (describing constructivism not simply as a sub-discipline of international relations, but as "a philosophical, social science and normative method" with "a tradition that transcends the study of politics").

emphasizes the process of interaction that vests statehood with meaning. Indeed, one constructivist account wrote of such meaning: "Identities are inherently relational".[69] For constructivists the definition of a state is neither natural nor static, but social and dynamic, embodying mutually constituted, and reconstituted, understandings. Sovereignty – the bundle of powers that each state enjoys – does not follow from unitary remonstration, as the realist premise would hold.[70] Rather, sovereign power depends on, and shifts according to, the understandings a state shares with other actors.[71] States remain the most significant actors;[72] nevertheless, the exalted status and broad immunity once granted the human designated head of state has suffered diminution.[73] The notion of what other actors matter also has been altered: non-state entities as varied as Amnesty International and al-Qaida owe their acquisition of influence to the concessions, or the collapse, of other sources of power. Constructivism, like realism, focuses on states, but it is more likely to accord to non-state actors a role in the transformation of meaning.[74]

Recognition that state identity is constructed through interaction exposes state behaviour as the product of choice among options rather than of acquiescence to some "global donnée".[75] Competition

69. Wendt (note 56), p. 397.

70. Grieco (note 56), p. 488 (positing as central proposition of realism that "states are "sensitive to costs" and behave as unitary-rational agents" (quoting K.N. Waltz, "Reflections on *Theory of International Politics*: A Response to My Critics", in Keohane (ed.), *Neorealism and Its Critics* (New York: Columbia University Press, 1986), p. 331).

71. Goldsmith (note 56), pp. 965–966; Wendt (note 56), pp. 412–415; accord Raustiala (note 62) (describing sovereignty not by "a fixed and rigid standard", but rather "as a bundle of attributes, only some of which a given state may possess at any particular times"); Schrijver (note 58), p. 70 (describing sovereignty as "a dynamic concept" that "can have a different meaning in different historical periods").

72. Cassese (note 36), pp. 16–17; Schrijver (note 58), pp. 65–66.

73. *See*, e.g., *Affaire Colombani et autres* c. *France*, no. 51279/00, Judgement, para. 68 (European Court of Human Rights., 2d section, 25 June 2002), <hudoc.echr.coe.int/hudoc> (visited 28 June 2002) (ruling that 1881 French law, authorizing penal sanctions for publishing articles critical of a head of state, "tend à conférer aux chefs d'État un statut exorbitant du droit commun", and concluding that by conferring this extraordinary status the law violated freedom of expression); *Pinochet* (note 50) (holding former head of state may be extradited to face torture charges).

74. Struett (note 26), (employing constructivist analysis to underscore role of non-governmental organizations in formation of ICC Statute); Schrijver (note 58), pp. 76–77, 81–83 (depicting challenges to state sovereignty from, e.g., minority groups, industry, non-governmental organizations, and regional bodies).

75. The term is used in D. Kennedy, "The Nuclear Weapons Case", in Boisson de Chazournes, Sands (eds.), *International Law, the International Court of Justice and Nuclear Weapons* (Cambridge; New York, Cambridge University Press, 1999) pp. 462, 472,

in interstate relations is not the sole means by which states may negotiate anarchy; cooperation too is an option.[76] In finding a prescriptive component in what might seem to be description – a statement of the way the world is – constructivists do not deny that the realist premise holds force. Actors may perceive the politics of power as fact; even if the perception erodes they may adhere to the practice, preferring the status quo to the uncertainty inherent in change.[77] The act of cooperation itself may work change, however; in building interstate institutions based on shared norms, states may learn to work toward shared goals. Out of this interaction, "state" could come to mean a cooperative entity that counts among its own national interests the welfare of the international community.[78] Such change depends, in the view of one constructivist, "on at least two preconditions": a reason for states to think about themselves differently, perhaps because of "new social situations that cannot be managed in terms of pre-existing self-conceptions", and an expectation that the cost of change will not exceed its benefits.[79]

A relational approach thus assumes that a state enjoys power not in an absolute sense, but to the extent that others cede power to it. Were there a Westphalian world, such powers would be robust and free of hindrance save by use of force. Even in today's interdependent world, states retain considerable powers. But they are ever more subject to scrutiny, even interference, by other states, by groups of states, and even by non-state actors. This development in turn affects the

and quoted in A.L. Paulus, "International Law After Postmodernism: Towards Renewal or Decline of International Law?", 14 *Leiden Journal of International Law*, 2001, 727, 736, in the context of postmodernist "insistence on unveiling the silences of traditional international law".

76. Wendt (note 56), p. 403 (asserting that "self-help is not a constitutive feature of anarchy"); *see also* Goldsmith (note 56), p. 965 (noting that "constructivists view international behaviour" not as "a function of power and interest", but "largely as a function of social relationships among nations").

77. Goldsmith (note 56), p. 411 (writing that "[t]he fact that the worlds of power politics are socially constructed . . . does not guarantee they are malleable", both because "once constituted, any social system confronts each of its members as an objective social fact", and because "systemic change may also be inhibited by actors" interests in maintaining relatively stable role identities").

78. Goldsmith (note 56), p. 417 (contending that process by which states "learn to cooperate is at the same time a process of reconstructing their interests in terms of shared commitments to social norms", which "will tend to transform a positive interdependence of *outcomes* into a positive interdependence of *utilities* or collective interest organized around the norms in question").

79. Goldsmith (note 56), p. 419.

meaning of "consent"; that is, of what powers are so sacrosanct that a state need not relinquish them unless it agrees to do so.[80] A relational response, in short, casts doubt on protestations of constant prerogative. It accepts, then analyzes, change in global relations.[81]

5. *The International Criminal Court in light of theories of state*

To a great extent, the development of the International Criminal Court fits within a traditional view of state sovereignty; that is, within the realist premise. Operating as individual and independent beings, states established a permanent court to adjudicate crimes they believed warrant joint repressive action. They did so by means of a treaty, negotiated at a five-week conference attended by most of the world's states, and approved at a session in which each state, large or small, cast an equal vote. The court they created must adhere to a statute that exemplifies the notion that outsiders may not interfere in matters of state unless that state has so consented by means of accession to carefully drafted, positive law. The statute reserves key decisions, such as choice of the prosecutor and judges and adoption of Elements of Crimes and Rules of Procedure and Evidence, for an assembly of all ICC member states. In short, as the realist premise would expect, states viewed themselves the key actors in producing the court.

Realist theories also would predict the self-maximization that marked some states' behaviour at the 1998 Rome conference. A number threatened to remain outside the treaty regime unless their self-interests were accommodated. In this way France persuaded drafters both to institute a Pre-Trial Chamber as a check on prosecutorial initiative and to permit exemption from prosecution for war crimes during the court's first seven years.[82] Some states whose ultimata failed

80. Schrijver (note 58), p. 71 (stating that the concept of external sovereignty, by which "[e]xpress prior consent of the State is required for any surrender of specific competences or elements of its sovereignty in the international realm", "is to a certain extent a fiction in an increasingly interdependent world in which States have to co-operate closely and are constantly compelled to make compromises").

81. W.G. Werner, "Speech Act Theory and the Concept of Sovereignty: A Critique of the Descriptivistic and the Normativistic Fallacy", 14 *Hague Yearbook of International Law*, 2001, 73, 81–82 (exploring changing "social relation" between "*existence* of a sovereign state" and "rights, powers and responsibilities" accorded to states) (emphasis in original).

82. ICC Statute (note 2), Arts. 15, 18, 19, 39, 53, 54, 56–61, 64, 72 (referring

– among them, China, Turkey, India, and Israel – have chosen not to ratify the ICC treaty.[83]

Self-interest doubtless played a role too in adoption of Article 12(2), the non-consensual jurisdiction provision. At first blush this might seem counterintuitive. The traditional requirement of state consent fosters the Westphalian ideal of the autonomous state, free to act in its own interest.[84] At Rome 120 states voted in favour of the ICC treaty; since then, well over two-thirds that number have ratified and thus obligated themselves to the ICC. How might self-interest have motivated the remainder – scores of countries – to endorse a document that could result in a non-consensual international trial, before an untested non-state actor, of their nationals, even their heads of state? One answer may be that such states feared international scrutiny over the conduct of their own nationals less than they feared the absence of such scrutiny over the conduct of nationals from other outsider states. States well might have seen the ICC as an unprecedented opportunity to check power – not only unilateral arrogations of power, but also the power of the five permanent members of the Security Council.[85] Such states thus supported a new means of combining the resources of the weak to counter the power of the strong.

This explanation owes much to the realist premise, yet exceeds its bounds. The depiction of states as having acted defensively to curb others' power, perhaps to achieve a relative gain in power, fits neatly within realism. But the vehicle through which states chose to act does not. The Statute of the International Criminal Court requires states to relinquish once-cherished powers, such as the power to shield their nationals from outside punishment,[86] and so, in some

to Pre-Trial Chamber); ICC Statute (note 2), Art. 124 (containing opt-out provision). France signalled its intention to exercise this exemption in a declaration attached to its ratification of the ICC statute; the only other state that did so was Colombia. *See* UN treaty database (note 11). By early 2003, however, Colombia was considering withdrawal of this declaration. *See* "Presidente Alvaro Uribe reconoció que su gobierno estudia levantar la salvaguarda de Colombia ante la Corte Penal Internacional (CPI)", *El Tiempo* (Bogotá), 11 February 2003, <eltiempo.terra.com.co/coar/noticias/ARTICULO-WEB-NOTA_INTERIOR-276280.html> (visited 14 February 2003).

83. Amann (note 23), pp. 862–865 (discussing negotiating positions of France and other named states).

84. Goldsmith (note 56), p. 962 (noting that the Westphalian concepts of sovereignty constitute "central concepts of international law").

85. Schabas (note 48), pp. 419, 421–424.

86. Cassese (note 36), pp. 14–15.

cases, to shield their policies from outside scrutiny. By the terms of the statute this loss of power applies equally to consenting and non-consenting states. States' widespread willingness to give birth to such an institution – by endorsement of the statute at Rome no less than by ratification of the treaty – implies a notion of a state far different from that of the single actor operating in independent isolation. A relational, or constructivist, approach promises fuller appreciation of this phenomenon.

A relational response recognizes that the meaning of concepts like "sovereignty", "consent", and "state" are fluid, fashioned and refashioned by global actors. It marks the growing interdependence among states, the much-bruited eclipse of government by governance, and the rise of competing, non-state sources of authority. It views claims of unilateral prerogative with scepticism. It does not deny that states may seek to maximize self-interest; nevertheless, it accepts that self-interest may entail something other than aggrandisement of political and economic power. New situations may lead to alteration of state behaviour, to the way states think of themselves, and, eventually, to the collective understanding of state identity.

States may, for example, come to find self-interest in the promotion of international respect for human rights. At the very least, a state may want to be seen as acting in this manner,[87] even if it simultaneously pursues less idealistic paths.[88] This well may have a prag-

87. Struett (note 26) (linking decision by United Kingdom to support independent, rather than Security Council-dominated, ICC to "new Prime Minister Tony Blair's desire to have a strong human rights based foreign policy"); Ruiz Fabri (note 16), p. 453 (noting that although the decision of the *Conseil constitutionnel* cited supra note 34 eventually held some aspects of the ICC Statute incompatible with the French Constitution, it first recognized that participation in ICC would serve French constitutional principle of "sauvegarde de la dignité humaine contre toute forme d'asservissement et de dégradation"; that is, "of safeguarding human dignity from any form of enslavement or degradation").

88. An example of this is state behaviour regarding persons held at a US base in Guantánamo Bay, Cuba, in the aftermath of the 11 September 2001, terrorist attacks against the United States. Officials of many states decried US treatment of detainees. *See* D.M. Amann, "Le dispositif américain de lutte contre le terrorisme", 4 *Revue de science criminelle et de droit comparé*, 2002, 745. Yet one report stated that the United States had conducted intense interrogations in Afghanistan and on the Indian Ocean island Diego Garcia, owned by the United Kingdom. D. Priest, B. Gellman, "U.S. Decries Abuse but Defends Interrogation", *Washington Post*, 26 Dec. 2002, p. A01. Some captives were handed over to "countries with security services known for using brutal means" – including, according to this report, Jordan – along with a list of questions US officials wished answered. *Id.* As of 2003, all three of these countries were ICC states parties. *See* UN treaty database (note 11). Another jour-

matic dimension: the self-interest of a weaker state in restraining the power of others is evident. But there also may be an idealistic dimension, a self-interest in placing the needs of the cross-border human collectivity over those of any individual state.

Construction of such a self-interest indeed seems to have occurred. The end of the Cold War renewed discourse about the interests of humanity, and states began to act in service of those interests, promulgating conventions on matters as diverse as elimination of landmines and reversal of climate change.[89] Among Europeans, moreover, one discerns not only a visceral sense of "Never Again" lingering decades after the Holocaust, but also a comfort level achieved as a result of positive experience with a supranational human rights system.[90] Both elements also may be at play in Latin America, where human rights litigation both in the supranational system and in courts outside the region has influenced transition from dictatorship to democracy.[91] Less-than-stable states, meanwhile, may seek a peaceful way to bring an end to civil wars.[92] Also important are non-state actors, individuals and non-governmental organizations whose expectations, as likely to derive from moralism as from materialism, may foist on a state new burdens;[93] for instance, a duty to prevent or punish human rights abuses, even if they occur within the state's borders, even if committed by a private actor, and even if the victims are the state's own nationals.[94]

nalist reported that several states had sent agents to Guantánamo to interview their own nationals, then shared the answers with US officials. E. Becker, "Foreign Officials Question Guantánamo Prisoners", *New York Times*, 25 June 2002, p. A22.

89. Schrijver (note 58), p. 88 and n. 87 (stating that use in climate change instrument "of the words 'humankind' and 'common concern of humankind' reflect a formative trend in current international law to perceive the interests of humankind as a whole as a universal value").

90. R. Badinter, "Réflexions générales", in Cassese, Delmas-Marty (note 26), pp. 53–54 (citing limitation of sovereignty required by European human rights system as precursor for international criminal justice).

91. E. Lutz, K. Sikkink, "The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America", 2 *Chicago Journal of International Law*, 2001, 1; J.M. Pasqualucci, "The Inter-American Human Rights System: Establishing Precedents and Procedure in Human Rights Law", *University of Miami Inter-American Law Review*, Winter 1994–1995, 297.

92. Schabas (note 48), p. 419 (concluding that "States are ratifying the Statute precisely because they view the Court as a promising and realistic mechanism capable of addressing civil conflict, human rights abuses and war").

93. Struett, supra note 26 (arguing that non-governmental organizations promoted idealism at Rome conference by employing discourse grounded in universal values).

94. *Velásquez Rodríguez* case, Inter-Am. Ct. H.R. (ser. C) No. 4, para. 174 (1988)

Construction of a notion of national self-interest that incorporates supranational ideals seems a not insignificant factor in the adoption of Article 12(2) of the ICC Statute.[95] The 120 states that voted "aye" at Rome subscribed to a view of the state as an actor accountable not just to its own citizens, but to external actors; indeed, to humanity.[96] Even as these like-minded states accorded great deference to traditional views of sovereignty, they resisted concessions that might have thwarted the goals underlying establishment of a permanent, global court. Among the rejected were calls to block intervention in any case in which the accused belonged to a non-party state that opposed the ICC's exercise of jurisdiction. Acceptance of such a limitation would have ensured continued impunity, for states could have avoided scrutiny of even the most awful acts of their agents simply by opting out of the treaty. In this one aspect, therefore, drafters gave a tradition of individual consent less priority than a newer perception of common good. Authorizing the ICC to act absent the agreement of all interested parties helped ensure that nationals from the states least likely to offend would not be the only ones within the compass of a treaty aimed at the world's worst offenders. Indeed, because Article 12(2) left little reason to stay outside the ICC, it may have had the *in terrorem* effect of encouraging otherwise reluctant states to ratify the treaty.

This limited step away from the tradition of state consent does

(judgment) (establishing broad duty with regard to state actors); *see Kurt* v. *Turkey*, 1998–III, European Court of Human Rights 1152, para. 107 (acknowledging duty of more limited scope); *see also A.* v. *United Kingdom*, 1998–VI Eur. Ct. H.R. 2692 (underscoring state's affirmative duty to protect individual against human rights violations at the hands of private actor).

95. P.W. Kahn, "American Hegemony and International Law Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order", 1 *Chicago Journal of International Law*, 2000, 1, 14 ("The rapid advance of support for an International Criminal Court is just one of a number of contemporary indications that the international law of human rights is moving from the rhetoric of opposition to an institutionalized, global regime".).

96. National and international judges have espoused this view. *See*, e.g., *Prosecutor* v. *Tadic*, Case No. IT_94_1_AR72, Appeals Chamber, Decision on Jurisdiction, paras. 58, 102, 129 (2 October 1995), reprinted in 105 *International Law Reports* (1997), 419, 483, 508, 520–521 (stating, in opinion signed by Cassese, and joined by Li, Deschênes, and Abi-Saab, that humanitarian law implicates "elementary considerations humanity") (quoting ICJ, *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (Merits), *ICJ Reports* (1986), 14, para. 218 (27 June), and citing *Federation Nationale des Déportés et Internés Résistants et Patriotes and Others* v. *Barbie*, 78 *International Law Reports* (Cass. crim. 1983) 125, 130).

not leave the ICC Statute without justification.[97] Rather, it suggests a shift in understanding of the meaning and parameters of consent, the kind of change in state practice essential to evolution in international custom. Nor does non-consensual jurisdiction necessarily render the ICC undemocratic. What constitutes "democracy" in the international arena remains an open question. It may well be that an international institution that operates effectively, that achieves the objectives for which it was established in a fair and responsive manner, counts as democratic even though it cannot be held directly accountable to some identifiable polity.[98] By this measure, a responsible court would be capable of exercising non-consensual jurisdiction in a democratic manner. States that endorsed the ICC Statute may be seen as having acted on just such an understanding of democratic international governance.

The complex image of state interaction revealed by a relational analysis also illuminates the United States' ongoing dialogue with the ICC. Dire pronouncements have characterized US opposition ever since the Rome conference. Nonetheless, the United States remained active in post-Rome preparatory sessions, labouring, sometimes by doomsaying, sometimes by diplomacy, to shape the court. The jockeying persisted even after the 2002 repudiation of the US signature on the ICC treaty: having threatened not to take part in UN peacekeeping missions, the United States secured from the Security Council a one-year exemption of its peacekeepers from ICC jurisdiction.[99] Pursuant to the American Servicemembers' Protection Act of 2002 – labelled the "Hague Invasion Act" because it empowered the President to use force to free persons who might fall into ICC hands[100] – the

97. Goldsmith (note 56), p. 967 (stating, in description of analysis in book under review, that "[c]ontrary to conventional wisdom, Westphalian and international legal sovereignty have been systematically disregarded for hundreds of years").

98. In an examination of this issue as it relates to international bodies like the World Trade Organization, Professor Raustiala (note 62) as written: "[T]he key question is (or ought to be) the following: in creating increasingly powerful international institutions to help us achieve the aims we desire, have we done so in a manner that best protects the democratic values that lay at the heart of the modern liberal state? . . . The move to international institutions can be done in ways that are more or less accountable, transparent, and open. However, it is possible that if state legitimacy is partly grounded in effectiveness, responsive or effective international economic institutions may be legitimate – because they are instrumentally useful – even though they lack democratic accountability in the usual sense".

99. SC Res. 1422, UNSCOR, 4572nd mtg., UN Doc Res. 1422 (12 July 2002).

100. American Servicemembers' Protection Act of 2002, Pub. L. 107–206, tit. II,

United States threatened to withhold military aid from states that refused to agree not to surrender US nationals to the ICC.[101] Romania signed a bilateral agreement to this effect, provoking a rebuke from the Parliamentary Assembly of the Council of Europe.[102] But the Council of the European Union granted its member states some freedom to sign agreements.[103] By early 2003 21 states, among them several members of the ICC, had signed.[104]

These efforts fuelled criticism of US unilateralism. By insisting that its nationals remain beyond reach, the United States had given first priority to its political interest in being able to act militarily without concern that its personnel – whether its rank-and-file soldiers or its highest-ranking leaders – might be haled before an international criminal court. That states acceded to US demands demonstrates the continued international power of the most powerful state; in this case, the power to force flexibility into a provision that, given the impossibility of reservation, had seemed inflexible. At the same time, the United States, by working to secure permission to act without fear of ICC scrutiny, tacitly admitted to fear that the ICC would have power. Congress further credited the potential of the ICC by inserting at the end of the anti-ICC Service members' Protection Act a clause that permits some cooperation.[105] In effect, the United States' unilateralist machinations acknowledged global interdependence.

116 Stat. 820, 2 Aug. 2002, codified at 22 USCA. § 7421 *et seq*. (2002); *id*., § 7427 (authorizing President "to use all means necessary and appropriate to bring about the release" of US national or national of US ally "who is being detained or imprisoned by, on behalf of, or at the request of the International Criminal Court").

101. *See* note 100 § 7426 (permitting prohibition on military assistance to certain countries); E. Becker, "U.S. Ties Military Aid to Peacekeepers' Immunity", *New York Times*, 10 August 2002, p. A1.

102. Res. 1330, Council of Eur. Parl. Assem., 29th sitting (25 Sept. 2002) (calling on Romania not to ratify, and on other members not to enter, such agreements, on the ground that they "might compromise the integrity of the ICC Treaty and efficient work of the Court"). For the asserted basis for such agreements, *see* ICC Statute, *supra* note 2, Art. 98 (forbidding ICC to seek a "surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required").

103. *See* 2450th Council meeting, "External Relations", 12134/02 (Presse 279) (30 September 2002).

104. ICC states parties that had entered such pacts included Afghanistan, Djibouti, East Timor, Gambia, Honduras, Marshall Islands, Romania, and Tajikistan. "U.S., Georgia sign agreement on criminal court", *Reuters English News Service*, 12 February 2003, available in Westlaw; "US seals 18th ICC immunity deal as Djibouti agrees to pact", *Agence France-Presse*, 24 January 2003, available at 2003 WL 2712570.

105. 22 USCA § 7433 ("Nothing in this subchapter shall prohibit the United

6. *Conclusion*

In large part the Statute of the International Criminal Court adheres to the settled principle that conditions treaty obligations on state consent. Breaking from that tradition is Article 12(2), which permits the ICC to act against a national of a non-party, objecting state. The provision has proved a flashpoint for controversy. ICC critics, most vocal among them the United States, characterized the provision as a menace to state sovereignty. Counterarguments – some of which would draw upon international law – do not fully justify non-consensual jurisdiction. Justification nonetheless may be found by consideration of two views of the state.

The first view of the state, the realist premise, reinforces an image of states as equal and independent beings, each competing to maximize its own power. Cooperation is tentative and contingent on state consent. The relational response, the second view of the state, questions the implicit inevitability of the realist premise. Situated within the constructivist school, the relational response sees states as the product of mutually constituted understandings. It stresses interdependence among states, and thus leaves room for the possibility that states may come to prefer cooperation to competition as a means of governance in an anarchical world.

Many opponents of the International Criminal Court give voice to the realist premise. Viewing power as the state's quintessential self-interest, they shirk from the call to cede attributes of sovereignty to a multilateral institution that will have, at least in part, a supranational character. That the ICC may judge a national, and by implication the policy, of a non-consenting state is seen to violate the central concept of state sovereignty. A relational response would articulate a new and different state interest: promotion of the human collectivity by combating atrocity. A permanent international criminal court can foster the interstate cooperation necessary to advance this interest, but only if it has sufficient power. The extension of ICC jurisdiction to nationals of resistant states enhances the likelihood that the court will be able to investigate, prosecute, and punish the world's worst

States from rendering assistance to international efforts to bring to justice Saddam Hussein, Slobodan Milosevic, Osama bin Laden, other members of Al Queda [sic], leaders of Islamic Jihad, and other foreign nationals accused of genocide, war crimes or crimes against humanity").

offenders. That so many states have agreed to dispense with consent in this singular situation indicates a shift in understandings; that is, the construction of a new, and justifiable, understanding of a state's role with regard to international crimes. The United States' vehement efforts to blunt the force of the ICC, even as it allowed room for cooperation if necessary, were indicative of this shift. Viewed in tandem, US actions affirmed that the international community had succeeded in constructing a counterbalance to state power, a new global actor with which even the United States, like it or not, must reckon.

PART III

INTERNATIONAL ORGANIZATIONS

CHAPTER EIGHT

GOVERNANCE BY INTERNATIONAL ORGANIZATIONS: RETHINKING THE NORMATIVE FORCE OF INTERNATIONAL DECISIONS

Ige F. Dekker and Ramses A. Wessel*

> Legislation is often only part of a broader solution combining formal rules with other non-binding tools such as recommendations, guidelines, or even self-regulation within a commonly agreed framework.
>
> *European Commission's White Paper on European Governance, 2001*

1. *Introduction*

The proliferation of international organizations of states and of norm-setting organs within these organizations has resulted in a large variety of types of decisions on the international level of administration.[1] International organizations have shown a need for varying types of decisions to be able to respond to the need of establishing integration in different areas in a balanced manner (sometimes compelling, other times more directing). Reasons can be found in the necessity to find a balance between the process of integration and the degree of freedom of member states to continue setting their own policies, and the fact that citizens are often directly affected by decisions of these organizations. Each organization knows its own specific decision-

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1. On the proliferation of international organizations, *see* N. Blokker, "Proliferation of International Organizations: An Exploratory Introduction", in N.M. Blokker and H.G. Schermers (eds.), *Proliferation of International Organizations. Legal Issues* (the Hague, Kluwer, 2001), pp. 1–50.

types, but some well-known decision-types of the European Union can also be discovered in other international organizations.[2]

The proliferation of decision-types, in particular, seems to hold true for so-called "international integration-organizations".[3] This label is used for organizations that do not merely purport to establish a cooperation between their member states, but aim to go beyond this cooperation by establishing an integration in one or more policy areas. An essential feature of these organizations is that competences are being transferred from the member states to the organizations or that new competences for the organizations are created, through which it has become competent (often competing with the member states, but sometimes exclusively) to set rules to "harmonize" the legal systems of the member states in certain sectors. The main example, of course, is the European Union, but a number of other international organizations of a universal or regional character fall within this category as well.

In international legal literature the importance of decisions of international organizations is increasingly recognized. However, the main schools of international legal doctrine prove to offer an insufficient basis for an analysis of modern international administrative law, and in particular for a meaningful classification of the various forms in which international organizations mould their legal acts. According to the traditional positivist legal approach the legal validity of decisions of international organizations is regarded as identical to their legally binding force. As Kelsen stated: "to say that a norm is valid, is to say that we assume its existence or – what amounts to the same thing – we assume that it has "binding force" for those whose behaviour it regulates".[4] This approach conceives of the international legal system as a set of basically mandatory rules of conduct and competences to set those rules. Applied to decisions of international organizations: either decisions are legally binding, in which case they exist as legal rules, or decisions are not legally binding and do not exist as elements of the legal system. Thus this school of thought (strongly) rejects notions of "normative relativity" and "soft law" as

2. *See also* N. Blokker, "Decisions of International Organizations: The Case of the European Union", 30 *NYIL*, 1999, pp. 3–44 at 35–42.

3. *See*, in particular, M. Virally, "Definition and classification of international organizations: a legal approach", in G. Abi-Saab (ed.), *The Concept of international organization* (UNESCO, Paris, 1981), pp. 50–66.

4. H. Kelsen, *General Theory of Law and State* (Harvard University Press, 1961), p. 30.

relevant concepts of international (institutional) law.[5] It is not surprising that in this particular approach of international law, international organizations play only a modest role in the development of the international legal order. After all, only in exceptional instances do international organization have the competence to impose rules of conduct on their member states.[6]

Mainly under the influence of the so-called policy oriented approach of international law, this restricted view on the law-creating role of international organizations was opposed, first of all, by those who drew attention to the *effect* of non-binding decisions of international organizations – in particular declarations of the General Assembly of the United Nations – on the development of international law.[7] These play, as it was held, in particular an indirect role in the creation of customary law, as they function both as the formulation of the *praxis* and as the reflection of the *opinio iuris sive necessitatis*.[8] This approach became increasingly popular, not only in doctrine but also in international case law. Thus, the International Court of Justice based the customary legal status and substance of the ban on the use of force to a large extent on the formulation in the 1970 Declaration on Principles of International Law and the 1974 Resolution on the Definition of Aggression[9] and, in 1996 the Court stated in general:

5. *See*, in particular, P. Weil, "Towards Normative Relativity in International Law?", 77 *AJIL* 1983, pp. 413–442; J. Klabbers, *The Concept of Treaty in International Law* (Kluwer, The Hague, 1996), pp. 157–159.

6. The most well-known examples of organs having this competence include the Security Council of the United Nations and the Council of the European Union (the latter increasingly together with the European Parliament, as far as Community matters are concerned). *See* P. Szasz, "General law-making processes", in O. Schachter, Chr. C. Joyner (eds.), *United Nations Legal Order* Cambridge University Press, Cambridge, 1995), pp. 35–108; F.L. Kirgis, Jr., "Specialized law-making processes", in *idem*, pp. 109–168.

7. Classics in this respect include: R. Higgins, *The Development of International Law through the Political Organs of the United Nations* (Oxford University Press, London, 1963); O.Y. Asamoah, *The Legal Significance of the Declarations of the General Assembly of the United Nations* (The Hague, Martinus Nijhoff, 1966); R.A. Falk, "On the Quasi-Legislative Competence of the General Assembly", 60 American Journal of International Law 1966, p. 782; B.V.A. Röling, *Volkenrecht en Vrede (International Law and Peace)*, (Deventer, Kluwer, 3rd ed., 1973).

8. Some took the radical view point that resolutions of the General Assembly would as such to be seen mandatory decisions for the member states. This opinion, endowing the General Assembly with an international law-making competence, is, also today, not dominant. It is, however, strongly inspired by the traditional perception of international law as a system of mandatory rules of conduct and competences to enact those rules. *See* J. Castaneda, *Legal Effects of United Nations Resolutions* (New York, Columbia University Press, 1969).

9. International Court of Justice, *Military and Paramilitary Activities in and against*

> . . . that General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio iuris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio iuris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio iuris* required for the establishment of a new rule.[10]

The acknowledgement of the legal importance of non-binding rules is an expression of the increasingly autonomous position of international organizations *vis-à-vis* their member states. However, according to this approach the legal significance of such rules – the normative effect of the results of the decisions-making processes – still lays (primarily) in the function they have in relation to mandatory rules of international law. Thus, in effect, this view is not that different from the traditional positivist analysis of international law.

These approaches to the law of international organizations prove to be unsatisfactory, in that they fail to explain and account for the existence and effect of a number of "acts" of international organizations as a consequence of their *a priori* exclusion from the legal system. Should we really conclude that the first article in the 1992 Treaty on European Union concerning the establishment of the Union, should be disregarded as a legal norm because it neither imposes a duty nor confers a power? Or that a norm such as "The European Council shall provide the Union with the necessary impetus for its development and shall define the general political guidelines thereof" is an extra-legal norm because it seems to do both?

According to the "institutional" approach to law, the confinement of norms to the guidance of human behaviour does not present the whole picture, since significant parts of the administrative legislation and regulation of the modern welfare state, as well as of international organizations, no longer consists of rules of conduct or even of classical power-conferring rules, but of rules constituting legal institutions or powers to create rules constituting legal institutions. In Ruiter's words,

Nicaragua, Judgment of 27 June 1986, *ICJ Reports* 1986, pp. 99–100. *See* for the text of the resolutions resp. UNGA Res. 2625(XXV), 24 October 1970, GA Res. 3314(XXIX), 14 December 1974.

10. International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, *ICJ Reports* 1996, pp. 254–255.

this means that "the issue is no longer how the concept of legal system can help us to legitimize legal norms of conduct. It must be replaced with the question what kind of results stemming from human activity, can obtain legal validity as elements of a legal system".[11] The legal system is conceived of as an "extra-linguistic institution", which confers legal validity to certain qualified linguistic utterances. This means that "words" uttered in the specific context of a legal system have different consequences than when they would be used in regular social day-to-day communication. Within the legal institutional framework "speech acts" bring about valid presentations of orders, inducements, purposes; but they may also bring about legally valid (re)presentations of a state of affairs, or (just) of an attitude about a state of affairs. This approach – based on the separation between legal validity and legal effects of acts – makes it possible to account for the legal significance of rules of international organizations that cannot always be placed under one of the two traditional headings of mandatory rules of conduct and competence-conferring rules.

In this chapter we examine the "institutional legal reality" of decisions of international organizations in two respects. Section 2 will try to explain the institutional legal approach to the normative force of decisions of international organizations by analyzing an institutional legal concept of international organizations, their legal regimes and a classification of their legal acts. In section 3 we will make an attempt to shed a light on the acts of international organizations in relation to the legal systems of the member states. In exploring these points we do not purport to present final answers, but merely whish to reflect on the line of research followed by both authors in addressing issues of international institutional law. It is only the beginning of a more extensive research project, which aims to shed more light on the normative force of decisions of international organizations, in particular the European Union.

11. D.W.P. Ruiter, *Institutional Legal Facts* (Deventer, Kluwer, 1993), pp. 32–33. The idea of the "extra-linguistic institution" is derived from the speech act theory of Searle. *See*, J.R. Searle, *Speech Acts. Expressions and Meaning* (Cambridge, Cambridge University Press, 1969).

2. *The normative force of decisions of international organizations*

2.1 *Legal institutions*

In earlier publications the present authors have analyzed the legal system of international organizations, in particular the legal system of the European Union, on the basis of the conceptual apparatus of the "institutional legal theory".[12] According to this theory, the main building blocks of legal systems are "legal institutions".[13] "Legal institutions" in this sense are not to be seen as synonymous with organizations or organs thereof but can be characterized as distinct legal systems governing specific forms of social conduct within an overall legal system of which they derive their validity. Ruiter defines a legal institution as ". . . a regime of legal norms purporting to effectuate a legal practice that can be interpreted as resulting from a common belief that the regime is an existent unity".[14] In other words, a legal institution does not refer to an existent entity, but to a presentation of a phenomenon that ought to be made true in the form of social practices. Thus, legal institutions have their counterparts in social reality, often referred to as "real" institutions. As Ruiter puts it: ". . . a legal institution is in the first instance a fiction that is subsequently realized by people believing in it and acting upon this belief. It follows i) that human beings must be able to visualize legal insti-

12. I.F. Dekker, R.A. Wessel, "The European Union and the Concept of Flexibility: Proliferation of Legal Systems Within International Organizations", in N.M. Blokker and H.G. Schermers (eds.), *Proliferation of International Organizations* (The Hague, Kluwer, 2001), pp. 381–414. *See also* R.A. Wessel, *The European Union's Foreign and Security Policy. A Legal Institutional Perspective* (The Hague, Kluwer, 1999); D.M. Curtin and I.F. Dekker, "The EU as a 'Layered' International Organization: Institutional Unity in Disguise", in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law* (Oxford, Oxford University Press, 1999) pp. 83–136; R.A. Wessel, "Revisiting the International Legal Status of the EU", 5 *European Foreign Affairs Review* 2000, 507–537; D.M. Curtin and I.F. Dekker, "The Constitutional Structure of the European Union: Some Reflections on Vertical Unity-in-Diversity", in P. Baumont, C. Lyons, N. Walker (eds.), *Convergence and Divergence in European Public Law* (Oxford, Hart, 2002), pp. 59–78.

13. *See* N. MacCormick, O. Weinberger, *An Institutional Theory of Law, New Approaches to Legal Positivism* (Dordrecht, Kluwer, 1986); O. Weinberger, *Law, Institution and Legal Practice. Fundamental Problems of Legal Theory and Social Philosophy* (Dordrecht, Kluwer,1991); D.W.P. Ruiter, *Institutional Legal Facts, Legal Powers and Their Effects* (Deventer, Kluwer, 1993); D.W.P. Ruiter, *Legal Institutions* (Deventer, Kluwer, 2002).

14. D.W.P. Ruiter, "A Basic Classification of Legal Institutions", 10 *Ratio Iuris*, 1997, 358.

tutions and ii) that the existence of legal institutions must be conceivable as inherent in human behaviour".[15]

The *existence* of a legal institution is determined by a set of different so-called "institutional rules".[16] These rules relate to the creation and termination of a specific legal institution as well as to the legal consequences the encompassing legal systems attach to such a legal institution. The latter rules regulate which legal norms can or cannot be part of a valid legal institution. A distinction is thus made between the legal institution as a *type* – also referred to as the "institutional legal concept" – and the *instance* or *token* of the concept.[17] Legal institutions in the sense of institutional legal concepts – such as the concepts "treaty" and "international organization" – are pre-requisites to the specific operationalization thereof – such as, respectively, for example, the 1969 Vienna Convention on the Law of Treaties and the United Nations Organization. The rules with regard to the establishment, termination and legal consequences of a specific treaty or international organization are part, respectively, of the international law of treaties and the international law of organizations.

Legal institutions refer to entities – subjects and objects – to properties of these entities – qualities and status – and to connections between entities. On the basis of these distinctions, Ruiter developed a classification of seven legal institutions.[18] Only two of these seem to be *prima facie* relevant to the concept of international organizations: "personal legal connections" and "legal persons". The first category is defined as "a valid legal régime with the form of a connection between subjects".[19] The bottom line is that this legal institution brings forward a set of legitimate expectations between legal persons – for instance, states – about their reciprocal behaviour. With regard to the law of international organizations, the most relevant legal institution of this kind is the institutional concept of "treaty", the relevant

15. D.W.P. Ruiter (note 14), p. 363.

16. *See* N. MacCormick, O. Weinberger, *An Institutional Theory of Law* (Dordrecht, Kluwer, 1986), p. 53.

17. *Ibid.*, p. 54.

18. *Legal persons* (subjects), *legal objects* ("goods"), *legal qualities* (property of subjects), *legal status* (property of objects), *personal legal relationships* (connection between subjects), *legal configurations* (connection between objects), and *objective legal relationships* (connection between subjects and objects). *See* D.W.P. Ruiter, *Legal Institutions* (The Hague, Kluwer, 2002), pp. 102–115.

19. Ruiter (note 18), p. 99.

institutional rules having been codified in the 1969 Vienna Convention on the Law of Treaties.

The second appropriate category of legal institutions for analyzing international organizations, the "legal person", is defined as "a valid legal regime with the form of an entity that can act".[20] In this case it is not so much the relation between legal persons that counts, but rather the establishment of a new legal entity. A legal institution in this sense is not only a set of mutual expectations of behaviour, but at the same time an entity which in legal terms and in reality – to a certain extent – occupies an independent position *vis-à-vis* its members and the outside world. The central element of the legal regime of a legal person is its capacity to pursue collective decision-making: a legal person makes it possible "to ascribe aggregate outcomes of collective decision-making processes to the collectivity of the participants".[21] In order to do that a legal person needs normally at least one organ (which is in fact a legal person too). Through this decision-making organ, the legal person will have the possibility, on the basis of power-conferring rules, to develop a relatively independent institutional legal system by issuing legal norms and rules, including other power-conferring rules.

Thus international organizations can be seen as contractual relationships between member states (legal persons) or as a legal entity with an autonomous status in the international legal system. According to the first view, decisions of international organizations are agreements between the member states, whereas in the latter view decisions are unilateral legal acts. In the following pages our analysis is based on the conception that international organizations are (international) legal persons in the institutional legal sense.

2.2 *The legal competence of international organizations*

Apart from the institutional rules, legal institutions – such as legal persons – have their own legal system, sometimes also called its "legal regime". The legal regime functions as the specific legal framework of a legal institution and is in itself in most cases a complex system of different legal rules (norms and principles). The concept "legal rules" is used in the institutional legal theory in a wide sense, encom-

20. *Ibid.*, p. 98.
21. *Ibid.*, p. 105.

passing all normative acts which can obtain legal validity in a legal system.[22] Besides these legal rules, the legal regime of an institution can include legal competences conferring legal powers on an organ of the institution to create legal rules. Through legal competences, a specific legal institution can develop its *own* institutional legal system with the purpose to regulate further its own practice. In other words: "An institutional legal regime that comprises power-conferring norms is no longer a mere concretization of consequential rules . . ., but actually becomes a relatively *independent institutional legal system* within a comprehensive legal system. By virtue of their self-regulatory powers, participants are to a certain extent able to design the institutional legal systems in accordance with their own wishes".[23]

Legal competences make an institutional legal system complex. By using the legal powers that have been conferred, "organs" of a legal institution have the capacity to create within the legal institution other legal institutions with their own legal regimes. With regard to such complex, "layered", legal institutions the concept of legal *unity*, as used in the definition of a legal institution, becomes important. It has, in the first place, the purpose of indicating that the institution can be dealt with as a more or less autonomous element within the over-all legal system and that it can be distinguished from other legal institutions within that system. Secondly, the unitary character of a legal institution implies that its institutional legal system has to be "coherent". In relation to law, "coherence" not only means the absence of contradictions – often referred to as "consistency" – but also the presence of positive connections between different parts of a legal system. However, it is important to stress that – contrary to consistency, which is an absolute concept – coherence of a legal system is always to be regarded as a matter of degree. The test of the unity of the legal regime of a legal institution thus depends on the question whether and in what manner the legal regime binds together its different sub legal systems by (fundamental) legal rules and competences.

Insofar as an international organization is conceived of as a legal person, the consequence is not only that an international organization is an autonomous subject of international law, but also that its

22. D.W.P. Ruiter, *Institutional Legal Facts, Legal Powers and Their Effects* (Deventer, Kluwer, 1993), p. 52–79, 90.

23. D.W.P. Ruiter, "A Basic Classification of Legal Institutions", 10 *Ratio Iuris*, 1997, 357, at 370.

capacities (in the sense of *potential* competences) are based on the legal system of the organization itself. In that line of thought, an international organization has all the competences needed to fulfil its purposes as far as they are not excluded by international law or by its own constitutive treaty. This is what in the literature on international organization is often referred to as *inherent powers*. The validity criterion of a competence is whether the competence fits in the legal system of the organization, taking into account the constitutive treaty and the purposes of the organization. In that sense this approach relates to the "institutional" notion of legal personality on the basis of which international organizations, like states, are "complete" international legal persons, and thus free "to perform any sovereign act, or any act under international law, which they are in a factual position to perform to attain their aims, provided that their constitutions do not preclude such acts".[24]

According to the institutional approach followed in this chapter competences of international organizations can also legally be founded on customary law. Besides the fact that contracts are almost by definition "incomplete", allowing for contractors to approach their relationship in a dynamic fashion, the constituting treaties of international organizations create a legal order with an "Eigendynamik". The legal orders of international organizations in general, but of integration-organizations in particular, often know a rule of recognition on the basis of which the organization is allowed to issue norms that cannot explicitly be traced back to the treaty. Sometimes these norms are said to be based on implied powers (in which case they are believed to attributed after all), but in other cases the existence (and subsequent acceptance) of rules can better be explained on the basis of customary powers, attaching validity to norms on the basis of a praxis and an acceptance of an articulated norm.

2.3 *Classifying the normative force of decisions*

What institutional legal theory basically does is combine legal positivism with the institutionalism that can be found in the linguistic philoso-

24. F. Seyersted, *United Nations Forces in the Law of Peace and War* (Leyden, Sijthoff, 1966), p. 133. Zie ook F. Seyersted, "International Personality of International Organizations. Do their capacities really depend upon their constitutions?", 4 *Indian Journal of International Law*, 1964, 1.

phy of John Searle.[25] According to Searle speaking is more than just uttering sounds; it is both a regulated and a regulating activity. This is reflected in the possible relations between, what he calls, "word" and "world". Depending on the type of "speech act" the "world" adapts itself to the words that are uttered in its context, or *vice versa*. But, it is equally possible that there is no relation between word and world or even that there exists a mutual adaptation. According to Searle, these adaptation relations, or "directions of fit", result in five conceivable speech acts: assertives (word to world direction of fit), directives and commissives (world to word direction of fit), expressives (null direction of fit) and declaratives (double direction of fit). This way language does not merely convey content (as a locutionary act), but the speaker also performs an action in saying something (an illocutionary act). Translated to legal theory this means that this illocutionary act consists in *the creation of* legal rights and duties, once it is performed by a competent actor.[26]

By taking the speech act theory as a starting point, Ruiter came up with a list of conceivable "results stemming from human activity" that qualify as legal acts.[27] The reason to present this classification in the present chapter is that it offers a far more shaded differentiation in rules than the classical distinctions between duty-imposing and power-conferring rules, or between legal and political rules. The following seven legal acts form part of Ruiter's classification:[28]

1 A *declarative* legal act is a legally valid presentation of a *state of affairs*. For instance an act through which an international organization is established.
2 A *hortatory* legal act is a legally valid presentation of an *inducement*

25. J.R. Searle (note 11). *See* for a Dutch analysis of institutional legal positivism: W.G. Werner, *Het recht geworden woord* (Enschede, 1995), Chapter 5.

26. *See also* S.N. Onuf, "Do Rules Say What They Do? From Ordinary Language to International Law", *Harvard International Law Journal*, 1985, 385.

27. It would seem that this notion covers both "rules" (which in Ruiter's terminology present a particular state of affairs that ought to be realized by way of a social practice based on a general belief in the existence of that state of affairs) and "norms" (that prescribe that, whenever a fact of a certain category occurs, a certain rule comes to apply). *See* D.W.P. Ruiter, "Institutions from the perspective of Institutional Theory", *NIG working papers*, no. 95–15, Enschede, University of Twente, 1995, p. 16.

28. Ruiter (note 22), Chapter 3. When the "negative acts-in-the-law" are taken into account, as acts-in-the-law whose successful performances have "negative" legal effects ("illocutionary denegations of acts-in-the-law"), Ruiter comes to a total of fourteen conceivable types. *Id.*, Chapter 4.

to get the *hearer* to carry out some future course of action. For instance a call of an international organization to its member states to spend a certain percentage of its GNP to development aid.

3 An *imperative* legal act is a legally valid presentation of an *order* to the *hearer* to carry out some future course of action. For instance the imposition of an organization to its member states to impose sanctions on another state.

4 A *purposive* legal act is a legally valid presentation of the *speaker's purpose* to carry out some future course of action. For instance the aim of an international organization that all states in a certain region within a set time limit require and acquire the membership of the organization.

5 A *commissive* legal act is a legally valid presentation of an *order* to the *speaker* to carry out some future course of action. For instance the promise of an international organization to send emergency funds to a disaster area.

6 An *assertive* legal act is a legally valid *re*presentation of a *state of affairs*. For instance the claim of an organ of an international organization that despite the silence of the constituting treaty on that point, the organization has the obligation to live up to human rights standards in its activities.

7 An *expressive* legal act is a legally valid presentation of an *attitude* about a state of affairs. For instance the statement by an organ of an international organization condemning the gross and massive violations of the rule of law in a certain country.

With the presentation of this classification, Ruiter makes clear that, regardless of the fact that the limits of the legal system are still defined by the criterion of validity, a larger number of rules in a variety of shades conceivably form part of that legal system. Looking at the above list, the question emerges of where competence-conferring norms fit in. After all, as we have seen, norms obtain a legal character only when uttered by certain specified subjects in a specified procedure. It is the norm of competence (or "rule of recognition') which determines that, if certain subjects utter certain presentations in a certain procedure, these presentations are legally valid.[29] According to Ruiter, competence-conferring acts are a special case of declarative speech acts: "Norms of competence convey legal validity to pre-

29. Ruiter (note 22), pp. 91–92.

sentations resulting from successful performances of the acts-in-the-law they specify. At the same time, they themselves are legally valid presentations pressing on the legal community to accept the legal validity of the former presentations".[30]

Organs such as the UN Security Council may, within their inherent competence, take decisions covering – in principle – all mentioned types of legal acts, including imperative ones. In addition, the Council of the European Union may make use of a large number of different decisions. Apart from Regulations, Directives and Decisions of the European Community, the European Union knows Joint Actions, Common Positions, Framework Decisions, and also Declarations of the Presidency or Conclusions of the European Council, Reports of the Council or Communications of other organs. All these acts purport to have an effect in the legal system in which they are uttered. This holds true as well for acts that *prima facie* may be seen as "non-binding". Even a statement of the Presidency of the European Union gives, or aims to give, an interpretation, fix an objective, or maybe make a promise. When these legal acts are ignored in the analyzes of the legal systems of international organizations, a large number of acts are kept outside the (legal) game, which in the case of integration-organizations – in practice – often subtly defines the policy to be pursued. But also within the category of so-called "binding" decisions – like Regulations or Framework Decisions of the EU Council – one may discover norm-types with a variable normative force. Apart from norms of conduct, these decisions may establish new organs and new competences. Some of these decisions only have effect within the organization itself, others also have effects within other legal systems, including the national legal systems of the member states.[31]

3. *Relations between legal systems of international organizations and legal systems of member states*

3.1 *Validity relations between legal systems*

So far we have concentrated on the internal systematics of a legal system, on the validity and normative force of rules within the legal

30. *Id.*, pp. 96 and 156.
31. *See* Art. 249 EC Treaty. The other EU decision types can be found in Arts. 12 and 34 of the EU Treaty.

system of an international organization. However, since it was established in the introduction of this chapter that the proliferation of different forms of decisions takes place in so-called integration-organizations in particular, the legal systems of international organizations are not to be approached in isolation and attention needs to be devoted to the relation between these systems and the legal systems of the member states.

Regarding this question, Kelsen pointed to the existence of different "basic norms" as the ultimate "source" of distinct legal systems, but he also argued that the source of two distinct legal systems can be the same when one order is based on the other.[32] Kelsen argued that there are four conceivable validity relations between two distinct legal systems:[33] a) both systems are completely divided ("*unabhängig*"), that is: they have distinct sources of validity; b) system A derives its validity from system B; c) system B derives its validity from system A ("*über- und unterordnung*"); and d) both systems are of equal value, they are (relatively) independent sub-systems, coordinated by an overarching superior system ("*Koordination*").[34]

In the *first* perspective, the classic *dualist* approach, the legal systems of international organizations and the member states are completely independent, separate of each other, in the sense that they have different legal sources and different legal subjects. In this approach the legal system of the international organization provides rules for the member states, for the functioning of the organization itself, whereas the legal system of the member states regulates the activities of *its* citizens and other private persons and the functioning of the state itself. In other words, legally valid rights and duties of individuals can only be created under the national legal system of the member states. This *dualist* construction is questioned in general with regard to the

32. H. Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts: Beitrage zur einer reinen Rechtslehre* (Scientia Aalen, 1928, 1960), pp. 104–105: "In der Einheit und Besonderheit dieses Ursprungs, dieser Grundnorm, liegt das principium individuatis, liegt die Besonderheit einer Ordning als eines Systems von Normen". Despite its age, this book still serves as one of the clearest interpretations of the concept of sovereignty and the relation between the international legal order and national legal orders (or "states" in Kelsen's line of reasoning).

33. *Id.*, p. 104. *see also* Werner (note 25), p. 158.

34. *See also* D.M. Curtin, I.F. Dekker, "The Constitutional Structure of the European Union: Some Reflections on Vertical Unity-In-Diversity", in P. Baumont, C. Lyons, N. Walker (eds.), *Convergence and Divergence in European Public Law* (Oxford, Hart, 2002), pp. 59–78.

relation of international and national legal systems, both on theoretical and empirical grounds.[35] Theoretically, the approach in particular falls short in explaining the position of the state in relation to the national legal system, because that state, as the central subject of the international legal system, cannot be a part of the national legal order at the same time. However, this last consequence is difficult to reconcile with modern concepts of the rule of law, in which the state is (also) a legal subject of national law. Empirically, one can point to rules of positive international law purporting to bind private persons directly, without interference from national law. Under general international law, obvious examples of such rules relate to the international criminal responsibility of individuals for international crimes. Other examples may be found in the legal system of the European Union – and in particular that of the European Community – providing a range of treaty-based rules, regulations and decisions directly creating rights and duties for individuals and other legal persons. Taking the case law of the European Court of Justice as well as legal doctrine into account, it is difficult to maintain that the validity of these legal acts is based on the national legal systems of the member states, because the legal system itself provides for (secondary) rules on the formation, interpretation and implementation of EU law.

The dualist approach to the validity relation between the legal system of international integration-organizations and those of the member states thus raises serious objections. This leaves us with the three *monist* options distinguished above. According to the first option, the legal system of an international organizations is – qua legal validity – the highest legal order, implying that the national legal systems derive their validity from that legal system. Of course, already on historical grounds this explanation leads to the rather absurd conclusion that the legal systems of the member states are based on the treaty by which those same states created an international organization.

35. *See also* I. Weyland, "The Application of Kelsen's Theory of the Legal System to European Community Law – The Supremacy Puzzle Resolved", *Law and Philosophy*, 2002, 1–37. Although dealing with Community Law, Weyland argues: "[. . .] and analysis based on Kelsen's theory must reject a dualist conception and will lead to the assumption of only one basic norm of a unified set of norms, where the basic norm, either of the Community or of each Member State, validates both Community and national constitutional norms. The principle of the supremacy of Community over national constitutional norms may be fitted into either model". Weyland thus does not see a basic norms in an "overarching" legal order, but rather in either the national legal order or the legal order of the international organization.

In the second monist option the national legal systems of the member states are the highest legal orders, of which the legal system of the international organization is an offspring. This option is, at least implicitly, probably the most common assumption about the source of the validity of the legal system of an international organization. The validity of the system is derived from the competence of the member states – or, more correctly: the High Contracting Parties – to establish this legal system by concluding a constitutive treaty. This option seems to be the common explanation with regard to the European Communities, and is also used by the European Court of Justice.[36] However, this construction of the validity relation between the two legal systems poses new problems. When the validity of the legal system of an international organization would only be based on the distinctive legal orders of the various member states, the consequence would be that the constitutive treaty has not created *mutual* obligations between the member states.[37] A national legal system as such cannot be a sufficient legal basis for the establishment of a valid *international* agreement between sovereign states. One would at least need an "independent" rule (not based in the national legal systems) according to which the expressed will by a sovereign state counts as a valid way to be bound by an international agreement. It follows that this option, presenting the national legal system as the supreme system, cannot sufficiently explain the validity of the legal system of international organizations.

This leads us to the third monist approach to the validity relations between legal systems. In this construction both legal systems are to be considered as equal and (relatively) independent legal subsystems of the overarching international legal system. Both are based on international law and the validity of the legal system of the international organization in particular finds its basis in the international

36. *See*, for instance, Case 6/64, *Costa ENEL*, [1964] *ECR* 585, in which the Court, *inter alia*, stated that ". . . the EEC Treaty . . . became an integral part of the legal system of the Member States . . ". and that the Member States have limited their sovereign rights by creating a Community having "real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community . . .".

37. The other possibility to base the primacy of the national legal order over de European Union legal system is that the highest rule is laid down in *one* of the national legal orders of the member states. However, this option leads to rather absurd consequences because not only the European legal system but also all the other national legal orders are in this case subordinated to the "highest" national legal order (for instance, the Irish or Dutch legal order).

customary rule of *pacta sunt servanda*.[38] Thus, the treaties establishing the European Union created – in the words of the European Court of Justice with regard to the European Community – "a new legal order in international law",[39] and this order indeed has an "autonomous" nature.[40] However, this autonomy concerns the relationship with the legal systems of the member states and not with the international legal system. On the contrary, the international legal system not only provides the validity of the legal sub-systems, it also co-ordinates the relations between them. For instance, international treaty law provides that a state may not invoke its internal law as a justification for its failure to perform a treaty obligation, which, in principle, also applies to national constitutional law.[41] It is important to realize that this principle of (external) supremacy of the law of an international organization over national law cannot follow as such from the validity relationship between the two systems, since after all the systems are equal in that respect. The supremacy must therefore be based on a priority rule laid down in the overarching international legal system.

3.2 *Applicability, effect, and supremacy*

The consequence of the view that the legal systems of international organizations and those of their member states are both part of one, overarching legal system, is that *valid* legal rules of international organizations have to be accepted as legal *facts* by the member states. In other words, states are not free to grant or to deny a valid legal rule of an organization of which they are a member its *validity* in its own national legal system. The validity of the law of an international organization can only be judged on the basis of the conditions set out in that same legal system (including the relevant rules of international law) and is not dependent on the (constitutional) law of the member states, even where it concerns its status in the national legal system.

However, at the same time it is important to underline that no other consequences can be attached, on logical grounds, to the unity of the legal systems of international organizations and the member states

38. *See*, Article 26 of the Vienna Convention on the Law of Treaties, 1969.
39. Case 26/62, *Van Gend & Loos*, [1963] *ECR* 1, 12.
40. Case 6/64, *Costa ENEL*, [1964] *ECR* 585.
41. *See* Articles 27 and 46 of the Vienna Convention on the Law of Treaties, 1969.

as far as this unity is shaped by their validity relations. As mentioned before, the legal systems of the organization and its member states are, qua legal validity, in an hierarchically equal position and are relatively independent of each other. In particular the validity relationship does not say anything about the following issues:[42] a) whether the law created by the international organization is directly applicable in the national legal system or not, meaning whether besides the national legislature other national authorities – such as regional or local administrations, and national courts – are competent to apply that law as such; b) whether the legal rules of international organizations are directly effective or not, meaning whether individuals can rely on provisions of that law before their national courts; and c) whether the law of the international organization has supremacy over national law in the event of conflict between both kinds of rules. The answers to these questions do not follow from the validity of the specific legal rules of international organizations in the national legal systems of the member states, but depend on the relevant rules of international and national law.

It is well known that according to international law, states are, in principle, free in the way they apply and give effect to international law in their national legal systems. The consequence of this freedom is that, in practice, there are as many different ways in which the aforementioned issues are regulated as there are states.[43] For instance, with regard to the issue of applicability of international law in the national legal system, the national "solutions" vary between the situation in which international legal rules have to be transformed by the national legislature into national law before it can be applied by other national authorities,[44] or the situation in which, in principle, international legal rules are as such directly applicable by every national

42. *See*, A. Verdross and B. Simma, *Universelles Völkerrecht, Theorie und Praxis* (Berlin, Duncker & Humblot, 3rd ed., 1984), pp. 550–554. For the application of these issues in the European law context, *see*, A. Koller, *Die unmittelbare Anwendbarkeit völkerrechtlicher Verträge und des EWG-Vertrages im innerstaatlichen Bereich* (Bern, 1971); J. Winter, "Direct Applicability and Direct Effect, Two Distinct Concepts in Community Law", 9 *Common Market Law Review*, 1972, 425; P. Eleftheriadis, "The Direct Effect of Community Law: Conceptual Issues", 16 *Yearbook of European Law*, 1996, 205; J. Shaw, *Law of the European Union* (Basingstoke, Palgrave, 3rd ed., 2000), Chapter 12.

43. *See*, with further references, P. Malanczuk, *Akehurst's Modern Introduction to International Law* (London, Routledge, 7th ed., 1997), pp. 63–71.

44. Sometimes, such a system is also referred to as "dualist", however this is confusing because it can be applied within a monist relationship between distinct legal systems.

authority. This relatively anarchic situation is one of the reasons why the international legal system is often characterized as horizontal or decentralized. One can also say that institutional vertical unity between international law in general and the 200 or so national legal systems is – apart from their validity relation – presumptively absent and, as far as it is present in practice, that it solely rests on the limited practical options available.

The way to realize institutional vertical unity between the international and national legal systems is to regulate the issues of applicability, effect and supremacy in the international legal system. Such a regulation takes priority over national (constitutional) rules on the basis of the aforementioned customary rule that states may not invoke internal rules to justify breaches of international obligations.[45] The most well known example in this respect is, of course, the European Community legal system. Although an explicit regulation of the issues of applicability, effect and supremacy of Community law in the national legal systems of the member states was almost absent in the treaties establishing the European Communities, the Court of Justice assumed that the founding fathers of the Communities had the clear intention that these issues in the end had to be settled by the Community institutions, and in particular, the Court of Justice, on the basis of some fundamental unwritten Community principles. There is no need to go into the farreaching significance of the *assertion* that the applicability, effect and supremacy of Community law in the national legal systems are at least also questions of Community law.[46] It suffices to say, on the basis of European and national case law, that Community law is in principle directly applicable and directly effective on a priority basis in the national legal orders of the member states, although not all consequences of these structural principles are as yet fully developed or indeed fully accepted by the member states, in particular by some national courts.[47]

The question is whether this institutional vertical unity also exists between legal systems of other international organizations and those

45. *See*, *supra* note 41.

46. *See*, literature mentioned *supra* note 42. For an excellent and recent overview of the development of some of the core concepts, *see* B. de Witte, "Direct Effect, Supremacy, and the Nature of the Legal Order", in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law* (Oxford, Oxford University Press, 1999), pp. 177–214.

47. *See*, also P. Craig and G. de Búrca, *EU Law, Text, Cases and Materials* (Oxford, Oxford University Press, 3rd ed., 2002), Chapters 5, 6 and 7.

of their member states. This seems in particular relevant with regard to the aforementioned integration-organizations because they have the legal powers to take decisions about matters which can affect the legal position of individuals and other private parties. Insofar as the literature deals with this question, the answer is quite simply negative. It is assumed that the issues of applicability, effect, and supremacy have to be dealt with under the traditional rules of international law meaning that these issues are solely regulated by the internal (constitutional) law of the member states.

However, this conclusion seems premature and needs further research. At least two considerations seems to be important in this respect. In the first place, the absence of an explicit regulation of the relationship between the legal system of an international organization and those of the member states in the founding treaties is, in itself, not decisive with regard to the question whether rules of an international organization can be considered directly applicable and directly effective on a priority basis in the legal systems of the member states. It is generally recognized that the judgments of the European Court of Justice on the legal nature of the Community legal system were mainly based on "legal policy" considerations, in particular the objectives the effectiveness and uniformity of the application of Community law and the legal protection of individuals and other private parties. It is not clear why such objectives would have, beforehand, less relevance for other integration-organizations.

In the second place, a provision in a treaty establishing an international organization which *excludes* for instance the direct effect of certain types of legal act of the organization nevertheless shapes to some extent the vertical unity of the legal systems of the organization and those of the member states. By inserting such a clause – as happened in the PJCC chapter of the European Union with regard to "framework decisions" and "decisions"[48] – the member states accept in principle that the regulation of the relation between the legal system of the organization and their own legal systems has become a matter of the law of the organizations itself and that they are not free anymore to control this matter solely under their internal law. Moreover, the exclusion of the direct effect of certain legal acts implies that they are in principle directly applicable in the national

48. *See* Article 34(2)(a)(b) TEU.

legal systems, otherwise the exclusion makes no sense at all. At least within the Community legal system, the direct application of legal acts is the legal basis for the principle of "indirect effect", meaning that national authorities have the obligation to interpret national legislation and other national measures as much as possible in the light of the wording and purpose of Community law.[49]

4. *Conclusion*

With the increasing "institutionalization" of the international system, international organizations have evolved into autonomous legal entities with competences to govern the behaviour of their members. To make a comparison to national legal systems: where classic international law can be seen as "private law" between states, the choice for international organizations as a governance structure of the international system caused for the development of what one may call "international administrative law".

In this development some organizations play an important role, as they have been given the competence to operate not only on the level of the international (inter-state) legal order, but also within the national legal orders of their member states. The present contribution first of all made an attempt to reconsider the validity sources of decisions of international organizations, in particular when these decision not only affect the member states, but also natural and legal persons within those states. With the help of institutional legal theory we have presented a model of the international legal order in which states and international organizations are not hierarchically subordinate to one another, but in which both international legal persons rather stand on an equal footing. The validity of norms of international organizations within the national legal orders of the member states (as well as in the international legal order) is thus explained on the basis of a common basic norm. This does not mean that norms of international organizations by definition have direct effect or that they have supremacy over national norms. The "rules of recognition" by which these issues are settled are traditionally found in the national legal order, but may also be made on the international level; the European Community being the prime example in this respect.

49. *See* European Court of Justice, Case C-106/89, *Marleasing*, [1990] *ECR* I 3061.

It is in particular these "integration-organizations" that are in need of a whole toolbox of governance instruments to steer, stimulate or enforce the cooperation between member states and to get a grip on the actions of their citizens. However, classic classifications of legal norms usually do not allow for many of these norms to be regarded as legal, which causes problems related to the validity of these decisions, their normative force and accountability in case of non-compliance. This is for instance illustrated by the quote from the European Commission in the beginning of this chapter, in which "legislation" is opposed to "non-binding tools", implying that the latter fall outside the legal scope.

The approach used in the present contribution departs from the notion that international organizations – as "legal institutions" – are also competent to create legal facts that cannot be qualified as either mandatory or competence-conferring norms (the classic dicho-tomy). This means that a larger number of legal acts in a variety of shades conceivably form part of the legal system of international organizations, and, thus – qua validity – of the national legal systems. The value of this approach can be found in the fact that is allows us to explain the validity and normative force of norms that are not mandatory, but nevertheless explicitly form part of the governance system of international organizations. A next step would be to apply the presented classification to the norms in decisions of – for instance – the European Union, in order to establish their normative force and meaning, as the proliferation of types of decisions in modern forms of international governance only makes sense when the legal status and meaning of the norms is comprehensible for the addressees.

CHAPTER NINE

INTERNATIONAL JUDICIAL BODIES AS SOURCES OF NORMATIVITY: THE WTO DISPUTE SETTLEMENT SYSTEM IN COMPARATIVE CONTEXT

Tomer Broude*

1. *Assessing the evolving role of international judicial bodies*

Are international judicial bodies gaining a more potent role as sources of normativity in international law? Much has been said of the shift from national authority to international "governance"; indeed, this trend may be regarded as one of the defining elements of the globalization of our age. Are we witnessing an additional move from political lawmaking to international judicial norm-creation? Is the international institutional balance tipping in favour of the judiciary?[1]

Contemporary thought would answer these questions in the affirmative. The "proliferation of international judicial bodies" is an acknowledged facet of international affairs, bringing with it conceptions of "legal pluralism" and "new medievalism".[2] Numerical growth may imply greater judicial normative influence. Arguably, judicial involvement is increasing not only as a complement to political intergovernmentalism

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1. For more detailed discussion, see T. Broude, *Judicial Boundedness, Political Capitulation: The Dialectic of International Governance in the WTO* (London, Cameron May, 2004).

2. *See* C.P.R. Romano, "The Proliferation of International Judicial Bodies: The Pieces of the Puzzle", 31 *New York University Journal of International Law & Policy*, 1999, 709. On the latter terms, *see* the stimulating contributions by G. Anders and J. Friedrichs in this volume.

or supranationalism, but as an alternative to it. Judicial bodies may be entrusted with the formation of international normativity, not only with its application.

Moreover, more issue areas are regulated by international agreements and customary norms. This "hardening" of international law leads many to assume that international judicial power is greater than in the past. These trends – real and perceived – have been labeled (mainly in international trade law) "formal legalism", "judicialization", "juridification" or "juridicization".[3]

Yet these tendencies do not necessarily entail increased judicial influence. The opposite may be true, if they are merely indicative of an increase in rules, requiring more judicial activity to apply them. The breadth of judicial involvement need not attest to its depth. The question asked in opening remains, therefore, unanswered: are international judicial bodies more powerful today as sources of international normativity?

I suggest a tentative answer by addressing one international judicial body that has been the focal point of claims of an increase in international judicial power – the World Trade Organization (WTO) Dispute Settlement System (DSS). This judiciary is generally perceived as holding disproportionate power in comparison to the WTO's political bodies and membership, breaking with the conventional role of international tribunals; it is seen as wielding greater *relative judicial power*, and acting more as an *independent source of normativity*.

"Relative judicial power" is a term I introduce here, and define as the power of the judicial organ of an organization in relation to the power of its political-legislative branches and subjects. A judiciary with greater relative judicial power has greater normative influence. By "power" I do not mean authority or jurisdiction, but rather strength,

3. Authors who have employed some of these terms include: G.R. Shell, "Trade Legalism and International Relations Theory: An Analysis of the WTO", 44 *Duke Law Journal*, 1995, 829; J.R. Silverman, "Multilateral Resolution Over Unilateral Retaliation: Adjudicating the Use of Section 301 Before the WTO", 17(1) U. Pa. J. Int'l Econ . . . L, 1996, 233, pp.253–263; G.R. Shell, "The Trade Stakeholders Model and Participation by Nonstate Parties in the WTO", 17(1) U. Pa. J. Int'l Econ. L. 1996, 359, p. 363; A. Reich, "From Diplomacy to Law: The Juridicization of International Trade Relations", 17 *Northwestern Journal of International Law and Business*, 1996–7, 775; A.K. Schneider, "Getting Along: The Evolution of Dispute Resolution Regimes in International Trade Organizations", 20 *Michigan Journal of International Law*, 1999, 697; and J.H.H. Weiler "The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement", 35(2) *Journal of World Trade Law*, 2001, 191.

ability and influence.[4] Hence, by "judicial power" I do not refer to the normal legal usage of the term, that relates to a court's authority,[5] but rather to a more political, even tangible or physical meaning: the capacity of a judiciary to exert an effect, to produce normative outcomes.

I set out to challenge the aforementioned received wisdom regarding the power of the WTO DSS, using comparative analysis. In my view, the design of the WTO DSS is no stronger, perhaps even weaker, than the traditional model of international adjudication, represented by the International Court of Justice (ICJ). In current thought this argument seems counter-intuitive. How can the WTO DSS, one of the most frequently used international tribunals (certainly among those of near universal membership), be weaker than the ICJ, the judiciary of the seemingly impuissant United Nations (UN)?

In the next section I elaborate on the perception of the relative judicial power of the DSS, and the role it plays in the debate on the legitimacy of the WTO. In the third section, I propose a partial framework for comparing relative judicial power. Then I apply this framework to the WTO DSS and the ICJ. In conclusion, I discuss the broader implications of the comparative exercise.

2. *Relative judicial power and the legitimacy debate in the WTO*

Critics of different motivations decry the WTO for its purported lack of legitimacy,[6] focusing on the DSS.[7]

4. The word "power" has many meanings. The one I refer to here is of "the employment of strength; the exercise of any kind of control; influence; dominion; sway; command" (*see Webster's Revised Unabridged Dictionary* (Plainfield, NJ: MICRA, Inc., 1998), *s.v.* "power".

5. *See Black's Law Dictionary*, 7th ed. (1999), *s.v.* "judicial power".

6. The fiercest criticism comes from "anti-globalist" non-governmental organizations. Their public manifesto against the WTO (not necessarily representative of mainstream civil society), while easy to brush aside as dogmatic hype that lacks a firm empirical or theoretical basis, is still the most definitively articulated attack on the WTO; *see* " 'WTO – Shrink or Sink!' – The Turnaround Agenda International Civil Society Sign-On Letter", online: Public Citizen <www.citizen.org/trade/wto/ shrink_sink/articles.cfm?ID=1569#Sign-on> (last accessed: 27 August 2002) or Focus on the Global South <www.focusweb.org/our-world-is-not-for-sale/statements/Shrink-or-sink.html> (last accessed: 6 November 2002) (hereinafter – "Shrink or Sink"): "The WTO system, rules and procedures are *undemocratic, un-transparent and non-accountable* and have operated to marginalize the majority of the world's people" (emphasis added).

7. Steger writes of the current debate: "there is a struggle for legitimacy in the

On one hand, the "external" attack on the WTO – primarily from "anti-globalist" NGOs – challenges substantive trade rules, but above all demands the "democratization" of WTO decision-making, directly criticizing the DSS.[8] Indeed, many commentators readily acknowledge the existence of a "democratic deficit"[9] or "legitimacy gap" in the WTO.[10]

On the other hand, the "internal" challenge comes from WTO Members questioning basic aspects of the WTO. It is difficult for Members to question the binding validity of the WTO Agreements" language; rather, they challenge the interpretation and application of their rules by the DSS. Thus, the internal argument is essentially a debate over the legitimacy of the DSS, which to its inside critics, is like the *Golem* of Prague – a lump of clay intended to be meek and subservient, that has taken a life and will, beyond the control of its creator.[11]

For example, Ricupero writes that developing countries "perceive an imbalance in their ability to assert their rights in the WTO, particularly in a context where the decisions of the Dispute Settlement Body and the Appellate Body appear to be in some contradiction

WTO, and the dispute settlement system has become its battleground"; D.P. Steger, "Book Review: *Free Trade, Sovereignty, Democracy: The Future of the WTO by C.E. Barfield*", 5 *Journal of International Econonomic Law*, 2002, 565.

8. E.g., "Shrink or Sink" (*see* note 6): "The WTO dispute settlement system is unacceptable. It enforces an illegitimate system of unfair rules and operates with undemocratic procedures. It also usurps the rulemaking and legislative role of sovereign nations and local governments".

9. J.M. Curtis, "Trade and Civil Society: Toward Greater Transparency in the Policy Process", in Canada – Department of Foreign Affairs and International Trade, *Trade Policy Research 2001* (Ottawa, 2001), p. 301; online, Canada – Department of Foreign Affairs and International Trade, <www.dfait-maeci.gc.ca/eet/12–e.pdf> (last accessed: 27 August 2002).

10. R. Ricupero, (Secretary General, UNCTAD), "Rebuilding Confidence in the Multilateral Trading System: Closing the 'Legitimacy Gap' ", in Sampson (ed.), *The Role of the WTO in Global Governance* (Tokyo, United Nations University Press, 2001), p. 37. For further discussion of the "external" legitimacy debate in the WTO, *see* R.O. Keohane, J.S. Nye, "The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy", in Porter *et al.* (eds.), *Efficiency, Equity, Legitimacy: The Multilateral Trading System at the Millennium* (Washington, DC, Brookings Institute Press, 2001), p. 264; also available online, Kennedy School of Government, <www.ksg.harvard.edu/cbg/trade/keohane.htm> (last accessed: 6 November 2002); R. Howse, "The Legitimacy of the WTO", in Heiskanen, Coicaud, (eds.), *The Legitimacy of International Organizations* (Tokyo, United Nations University Press, 2000), p. 355.

11. For adaptations of the story of the *Golem* of Prague, *see* G. Winkler, *The Golem of Prague: A New Adaptation of the Documented Stories of the Golem of Prague* (New York, Judaica Press, 1997).

with the exclusive authority of the Ministerial Conference and the General Council to adopt interpretations".[12] Barfield, in an influential book, contends that the WTO DSS is "not sustainable politically because the imbalance between ineffective rule-making procedures and highly efficient judicial mechanisms will increasingly pressure the panels and Appellate Body to "create" law, raising intractable questions of democratic legitimacy".[13] These views concentrate on the WTO DSS – its perceived high relative judicial power and ability to generate norms – as the source of the legitimacy problem. A recurring theme in academic writing is that the DSS is too strong, overstepping the bounds of its authority.[14]

This perception – that the DSS has disproportionately high relative judicial power – is thus central in the debate around the internal and external problems of legitimacy in the WTO.[15] This perception is easily understood in terms of normativity: NGOs, American conservatives,

12. *See* Ricupero (note 10), p. 50. Developed countries – indeed, the titans of international trade, the United States and the European Union – also defy the authority of the DSS, when refraining from full compliance with dispute settlement rulings. For a factually dated but otherwise lucid depiction of this aspect of the problem, *see* B.L. Brimeyer, "Bananas, Beef, and Compliance in the WTO: The Inability of the WTO Dispute Settlement Process to Achieve Compliance from Superpower Nations", 10 *Minnesota Journal of Global Trade*, 2001, 133. The sentiment that the DSS may be overly powerful is acknowledged by the EU; *see* speech by Pascal Lamy, Trade Commissioner of the EU, "The Multilateral Trading System and Global Governance after Doha", Berlin, 27 November 2001: "The WTO has a substantial body of rules, including a very strong (some would say too strong) DSS, but its rule-making machinery is heavy handed and indeed sometimes chaotic"; available online: European Commission, <europa.eu.int/comm/trade/speeches_articles/spla86_en.htm> (last accessed: 6 November 2002).

13. C.E. Barfield, *Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization* (Washington, DC: The American Enterprise Institute Press, 2001), p. 7.

14. *See ibid.* pp. 53–56; K. Raustiala, "Sovereignty and Multilateralism", 1 *Chicago Journal of International Law*, 2000, 401, at 410; F. Roessler, "The Institutional Balance between the Judicial and the Political Organs of the WTO", in Bronckers, Quick (eds.), *New Directions in International Economic Law: Essays in Honour of John J. Jackson* (The Hague, Kluwer Law International, 2000), p. 326. *See, contra*, W.J. Davey, "Has the WTO Dispute Settlement System Exceeded its Authority? A Consideration of Deference Shown by the System to Member Government Decisions and its Use of Issue-Avoidance Techniques", 79 *Journal of International Economic Law*, 2001, 85–88; and R. Howse, "The Most Dangerous Branch? The Limits and Role of the Judicial Power in the WTO", in Mavroidis, Cottier (eds.), *World Trade Forum 2000: The Role of the Judge* (Ann Arbor, MI, University of Michigan Press, 2001).

15. The perception of a powerful WTO DSS is also central in a related strand of thought, that views the DSS as a successful form of "constitutionalized" international governance. For a more detailed analysis of the relation between relative judicial power and both legitimacy and "constitutionalization" in the WTO, *see* Broude (note 1).

trade diplomats, developing countries – all are concerned that the DSS, as an international judicial body, is acting as a generator of international trade norms, an independent source of normativity, not merely an interpreter of rules made by the political process. Yet this perception begs the question: is the DSS indeed so strong?

3. *A framework for institutional comparison*

How can we assess the relative judicial power of the WTO DSS and the extent to which it functions as an independent source of normativity? A comparative approach seems appropriate. Is the DSS unusually powerful in comparative terms? Does the DSS have more power *vis-á-vis* the political WTO organs (the General Council/Ministerial Conference [GC/MC])[16] and membership, than other international judicial bodies have *vis-á-vis* the corresponding organs (in this contribution I refer to the ICJ and the organs of the UN system; in my broader work[17] I also refer to the European Court of Justice)?

Such an inquiry is a form of "comparative judicial politics",[18] concerned with "integrating the study of courts into the study of comparative politics".[19] Several inconclusive theoretical frameworks have been proffered for cross-national comparative judicial analysis.[20] None of them directly addresses relative judicial power. Furthermore, it is necessary to conduct the comparison with international tribunals, not domestic courts. Existing tentative cross-national comparative frameworks may provide insight, but are not fully compatible with our

16. For a succinct survey of the institutional structure of the WTO, *see* WTO Secretariat, *Guide to the Uruguay Round Agreements* (The Hague, Kluwer Law International, 1999), pp. 6–11.

17. *See* Broude (note 1).

18. T.L. Becker, *Comparative Judicial Politics: The Political Functioning of Courts* (New York, Rand McNally and Co., 1970).

19. C.N. Tate, "Judicial Institutions in Cross-National Perspective: Toward Integrating Courts into the Comparative Study of Politics", in Schmidhauser (ed.), *Comparative Judicial Systems: Challenging Frontiers in Conceptual and Empirical Analysis, Vol. 6, Advances in Political Science: An International Series* (London, Butterworths, 1987), p. 7.

20. *Ibid*. and J.R. Schmidhauser, "Alternative Conceptual Frameworks in Comparative Cross-National Legal and Judicial Research", in Schmidhauser (note 19), p. 34. *See also* H. Jacob, "Introduction", in Jacob *et al*., *Courts, Law and Politics in Comparative Perspective* (New Haven, Yale University Press, 1996), p. 2: "no widely accepted paradigms exist which model the relationship between law, courts, and politics in a cross-national context".

present purposes. Classifications of international dispute settlement bodies have been suggested[21] and comparative databases have been compiled,[22] but comparative frameworks of international judicial bodies and their relation to international politics are yet to be developed.

In constructing a framework for comparing relative judicial power, I turned to studies by Fried,[23] Blondel,[24] Becker[25] and Schmidhauser.[26] Each suggests different frameworks for cross-national court-comparison. It is possible to discern in these studies the general understanding that a court's relative power is determined, to great extent, by elements such as its institutional independence from political bodies, the hierarchy between the court's rulings and political intervention, and the degree of freedom the court enjoys in reaching its legal opinions. In my broader research, I have departed from these abstract ideas and identified additional determinants of relative judicial power, building on determinants employed in the cross-national comparative frameworks mentioned above.[27] In the current contribution I focus on only three of these determinants, selected because of their relatively direct bearing on the question of judicial norm-creation. These determinants are:

(1) Functional separation of judiciary from other organs (total separation – partial separation – unity);

21. For example, the work of Schneider (note 3).

22. The ongoing work of the Project on International Courts and Tribunals (PICT) at New York University (*see* online: <www.pict-pcti.org/home.html>) primarily consists of collecting and categorizing data on various aspects of international courts and tribunals. *See also* P. Sands, Y. Shany Y., R. Mackenzie, *Manual on International Courts and Tribunals* (London, Butterworths, 1999).

23. R.C. Fried, *Comparative Political Institutions* (New York, McMillan, 1966), p. 1.

24. J. Blondel, *An Introduction to Comparative Government* (New York, Praeger, 1969), Ch. 22.

25. Becker (note 18).

26. J.R. Schmidhauser, "A Weberian Conceptual Framework for Comparative Judicial Research", paper presented to the annual meeting of the Southern Political Science Association, Atlanta, GA, 1978; surveyed in Tate (note 19) at 19–21.

27. For the full (if not exhaustive) range of determinants of relative judicial power, *see* Broude (note 1). Determinants not dealt with in the present contribution include the appointment and tenure of judicial decision-makers (independent/lifetime – mixed/limited – appointment and removal at will by political fiat); the number of judicial decision-makers (concentrated/fixed – mixed – scattered/variable); compliance and enforcement of rulings (mandatorily judicial – optionally judicial – non-judicial); basis of jurisdiction ("supra-compulsory" – intermediate – "supra-consent" based); sources of law (diversity and dependence on consent: diverse/independent – restricted/mixed – case specific/dependent); and judicial review of acts of other organs (comprehensive-restricted-none).

(2) Immediate reactive capacity of other organs (none – declaratory – effective overruling and annulment);
(3) Long-term reactive capacity of other organs (none – evolutionary – legislative).

The first determinant, the *functional separation of judiciary from other organs*, is the most obvious indicator of judicial independence and is the basic measure of institutional autonomy. If a judiciary is functionally separate from the political organs of the system it serves, its judicial power is relatively great; if it is an organic part of an hierarchical system, depending on other bodies for its own functioning, its relative power is acutely diminished.

Once a judiciary has issued a valid ruling, another determinant of its power is the *immediate reactive capacity of the other organs and membership*. This determinant is of importance when the judicial ruling is regarded undesirable by another organ or by a large portion of the membership. When the judiciary is most powerful, other actors may be powerless to react in any way, barred from even displaying discontent. In a system where the judiciary is relatively weaker, they may be able to express their concern, communicating their views to the judiciary, possibly affecting court conduct. When the judiciary is weakest, its unpopular decision may in fact be overruled by the membership or other organs, annulling it completely.[28]

Distinct from immediate reaction to a ruling as a determinant of relative judicial power, is *long-term reactive capacity*. This is the ability of the legislative or executive branches of the system served by the judiciary, or its membership, to rectify the legal and normative results of judicial rulings by replacing them with other rules. Immediate reaction is concerned with the ability to nullify a specific judicial decision; long-term reactive capacity deals with the replacement of judicial rulings by alternative norms from non-judicial sources.

Relative judicial power is greatest in a system in which non-judicial actors have no rule-making powers. At an intermediate level of relative judicial power are systems in which other actors engage in rule-making that is an evolutionary process (such as the development

28. The idea of a legislature overruling and annulling a judicial decision is virtually unrecognized in democratic societies. Where proposals are made this direction, attempts are made to justify them in terms of separation of powers; for a unique example, *see* R.H. Bork, *Slouching Towards Gomorrah: Modern Liberalism and American Decline* (New York, Harper Collins Publishers, Inc., 1996), pp. 317–330.

of custom). Relative judicial power is weakest where the system has efficient, legislative or quasi-legislative, non-judicial rule-making processes. How does the WTO DSS compare with the ICJ, with respect to these determinants?

4. *Relative judicial power in the WTO DSS: A partial comparative analysis*

4.1 *Functional separation of the judiciary from other organs*

4.1.1 *The ICJ*

An understanding of the functional separation of the ICJ requires recourse to the history of its predecessor, the Permanent Court of International Justice (PCIJ). Although it had been founded by the League of Nations,[29] the PCIJ was not formally an organ of the League, but rather a separate international institution. The PCIJ Statute "as an instrument was completely independent of the Covenant".[30] Subsequently, states that were not members of the League could nevertheless adopt the PCIJ Statute, while League members could decline it.[31] Despite the lack of a comprehensive institutional connection with the League, the PCIJ had strong and obvious ties to it. PCIJ judges were nominated by states, but elected by the League Assembly and Council.[32] PCIJ expenses were borne by the League.[33] More substantively, the PCIJ was "part of the organization of the League"[34] and "part of the machinery at the League's disposal".[35]

The fate of the PCIJ was sealed, by association, when the League proved ineffective on the eve of World War Two. Some suggestions

29. The League had been established by the Covenant of the League of Nations, Part I of the Paris Peace Treaties of 1919; the PCIJ was brought into existence in 1922 under the Statute of the PCIJ of 1920, in accordance with the requirements of Article 14 of the League Covenant.

30. S. Rosenne, *The Law and Practice of the International Court 1920–1996*, 3rd ed. (The Hague, Martinus Nijhoff Publishers, 1997), Vol. I., p. 100.

31. S. Rosenne, *The World Court: What It Is and How It Works*, 5th ed. (Dordrecht, Martinus Nijhoff, 1995).

32. P. Sands, P. Klein, *Bowett's Law of International Institutions*, 5th ed. (London, Sweet and Maxwell, 2001), p. 353.

33. On the budgetary arrangements of the PCIJ *see* Rosenne (note 30), pp. 449–451.

34. M.O. Hudson, *The Permanent Court of International Justice, 1920–1942: A Treatise* (New York, The Macmillan Company, 1943), p. 111.

35. Rosenne (note 30), p. 101.

for post-war international architecture advocated a complete severance of the judicial system for the settlement of disputes from the organization that would replace the League.[36] An alternative view was that the separation of the PCIJ from the League was in fact a weakness of the League, and that "to be complete, any future international organization must have a judicial organ of its own".[37] The latter view prevailed, and the ICJ was indeed established as the principal organ of the UN.[38]

The integration of the ICJ into the UN system did not result, however, in a lower level of functional separation. In fact, the opposite is true. While the PCIJ was formally separate from the League, it had an obscure status in relation to the League Council and Assembly. In the UN system, while the organic connection between institutions is clearer, it is also clear that the ICJ has a formal status that is equal to that of the five other principle organs,[39] as *par inter pares*.[40] As was the League Assembly in the case of the PCIJ, so is the UN General Assembly (UNGA) involved in the appointment of ICJ judges[41] and the coverage of the ICJ budget.[42] Yet several attributes ensure the functional separation of the ICJ.

First, no hierarchical relation exists between the ICJ and other organs of the UN, just as none exists between the UNGA and the UN Security Council (UNSC).[43] The ICJ is an organ of the UN as

36. *Report of the Informal Inter-Allied Committee on the Future of the Permanent Court of International Justice*, 10 February 1944, reproduced in (1945) 39 AJIL Supplement, paras. 12–20.

37. Rosenne (note 30), p. 104. *See also* T.J. Bodie, *Politics and the Emergence of an Active International Court of Justice* (London, Praeger Publishers, 1995), p. 58: "It was the intention of the founders of the United Nations to emphasize to a much greater degree than had been done with the relationship between the League and the PCIJ the extent to which the judicial process should be considered an avenue for peaceful resolution of disputes, the main *raison d'etre* for the organization as a whole".

38. Article 92 UN Charter and Article 1 ICJ Statute.

39. The six principle organs of the UN established under Article 7 UN Charter are the General Assembly (UNGA), the Security Council (UNSC), the Economic and Social Council (ECOSOC), the Trusteeship Council, the Secretariat and the ICJ. *See* B. Conforti, *The Law and Practice of the United Nations*, 2nd rev. ed. (The Hague, Dordrecht, Boston, MA: Kluwer Law International, 2000), pp. 61–123.

40. *See* Bodie (note 37), p. 58, describing the ICJ as "co-equal" to the other organs, and also Rosenne (note 30), p. 113.

41. *See* Conforti (note 39), pp. 122–123 and source cited there. Judge appointment is a separate determinant of relative judicial power, not dealt with in this contribution; *see also* note 27.

42. Article 33 ICJ Statute.

43. The ICJ has held that the UNSC "is not in a subordinate position" in rela-

an organization, not a subsidiary organ of the UNGA. Illustrative of this non-hierarchical parity, the ICJ is under no obligation to submit an annual report to the UNGA as are other UN organs, although it has done so voluntarily since 1968. As Rosenne writes: "More than formal importance attaches to this, for it carries with it a necessary implication of the *complete functional independence of the Court*, and serves as a valuable corrective to any tendency to read into the organic connection of the Court with the Organization more than is warranted".[44]

Second, the ICJ Statute is an integral part of the UN Charter under Article 92 of the latter, in the sense that the Charter and Statute are to be read together, but "there is no subordinate status in the Statute in relation to the Charter".[45] In other words, no interpretative or functional hierarchy exists between the founding documents either. Furthermore, the ICJ Statute has a specialized process of amendment that allows for the initiation of amendment procedures by the ICJ itself.[46]

Third, the other organs of the UN have no role in contentious proceedings before the ICJ, nor do they have a part in the initiation of such proceedings. This is the essence of functional separation: in its adjudicatory process, the ICJ functions separately from the other UN organs.

In sum, the functional separation of the ICJ from the other relevant organs is nearly total, enhancing its relative judicial power.

4.1.2 *The WTO DSS*

From a formal perspective, there are obvious faults in the functional independence of the DSS. Strictly speaking, the judicial "branch" of the WTO – consisting of Panels and the Appellate Body (AB) – does not have a separate and independent existence or institutional structure. Both Panels and AB are organizational subjects of the Dispute Settlement Body (DSB), which is a political organ of the WTO;[47] they do

tion to the UNGA; *see* ICJ, *Competence of the General Assembly for the Admission of a State to the United Nations (1949–1950)*, Advisory Opinion of 3 March 1950, *ICJ Reports* 1950, p. 1 at 8.

44. *See* Rosenne (note 30), p. 115 (emphasis added).

45. *Ibid.*, p. 109.

46. *See* Articles 69–70 ICJ Statute.

47. This is clear from the official organizational chart of the WTO. *See* WTO Secretariat *supra* note 16 at 9. *See*, however, a looser description of the structure of the DSS in C.-D. Ehlermann, "Experiences from the Appellate Body", contribution to the Symposium of the Texas International Law Journal on Judicialization

not, together, officially form a single, separate, judicial organ. The very term "dispute settlement system" is a constructed one, being undefined in the WTO Agreements.[48] The AB reviews Panel decisions on appeal,[49] forming a judicial hierarchy, but there is no functional hierarchy between the AB and Panels (in the sense that Panels are not organizationally linked to the AB, but rather to the DSB).

There is, however, a clear formal functional hierarchy between the Panels and AB, on one hand, and the DSB, on the other. It is the DSB, not the AB or Panels, that is entrusted with the administration of the DSU.[50] Accordingly, it is the DSB that establishes Panels.[51] It is the DSB that produces rulings and recommendations in disputes; the official function of Panels is merely "to assist the DSB in discharging its responsibilities" under the DSU and Covered Agreements.[52] The results of Panel procedures and AB review are "Reports" to the DSB, not decisions or rulings. While the ICJ is not legally required to report to the UNGA at all, the AB and Panels report every judicial decision they make to the DSB.

In this sense, the DSS has been designed as considerably less independent than the ICJ. While the ICJ is a principal organ of the UN, the DSS (the AB and Panels) – is not a legal organ of the WTO, but rather an organic, subsidiary, agent of the DSB. This may seem a formalistic analysis, but it is important to understand the different conceptual architecture of the organizations. The DSS is a vital part

and Judicial Globalization, Austin, Texas, 5–6 September, 2002 (on file with author), section II: "The DSU does not define expressly the institutional structure of the WTO dispute settlement system. This structure results however clearly from the DSU. The dispute settlement system of the WTO is composed essentially of three elements: the Panels, the Appellate Body and the Dispute Settlement Body (DSB)". This may be understood as belittling the lack of functional dependence of the judicial elements (Panels and AB) upon the DSB, but at the same time it underlines the absence of functional coherence and of functional hierarchy between the AB and Panels.

48. Article 3.2 of the Agreement Establishing the World Trade Organization (hereinafter – "WTO"), *Annex 2: Understanding on Rules and Procedures Governing the Settlement of Disputes*, 15 April 1994, app. 1 in *The Results of the Uruguay Round of Multilateral Trade Negotiations*, 33 ILM 1226 at 1244 (hereinafter – "DSU"), does make reference to the "dispute settlement system of the WTO", but does not define the term; Article 3.7 DSU does the same with the term "dispute settlement mechanism". In both cases, the terminology probably includes both political and judicial aspects.

49. Article 17.1 DSU.

50. Article 2 DSU.

51. Article 6 DSU.

52. Article 11 DSU.

of the WTO, but if the WTO Agreements are read as a blueprint for the world trading system, the judicial DSS is not one of its pillars, but rather a reinforcement within the pillar of the political DSB.

The DSU may be likened to a court's statute. It is an "integral part" of the WTO Agreement,[53] terminologically on a par with the ICJ Statute, that is an "integral part" of the UN Charter. From a functional, interpretative perspective, however, it is a slightly inferior "integral part" – in any event of conflict between its provisions and those of the other WTO Agreements, the "special or additional rules" of the latter regarding dispute settlement shall prevail.[54] Thus, the DSU may be functionally dependent on the provisions of substantive WTO agreements, unlike the ICJ Statute, that has no comparable interpretative subordination.

In contrast to ICJ involvement in amendments of its Statute, the DSS does not have legal standing in the DSU amendment process. Informal consultations with AB Members may occur during ongoing DSU review talks, but these are formally held among WTO Members only.[55] Panels have the prerogative of changing the default Panel Working Procedures[56] for the dispute before them, after consulting the parties to the dispute, but this is fairly uncommon. The AB draws up and amends its own procedures,[57] but only after consultation with the DSB Chairman and WTO Director-General.[58]

53. Article II:2 WTO.

54. Article 1 DSU.

55. The review of the DSU was established in 1994 by a WTO Ministerial Decision reached as part of the WTO Uruguay Round results; *see* Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes, 15 Apr. 1994, 33 ILM 1125, 1259. The decision does not allow for any formal participation of the AB in the review process. The review was to have been completed after four years from the entry into force of the WTO Agreements, but the review period was extended by a 1999 DSB decision, again without mention of a role for the AB; *see* WTO, Dispute Settlement Body, *Minutes of Meeting* (held on 3 December, 1998), WTO Doc. WT/DSB/M/52 (1999). The DSU review is now part of the negotiations set out in the Doha Work Programme of Multilateral Negotiations (WTO, Ministerial Conference, *Ministerial Declaration* (14 November 2001), WTO Doc. WT/MIN(01)/DEC/W/1 (2001)) (hereinafter – the "Doha Declaration"). For a discussion of issues on the review agenda at the time of the extension of review period, *see* K. van der Borght, "The Review of the WTO Understanding on Dispute Settlement: Some Reflections on the Current Debate", 14 *American University International Law Review*, 1999, 1223.

56. *See* Annex 3 DSU.

57. The Working Procedures for Appellate Review have undergone a few amendments. The current version is WTO, Appellate Body, *Working Procedures for Appellate Review*, WTO Doc. WT/AB/WP/4 (2002) (hereinafter – "AB Working Procedures").

58. Article 17.9 DSU.

Non-judicial elements of the WTO are intensively involved in the dispute settlement procedure. The DSB is in charge of the actual initiation of judicial proceedings – no Panel can be established without its approval. The DSB is again crucially involved in the adoption of Panel and AB Reports. Both these decisions are virtually automatic, since the DSB may decide not to establish a panel or decline to adopt a Report only if negative consensus is reached. But in terms of the conceptual architecture of organizations, the requirement of non-judicial decision is a sign of diminished formal functional independence – disputes may enter and exit the judicial domain only by passing through the political gateway of the DSB.[59]

On a more practical level, the Secretariat is greatly involved in the actual formulation of Panel opinions, with Secretariat attorneys providing counsel to Panelists. The AB has greater independence in this respect, employing its own internal legal counselors.[60]

The WTO DSS therefore displays a lower level of functional independence than the ICJ. This diminished independence is to some extent conceptual and less practical, especially at the AB level; nevertheless, the DSS enjoys only qualified formal functional independence.

4.2 *Immediate reactive capacity of other organs*

4.2.1 *The ICJ*

ICJ decisions are nearly impervious to the short-term reactions of the other UN organs and membership. A number of observations underpin this statement. First, a substantive ICJ ruling is the final word on the matter of the dispute or legal question set before it. An ICJ ruling requires no acceptance, approval or certification by

59. Indeed, it is the adoption process of Panel and AB Reports that has led to the opinion that the WTO dispute settlement system is not "a truly judicial procedure", but rather a "quasi-judicial system" (*see* Ehlermann, note 47). This is not different from my own analysis, because Ehlermann uses the term "dispute settlement system" to refer to the entire system established by the DSU, incorporating both political and judicial elements, while I employ it to label the judicial elements only. In my understanding, the Panels and AB (the dispute settlement system, or DSS, in my terminology) are judicial bodies that lacks full independence, functioning under a fiction that they are not entirely judicial.

60. On the role of Secretariat personnel and counseling functions in the WTO DSS, *see* M.E. Janow, "The Role of the Secretariat in Dispute Settlement", paper presented at the World Trade Forum 2002 on "Dispute Settlement and Decision Making in the Multilateral Trading System: Current Operation and Options for Reform", 17 August 2002, World Trade Institute, Berne (on file with author).

any organ, party or parties. A valid, positive ruling given by the ICJ in a contentious proceeding on the merits of a case is of itself an order to be complied with.[61] It is "final and without appeal".[62] The UNGA, UNSC and UN membership have no official, legally potent opportunity to effectively react to such an ICJ ruling in the sense of overruling or altering it.[63] By default, it could be said that they are legally barred from doing so, short of actually altering the legal basis on which the ruling in question rests – but that would be a case of long-term rather than immediate reaction.[64]

Here one must carefully distinguish between cases in which the ICJ renders a substantive ruling deciding a case on its merits, on the one hand (either upholding or rejecting a complaint), and, on the other, cases in which a ruling is given that is not wholly on the merits of a case, such as rulings that reject a complaint as inadmissible due to preliminary arguments. In the former cases, as noted above, the political organs of the UN have no immediate opportunity or power to overturn the ICJ ruling. Moreover, in the latter cases, they are posed with a form of specific normative vacuum, because the ICJ

61. Article 94(1) UN Charter: "Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party". The other side of this coin is that formally, ICJ rulings are binding only *inter partes*. Under Article 59 ICJ Statute, a decision of the ICJ "has no binding force except between the parties and in respect of that particular case". This does not reflect the true precedential value of ICJ rulings (*see*, e.g., M. Shahabudeen, *Precedent in the World Court* (Cambridge, Cambridge University Press, 1996), p. 109: "in effect, seen from the point of view of the Court itself, the law as stated in a decision is regarded as part of international law; it thus applies to all States whether or not parties to the particular case. It is not then a question whether the decision *per se* applies as a binding precedent, but whether the law which it lays down is regarded as part of international law"). At all events, this question relates, in my analysis, to determinants of relative judicial power that have additional and independent merit, either as separately (e.g., precedential value of decisions) or as part of a broader one (e.g., sources of law); *see* Broude (note 1).

62. Article 60 ICJ Statute.

63. Indeed, the UNSC may become involved in a dispute after a ruling has been given, only if a problem of non-compliance arises (Article 94(2) UN Charter). The substance of the ruling, however, is not questioned in this context. At most, the UNSC may decide not to take action that would "give effect to the judgement", but the UNSC "cannot destroy rights adjudicated by the Court" (*see* Rosenne *supra* note 30, p. 254). Similarly, the UNSC is notified of provisional measures ordered by the ICJ, but this notification does not require approval by the UNSC of the measures nor invite its opinion (Article 41(2) ICJ Statute and Article 77 ICJ Rules). Rather, this notification is made for practical purposes, in order to ensure respect by UN members for the provisional measures already decided upon.

64. On long-term reaction to ICJ decisions, *see* Section 4.3(a) *infra*.

has refrained from definitively settling an existing dispute. When the UNGA or UNSC, or both, step into this void in order to influence the same dispute, their action may gain the appearance of immediate political reaction to a judicial decision. Yet, in fact, no judicial decision has been made that can be reacted to.

For example, it could be argued that the 1966 UNGA resolution terminating South Africa's mandate in South West-Africa (Namibia),[65] and the subsequent 1970 UNSC Resolution declaring the continued presence of South Africa in South-West Africa (Namibia) as illegal,[66] were a direct reaction of the political bodies of the UN to the 1966 ICJ decision in the *South-West Africa* case.[67] In this judgement, the ICJ refrained from finding that the apartheid policy pursued by South Africa was a violation of its mandate in South-West Africa (Namibia). Yet the political Resolutions that came in the wake of this judgement essentially declared that South Africa was indeed in violation of its mandate. So, because the Resolutions had made a normative statement on the mandate that the ICJ ruling had not, it is possible to interpret the UNGA and UNSC Resolutions as "overruling" the ICJ, in a form of effective immediate reaction.

There is no doubt that on the pragmatic level, the UNGA and UNSC in this case took control of the situation where the ICJ had not. It was not, however, overruling the ICJ, which had given no positive ruling on the question of the legality of apartheid, but only rejected the complaints on the basis of preliminary arguments regarding the standing of Ethiopia and Liberia in the case. Had the ICJ ignored or rejected the preliminary arguments made by South Africa, and found on the merits that South Africa had indeed violated its mandate, there would of course had been no need for the UNGA and UNSC Resolutions that later established this; or rather, at least the later political Resolutions would not appear to contradict the ICJ ruling.

The ICJ did not, however, *reject* the complaints on the merits either; in other words, it had made no positive finding whereby the South African mandate had *not* been violated. It had merely found the complaints made by Ethiopia and Liberia against South Africa inad-

65. UN GAOR, 21th Sess., UN Doc. A/6316 Supp. (1966).
66. UN SCOR, 25th Sess., 1550th mtg., UN Doc. S/RES/284 (1970).
67. ICJ, *South-West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, (Second Phase, Judgement) of 18 July 1966, *ICJ Reports* 1966, p. 6.

missible because the applicants lacked "legal ground or interest appertaining to them in the subject-matter" of the claim, essentially without prejudice to the substantive legal question presented to it. Thus, it cannot be said that the UNSC and UNGA Resolutions in this case were in any way an overruling of the ICJ decision. An overruling in this case would have been a (hypothetical) UNGA or UNSC decision proclaiming, *contra* the ICJ position, that Liberia and Ethiopia in fact had a legal interest in the case. Rather, the political Resolutions were an alternative to judicial remedy which had not been granted, not a contradiction of judicial decision (not surprising, given that the political and judicial processes had run in parallel, raising questions of litispendence).[68]

If we generalize on the basis of the *South-West Africa* example, cases in which the UNGA or UNSC politically decide normative issues that the ICJ had refrained from deciding judicially (for example, when a case is decided on preliminary rather than substantive issues), are not cases of immediate reaction in the sense relevant to this determinant of relative judicial power. They are not exceptions to the generally low immediate reactive capacity of the political organs of the UN.

Second, the legal impediment to short-term reaction to ICJ decisions is compounded by an ethical one that stems from the respect commanded by the ICJ, reminiscent of the inter-institutional comity of separation of powers in domestic political structures. This is apparent in the self-restraint the UNGA shows in refraining from debating ICJ rulings. With respect to the voluntary annual reports submitted by the ICJ,[69] the UNGA has generally "merely taken note [. . .] without debate. Frequently when that agenda item is before the plenary General Assembly, the President of the Court attends and addresses both the General Assembly itself and possibly also the Sixth (Legal) Committee. These statements are usually made after the General Assembly has adopted its formal decision taking note of the report, *in that way avoiding a debate on the substance of the report*".[70] There is therefore no occasion to criticize the rulings described in the report.

This is not to say that individual members of the UN – and at times even a large portion of them – are never critical of an ICJ

68. *See infra* note 77.
69. *See* text following note 43 *supra.*
70. *See* Rosenne (note 30), pp. 115–116, n. 37 (emphasis added).

ruling. Whatever discontent or criticism exists, however, does not find its way to UNGA or UNSC Resolutions of substance.

Third, even in the event of a UNGA Resolution on the subject of an ICJ ruling already given, its effectiveness as an immediate reaction to the ruling, in the sense explored here, would be restricted. Formally, under Chapter III of the UN Charter, UNGA Resolutions have the limited status of recommendations, with no binding effect or express legislative consequence. It is nevertheless accepted that UNGA Resolutions do have a role in the creation of international public law, particularly in the evolution of customary law (both as expressions of *opinio juris* and as indications of state practice).[71] Such a role in law-creation would not be enough to overrule a specific ICJ ruling and qualify a UNGA Resolution as effective immediate reaction. The UNGA could, theoretically, issue a resolution criticizing a ruling of the ICJ, but this would function as a political communication to the ICJ, with no real reactive effect, and would not displace the ICJ ruling.[72] At most, it would be a single contribution to long-term reaction to the ruling, a milestone in the creation of customary law that may eventually replace the normative basis of the ruling in question.[73]

71. On the status of UNGA Resolutions, *see* R. Higgins, *The Development of International Law Through the Political Organs of the United Nations* (London, Oxford University Press, 1963; Asamoah, O.Y.); *The Legal Significance of the Declarations of the General Assembly of the United Nations*, (The Hague, Martinus Nijhoff, 1966); R. Falk, "On the Quasi-Legislative Competence of the General Assembly", 60 AJIL, 1966, 782; and J. Castaneda, *Legal Effects of United Nations Resolutions* (New York, Columbia University Press, 1969). I concur with the following relatively recent summary of the question: "Except for budgetary or membership questions, the General Assembly does not have explicit authority to fashion, adopt, and implement binding legal norms or fiats upon any of the United Nations membership absent each government's sovereign consent. The power to issue legal norms is not supplied to the General Assembly by the UN Charter, nor by any binding declaration, nor by state practice. Still, the General Assembly evokes a certain "quasi-legislative" capability that can directly influence the nature and substance of contemporary international law in a number of ways." *See* C.C. Joyner, "Conclusion: The United Nations as International Law-Giver", in Joyner (ed.), *The United Nations and International Law* (Cambridge, ASIL, Cambridge University Press, 1997), pp. 432, 440.

72. In practice, post-judgement involvement by the UNGA is in the form of calls to ensure implementation of the ICJ judgement. For example, *see Judgement of the International Court of Justice of 27 June 1986 Concerning Military and Paramilitary Activities in and against Nicaragua: Need for Immediate Compliance*, UN GAOR, 44th Sess., UN Doc. A/Res/44/43 (1989).

73. It is interesting to consider, alternatively, the immediate reactive capacity of UNGA Resolutions when their normative validity is viewed in terms of Ruiter's classification of the normative force of legal acts, as applied to decisions of international

Similarly, the UNSC may issue binding decisions, but only in the context of actions with respect to threats to the peace, breaches of the peace and acts of aggression.[74] While this may be interpreted broadly by the UNSC, there is nevertheless only a limited range of cases in which the UNSC could, at least in theory, make binding decisions that are contrary to a recent, previous and specific ICJ ruling.

Fourth, while in practice the UNSC has never taken such post-ruling action,[75] the UN system is experienced with litispendence – instances in which the ICJ and the UNGA or UNSC are concurrently seized of the same dispute.[76] The *sub judice* principle, that would bar political organs from action and indeed deliberation, has consistently been rejected.[77] Thus, the political organs may make recommendations or take measures that have an effect on the dispute being adjudicated, to the point of overriding the legal basis for the measures requested of the ICJ.[78]

organizations by Dekker and Wessel; *see* D.W.P Ruiter, *Legal Institutions* (Dordrecht, Boston London: Kluwer Academic Publishers, 2002), pp. 4–6, and subsequent development and discussion in I.F. Dekker and R.A. Wessel, "Governance by International Organizations: Rethinking the Source and Normative Force of International Decisions", in this volume. Ruiter's classification transcends the classical division between "binding" and "non-binding" effect, and shows that there are additional "shades" to normative force. For the purposes of the present discussion, a UNGA Resolution attempting immediate reaction to an ICJ ruling, could take several different forms: it could be a "declarative" act, simply contradicting the ICJ's findings; it could be a "hortatory" act calling upon the parties to the dispute to ignore the ruling; it could be an "imperative" act, "ordering" the parties to act in a manner inconsistent with the ICJ ruling, and so on. Regardless of the form, I do not think this classification in itself is sufficient to grant the UNGA immediate reactive capacity. First, none of these forms would be regarded in their own conceptual framework as valid if they were not within the "inherent competence" of the UNGA; it is far from obvious that the overruling of an ICJ ruling is within this competence. Second, even if such a resolution were valid, it is not clear that it would be normatively superior to the contested ICJ ruling in the conflict of norms that would ensue.

74. *See* Chapter VII, UN Charter.

75. As I discuss the *South-West Africa* case and the subsequent UNSC Resolution do not demonstrate immediate political reaction to a definitive, substantive ICJ ruling.

76. On litispendence *see* T.J.R Eisen, *Litispendence between the International Court of Justice and the Security Council* (The Hague, T.M. Asser Institute, 1986).

77. The question of *sub judice* was brought before the UNGA in a series of deliberations on the question of South-West Africa, in which South Africa repeatedly raised the argument that since Ethiopia and Liberia had filed applications for proceedings against South Africa relating to the same dispute, the UNGA could not hold debate on the subject. This contention was rejected by the UNGA on a number of occasions. For a full description *see* Rosenne (note 30) pp. 150–153.

78. ICJ, *Questions of Interpretation and Application of the 1971 Montreal Convention Rising from the Aerial Incident at Lockerbie (Libyan Arab Jamahariya v. United Kingdom)*, (Provisional

It does not, however, necessarily follow from the UN system's flexible approach to litispendence, that a political organ could issue a *post*-ruling decision vacating that ruling. As already noted, a UNGA resolution of this nature would be primarily political, lacking in direct, express, legal effect, so that the ICJ ruling would stand unscathed – at least in the critical immediate term relevant to this determinant of relative judicial power. A UNSC recommendation under Chapter VI UN Charter would have similarly limited effect.[79] An operative UNSC measure under Chapter VII UN Charter could, theoretically, override the operative part of an ICJ ruling in a contentious proceeding, just as the UNSC sanctions against Libya in the *1971 Montreal Convention* cases pre-empted judicial provisional measures.[80] The legal effect and even validity of such UNSC measures would, however, be questionable.

This is because under Article 24(2) UN Charter, the UNSC must discharge its duties "in accordance with the Purposes and Principles" of the UN; these include the maintenance of peace and security, and to that end the taking of measures "in conformity with the principles of justice and international law".[81] A UNSC measure that contradicted a ruling of the ICJ might not be in accordance with international law, if it prevented the parties to the judicial proceeding from complying with the ruling; in such a case, the UNSC would in fact be betraying its role of enforcer of ICJ rulings under Article 94 UN Charter.

Furthermore, while any contradictory measures taken by the UNSC in the face of an ICJ ruling might affect political reality in a manner inconsistent with the operative orders of the ruling, they would

Measures), Order of 14 April 1992, *ICJ Reports* 1992, 1 (hereinafter – "*1971 Montreal Convention* Cases"), Libya had requested provisional measures that would prevent the United Kingdom from taking any measures that would coerce Libya into surrendering the accused perpetrators of the Lockerbie terrorist incident. On 31 March 1992, three days after the hearings of this application were closed, the UNSC adopted resolution 748 (1992) imposing sanctions against Libya until it surrendered those individuals. For one analysis of the relations between the ICJ and the UNSC in light of these cases *see* V. Gowland-Debass, "The Relationship between the International Court of Justice and the Security Council in the Light of the *Lockerbie* Case", 88 AJIL, 1994, 643.

79. When acting under Chapter VI UN Charter, UNSC decisions are recommendations without binding legal consequences (with the caveat that they do contribute to the development of international public law, like UNGA Resolutions).

80. *See* note 78 *supra*.

81. Article 1(1) UN Charter.

not have the effect of changing or overruling international law as stated by the ICJ in its decision. This flows from the important distinction between political measures and legal reasoning. The ICJ ruling is a statement of law; the UNSC resolution is a statement of political agreement. In fact, one might say that this distinction precludes any real contradiction between an ICJ ruling and subsequent UNSC action. As Rosenne concludes on litispendence, "the fact that a dispute is simultaneously being dealt with by the General Assembly or by the Security Council and by the Court is not in itself regarded in either organ as a bar to its further action, the competence of the Court being limited to the purely legal aspects of the matter".[82] Similarly, a political decision by the UNSC would not change, *ex post*, the legal ruling of the ICJ. In the terminology of relative judicial power, the UNSC resolution would not be effecting a normative change that would overrule the ICJ ruling.

It is additionally important to note that just as the UNGA or UNSC are not barred from dealing with an issue that is simultaneously under judicial scrutiny, so is the ICJ not precluded from ruling on a matter that is in political debate. In this sense, the ICJ is on a par with the political organs of the UN.

In sum, the special – and to date theoretical – case of a UNGA or UNSC operative resolution contradicting a prior substantive ICJ ruling on the same political-factual circumstances, would not invalidate the legal effects of that ruling and its validity would be doubtful. Otherwise, any immediate reaction by the UN organs or membership to an ICJ ruling would be ineffective and would therefore be merely potentially declaratory, and in practice – non-existent. In this determinant the ICJ therefore gains a high level of relative judicial power – and normative influence.

4.2.2 *The WTO DSS*

In contrast to the UN system, the WTO foundational instruments grant a political organ and its membership the legal power to annul judicial decisions by preventing their entry into force. Quite simply, in order to gain full normative effect, Panel and AB Reports must first be adopted by the DSB.[83]

82. *See* Rosenne (note 30), p. 155.
83. Articles 16 and 17.14 DSU.

Having said this, it is of course true that the power of the DSB to annul judicial decisions has a formidable obstacle to overcome before it may be exerted in practice, in the form of the "negative consensus" requirement: Panel and AB Reports may be discarded as unadopted by the DSB, only if a consensus is reached to this effect among all members, including the party to the proceedings that has won the case.[84] Since it is unlikely that a prevailing litigant would agree to forfeit its victory, the adoption process is usually regarded as virtually automatic.[85] This assumption is borne out by the fact that no Reports, to date have been refused adoption by the DSB. While the DSB is formally empowered with the capacity of immediate reaction to judicial rulings by the DSU, this power – so it would seem – is almost a dead letter.

A deeper, more critical look may be in order here. While most commentators would probably agree that the "negative consensus" rule "has made WTO dispute settlement into what is, in all probability, the most effective area of adjudicative dispute settlement in the area of public international law",[86] this is precisely the assumption that is critically examined in this study, and so it cannot be taken at face-value. From the perspective of immediate reaction as analyzed here, this recognized strength of WTO dispute settlement actually stands out, in comparative context, as a weakness. This is because ICJ rulings, in contrast to those of the DSS, do not need the seal of approval of any political or other body, by "negative consensus" or otherwise.

Is DSB adoption really a mere rubber stamp, something like a court clerk affixing a seal on the writ in order to give it force? An alternative

84. Panel Reports are not adopted if a party to the dispute formally notifies the DSB of its decision to appeal or if the DSB decides by consensus not to adopt the Report (Article 16.4 DSU). AB Reports are not adopted if the DSB decides so by consensus (Article 17.14 DSU).

85. *See*, e.g., E.-U. Petersmann, *The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement* (The Hague, Kluwer Law International, 1997), p. 186: ". . . the complainant will not join such a negative consensus unless the dispute is settled in accordance with WTO Law . . ."; *see* J.H. Jackson, *The World Trade Organization: Constitution and Jurisprudence* (London, Royal Institute of International Affairs, 1998), p. 72: "After the Appellate Body has ruled, its report will go to the DSB, but in this case it will be deemed adopted unless there is a consensus *against* adoption, and presumably that negative consensus can be defeated by any major objector. Thus, the presumption is the reverse of previous procedures, with the ultimate result that the appellate report will come into force as a matter of international law in virtually every case".

86. D. Palmeter, P.C. Mavroidis, *Dispute Settlement in the WTO: Practice and Procedure* (Dordrecht, Kluwer Law International, 1999), p. 153.

analysis would argue that DSB adoption is in fact an important instrument of political influence on the judiciary, in several ways.

First and foremost, we must reconsider the likelihood of the DSB actually refusing adoption of a Report. The "negative consensus" rule means that no single member, party to the proceedings or otherwise, has the independent capacity to block the adoption of a Report. The DSB, however, as a separate WTO organ, does have that capacity. If the DSB is regarded as a "black box", its inherent power to "trump" a DSS Report cannot be ignored or understated. This is an important part of the conceptual architecture of the WTO.

It is therefore just a question of circumstance, whether this power of the DSB will be applied or not. This depends on the readiness of one (or several) members, who have won a dispute according to the Report in question, to set aside their legal achievement. It should not be considered impossible for a member to vote against a ruling made in its favour; the pre-WTO GATT DSS worked on the basis of a positive consensus, whereby a Panel Report did not take effect without consensus adoption by the Contracting Parties.[87] Reports would not enter into force without the acquiescence of the losing party. Nevertheless, in most cases Reports were adopted. States did accept Reports that went counter to their interests. It is not unthinkable, then, for a WTO Member to agree to annul a Report given in its favour, if faced with the consensus of all other Members, and if another interest is present.

Such a situation could arise, for example, if the general legal implications of a Report were so offensive to the members of the WTO, that even the winning party would agree to annul the legal ruling, in order to prevent the adoption of the Report's rationale. To secure a negative consensus, parties could reach agreement on the specifics of the dispute, even adopting the practical result of the Report, but effectively blocking the Report and its legal reasoning.[88]

Is such a scenario possible? The idea cannot be discounted. Much of international trade law acts as a double-edged sword, with Members simultaneously using certain disciplines as complainants, and defending against them as respondents in different cases. Winning one case may

87. *See* Jackson (note 85), p. 68.

88. There arises an additional question, which I will not address here, whether the DSB may opt to adopt a DSS Report only in part. If the DSB may in fact do so, this of course increases its immediate reactive capacity.

produce law that causes the loss of another, more important case. In more extreme cases, a Panel or the AB may act upon its own reasoning, pronouncing law that no Member advocates or supports.

Cases as these are not hypothetical, although none has been, to date, so extreme as to be deprived of DSB adoption. Consider, for example, the *Australia – Automotive Leather – Article 21.5* case,[89] and its systemic implications. In the original *Australia – Automotive Leather* case,[90] the Panel found that payments of $A30 Million made by the Australian government under a grant contract with an Australian producer of automotive leather were in fact prohibited export subsidies under Articles 1 and 3.1(a) of the WTO Subsidies and Countervailing Measures Agreement (SCM).[91] The Panel recommended that Australia "withdraw the subsidies . . . without delay",[92] in accordance with the language of Article 4.7 of the WTO SCM.

Shortly thereafter, the Australian government announced that it had been repaid $A8.065 million by the recipient of the grant and had terminated all outstanding obligations under the grant contract. The US then claimed that Australia's withdrawal of only $A8.065 million out of the $A30 million grant, and Australia's provision of a new $A13.65 million loan on non-commercial terms to the grant recipient's parent company, were inconsistent with the recommendations and rulings of the DSB and Article 3 SCM.[93] Accordingly, and at the request of the US, the issue of compliance was referred by the DSB to the original Panel, under Article 21.5 DSU.[94]

Before the Panel, several issues were disputed among the parties, yet with regard to the temporal application of the withdrawal requirement, both parties, and the EC as a third-party, were of the view that a Panel recommendation of repayment of a subsidy was prospective rather than retroactive in nature, although different interpretations of this prospectivity were advanced.[95]

89. *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather – Recourse to Article 21.5 of the DSU by the United States* (2000), WTO Doc. WT/DS126/RW (Panel Report) (hereinafter – "*Australia – Automotive Leather – Article 21.5* case").

90. *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather* (1999), WTO Doc. WT/DS126/R (Panel Report).

91. *Ibid.* at para. 10.1(b).

92. *Ibid.* at para. 10.3.

93. *See Australia – Automotive Leather – Article 21.5* at paras. 1.2–1.5.

94. Article 21.5 DSU allows recourse to dispute settlement procedures where there is "disagreement as to the existence or consistency with a covered agreement of measures taken to comply" with recommendations and rulings of the DSB in a dispute.

95. The US (supported by the EC) argued that the "prospective portion" of a

Regardless, the Panel asserted that "a panel's interpretation of the text of a relevant WTO Agreement cannot be limited by the particular arguments of the parties to a dispute".[96] It then found, contrary to the views presented to it, that the phrase " 'withdraw the subsidy' is not limited to purely prospective action, but may encompass repayment of prohibited subsidies".[97]

The long-term problems raised by this decision are complex. They venture into other fields of WTO law (the question of retroactive remedies under other WTO disciplines), and the enforceability of retroactive measures in private law (as the Australian government argued, that it had no legal power to extract repayment of a subsidy from a private firm to which the subsidies had been granted, and that doing so would violate constitutional rights).[98] If applied, the financial implications for firms in members that have lost an SCM case may be devastating – one need only consider the application of retroactive withdrawal of subsidies to the facts of the *United States – FSC* cases,[99] to see this.[100]

subsidy is that portion of the funds provided by a government that continues to confer a benefit to the recipient after the adoption of the Report in the dispute. Australia asserted that the termination of the grant contract and withholding all forthcoming payments was sufficient to comply with the recommendation of withdrawal. *See Australia – Automotive Leather – Article 21.5* at paras. 6.9–6.10, 6.14 and 6.23.

96. *Ibid.* at para. 6.19.

97. *Ibid.* at para. 6.9.

98. For criticism of this aspect of the Report *see* S. Charnovitz, "The WTO and the Rights of the Individual", 36 *Intereconomics*, 2001, 98, pp. 106–07.

99. *United States – Tax Treatment for "Foreign Sales Corporations"* (1999), WTO Doc. WT/DS108/R (Panel Report); *United States – Tax Treatment for "Foreign Sales Corporations"* (2000), WTO Doc. WT/DS108/AB/R (Appellate Body Report); *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities* (2001), WTO Doc. WT/DS108/RW (Panel Report); *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities* (2002), WTO Doc. WT/DS108/AB/RW (Appellate Body Report). In a nutshell, in these cases the dispute settlement system found that certain US tax legislation was inconsistent with SCM obligations. The tax benefits in question are valued in billions of US Dollars.

100. Indeed, the US approval of the adoption of the Panel Report in *Australia – Automotive Leather – Article 21.5* was raised by the Australian representative in the DSB, when discussing the implementation of the Report in *United States – FSC*, when he "recalled that the United States had supported the adoption of the Panel Report under Article 21.5 in the case of Automotive Leather which called for the withdrawal of past payments . . . In this light, Australia looked forward to hearing from the United States exactly what it intended to do in order to bring itself into conformity . . ." (*see* WTO, Dispute Settlement Body, Minutes of Meeting (held on 20 March 2000), WTO Doc. WT/DSB/M/77, para. 60). This demonstrates how agreement to adoption, not only positive argumentation, may act as a double-edged sword.

The DSB ultimately adopted the *Australia – Automotive Leather – Article 21.5* Panel Report; both parties accepted its terms. It is, however, an example of a case in which the parties could have considered – and perhaps chosen to pursue – a bilateral agreement on the extent of repayment and subsidy withdrawal whereby the Panel Report would be discarded by "negative consensus", in order to prevent the preservation of an offensive rule presented by Panel.[101] Indeed, after protracted negotiations, Australia and the US reached a negotiated settlement.[102] In hindsight, one can imagine that the US would have preferred to see the Panel decision annulled, and an agreed settlement reached without the more general legal implications surviving.

Here the difference between the WTO DSS and the ICJ is striking, because as we have seen, in the UN system the path of legally annulling a judicial decision does not exist. Yet beyond the technical possibility of a political overruling of a judicial DSS decision, other, more subtle modes of influence and immediate reactive capacity exist in the WTO. While the UN organs are restrained (if not precluded) from criticizing ICJ rulings, under the DSU WTO Members have an acknowledged right to formally object to a Report and to "express their views" on it.[103] Thus, even if a Report is adopted, members have an effective way of communicating their concern at the normative paths followed by the judiciary. In fact, it could be said that the DSB holds a veritable dialogue with the Panels and AB while cases are pending and after Reports are issued.

The most celebrated example of such dialogue relates to the question of AB acceptance of *amicus curiae* briefs, submissions of arguments by non-member third-parties, during its proceedings on the *European Communities – Asbestos* Case.[104] Following previous exchanges and deci-

101. *See* WTO, Dispute Settlement Body, *Minutes of Meeting* (held on 11 February 2000), WTO Doc. WT/DSB/M/75, for the discussion of the DSB prior to adoption of the Panel Report in *Australia – Automotive Leather – Article 21.5*. Many delegates noted the "serious systemic implications" of the Report, some noting that the decision was a "bad" one. Non-adoption was not openly contemplated by any Member other than Australia.

102. *See* WTO, Dispute Settlement Body, *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather – Notification of Mutually Agreed Solution* (31 July 2000), WTO Doc. WT/DS126/11.

103. Article 16.2 and 17.4 DSU.

104. *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products (Complaint by Canada)* (2001), WTO Doc. WT/DS135/AB/R (Appellate Body Report) (hereinafter – "*European Communities – Asbestos*").

sions on related questions[105] in the *United States – Shrimp*[106] and *United States – British Steel*[107] cases, the AB Chairman issued a communication to the DSB Chairman,[108] announcing an additional procedure for receiving submissions from "any person other than a party or a third-party" in the case; the procedure was to apply in that dispute only. This procedure caused considerable consternation among WTO members. A special meeting of the WTO GC was called to discuss this issue.[109] According to the DSB Chairman, this meeting was intended to "enhance communications between the membership and the Appellate Body"[110] – unabashedly opening the door to attempted political influence on the judiciary.

At the special DSB meeting, more than forty Members openly objected to the AB communication, arguing that it had been made without legal basis or mandate, had altered the institutional balance within the WTO and had diminished the rights of members. Only three members did not subscribe to these views (the US, Switzerland and New Zealand). The GC failed to reach an operative decision with the effect of annulling the AB communication, if only for lack of consensus. The GC Chairman was, however, encouraged to communicate to the AB the strong feelings of the majority of the GC. As the Colombian delegate stated, "it should be made sufficiently clear that the majority of delegations did not agree that the procedure at hand should be applied due to its future consequences".[111] For this form

105. One account of the progressive treatment of *amicus* briefs is offered in Barfield *supra* note 13 at 50–53. Barfield uses the issue to argue that the DSS transcends its mandate and is excessively powerful.

106. *United States – Import Prohibition on Certain Shrimp and Shrimp Products* (1998), WTO Doc. WT/DS58/AB/R (Appellate Body Report) (hereinafter – "*United States – Shrimp*").

107. *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom* (2000), WTO Doc. WT/DS138/AB/R (Appellate Body Report).

108. *See* WTO, Appellate Body, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, Communication from the Appellate Body* (November 8, 2000), WTO Doc. WT/DS135/9.

109. It is the GC, not the DSB, that has interpretative powers under the WTO Agreement. A convention of the GC could have, in theory, adopted an interpretative decision that would have overridden the AB procedure on *amici curiae* briefs.

110. WTO, Dispute Settlement Body, *Minutes of Meeting* (held on 17 November 2000), WTO Doc. WT/DSB/M/92 at para. 127.

111. WTO, General Council, *Minutes of Meeting* (held on 22 November 2000), WTO Doc. WT/GC/M/60 at para. 127.

of action, consensus was not considered necessary, for as the delegate from Egypt stated, it was "recognized that there was no consensus on the matter at hand because one or two delegations had different views. However, there was no difficulty in drawing out some conclusions which should then be communicated to the Appellate Body".[112] The GC Chairman himself assured Members that their views would be conveyed to the AB.[113]

It is a matter of speculation how the GC Chairman communicated the sentiment among WTO membership on this matter. It is, however, a matter of record that in pursuing the special procedure for submission of *amicus curiae* briefs that—, importantly, it did not discard—the AB eventually disregarded all such briefs that had been submitted to it.[114] It is impossible to establish causality between the political pressure applied by WTO members on the AB and the eventual result. This episode does, however, demonstrate the potential for political immediate reaction to AB decision-making, that falls short of direct overruling (and may be even more effective).

In sum, while the political branch of the WTO lacks full discretionary powers of effective immediate overruling of DSS decisions (due to the "negative consensus" rule), it does demonstrate a considerable formal capacity for immediate reaction. Effective overruling may occur in rare cases of systemically offensive rulings; political influence is exerted through direct and indirect communications between the DSB and GC, on one hand, and the DSS, on the other. This is in contrast to the negligible immediate reactive capacities of the UN membership and political organs with regard to the ICJ.

4.3 *Long-term reactive capacity of other organs*

4.3.1 *The ICJ*

With regard to the UN and ICJ, we have seen that the immediate capability of the UNSC to change even the operative effects of an ICJ ruling is tenuous, and that of the UNGA and membership is virtually non-existent. What is the long-term capacity of the non-judicial UN organs and membership to enact rules that would prevail over international law as stated in an ICJ ruling?

112. *Ibid.* at para. 130.
113. *Ibid.* at para. 131.
114. *See European Communities – Asbestos* at paras. 53–57.

As described above, the direct general law-making role of the UN and its organs is restricted. The UNGA does not strictly make fully binding law. This is not to say that UNGA/UNSC resolutions are not instrumental in the process of creation of international law, particularly in customary law, yet the role played is limited.[115] The UNSC may issue binding *ad hoc* decisions in cases of threats to international peace, but these are of a specific and executive nature rather than legislative and general. Otherwise, the UN participates in international law-making as a facilitatory forum, particularly through the work of the International Law Commission (ILC).[116] Yet the UN political organs, as such, do not usually make general international law. Rather, it is the membership of the UN, in a non-institutional guise, which does this.

In the broader context of public international law, there are two paths that the UN membership – the international community of states – may follow in producing new law that would override rules stated in an ICJ decision: multilateral international treaty-making and international customary law. The effectiveness of these two paths determines the long-term reactive capacity of the UN membership: the more effective they are, so is the reactive capacity greater and, accordingly, relative judicial power lower.

UN membership discontented with the general legal implications of an ICJ ruling (for example, a statement by the ICJ of a rule of customary international law) could turn to treaty law-making, and hope to achieve a multilateral agreement that would revoke the offensive findings of law by the ICJ. The fundamental rule guiding this rule-making process is that of consent: a conventional norm is binding only upon the states that have consented to it.[117] A multilateral agreement therefore requires consensus or near consensus[118] among

115. *See* the discussion and sources at note 71 *et seq*., *supra*, and also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Merits – Decision of 27 June 1986, *ICJ Reports*, 1986, 14 (hereinafter – "*Nicaragua* case").

116. For a good presentation of the ILC and its work *see* online: International Law Commission <www.un.org/law/ilc/index.htm> (last accessed: 6 November 2002).

117. *See V*ienna Convention on the Law of Treaties, opened for signature 23 May 1969, entered into force 27 January, 1980, 1155 UNTS 331 (hereinafter – the "Vienna Convention"), Articles 34–38.

118. Consensus need not necessarily be complete. Multilateral treaties may have an intricate array of national reservations under Articles 19–23 of the Vienna Convention. In accordance with Article 19 of the Vienna Convention, "a State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation

its signatories, and to effectively supercede a rule established by the ICJ, it would need to be adopted by very broad, almost universal subscription. As a result, the law-making process of a multilateral treaty is one of arduous negotiation that may take a very long time to complete, and even then its products may not have universal application. It is enough to observe the lengthy negotiations on the law of the sea,[119] or the even more extended codification process of the ILC draft articles on state responsibility,[120] to understand that treaty-making may be an extremely protracted exercise. Thus, many years might pass before a conventional overruling of an ICJ decision were reached, and even then, several states may remain unbound by it (although there may be exceptions to this general observation).

Even if broad consensus were reached on a treaty aimed at rectifying the legal results of an ICJ ruling, two qualifications may in certain circumstances diminish its effectiveness. First, even conventional international law cannot violate or stray from peremptory norms or *jus cogens*;[121] if the ICJ has ruled that a norm is peremptory, "legislating out" that norm and ruling by membership decision (for example, by treaty) would not be simple. Second, the adoption of a multilateral treaty in a certain field of law does not preclude the coexistence of customary norms.[122] So a new treaty would not

unless: (a) the reservation is prohibited by the treaty; (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or (c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty".

119. The third UN Conference on the Law of the Sea (UNCLOS III) extended over 9 years from 1973 to 1982 with agreement on the text of the United Nations Convention on the Law of the Sea, opened for signature 10 December, 1982, entered into force 16 November, 1994 UN Doc. A/CONF. 62/122, and an additional 12 years passed until it entered into force in 1994.

120. At its first session in 1949, the ILC initiated codification in the field of state responsibility (*see* International Law Commission, *Report of the International Law Commission on the work of its First session*, UN ILC, 1949, UN Doc. A/925 (1949). Over half a century later, the ILC completed its work on draft articles on the subject (International Law Commission, *Draft Articles on State Responsibility For Internationally Wrongful Acts*, excerpt from *Report of the International Law Commission on the Work of its Fifty-third Session*, UN GAOR, 56th Session, Supp. No. 10, UN Doc. A/56/10 (2001), online: UN ILC <http://www.un.org/law/ilc/texts/State_responsibility/responsibilityfra.htm> (last accessed: 6 November 2002). These articles still have no binding legal effect and the mode of their formalization is yet to be selected. Presumably, multilateral negotiations on an international treaty on their basis would take many more years.

121. *See* Vienna Convention, Articles 53, 64, 71.

122. *See*, for example, the ICJ's finding that the prohibition of the use of force is a rule of customary international law, that exists contemporaneously with the

necessarily supercede the findings of law made by the ICJ, but perhaps only add to them.

The second avenue open to the membership of the UN is that of customary international law. Famously, international custom is "evidence of a general practice accepted as law".[123] It has two constituent elements: general and consistent state practice and *opinio juris* – the sense of legal obligation that brings about that practice.[124] Traditionally, the focus has been on the active element of state practice rather than on *opinio juris*.[125] An accumulation of many instances of specific state practice would need to be noted over time as evidence of international custom. This is a lengthy, fluid and unpredictable process that is much more evolutionary than legislative.[126]

In this sense of customary international law, the capacity of the UN membership to react effectively to an ICJ ruling is limited. Years and even decades could pass before an appropriate gallery of cases of practice rejecting the law as stated by the ICJ would occur. The process would not be procedurally ordered in any way, and its results would be impossible to foresee. In addition, any case of state practice rejecting the legal implications of the ruling would be seen in fact as a contravention of international law as expressed by the ICJ, not necessarily as the formulation of new law, impeding the capacity to react to the ruling.

Complementing traditional customary law and contrasting with it, the "modern" approach to customary international law relies more heavily on the declarations made by states of legal obligation, less so on their actions.[127] In some cases, the ICJ has deduced the existence

similar prohibition in Article 2(4) UN Charter. *See Nicaragua* case, *supra* note 113 at paras. 172–183 *et seq*.

123. Article 38(1)(b) ICJ Statute.

124. *See* ICJ, *North Sea Continental Shelf (Federal Republic of Germany v. Denmark; Denmark v. Federal Republic of Germany)*, Decision of 20 February 1969, *ICJ Reports*, 1969, para. 3, p. 44 (hereinafter – "*North Sea Continental Shelf* case"); I. Brownlie, *Principles of Public International Law*, 5th ed. (Oxford, Oxford University Press, 1998), pp. 4–11; M. Byers, *Custom, Power, and the Power of Rules: International Relations and Customary International Law* (Cambridge, Cambridge University Press, 1999), p. 130.

125. *See* e.g. *North Sea Continental Shelf* case, *ibid.* at 44; *see also* ICJ, *Right of Passage over Indian Territory (Portugal v. India)*, Merits/Decision of 12 April 1960, *ICJ Reports 1960*, para. 6 at p. 42.

126. A.E. Roberts, "Traditional and Modern Approaches to Customary International Law: A Reconciliation", 95 AJIL, 2001, 757, p. 758.

127. B. Simma., P. Alston, "The Sources of Human Rights Law: Custom, *Jus Cogens*, and General Principles", *Australian Yearbook of International Law, 1988–1989*, 82.

of international custom from statements made by states and from non-binding international documents such as UNGA resolutions.[128] This form of customary international law may, by definition, develop more quickly than the traditional one, establishing in some contexts the seeming oxymoron of "instant" customary law.[129] This has been lauded as a way of overcoming the difficulties associated with traditional customary and treaty law, for developing universal norms in problem areas in the face of resistance by some states, and for the development of human rights law.[130] Others have, in the past, criticized the theoretical and normative basis of this type of development of law.[131]

Does "modern" customary law-making provide the international community with a more effective long-term capacity to react to ICJ rulings? Tellingly, legal history provides us with no answers to this question, and so I suggest a hypothetical scenario. Imagine a case where the ICJ accepts an argument raised by one party for the existence of a particular customary norm, based on evidence of state practice and *opinio iuris*. Could not a subsequent contradictory UNGA resolution proclaim that no such customary international legal obligation exists, ostensibly overruling the previous ICJ ruling to the contrary? While such a highly speculative scenario may be technically conceivable, its legal effect is doubtful.

First, findings of "modern" customary law that are based on *opinio juris* rather than on state practice tend to occur where state practice has been infrequent and inconsistent, precluding the establishment of a customary rule on its basis. The demonstration of *opinio juris* in these cases must be particularly strong. On the other hand, where state practice is highly consistent and frequent, there is less recourse to justification on the basis of *opinio juris*. This has been called the "slid-

128. *See Nicaragua* case (note 113), pp. 30–37; ICJ, *Legal Consequences for States of the Continued Presence of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June, 1971, *ICJ Reports 1971*, para. 16 at pp. 31–32.

129. B. Cheng, "United Nations Resolutions on Outer Space: 'Instant' International Customary Law?", 5 *Indian Journal of International Law*, 1965, 23; also B. Cheng, *Studies in International Space Law* (Oxford, Clarendon Press, 1998), Chapter 7.

130. J.I. Charney, "Universal International Law", 87 AJIL, 1993, 529, p. 543; T. Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford, Clarendon Pres, 1989). *See also* K. Wolfke, *Custom in Present International Law* (Dordrecht, Martinus Nijhoff, 1993).

131. A. D'Amato, "Trashing Customary International Law", 81 AJIL, 1987, 101.

ing scale" of custom.[132] Accordingly, if the ICJ ruling had been based primarily on consistent state practice, as "traditional" international customary law, the weight of *opinio juris* in the finding would be relatively low, and a mere declaration by states to the contrary would not be enough to erase the evidence of their own previous practice.

If, on the other hand, the ruling in our theoretical case had been based mainly on expressions of *opinio juris*, and not on state practice (a "modern" finding of custom), these expressions would have had to be particularly strong and unequivocal, and overriding them would require even greater strength, combining both practice and statements. A single contrary declaration in a UNGA resolution declaration would simply be a reneging of states on prior statements of legal obligation. The requisite strength of expression would probably not be achieved in one fell swoop. Rather, it could be achieved only over time, if subsequent state practice in accordance with the ICJ-formulated norm were accompanied by official disclaimers or declarations of lack of obligation. Such a development would be gradual and evolutionary, akin to "traditional" customary international legal development.

Second, stemming from the foregoing, if a contradictory UNGA Resolution or other collective expression of rejection of an ICJ judgement were to have the consequence of effectively making law, overruling that same judgement (and in the process, contradicting prior practice, statements, or both), it would have to be so strong, universally accepted and unequivocal that it would scarcely be different from a multilateral treaty in both subscription and obligation.[133] It would therefore encounter the same obstacles to effectiveness as do multilateral international treaties.

Third, any such UNGA Resolution would suffer from a weakness that is a result of relative judicial power, in this case: the final arbiter of the existence of an international customary norm would inevitably be the ICJ. In other words, if the effect of a UNGA resolution declaring the invalidity of an ICJ finding of customary international law were brought to judicial test, it would be before the same court as had made that finding in the first place. Persuading the same tribunal

132. K.L. Kirgis, "Custom on a Sliding Scale", 81 AJIL, 1987, 146.

133. In other words, mustering widespread political approval for a UNGA resolution that had the effect of altering the legal situation prevailing immediately after an ICJ ruling would be as difficult as successfully organizing an international conference for the adoption of a multilateral treaty that would have the same effect.

to change its prior ruling would require significant changes to the legal status – again leading to the understanding that a lengthy process would be needed to produce such changes.

In sum, the long-term reactive capacity of the organs and membership of the UN with regard to the legal implications of ICJ rulings is limited in the sense that they cannot react quickly and effectively. The organs themselves have no power in this respect. The membership may over an extended period of time succeed in restating a finding of law by the ICJ, either through treaty-making or through the evolution of international custom. In both cases, however, the process is not legislative, but rather evolutionary. This supports and enhances the formal relative judicial power of the ICJ.

4.3.2 *The WTO DSS*

On the formal level, the non-judicial elements of the WTO – its member states and the political decision-making fora – have several channels through which they may direct their long-term reaction to dispute settlement decisions. The following analysis will show that they have, in fact, considerably more flexibility in addressing problems of law raised by judicial decisions than do the membership and organs of the UN. It is only the WTO system's adherence to consensus decision-making that currently suppresses full exploitation of the potential modes of long-term reaction.

The tools of long-term reaction in the WTO are the negotiation of new or amended treaties; "amendments" under Article X WTO; and "interpretations" under Article IX:2 WTO.[134] How effectively would each of these be in expressing long-term reaction to a finding of law by the DSS? For example, how could they be employed to counter the finding by the Panel in *Australia – Automotive Leather – Article 21.5*, regarding the possibility of retroactivity in remedying SCM-prohibited export subsidies?

Regular WTO treaty amendment requires, of course, the unanimous

134. I have not included in this list the possibility of "waivers" under Article IX:3–4 WTO, because such a member-specific waiver does not have universal application and so would not constitute long-term reaction to a dispute settlement ruling. Neither do I find the possibility of long-term reaction by GC "decisions" adopted by simple majority under Article IX:1 WTO worth pursuing, because these decisions are of a specific, operative nature, and are not suitable for producing long-term normative effect.

consent of all WTO members. In this respect, long-term reaction would essentially encounter the same difficulties suffered by any multilateral treaty-making. If our analysis left off here, one could say that long-term capacity in the WTO is the same as in the UN, i.e., effective rectification of judicial decisions demands treaty amendment, which in turn requires unanimity. This is, however, incorrect in terms of practice; while treaty amendment as a response to judicial rulings is virtually non-existent in the UN system, in the WTO system it is regarded as a natural course to be pursued.[135] For example, the Doha Declaration[136] Work Programme that establishes the agenda for the current round of negotiations towards treaty amendment in the WTO includes several items that address issues raised by controversial dispute settlement Reports.[137] Negotiations in these fields may in the future change the law as stated by the Panels and AB.

Another feature that distinguishes the WTO from the ICJ with regard to treaty amendment is that the WTO Agreements include a special provision that should make amendment easier to achieve – Article X WTO. In fact, in the conceptual architecture of the WTO, treaty amendment under Article X WTO appears as the main vehicle of "treaty legislation", to be pursued on an ongoing basis. In practice, due to the loyalty of the WTO system to the rule of consensus, Article X WTO has not been used, as of this writing. It allows, however, for treaty amendment applying to all members – in certain cases – with as little as three-fourths of the membership supporting the amendment. This is a superior method of long-term reaction with great potential.

135. Under Article III:2 WTO, the WTO "shall provide the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with" under the WTO Agreements.

136. *See* note 55.

137. For example, para. 28 of the Doha Declaration (*ibid.*) deals, *inter alia*, with amendments to the SCM, and so the issue of retroactive subsidy repayments may indeed be dealt with in negotiations: "In the light of experience and of the increasing application of these instruments by members, we agree to negotiations aimed at clarifying and improving disciplines under the Agreements on Implementation of Article VI of the GATT 1994 and on Subsidies and Countervailing Measures, while preserving the basic concepts, principles and effectiveness of these Agreements and their instruments and objectives". The issues raised in *United States – Shrimp* (*supra* note 106), regarding trade and the environment will also probably be dealt with, as envisioned by para. 32 of the Doha Declaration.

For example, under Article X:1 WTO, any member of the WTO could initiate a proposal to the MC[138] to insert a new Article in the SCM, settling the problem of retroactivity in subsidy remedies raised by the Panel Report in *Australia – Automotive Leather – Article 21.5*. The MC or GC would have to reach a decision on whether the proposal should be submitted to the members for acceptance or not. For the first 90 days after the proposal had been tabled, a decision to submit for acceptance would require consensus. Following that initial period, such a decision would require only a two-thirds majority. Since the proposed amendment would not alter the treaty provisions listed in Article X:2 WTO,[139] it would not require acceptance by all members to take effect. It would not amend GATS, so the acceptance procedure of Article X:5 WTO would not be triggered;[140] neither would it amend TRIPS, so Article X:6 WTO would not enter into play.[141]

Once a decision has been reached to submit the amendment to member approval (either by consensus or by two-thirds majority), if a three-fourths majority of the members agrees that the amendment is one "of a nature that would not alter the rights and obligations of the Members", it would enter into effect for all members, after two-thirds of the members had accepted it (under Article X:4 WTO). If the three-fourths majority is not reached, the default would be that the amendment is of a nature that alters rights and obligations, and it would take affect only for those members accepting it once two-thirds had accepted it. The MC could then decide, by three-fourths majority, that Members that had not accepted the amendment would be free to withdraw from the WTO.

138. Under Article IV:2 WTO, the GC could, in effect, conduct the functions of the MC.

139. Under Article X:2 WTO, amendments to the provisions of that Article and to the provisions of Article IX WTO; Articles I and II GATT 1994; Article II:1 GATS; and Article 4 TRIPS, take effect only upon acceptance by all WTO Members.

140. Under Article X:5 WTO, amendments to Parts I–III GATS take effect for the Members accepting them upon acceptance by two-thirds of the Members; the MC may decide by three-fourths majority that Members that have not accepted the amendment are free to withdraw from the WTO. Amendments to Parts IV–VI GATS take effect for all Members upon acceptance by two-thirds of the Members.

141. Under Article X:6 WTO, amendments to TRIPS adjusting levels of protection to intellectual property rights achieved and in force in other multilateral agreements binding on all members, may be adopted by the MC without further formal acceptance process.

This procedure is cumbersome and indeed confusing, and runs counter to the GATT/WTO ideal of decision-making by consensus. Nevertheless, it does open the door to treaty amendment by special majority – an option that does not exist in the UN system.

Another plausible method of reacting to a judicial decision (and I shall stay with the example of *Australia – Leather – Article 21.5*), is the adoption of an interpretation under Article IX:2 WTO. Under this provision, the MC and GC "have the exclusive authority to adopt interpretations" of the WTO Agreements. The true exclusivity of this authority is questionable – after all, the DSS by its very nature must engage in interpretation of the WTO Agreements. This does not, however, diminish from the interpretative powers of the political bodies, who may adopt authoritative interpretations under Article IX:2 WTO by three-fourths majority. This interpretation would essentially be binding on the DSS and on all members; the only restriction is that an interpretation should not be made as a circumvention of the Article X WTO amendment procedures. This restriction would not, however, prevent an interpretation of the relevant SCM provisions whereby retroactive subsidy repayment was not included in their meaning, for example, overruling the *Australia – Leather – Article 21.5* Panel interpretation.

In short, as long as an interpretation rather than an amendment were sufficient, the membership of the WTO could produce an effective long-term reaction to Panel or AB rulings by three-fourths majority, and without treaty amendment. These are options that the membership of the UN does not have, even formally.

One important reservation is necessary here. It is impossible to overstate the current role of consensus decision-making in the WTO. This is not merely an "unwritten rule": Article IX:1 WTO stipulates that "the WTO shall continue the practice of decision-making by consensus followed under GATT 1947". Recourse to voting is to be sought only "where a decision cannot be reached at by consensus", an open-ended contingency. Article X WTO, too, grants priority to consensus decisions. Consensus is a "mantra" of the WTO that may be revisited,[142] but not easily rescinded. It molds the real, rather than formal, relative judicial power of the DSS. In other words, Article

142. J.H. Jackson, "The WTO 'Constitution' and Proposed Reforms: Seven 'Mantras' Revisited", 4 *Journal of International Economic Law*, 2001, 71, pp. 74–76.

X WTO majority amendments and Article IX:2 WTO majority interpretations are not likely to become active on the WTO scene in the near future. Their occurrence would in fact be regarded as a "constitutional crisis", akin to the exigencies brought on by the advent of majority voting in the EEC.[143] The legal possibility of long-term reaction by majority, however, is important because of its effects on two fronts. First, it may tacitly affect the judiciary, so that dispute settlement reports are reached out of awareness of the possibility of overruling; second, consensus may be reached with greater ease when all parties are aware that consensus is not a legal requirement.[144] Either way, the judicial power of the WTO DSS is diminished in relation to the GC and Membership, in ways that are nonexistent in the UN systems.

WTO long-term reaction, while not purely legislative, is considerably more so than in the UN systems. There is more room for long-term reaction in practice; directly and indirectly, the judiciary is subjected to more powerful political influences, reducing the formal relative judicial power of the DSS.

5. *Conclusions*

The above analysis shows that the WTO DSS is in fact comparatively weaker than the ICJ, in three important determinants of relative judicial power. It has lower functional independence, subordinate as it is to the political DSB. It carries out its judicial duties under the shadow of immediate political annulment of judicial decisions if it strays too far from the law as understood and desired by the membership, and of long-term reaction to findings of law by treaty amendment and other means. Indeed, these results are borne out, on the formal level, by broader analysis as well.[145]

This finding should not, however, devalue the DSS. It is still in effect – in contrast to its weak design – highly effective and valuable as upholder of stability in the global trading system. It is not,

143. D. Chalmers, *European Union Law*, Vol. 1 – *Law and EU Government* (Aldershot, Ashgate Publishing Ltd., 1998), p. 155.

144. On the interplay of consensus and voting in decision-making, *see* Jackson *supra* note 85, pp. 69–70.

145. *See* Broude (note 1).

however, the menace its delegitimizers portray. If the WTO DSS differs in its design from the ICJ model, it is because it is weaker; the membership bears the ultimate responsibility for the rules of world trade, if not by effective action, then by default. Blaming the judges for whatever legitimacy problems the WTO may have is to misidentify the real institutional centre of power and gravity in the WTO, which is the Membership, not the DSS.[146]

On the more abstract level of discussion this chapter commenced with, the conclusions of the analysis of the WTO may be expanded to international affairs in general. The international judiciary is not necessarily getting more powerful, gaining a structurally stronger grasp on norm-creation. It is perhaps gaining more salience as adjudicator and enforcer, but norm-creation is still the responsibility and domain of the laws immediate subjects, the community of states.

146. In these final thoughts I concur with those of Claus-Dieter Ehlermann, a former and founding AB member, who recently wrote that he would "congratulate the WTO if its political organs were able to use Articles IX and X of the Marrakesh Agreement to react to an interpretation of a covered agreement, given by a Panel or the Appellate Body, with which these political organs disagree. The inability of the political organs of the WTO to do so reveals not only a serious institutional weakness, but also a flaw with respect to the fundamental principle of democracy which requires that judges are subject to the law, and that the law can be changed by the legislator". *See* C.D. Ehlermann, "Some Personal Experiences as Member of the Appellate Body of the WTO", The Robert Schuman Centre for Advanced Studies, European University Institute, Policy Paper 02/09, 2002. *See also* C.D. Ehlermann, "Six Years on the Bench of the 'World Trade Court': Some Personal Experiences as Member of the Appellate Body of the World Trade Organization", 36 *Journal of World Trade Law*, 2002, 605.

CHAPTER TEN

THE EUROPEAN COURT OF JUSTICE AND LEGAL PLURALISM: THE CASE LAW OF THE "FOUR FREEDOMS" AND THE PLURALIST CONSTRUCTION OF THE LEGAL SYSTEMS OF THE EUROPEAN COMMUNITY

Herman Voogsgeerd*

1. *Introduction*

Until now the European Union has been largely a legal construction. The founding treaties and their interpretation by the European Court of Justice in Luxembourg were, and still are, extremely important in forming this construct. As Alter states in her recent book on the supremacy of European Community law, actors such as judges, litigants and lawyers – some of them transnational – have used "the legal method to construct an institution of governance, a piece of supra-state, built upon legal norms".[1] The close relationship between the European construct and European law inspired European judges to think more creatively about how law can be used to constrain political actors and states both at home and abroad. Lower national courts have discovered the so-called preliminary procedure of Article 234 of the Treaty of the European Community as a consequence of legal questions brought to courts by lawyers and litigants. The European Court of Justice has used the mere existence of this procedure as an instrument and argument to develop the European legal order in more than an "ordinary" international treaty.[2]

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1. K.J. Alter, *Establishing the supremacy of European Law: the making of an international rule of law in Europe* (Oxford, 2001), p. 229.

2. *See* the famous cases 26/62, *Van Gend en Loos, ECR* 1963, p. 1, and case 6/64, *Costa ENEL, ECR* 1964, p. 585.

An essential element in this European construct is the "common" or "internal market". It is the internal market law that makes the European legal order unique. The European Court of Justice case law concerning the "four freedoms" – goods, persons, services and capital – has made the contours of the "internal market" become more and more perceptible. The interpretation of these freedoms by the Court implies that national courts and national authorities must consider the perspective of citizens of other member states as well as events in other member states to their own national decision-making.[3] As a result national borders become more and more diffuse. The principle of territoriality on which most national legal systems are based has become somewhat neutralized as a consequence of case law of the European Court. This development is reflected, *inter alia*, in the definition of the internal market as an "area without internal frontiers", which was inserted in the European Community Treaty by the Single European Act, signed in 1986. Nevertheless, national borders do continue to exist. They define the limits of competence of national governments and authorities. Therefore, perhaps it is better to talk of an "incomplete internal market",[4] according to which the effects of the existing national borders are neutralized as far as possible.

The European Court of Justice is dependent on the courts of the member states for the implementation of Community law. Of course, in some senses, Community law is like national law. It is the law of the land and has to be applied by national courts that function as *juges de droit commun*. But this is an oversimplification. This becomes clear when the area free movement law, the focus of this chapter, is studied. On the one hand, the European Court, because of the fundamental character of the four freedoms, has interpreted them in an extremely broad sense. These freedoms are even applied in areas such as direct taxes, where member states are fully competent. On the other hand it has become a fact that recent case law concerning the four freedoms leaves a great deal more discretionary freedom to the national courts and the national authorities. Some decentral-

3. *See* K. Armstrong, "Mutual Recognition", in C. Barnard and J. Scott, *The Law of the Single European Market, Unpacking the Premises* (Oxford, 2002), p. 230, who correctly speaks of the "regulatory history" of a product or service.

4. *See* for this concept especially E. Steindorff, "Unvollkommener Binnenmarkt", *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht*, 1994, p. 160; P.J.G. Kapteyn, P. VerLoren van Themaat (ed. by Gormley), *Introduction into the Law of the European Communities*, 3rd Ed. (London, 1998), p. 581.

ization is essential. A completely centralized internal market is almost a *contradictio in terminis*. The problem is that the discretionary freedom differs almost case per case before the European Court. Thus, it is difficult to distinguish exactly how the member states and the European legal orders overlap. This increasingly creates practical problems, in particular, for national courts and institutions, which have difficulties applying other member states' laws and the Community law within their jurisdictions.

The overlapping of different legal orders within the European legal system is one part of the more general change in the structures of governance in the world. In particular, the literature on international relations discusses these changes under the heading of the "new medievalism". This concept points to a situation "where several authorities have overlapping and competing competencies, without the existence of a clear body of rules determing which set of prescriptions takes precedence over the rest".[5] The same holds true for the concept of "legal pluralism" that, beyond meaning the existence of more than one legal order, seems to be "fruitful for the study of governance from a legal point of view".[6] According to a report written for the Scientific Council for Government Policy in the Netherlands, legal pluralism is "an open construction, in which the legal spheres interact on an equivalent basis and refer to each other whereby differing configurations of connections between legal spheres are possible, given the specific characteristics of the issue area".[7] The development of the case law of the European Court of Justice concerning the four freedoms seems to fit into this phenomenon of legal pluralism.

With regard to the legal system of the European Community, legal pluralism is often confronted with the "monist" relationship between the legal systems of the European Union and those of the member states.[8] According to MacCormick, there is not so much a hierarchical relationship between international law, Community law and member state law, "rather the case is that these are interacting systems,

5. *See* the contribution in this volume by Jörg Friedrichs.

6. *See also* the contribution in this volume by Gerhard Anders.

7. *Staat zonder land. Een verkenning van bestuurlijke gevolgen van informatie- en communicatietechnologie*, Wetenschappelijke Raad voor het Regeringsbeleid (The Hague, 1998), p. 68.

8. This "monist" perspective concerns the *application* of Community law in the legal systems of the member states and has to be distinguished from the "monist" perspective on the *validity* relation between both legal systems. *See* the contribution of Ige Dekker and Ramses Wessel, in particular para. 3, to this volume.

one of which constitutes in its own context and over the relevant range of topics a source of valid law superior to other sources recognized in each of the member state systems".[9] However, as Cruz rightly states, "such pluralism takes place under Community law itself, and according to its own institutional and legal mechanisms".[10] This seems in line with Verhoeven's concept of "moderate pluralism".[11] She argues that the core of the community legal system should not be understood in hierarchical terms but rather characterized by legal pluralism "kept at bay through a set of common constitutional principles",[12] in particular, the principles of loyalty and mutual recognition.

The need for a pluralist understanding within the European legal system will be illustrated in this chapter in the discussion regarding the development of the case law of the European Court of Justice with regard to certain aspects of the principles governing the aforementioned four freedoms of the international market. The case law of the European Court of Justice has created not only an interaction between, one the one hand, Community law and the law of one member state, but also an interaction between the laws two different member states. Notorious in this internal market law is the so-called "home state" principle. The host state of a product or service may not regulate the product or the service a second time without reason. The importance of this principle, which functions as an allocation standard of regulatory competencies in a specific case, must not be underestimated in the case law of the European Court.[13] We do have a lot of experience with this principle in private international law, however in that branch of the law national courts often use their own national law when the public order proviso is invoked. They simply know their national law better. And this application may work against the rules of free movement. Free movement law has its own peculiarities that cannot be compared with private international law.

The European Court's case law concerning the four freedoms is interesting precisely because these freedoms are fundamental rights

9. N. MacCormick, *Questioning Sovereignty. Law, State, and Nation in the European Commonwealth* (Oxford, 1999), p. 117.

10. J. Baquero Cruz, *Between Competition and Free Movement* (Oxford, 2002), pp. 21, 22.

11. A. Verhoeven, *The European Union in Search of a Democratic and Constitutional Theory* (The Hague, 2002), p. 292.

12. *Id.*, p. 296.

13. But it must not be overestimated like N. Bernard does in his "La libre circulation sous l'angle de la compétence", *Cahiers de Droit Européen*, 1998, 45.

of the member states citizens in the European Community. It is because of the fundamental nature of the four freedoms that European Court interprets them in such a broad way. In the case law of the European Court not only discrimination on the basis of nationality is addressed, but sometimes all impediments to the movement of goods, services and capital. This case law has had a strong influence even on those policy domains in which the member states remain fully competent, such as the domains of direct taxes and labour law. Because they have been broadly interpreted, the freedoms interfere with core areas of national competencies.

Hereafter three separate sub-fields of free movement law are selected. In the first place, I will pay attention to the recognition of diplomas. This topic is related to free movement of persons (Articles 39 and 43 TEC). In the second place, the posting of workers within the framework of the provision of services will be dealt with. The European Court has recognized the right of the service-provider to take his own workers with him to another member state in order to provide the service in that member state. This has to do with the free movement of services (Article 49 TEC) but not with the free movement of persons. After finishing the service the service-provider and his workers must return to the home state. The last topic is the case law concerning the "purely internal situation". In purely internal situations the European Community is not competent. Because there is no question of free movement, European Community law is not applicable. However, in recent years the European Court of Justice has taken a somewhat different approach in this matter. The "purely internal situation" is now more seen by the European Court within the context of the dialogue between European and national judges. If a national judge thinks that he needs an answer from the European Court in a situation in which all relevant elements are outside the Community sphere, then the European Court will give an answer to that preliminary question. The developments in this field are interesting from the perspective of overlapping legal systems as well.

2. *Recognition of diplomas*

The case law concerning recognition of diplomas has changed from a case law of full respect for the European Community legislator to a case law that stresses a number of minimal rights for European

Community citizens with or without the enactment of an European Community directive concerning the recognition of a category of diplomas. Since the *Knoors* case (115/78)[14] the obtaining of a diploma in another member state can be seen as a sufficient criterion for a national of one member state to invoke the free movement of persons provisions in the European Community Treaty against his own member state. At the time, in 1979, this development was seen as a shock. Nationals could now sue their own member states before a national court in relation to the free movement provisions. But at the very same day in that year 1979 another case was produced by the Court, the *Auer* case (136/78). This case concerned a Frenchman who was punished in France for unlawfully acting as a veterinarian. Just like Knoors, Auer showed a university diploma and a written declaration of competence, both issued in another member state. But the French authorities had not recognized these as being equivalent to a French diploma. Furthermore, there was no existing European Community directive concerning the recognition of diplomas of veterinarians at that date. In *Knoors*, which concerned another activity, there was such a directive. Thus, *Auer* could not use the free movement provisions in the European Community Treaty to his own benefit, because the relevant directive was not yet implemented in France.[15]

In the 1980s and 1990s quite a few more "recognition directives" concerning specific activities were issued. Because of this development the European Court also takes a more robust approach to protecting the citizens of the European Community. An important change in the approach of the Court is the *Vlassopoulou* (C-340/89)[16] case concerning the admission to the bar in one member state on the basis of diplomas and qualifications of another member state. As in many other cases concerning free movement law, the Court looks to the effect of a national measure. In this case, the national authorities in the member state in which Vlassopoulou wanted to establish herself, did not take into account knowledge and qualifications, such as internships, obtained in her home country. The effect of this refusal was unacceptable, according to the European Court. Even in cases

14. *ECR*, 1979, p. 399.

15. For *Auer*, *see ECR* 1979, p. 437. A couple of years later the directive concerning activities as veterinarians existed. After the date at which the directive should be transposed in national law mr. Auer could invoke the directive and the free movement of persons. *See* case 271/820, *Auer* II, *ECR* 1983, p. 2727.

16. *ECR* 1991, p. I–2357.

where special directives concerning recognition the authorities of the host state do not exist, the state of establishment has a positive duty to arrange for comparative research into the national diplomas and the diplomas and qualifications of Vlassopoulou. This duty of diligence exists automatically. Sometimes the European Court refers to Article 10 TEC which obliges the member states to work in good faith with the European institutions in order to realize the goals of the EC. Of course, an automatic equivalence is not imposed by the interpretation of the Court of Article 43 TEC, but there is this duty to compare the diplomas, which is presupposed. The worker or self-employed person has also a duty: he or she must submit diplomas etc. in order for the authorities of the host state to be able to fulfil their duty to do the comparative research. Automatic equivalence, as such, can only be dealt with in a directive.

The European Court has further elaborated this case law, in which there are specific duties for the authorities of the host state. The duties to compare are directly based on Article 43 TEC. In *Dreessen* the Court stresses that every citizen of the Community has a minimal right for his or her diplomas or qualifications to be checked by the authorities of the host state.[17] The Court no longer refers to Article 10 TEC. This duty still exists after it has been established that the diplomas or qualifications of that citizen do not fulfil the criteria of a specific directive. According to the Court, only a special directive can guarantee an automatic equivalence of the diplomas. When the diplomas do not fulfil the criteria of the directive then there will be no automatic equivalence. But even in that case the obligation to check the diplomas and qualifications still exists. This is also the case if the citizen has a diploma from a third country which is not part of the Community.[18]

The directive does not change the rights inherent in Article 43 TEC. Free movement law is part of the core of the EC. Even apart from directives, this law has direct effect in the legal orders of the member states. Here we see an example of a required *active and positive duty* from the authorities of the host state, to check diplomas and other qualifications on the basis of free movement law. This duty is not a duty to bring about a certain result like the equivalence of the diplomas, but rather it is a duty to actively and honestly compare the diplomas

17. Case C-31/00, *ECR* 2002, p. I–663.
18. *See* for this specific point the case C-238/98, *Hocsman*, *ECR* 2000, p. I–6623.

and qualifications with the diplomas and qualifications that exist in the host state. As a consequence of European Community free movement law, the authorities have to take into account developments that happened in another member state, even in case a recognition-directive has not yet been enacted.

3. *Posting of workers within the context of the free provision of services*

The case law of the European Court concerning the interpretation of Article 49 TEC goes even one step further: it is here that we can see examples of juridical pluralism. It is here that we can also see that the internal market, or free movement law (which is after all economic law) is touching upon or interacting with other domains of law of a non-economic nature. I will also discuss European Court case law concerning the posting of workers. In an old case, *Rush Portuguesa* (C-113/89), the European Court contrary to the opinion of its Advocate-General, accepted that the right to provide a service in another member state includes the right to take personnel and workers with you to the member state in which the service will be provided. The construction firm Rush Portuguesa, from Portugal, thus had the right to bring some needed workers which were needed to implement a construction contract in France. The Court is very sensitive to the argument of a "level playing field". Therefore, if French construction firms can use their own personnel to provide a service within France, firms from other member states must also be able to bring their personnel. If this were not the case the comparative advantage of firms from other member states would suffer. Thus, the effect is discriminatory and against Article 49. But in this case the Court also showed an understanding of some of the host member state's arguments, for instance, "what about cheap labour pooring into the country?" The Court accepted "that Community law does not preclude member states from extending their legislation, or collective labour agreements entered into by both sides of industry, to any person who is employed, even temporarily, within their territory . . .".[19] Thus, the free provision of services was safeguarded, but the host states may also apply their social legislation and collective

19. *See* paragraph 18 of *Rush Portuguesa, ECR* 1990, p. I–1417.

labour agreements to the workers who temporarily join their employer/service-provider in the host state in order to fulfil the service contract.

After this first case we have seen a plethora of new cases dealing with the question "how far may the authorities of the host state apply their national legislation and collective agreements concluded in their state?" I just want to mention two more cases in order to clarify the "juridical pluralism" phenomenon. What is important to remember in these cases is, again, a duty to compare on the part of the authorities of the host state. This time the obligations of the employers/service-providers already fulfilled in the home state have to be compared to the obligations these employers have to fulfil according to the laws and collective agreements in the host state. These obligations are really the obligations of the authorities of the host state. If they do not compare the situation of these employers in the home state with those valid in the host state, the Court of Justice might conclude that there is a violation of Article 49 TEC in a subsequent case before a national court, provided that the national court asks a preliminary question to the Court in Luxembourg. This Court looks to the level playing field of the firms that compete each other on the European market. If, for example, a firm from another member state has to fulfil comparable obligations in Germany for the second time that that firm had already fulfilled in the home state that double burden is contrary to Article 49 TEC and this will have to be justified.

In a case concerning the construction industry French employers Arblade and Leloup posted their own workers in Belgium in order to provide services there.[20] The managers of the French firm were prosecuted in Belgium, for failure to comply with various social obligations provided for by Belgian legislation. The obligations concerned the drawing-up, keeping and retention of documents concerning the French workers in Belgium, the monitoring of compliance with those obligations and an obligation to pay at least the level of minimum remuneration in the construction industry in Belgium. According to Arblade and Leloup, they were not obliged to produce the documents, because they had complied with all the relevant legislation in their home state France. Therefore, applying the obligations under Belgian law on them was held to be against Article 49 TEC.

The European Court allows member states to legislate in the public interest, and the social protection of workers in the construction

20. Cases 369/96 and C-376/96, *Arblade a.o.*, *ECR* 1999, p. I–8453.

industry is such an overriding reason related to the public interest. But after this general remark, the Court goes in depth and looks more precisely to the obligations in the Belgian legislation. Not only do the competent authorities of the host state Belgium have to fulfil a comparative research to the equivalence of the regulation in France and in Belgium. They also have to stick to the transparency criteria. It is allowed to impose the valid minimum remuneration in the construction industry on workers that are temporarily in Belgium, but the valid minimum remuneration must be clearly made known to the employer/service-provider from other member states. If there is any doubt concerning the level of this minimum remuneration, for instance, concerning the contributions of the employer in respect of "timbre-intempéries"[21] as part of the workers' gross remuneration, this obligation would appear not to be part of the minimum remuneration. But the European Court adds, "this is a point for the national court to confirm" (para. 47).

This is a remarkable paragraph. Apparently the European Court does not trust itself 100 per cent to intervene in core elements of national labour law. It needs the national court to confirm what exactly is part of "valid minimum remuneration" in Belgium. Important at this juncture is to stress the horizontal relation Community law and the national Belgian law might seem to have here. Indeed, there seems to be something like "legal pluralism" here. Both legal systems, the European one and the Belgian one, seem to interact here in an equivalent way. There is no hierarchy that places one law above the other one.

Another element of "legal pluralism" is the duty of the authorities and the national courts of the host state to compare two national laws and to apply normative principles of Community law at the same time! Not only do the national authorities have to fulfil a comparative research requirement, but after that the law of host state may not be applied completely to workers who are temporarily in the host state within the context of a provision of services of their employer. Further, the requirement may only be applied as far as the obligations are not already fulfilled by the employer/service-provider in their home state. Here, there is a duty to not apply the national legislation in case of a cross border case. This goes further than the duty to com-

21. This is a supplement in order to finance the payment of wages during a time the workers cannot fulfill their job, e.g. during winter.

pare diplomas and qualifications. There is not only a duty to "take care" but also a duty to reach a certain result. The European Court, in these cases, provides a lot of parameters within which the national authorities have to remain. However, the parameters are much more precise compared to the parameters the Court gave in the diploma recognition cases.

Clearly, the duty to compare labour conditions in the home state with those of the host state is not always that easy. The case *Mazzoleni* (C-165/98)[22] concerns French frontier workers in the private security sector. Does the French employer of these French workers have to pay the Belgian minimum wage, when these workers fulfil surveillance duties around compounds in Belgium in addition to their work in France? The employer/service-provider argued that French minimum wages are admittedly lower, but, for the purposes of comparison, it was necessary to take account of the workers' overall position, including the impact of taxation welfare protection, which according to ISA, is more favourable in France. This is a legal conflict about the nature of the comparative duty of the authorities in the host state. Do they have to compare per issue (minimum wage, taxation etc.) or do they have to make an overall global comparison? The European Court takes the view that an overall global comparison in relation to remuneration, taxation and social security is appropriate in this case. A comparison per issue would create a disproportionate administrative burden. Nevertheless, the authorities of the host state do have to take account of the nature of the activities of the French workers in Belgium. Surveillance activities often take only a limited time and are sometimes executed more than once a day. Moreover workers are changed for security reasons, so it is not always the same workers that go to Belgium. Therefore, the authorities of the host state have to take into account the duration of the provision of services, their predictability and whether the employees have actually been sent to work in the host state. Again the parameters within which the authorities must operate are very detailed and precise. The European Court intervenes very deeply into national law. Furthermore, in some instances national law has to be set-aside so that the law in the home state of the workers prevails.

In order to comply with the rules concerning free movement national courts and national authorities have to act in a positive way. These very

22. *ECR* 2001, p. I–4221.

precise duties can be derived directly out of the provisions in the EC Treaty. Free movement law not only leads to an intricate relation between Community law and national law, the European Court also decides which law – the law of the host state or the law of the home state – must prevail in a certain situation. Sometimes this relationship is of a horizontal nature; consider the example given above concerning the minimum wage in the construction industry in Belgium. The national court has to confirm the suggestions of the European Court.

4. *Purely internal situations*

In an area without internal frontiers one should expect the disappearance of so-called "purely internal situations",[23] situations in which all relevant elements are situated within one and the same member state. But in its case law the European Court has always refused to answer preliminary questions of national courts in cases in which the facts are situated 100 per cent within the territory of the same member state. Legal problems connected with this kind of situations are left to the national courts because these courts are competent for the facts. They are simply better suited to study and weigh the facts.

Why does not the European Court not deal with "purely internal situations"? The dispositions in the European Community Treaty concerning free movement deal with *free movement*, meaning that a cross border element must be present in a case. Without a cross border element there can be no free movement. An Italian person cannot complain on the basis of the Treaty dispositions concerning free movement of workers about the treatment of him by an Italian railway corporation inside Italy. This is an internal matter: the member state is competent here and not the European Community. Lack of competence and lack of a sufficiently clear connection with free movement of workers inside the European Community is at the basis of this position.

Through the years the European Court has more extensively interpreted the dispositions concerning free movement of persons. National

23. According to J. Habermas "internal situations" are the only domain in a post-national constellation in which the states remain fully competent. *See* his *Die post-nationale Konstellation* (Frankfurt am Main, 1998), p. 151. But one could ask oneself what is the value of this in a European Community in which the quality of sausages and the noise to be allowed from lawn-mowers are decided on the European level.

citizens of member states are thus protected when they obtained a diploma in another member state. These citizens have used the Treaty freedoms in order to get the diploma, so they fall under the protection of these freedoms (*see* the *Knoors* case, mentioned above). But the refusal to answer preliminary questions in cases where the facts are 100 per cent inside one member state has led to critical notes in the doctrine. In an internal market there should be no internal frontiers. Citizens inside a member state are increasingly exposed to competition from other people of other member states. These people, when they make use of the Treaty freedoms, can invoke the Treaty freedoms. But citizens who do not make use of these freedoms, but still feel the effects of the use by others cannot invoke the freedoms. In this case the concept of "reverse discrimination" is often used. Member states can treat their own citizens in disadvantageous ways when compared to the "guest" citizens from other member states who make use of the Treaty freedoms.

In reaction to critical notes of academics and national lawyers the European Court has changed somewhat its position on "purely internal situations". A very interesting position in the doctrine is from Poiares Maduro. In one of his earlier publications he defended the case law of the Court concerning "internal situations" in view of the institutional context the European Court has to operate.[24] The reason that an issue like "reverse discrimination" did cause so much tension in the member states has according to him to do with failures in political representation. The market and the specific group of people who suffer from "reverse discrimination" are not congruent with the jurisdiction of national policymakers and the national political process. In a subsequent publication the same author presents a different view. Because the market as well as the political process does not always bring about an improvement in the position of those who suffer from "reverse discrimination" it is time for the European Court to act, according to Poiares Maduro.[25] It is possible for the European Court to act because "reverse discrimination" belongs to the jurisdiction of European law but at the same time it can only be combatted by means of national law. Therefore the author has the following sug-gestion: the

24. M. Poiares Maduro, *We, the Court: The European Court of Justice and the European Economic Constitution*, (Oxford, 1998), pp. 154–155.

25. M. Poiares Maduro, "The Scope of European Remedies: the Case of Purely Internal Situations and Reverse Discrimination", in C. Kilpatrick, T. Novitz, P. Skidmore (eds.), *The Future of Remedies in Europe* (Oxford, 2000), p. 118.

Court of Justice should answer preliminary questions by national courts concerning internal situations and reverse discrimination with the purpose to "empower" national courts in order that they can deal with reverse discrimination and internal situations. Poiares Maduro prefers in this way a better allocation of tasks between European Court and national courts, the national courts should be supported by the European Court in their attack on a phenomenon like reverse discrimination.

It must be submitted that the Court indeed has changed somewhat its position on internal situations and reverse discriminations. Now it takes the position that in case a national judge needs an answer from the European Court in order to combat reverse discrimination, when that is prohibited in his national law, the European Court will give that answer even in case the facts are completely contained within one member state. In the case law in which the European Court applied this new position the perceived need of the national judge is not tested very strictly. There is only a marginal test in that the preliminary question must have a relation with a real dispute or with the subject of the case. In *Guimont* (C-448/98), a case concerning the free movement of goods the European Court used this new criterion.[26] That this *Guimont* criterion can be used for other fundamental freedoms is decided in a recent case *Reisch a.o.* (C-515/99, C-519/99–C-524/99 and C-526/99–C-540/99) concerning free movement of capital.[27] In this last case the European Commission in her remarks before the European Court referred explicitly to a prohibition in the national law of Austria of reverse discrimination. The question is if this prohibition of reverse discrimination in national law has to be brought to the attention of the European Court or if it has to be confirmed explicitly in the proceedings before the European Court is going to answer the preliminary question. I do not think that it is. In fact, it is the national court that empowers the European Court to deal with the matter. One could turn upside down Poiares Maduro's argument.

This new case law is proof of a more horizontal approach in the relation between European and national courts. But it is also more difficult to separate the spheres of both laws. Something like legal pluralism exists indeed. If I recall here the definition given in the introduction, then there is indeed an open construction according to which there is an interaction on an *equivalent* basis between more than

26. *ECR* 2000, p. I–10663.
27. *ECR* 2002, p. I–2157.

one legal sphere. The legal spheres refer to each other or the national courts and/or national authorities are forced by the European Court in its interpretation of free movement law to take each other's spheres into account. Also differing configurations of connections are possible between legal spheres, given the specific characteristics of the issue area. We have seen three separate issue areas above with three differing configurations of connections. Therefore the definition of the Netherlands Scientific Council for Government Policy fits quite well.

Legal pluralism exists not only in the relation Community law – member state law but also in the relation between the different member state legal systems. The legal system of a member state is more vulnerable, not only to the legal system of the EU, but also to the rules and decisions taken within the legal systems of the other member states. The duty to compare home and host state a rule brings with it the question of "transplantability" of the laws of one member state to another.[28] This is not always an easy process, apart from the language problems that might arise here. It is the European Court of Justice that stimulates this development; in a Belgian case before it the Court even refers directly to a decision of the German Federal Constitutional Court.[29]

5. *Conclusion*

After this excursion into the case law of the European Court of Justice the following concluding remarks can be made. First, European Community law concerning free movement requires the "opening up" of the national state. National courts and national authorities have specific duties on the basis of European Community law. Kirchhof speaks correctly in this context of the "Europaoffene Staat".[30] The state has to adapt to the new situation required by European Community law. Also Jo Shaw stresses that pluralist conceptions has not so much to do with changes at the supra- or sub-state level, but it

28. *See also* K. Armstrong, "Mutual Recognition", in C. Barnard and J. Scott (eds.), *The Law of the Single European Market. Unpacking the Premises* (Oxford, 2002), p. 232.

29. Case C-108/96, concerning freedom of establishment, *Mac Quen*, *ECR* 2001, p. I–837.

30. *See* P. Kirchhof, *Handbuch des Staatsrechts der Bundesrepublik Deutschland* (J. Isensee and P. Kirchhof, eds.), part 12, chapter 183. The title of the chapter is "Der deutsche Staat im Prozess der europäischen Integration", p. 856.

concerns essentially changes within the nation-state itself.[31] Community law and national law should not be seen as binary opposite but as increasingly overlapping legal orders between one should not be dominant over the other.[32]

Second, the actual implementation of European Community law in the member states is relevant here. There is not a lot of research concerning the actual implementation by national courts and national authorities of the case law of the European Court. The European Court for not-implementing its earlier case law can now condemn member states and there are now about 29 of such cases before the Court. But in general we may suppose that national courts, when they ask preliminary questions, will also apply the answer of the European Court in their national cases. However, Weatherill correctly submits that the role of the European Court of Justice in deepening the impact of European law within the legal order of the member states has led to a neglect of aspects of *practical* implementation within the legal systems of the member states.[33] It is the national courts and authorities that are supposed to actually implement European law. But this "indirect rule", as Weatherill calls it, by way of the trusted national apparatus might need in the near future more "direct rule" by the European Commission or a new European agency in case there are continuing problems of maintenance of internal market law.[34] The success of the internal market needs trust and confidence. But Weatherill admits that any move to "direct rule" must be examined closely for reasons of legitimacy and accountability.[35]

Third, the case law analyzed in this article exactly points out that there are practical problems concerning the increasing overlap between Community law and the legal systems of the member states. The idea that Community law and the national law of the member states is one fully coherent body may be untenable in practice,[36] as is the case with an all-purpose subordination of member state law to

31. J. Shaw, "Postnational Constitutionalism in the European Union", in Th. Christiansen, K.E. Jorgensen and A. Wiener (eds.), *The Social Construction of Europe* (London, 2001), p. 74.

32. J. Shaw (note 31) pp. 74 and 75.

33. S. Weatherill, "New strategies for managing the EC's internal market", 53 *Current Legal Problems*, 2000, pp. 595–619.

34. *Ibid.*, p. 603.

35. *Ibid.*, p. 617.

36. A. Verhoeven, *The European Union in Search of a Democratic and Constitutional Theory* (The Hague, 2002), p. 301.

Community law.[37] Indeed, each of the interacting systems constitutes, in its own context and over the relevant range of topics, a source of valid law superior to other sources. But then, of course, the question is: who decides the "relevant range of topics"? This range of topics has been broadened in the case law of the European Court, and at the same time there has been some decentralization promoted in this case law under the supervision of the European Court.

Fourth, Verhoeven's ideas concerning the development of a situation of "moderate pluralism" within the European legal order are attractive. Pluralism will have to be "moderated" in order to be workable. Verhoeven mentions as "moderators" especially the principle of loyalty, as laid down in Article 10 TEC, and the principle of mutual recognition that is developed mainly in secondary law and case law. Some verticality is necessary to make the system work. But the problem with these principles is that they become clear only in an individual case, that the scope of the principle of loyalty is undetermined and that there exist several kinds of mutual recognition.[38] The intransparency of the relation between Community law and member state law therefore remains. However, I do agree with Verhoeven that the increasing intransparency between Community law and the national law systems puts a monist option very much under strain. A monist approach works best when the borderlines between Community law and the national law systems are transparent. In reality there could exist some sort of continuum, with at the one end a monist relation between Community law and the national law systems and at the other end a dualist relation. The exact spot on this continuum depends on the nature of the individual case before the European Court. Core areas of Community law, that are essential for the unity of the internal market, like non-discrimination on the basis of nationality are clearly on the monist end. But parts of free movement case law are somewhere in the middle. National courts

37. N. MacCormick, *Questioning Sovereignty. Law, State, and Nation in the European Commonwealth* (Oxford, 1999), p. 117.

38. *See* on the principle of loyalty: J. Temple Lang, "The duties of national courts under Community constitutional law", 22 *European Law Review*, 1997, 3–18; *id.* "The duties of national authorities under Community constitutional law", 23 *European Law Review*, 1998, p. 109. On mutual recognition, *see* K. Armstrong, "Mutual Recognition", in C. Barnard and J. Scott (eds.), *The Law of the Single European Market. Unpacking thePremises* (Oxford etc., 2002), pp. 225–267. He mentions diverse forms of mutual recognition: "it is difficult to offer a generalized and abstract definition of mutual recognition divorced from the legal context in which it is operationalized" (p. 230).

and authorities do have a more independent role there. The paragraph cited from the *Arblade a.o.* case that there is a point of labour law "for the national court to confirm" is proof of an awareness from the European Court that it needs the national court for a definitive interpretation. The same is true in the case *Guimont* concerning "purely internal situations". This fits in with the horizontal, non-hierarchical nature of the preliminary procedure as well.

Fifth, the European Court has interpreted the four freedoms in an extremely broad way. Although the European Community is not competent in all policy domains, the four freedoms do now affect almost every policy field. It is because of this broad interpretation that a more pluralist understanding of the relation between Community law and member state law becomes almost inevitable. In this contribution it has been shown that the European Court in its case law with regard to the application of the four freedoms to a certain extent is aware of this situation. However, one may expect that, as Cotterrell's definition of legal pluralism seems to suggest, there will be an increasingly contested relationship between the legal system of the European Union and the national legal systems of the member states. It is indeed "a complex of overlapping, interpenetrating or intersecting normative systems or regimes, amongst which relations of authority are unstable, unclear, contested, or in the course of negotiation".[39] The fact that the borderline between what is European and what is national becomes increasingly a blurred one could lead to a lot of conflicts and practical problems. However, these conflicts and problems should be solved by the further development of an interdependent and horizontal relationship between European Court and national courts. In order to increase the legal certainty it is necessary that the European Courts and national courts learn to work with more pluralist conceptions of law. In particular national courts need to know better how to separate what they can do autonomously and what they cannot do in relation to European Community law and the laws of the other member states. If this is not done properly, coordination at the European level will become more problematic.

39. R. Cotterrell, "Law and Community: A New Relationship?", 51 *Current Legal Problems*, 1998, 381.

PART IV

NON-GOVERNMENTAL ORGANIZATIONS

CHAPTER ELEVEN

NON-STATE ACTORS: UNDERMINING OR INCREASING THE LEGITIMACY AND TRANSPARENCY OF INTERNATIONAL ENVIRONMENTAL LAW

Joyeeta Gupta*

1. *Introduction*

Legal positivists have limited the role of non-state actors to that of mere observers in international treaty making. Liberal institutionalists, on the other hand, have increasingly taken the view that non-state actors have a major role to play in influencing international treaties.[1] Thus clearly, the perception of the role of the non-state actor in treaty making depends on the perspective of the observer. However, is it possible that the perception is coloured by an inadequate grasp of the facts?

Charnovitz argues that contrary to what many people think, non-state actors have been actively influencing international negotiations for more than two centuries.[2] He presents a detailed history of the role of non-state actors in the last two centuries and argues that in

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1. J.M. Grieco, "Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Institutionalism", in Beck, Arend, Vander Lugt (eds.), *International Rules: Approaches from International Law and International Relations* (New York, Oxford University Press, 1996), p. 56.

2. They were however active in influencing policies at international level from the 18th century. *See* for example, S. Charnovitz, "Two Centuries of Participation, NGOs and International Governance", 18 *Michigan Journal of International Law*, 1997, 183–286.

this long-term perspective seven periods can be discerned; a period of "emergence" (1775–1918), "engagement" (1919–1934), "disengagement" (1935–1944), "formalization" (1945–1949), "underachievement" (1950–1971), "intensification" (1972–1991) and "empowerment" (since 1992). He argues further that the history is a cyclical process; in times of peace, involvement of non-state actors reaches a peak and in times of crises, the non-state actors become less active.

This implies that the rise of the non-state actor is not a new phenomenon; and that in the past non-state actors have actively influenced decision-making at international level. At the same time, it is also clear that since 1992 the explosive development in communication technology has multiplied the effectiveness of non-state actors, especially, in the area of international relations. Thus although the phenomenon is not new, the challenges it poses are quite new. This chapter, in particular, focuses on two challenges posed by non-state actors to the issue of international law – the challenges to the transparency and legitimacy of international law. In doing so, this chapter will discuss the issue in the context of sustainable development and the climate change regime.

1.1 *Global environmental governance*

The literature points out that decision-making and treaty negotiation at international level is anarchical in nature. The process of sustainable development management unfolds in an *ad hoc* manner, depending on the social and political forces that champion specific causes. In other words, there is no real parliamentary process of prioritizing and, if necessary, integrating global environmental problems and developmental issues in order to facilitate problem solving through international conferences and treaties at the international level. This implies that the international law tool is being used as and when social and political forces can gather the momentum to push a certain issue onto the international agenda. This further implies that, on the one hand, the power of these forces determines the international agenda.[3] Putnam's theory of the two-level game postulates that international agreements come into being because domestic actors push

3. This is a fundamental thesis of neo-institutionalism. Regime theorists argue that in common pool resource issues, where non-cooperation appears to be the only possible alternative, other forces may compensate for the lack of a hegemonic leader and lead to problem solving.

for the internationalization of issues in order to have them addressed and at the same time states use international agreements to convince domestic actors to take action.[4] This two-level game can be empirically proved especially in relation to small-developed states like the Netherlands. However, once the international agenda is set, the dynamics of the negotiating process may lead in a different direction to that one may predict on the basis of a simple power analysis. Countries that come together in a negotiating process get absorbed by the process and it is then a slippery slope towards more and more agreements.[5]

The dynamics of problem solving at intergovernmental level is dependent on the social forces that push for such an approach. The empirical evidence of the increasing power of non-state actors in the environmental regime will therefore be covered in this article. In doing so, this chapter will also focus on what I believe to be the most important and serious of environmental problems – climate change. Climate change – by challenging the very way we live, produce and consume – calls for a re-examination of the global system.

What is clear is that the global community is presently in transition to globalization. The bulk of the world's countries are being involved in the global governance process either voluntarily or involuntarily, since environmental rules adopted internationally, bilaterally and even unilaterally or privately may affect them in one way or other. Thus, global environmental governance seems to consist of a patchwork of traditional and modern innovative approaches where the rules of the governance game are in flux. This raises some interesting legal questions about the future of international law.

1.2 *The environment, development and the law of sustainable development*

There is also a growing realization that for environmental protection to be effective it needs to be integrated into the broad range

4. R.D. Putnam, "Diplomacy and Domestic Politics: The Logic of Two-Level Games", 42 *International Organization*, 1998, 427–460.

5. This is because of the self-reinforcing dynamics of treaty negotiations, where sometimes states are legally obliged to sign a protocol if they want to join a framework treaty, and because of the diplomatic pressure to stay within the system once you have joined, reinforced by several institutional devices; *see* P.M. Haas, J. Sundregen, "Evolving International Environmental Law: Changing Practises of National Sovereignty", in N. Choucli (ed.), *Global Accord: Environmental Challenges and International Responses* (Cambridge M.A., MIT Press, 1993), pp. 401–429, at p. 411.

of development policies.[6] This brings us to the notion of sustainable development. Before delving into the questions posed by the new forms of participation of non-state actors in international law, I would like to spend some time introducing the newly emerging, although controversial, law of sustainable development in order to provide some context for the analysis that will follow.

The Rio Declaration defines sustainable development as follows: "The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations".[7] Clearly the concept of sustainable development has a North-South, rich-poor element to it. At the same time, it is increasingly being used as a way to balance economic, ecological and social interests. Sustainable development is becoming a guiding principle in several international treaties.[8]

In the climate change treaty, for example, sustainable development is seen as a right of all parties[9] and all activities under the Kyoto Protocol have to be focused on sustainable development,[10] although the process of defining sustainable development is left to national governments.[11]

If sustainable development is a question of balancing the interests of the poor *vis-á-vis* the rich as well as balancing the economic, ecological and social interests in relation to specific scientific problems, then the role of the state negotiating such treaties is to undertake a

6. Principle 4 of the 1992 Rio Declaration, UN Doc./Conf. 151/26.Rev.1, states: "In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation of it".

7. Rio Declaration (note 6), Principle 3.

8. N. Schrijver, "On the Eve of Rio Plus 10: Development – the Neglected Dimension in the International Law of Sustainable Development", *Dias Natalis*, lecture at the Institute of Social Studies, The Hague, 11 October 2001.

9. United Nations Framework Convention on Climate Change, 9 May 1992, in force 24 March 1994; 31 ILM 1992, Art. 3.4.

10. The Kyoto Protocol to the United Nations Framework Convention on Climate Change, 37 ILM 22 (1997), not yet in force; however the corrected text is available at the web site of the climate secretariat – <unfccc.de; Fccc/CP/1997/L/7/Add.1>. *See* Arts. 2, 10 and 12.

11. The Marrakech Accords and the Marrakech Declaration, Bonn: Climate Change Secretariat, (2001). For analysis *see* J. Gupta, "Climate Change: *De Jure* and *De Facto* Commitment to Sustainable Development", Presentation at the International Law Association Meeting, Session on The Legal Aspects of Sustainable Development, in New Delhi, 4 April 2002 and at the Conference on Re-conceiving Environmental Values in a Globalizing World, Mansfield College, Oxford, 11–12 July 2002.

balancing exercise internally and to then negotiate on the basis of that outcome. While the concept of sustainable development seems to have been launched as a strong concept in the soft law arena, it is becoming harder by the day. However, many will still doubt if there is sufficient state practice to support the conviction that this is part of customary international law. In the process, it is the non-state actors that are becoming important vehicles of pushing these norms further and increasing their sale value. Thus the International Law Association (ILA), a scientific/legal association sees sustainable development, not merely as a principle, but as a newly emerging area of international law. It has redefined the content of sustainable development partly on the basis of the increasing nominal commitment to the concept in various international treaties and partly on the basis of an intellectual endeavour, however legally questionable that may be, in order to determine what the content of such sustainable development should be.

The ILA argues that sustainable development includes seven sets of principles. Six of these principles focus on (1) the duty of states to ensure sustainable use of natural resources: (2) the principle of equity and eradication of poverty; (3) the principle of common but differ-entiated responsibilities; (4) the principle of the precautionary approach to human health, natural resources and ecosystems; (5) the principle of integration and interrelationship, in particular to human rights and social, economic and environmental objectives and (6) the principle of good governance. The remaining principles focus on the principle of public participation and access to information and justice. It states:

> Public participation is essential to sustainable development and good governance in that it is a condition of responsive, transparent and accountable governments as well as a condition for the active engagement of equally responsive, transparent and accountable civil society organizations, including industrial concerns and trade unions. The vital role of women in sustainable development should be recognized.

Public participation in the context of sustainable development requires effective protection of the human right to hold and express opinions and to seek, receive and impart ideas. It also requires a right of access to appropriate, comprehensive and timely information held by governments and commerce on economic and social policies regarding the sustainable use of natural resources and the protection

of the environment, without imposing undue financial burdens upon the applicants and with due consideration for privacy and adequate protection of business confidentiality.

The empowerment of peoples in the context of sustainable development requires access to effective judicial or administrative procedures in the state where the measure has been taken to challenge such measure and to claim compensation. States should ensure that where transboundary harm has been, or is likely to be, caused, individuals and peoples affected have non-discriminatory access to the same judicial and administrative procedures as would individuals and peoples of the state from which the harm is caused if such harm occurred in that state.

In other words, for the legal community as assembled in the ILA, a vital prerequisite for achieving sustainable development is to increase the opportunities for participation and legal redress for civil society and non-state actors in the national and international process.

This brings me to the following question: it appears that non-state actors and the international legal community are convinced about the need for non-state actors to take a more active role in the process of decision-making at all levels and hope that these non-state actors will increase the democracy, legitimacy, legality and transparency of decision-making, but is the reality quite so rosy?

Against this background, this chapter explores the legal implications of the new forms of global governance. In doing so, it uses empirical evidence from the climate change regime. This chapter first examines the way the climate change treaties make space for non-state actors to participate in the treaty negotiation and implementation process and then goes on to explore the legal implications of this role.

2. *The increasing role and participation of non-state actors in the climate change regime*

Non-state actors have been actively involved in several environmental regimes. They participated actively in the Stockholm Conference on the Human Environment,[12] and since then in almost all the environmental negotiations on the transboundary movement of hazardous

12. Report of the Stockholm Conference on the Human Environment, UN Doc. A/CONF./48/14/Rev.1.

wastes, the international trade in endangered species, etc. The following section focuses primarily on the role of non-state actors in the climate change regime.

The climate change regime refers to the global management of the problem of greenhouse gas emissions.[13] In order to address the problem of climate change, nations negotiated the United Nations Framework Convention on Climate Change (FCCC)[14] in 1992 and the Kyoto Protocol[15] in 1997. To facilitate the implementation of the Protocol agreements clarifying the Protocol were made at Marrakesh[16] in 2001.

The climate change regime aims at empowering the non-state actor in a number of different ways.

(a) *Guaranteeing participation in international negotiations*: the FCCC states:

> Any body or agency, whether national or international, governmental or non-governmental, which is qualified in matters covered by the Convention, and which has informed the secretariat of its wish to be represented at a session of the Conference of the Parties as an observer, may be so admitted unless at least one third of the Parties present object. The admission and participation of observers shall be subject to the rules of procedure adopted by the Conference of the Parties.[17]

This immediately opened doors for participation by non-state actors, as it considerably relaxed the rules developed by the Economic and Social Council. In 1998, the Subsidiary Body for Implementation decided to allow non-state actors to participate in informal contact groups if the chairmen of these contact groups agreed. In such meetings, the non-state actors "would need to keep their intergovernmental nature" and could be asked to leave the room at the discretion of the Chair.[18] Thus, in 2001, there were 172 states participating, and 234 observer organizations (including 20 intergovernmental organizations and 194 non-governmental organizations) and 166 media

13. For the latest scientific information on the climate change problem *see* J.T. Houghton, Y. Ding, D.J. Griggs, M. Noguer, P.J. van der Linden and D. Xiaosu (eds.), *Climate Change 2001: The Scientific Basis – Contribution of Working Group I to the Third Assessment Report of the Intergovernmental Panel on Climate Change (IPCC)* (Cambridge, Cambridge University Press, 2001).

14. United Nations Framework Convention on Climate Change (note 9).

15. The Kyoto Protocol to the United Nations Framework Convention on Climate Change (note 10).

16. The Marrakech Accords and the Marrakech Declaration (note 11).

17. Article 7.6 of the Climate Convention (note 9).

18. FCCC/SBI/1998/CRP.3.

organizations. There were 2432 participants from states, 1569 from non-state organizations and 459 from the media.[19] What is clear is that the number of non-state organizations exceeds governments, and possibly the resources of several of these non-state actors (from Shell to Greenpeace) far exceeds those of many of the poorer nations.

(b) *The role of public awareness and participation*: Article 6 of the Convention promotes public awareness of the problem and public participation in the decision-making processes.[20] While this was a neglected item for a long time, the National Communications (reports) of countries indicate that a range of different measures are being undertaken at domestic level to implement this article. Thus, for example, Canada has surveys, vehicle emission testing clinics, the European Union has Information Exchange Networks, the US has public-private partnerships and round table meetings, the Philippines has had a climate awareness survey, public consultations and local action planning on climate change, while Zimbabwe used a national Delphi survey to identify, clarify and rank environmental issues.[21] The Subsidiary Body on Scientific and Technological Advice (SUBSTA), set up under the Convention, also noted that intergovernmental organizations and

19. FCCC/CP/2001/Inf.4.

20. Art. 6 of the Climate Convention (note 9) states:

"In carrying out their commitments under Art. 4, para. 1(i), the Parties shall:

(a) Promote and facilitate at the national and, as appropriate, subregional and regional levels, and in accordance with national laws and regulations, and within their respective capacities:
   (i) The development and implementation of educational and public awareness programmes on climate change and its effects;
   (ii) Public access to information on climate change and its effects;
   (iii) Public participation in addressing climate change and its effects and developing adequate responses; and
   (iv) Training of scientific, technical and managerial personnel.

(b) Cooperate in and promote, at the international level, and, where appropriate, using existing bodies:
   (i) The development and exchange of educational and public awareness material on climate change and its effects; and
   (ii) The development and implementation of education and training programmes, including the strengthening of national institutions and the exchange or secondment of personnel to train experts in this field, in particular for developing countries.

21. Issues in the Negotiating Process: Clearinghouse – Public Participation Mechanisms: Public Participation Mechanisms Discerned from a Review of National Communications by Country, <wysiwyf://38/http://unfccc.int/cop7/issues/clearing/mechanisms/html>.

non-governmental organizations have been active in the implementation of Article 6.

(c) *Involving the private sector*: The Kyoto Protocol allows states to benefit from investments in environmental projects in developing countries and Central and Eastern Europe. Implicitly it empowers the private sector to engage in such investments by creating incentives and an institutional framework to encourage such investments.[22]

(d) *Two-way communication with the epistemic communities*: Under Article 9 of the Framework Convention on Climate Change, a Subsidiary Body for Scientific and Technological Advice has been established. This body has over the years tried to link the work of the Inter-governmental Panel on Climate Change (IPCC) with that of the negotiations and has relayed requests from the FCCC to the IPCC.[23] In re-examining the role of the non-state actor in the international climate negotiations, the latter has come up with a number of proposals.

Industry has also been lobbying for a business consultation mechanism which would provide business with a direct channel of communication with the treaty negotiations, would enable business to volunteer information and answer questions, would enable business to communicate with Parties and Participants, and to present its experience with policy options. This mechanism, it is argued, should be open to business NGOs, would provide a diversity of business views and not consensus. However, industry argues that the mechanism should not be used to identify technology winners and losers.[24]

Environmental actors have asked for a mechanism to evaluate the performance of national governments, undertake demonstration projects at national level, disseminate information, and they want the right to be able to table agenda items for discussion, the right to access and interventions as is the practice in the Commission on Sustainable Development, the Montreal Protocol on Substances that Deplete the Ozone Layer and in the plenary sessions of the IPCC.

22. Arts. 6, 12, 17 of the Kyoto Protocol (note 10).

23. J. Gupta, "Effectiveness of Air Pollution Treaties: The Role of Knowledge, Power and Participation", in Hisschemöller, Ravetz, Hoppe, Dunn (eds.), *Knowledge, Power and Participation* (Policy Studies Annual, Transaction Publishers, 2001), 145–174.

24. Workshop on Consultative Mechanisms for Non-Governmental Organization Inputs to the United Nations Framework Convention on Climate Change, <unfccc.int/resource/docs/1996/sbsta/misc02.html>.

In the climate change arena, local governments are becoming increasingly involved in the negotiation process. 130 local governments with 5 per cent of global greenhouse gas emissions (CO_2) are now cooperating within the context of the International Coalition for Local Environmental Initiatives (ICLEI). They also claim that they have close practical knowledge on dealing with climate change at the local level. They argue in favour of LGO (Local Government Organization) status as had been provided for by the UN General Assembly in 1995 in relation to the Second United Nations Conference on Human Settlements (GA Rule 62). Both environmental organizations and local authorities however, would like a stronger and explicit communication channel in line with that requested by business and already achieved by epistemic communities.

The climate change problem is closely related to the national economic structure of economies being closely related to the energy, industrial and agricultural systems of the countries. In order to address the problem a large number of social actors are necessary. While the negotiating process of the climate change convention, on the one hand, reveals the limited powers of the state to actually single-handedly and unilaterally implement policies; the open welcome to social actors to participate in the process and to execute the agreements, opens up the risk of regulatory capture.

3. *The role of non-state actors and the implications for international law*

3.1 *Failure of the state?*

The primary argument explaining the rise of the non-state actor in international relations is the so-called failure of the nation state[25] to protect the interests of the non-state actor. There are several arguments that can be culled from the literature to explain this rise. First the state attempts to present a unitary front in international negotiations; but the state is not really able to present the pluralistic views within the domestic context. This has meant that non-state actors that have not been able to influence their governments domestically

25. For analysis on the rise and fall of nation states, *see*, e.g. O. Schachter, "The Decline of the Nation State and its Implications for International Law", 36 *Colombia Journal of Transnational Law*, 1997, 7–23.

have formed transnational coalitions to try and influence the international process.[26] Second, the state does not, in fact, have the powers to implement farreaching environmental policy in the context of the declining power of the state in the domestic context.[27] This is especially true in the context of developing sustainable development policies which impact on the entire society. This may sometimes imply that some states, especially small states, use international agreements to convince domestic actors to take action.[28] Third, and related to the earlier point, the costs of such policy are so high that non-state actors have to be actively involved in the process since they are part of the implementation process. Fourth, non-state actors themselves see the United Nations as more than the sum total of the member countries and instead as something that represents the common good and should work towards problem solving at the global level. In other words, since they expect the UN bodies to go beyond the narrow powers entrusted to them by states, they put pressure on these bodies to take a more cosmopolitan view of issues.[29] Cronin argues further that the rise of the non-state actor in international relations can also be attributed to issues that are not specifically state-oriented or state-limited. These include the protection and relocation of refugees and humanitarian assistance; as well as for tasks that states would most likely be unwilling to accept voluntarily, such as keeping peace, monitoring elections, exposing human rights violations and in areas where states may lack the legitimacy to act (such as war crimes).[30] One can extend this argument further to submit that global environmental issues are also areas in which states have less motivation to take action because the benefits are not immediately visible at national level and the

26. This has led to the entire range of literature on pluralism in international relations.

27. *See* A. Hurrell, "A Crisis of Ecological Viability? Global Environmental Change and the Nation State", XLII *Political Studies*, 1996, 146–165. This may also be because such states are "failed" and/or "quasi" in that they do not have solid dependable institutions or are dependent on foreign assistance.

28. Putnam (note 4) postulates in his theory of the two level game that international agreements come into being because domestic actors push for the internationalization of issues in order to have them addressed and at the same time states use international agreements to convince domestic actors to take action.

29. B. Cronin, "The Two Faces of the United Nations: The Tension Between Inter-governmentalism and Transnationalism", 8 *Global Governance*, 2002, 53–71.

30. *Ibid.*

cause-effect path is not clear. Here there is a strong incentive to free-ride on the policies of other countries. It is in such a situation that there is a major role for non-state actors. Finally, in the evolutionary process, non-state actors have become, in fact, a new constituency and their participation in international treaty making is inevitable.[31]

The rise of the non-state actor is not just rooted in necessity, as argued above, but is also fuelled by a growing ideology. It is part of the social recognition of the need to increase the democratic value of international institutions and their legitimacy and transparency. It is rooted in a belief that certain values are being systematically undermined or ignored by the global management structure.

3.2 *Non-state actors and transparency*

It is generally believed that transparency improves the quality of decision-making and makes the motivations of individual actors explicit in the international negotiation process. It is thus a norm to be strived for. In examining the issue of transparency of international negotiations, let me take the example of the negotiations on climate change. Having closely followed the international climate change negotiations for ten years, one can submit that almost every word uttered in public plenary sessions is subject to the scrutiny of the non-state actors. These words are not only factually reported the next day in the daily Earth Negotiations Bulletins,[32] they are commented on and critiqued, sometimes with incredible humour, in the daily ECOs.[33] There are several other journals and papers and side-events that occur simultaneously during the negotiations that try to explain the significance of the terms being negotiated and their implications. They try to pierce the veil of complex terms. Given that climate change is a multidisciplinary and complex issue, these negotiations become somewhat easier to understand by virtue of the huge amount of literature and side-discussions that have been made available. Most negotiators keep up to date with the entire process of negotiation by reading these Earth Negotiations Bulletins and ECOs. There is no doubt that for those

31. *Ibid.*

32. The Earth Negotiations Bulletin is a Reporting Service for Environment and Development Negotiations and is published by the International Institute for Sustainable Development in Canada.

33. The ECO is published by the Non-Governmental Environmental Groups at major international conferences since the Stockholm Environment Conference in 1972.

seeking clarification, there is sufficient printed material around and numbers of experts to answer those questions.[34]

At the same time, I have some reservations about the improvement in the transparency of the process. I would, first, argue that with increased transparency comes increased confusion. The non-state actors are not a homogenous group; they include scientists, environmental groups and industry, each using the resources and skills at its disposal to disseminate information and interpretations during the negotiations. The question is: does the overflow of information serve as information overkill and cause more confusion? Or does it instead make the process more translucent rather than transparent? At the sixth Conference of the Parties in the Hague, with more than 1,000 participants from the non-state actor world, each armed with a variety of informational documents, the question is: how does the average one-man team negotiator deal with the information?

Second, the huge numbers of non-state actors present may even hamper the process of reaching a deal. As non-state actors acquired access not just to plenary sessions, but also to the sessions of the subsidiary bodies, the organizers had to keep thinking of new ways to keep the non-state actor out. Thus, the "Informal Informal" was invented.[35] This would allow for free discussion between diplomats and open-up the possibilities for them to discuss issues without fear of citation or critique from the NGO community.

Third, there is also the internal problem of transparency. A representative of the Climate Action Network clearly states that in the current negotiating process, they do not know which non-state actors are participating, what their hidden agenda is, what their goals and motivations are. The Network is calling for increased transparency in the accreditation and registration process.[36] This problem is also reflected across-the-board in the UN. There is a standing conflict between the elite old non-state actors and the new and upcoming

34. J. Gupta, *Our Simmering Planet: What to do About Global Warming* (London, Zed Publishers, 2001); P. Chasek, "NGOs and State Capacity in International Environmental Negotiations: The Experience of the Earth Negotiations Bulletin", 10 *Review of European Community and International Environmental Law*, 2001, 168–176.

35. There are several types of meetings, plenary meeting, sub-groups, informals, etc.; for details *see* J. Gupta, *On Behalf of My Delegation: A Guide for Developing Country Climate Negotiators* (Washington D.C., Center for Sustainable Development of the Americas, 2000), p. 100.

36. Paper No. 4 by the Environmental NGOs, submitted to the Subsidiary Body for Implementation at its 7th session in Bonn 20–29 October 1997.

non-state actors within the context of the Conference of Non-Governmental Organizations in Consultative Status with the United Nations (CONGO). After three years of debate, in 1996, finally three lists of non-governmental organizations (NGOs) were established. The first granted some international NGOs general consultative status with the maximum number of rights; some qualified for special consultative status with relatively restricted rights and there were some that qualified for a roster with far less rights. What is becoming more and more apparent is that the process is not becoming more democratic but bureaucratic.[37] This also raises the issue that if a large number of organizations qualify for participation will the process not become entirely unmanageable?

The problem is less acute for local authorities, but even here the International Coalition for Local Environmental Initiatives has proposed that only democratic, legitimate, representative local authorities should be accredited.[38]

Fourth, there is the question of the transparency and accuracy of the scientific material prepared by the various scientific bodies as background information for the negotiations. Much of the scientific material emerges from the Western, Anglo-Saxon world and as such is rooted in the theories, assumptions and perspectives of these countries, often presenting policy suggestions as the best answer, objectively speaking, when that is not necessarily universally valid.[39] There is further very little influence from the entire body of legal and political science scholars working on normative issues on the norm setting in the international climate change regime.[40]

37. M. Ottaway, "Corporatism Goes Global: International Organizations, Non-Governmental Organization Networks, and Transnational Business", 7 *Global Governance*, 2001, 265–292 at 277; C. Alger, "The Emerging Roles of NGOs in the UN System: From Art. 71 to a Peoples Millennium Assembly", 8 *Global Governance*, 2002, 93–118, at 29.

38. Paper No. 5 by the International Council of Local Environmental Initiatives, submitted to the Subsidiary Body for Implementation at its 7th session in Bonn 20–29 October 1997.

39. J. Gupta, (note 23); J. Gupta, "Legitimacy in the Real World: A Case Study of the Developing Countries, Non-Governmental Organizations and Climate Change", in Coicaud, Heiskanen (eds.), *The Legitimacy of International Organizations* (Tokyo, United Nations University Press, 2001), 482–518; S. Shackley, "The Intergovernmental Panel on Climate Change: Consensual Knowledge and Global Politics", 7 *Global Environmental Change*, 1997, 77–79.

40. Gupta (note 39).

3.3 *Non-state actors and (legal) legitimacy*

What is legitimacy at international level? Franck argues that legitimacy is:

> a property of a rule or a rule-making institution which itself exerts a pull towards compliance on those addressed normatively because those addressed believe that the rule has come into being and operates in accordance with generally accepted principles of right process.[41]

He argues that legitimacy depends on the pedigree of international agreements[42] and the use of determinate (clear, unambiguous) text. The text must be symbolically accepted by states. The rules must be coherently applied[43] and must adhere to a normative hierarchy.

If one looks at the climate change agreement, one is tempted to question whether any of these (apart from symbolic acceptance) are valid. Many of the implicit and explicit principles underlying the rules and articles in the Climate Change Convention and the Kyoto Protocol do not conform to traditional principles and solutions in international law,[44] being both innovative and often controversial.[45] The text is frequently very unclear and ambiguous.[46] There is lack of clarity as to whether the principles and rules are internally coherent[47] and whether they adhere to a normative hierarchy.

41. T.M. Franck, *The Power of Legitimacy Among Nations* (Oxford, Oxford University Press, 1990).

42. The legal origin of such rules – from treaties, custom, decisions of tribunals, *opinio juris*, etc. – Franck (note 41), p. 4.

43. Franck (note 41): "The legitimacy of a rule is determined in part by the degree to which that rule is practised coherently; conversely the degree to which a rule is applied coherently in practice will depend in part on the degree to which it is perceived as legitimate by those applying it".

44. Thus concepts such as joint implementation as in Art. 6 of the Kyoto Protocol (note 11), the Clean Development Mechanism (Art. 12 of the KPFCCC) and emission trading (Art. 17 of the KPFCCC) are unprecedented in the international arena.

45. J. Gupta, *The Climate Change Convention and Developing Countries – From Conflict to Consensus?* (Dordrecht, Kluwer Academic Publishers, 1997), p. 256.

46. *See* Art. 4.2a, b; D. Bodansky, "The United Nations Framework Convention on Climate Change: A Commentary", 18 *Yale Journal of International Law*, 1993, 451–588; P. Sands, *Principles of International Environmental Law, Vol. I, Frameworks, Standards and Implementation* (Manchester, Manchester University Press 1995); Gupta (note 45).

47. For example, only the Clean Development Mechanism is subject to a fee, while the other two mechanisms are not similarly taxed; *see* J. Gupta, "North-South Aspects of the Climate Change Issue: Towards a Constructive Negotiating Package for Developing Countries", 8 *Review of European Community and International Environmental Law*, 1998, 198–208.

What is the source of the non-legalistic innovative character of the agreements to the regime? The answer lies in the scientific documents and analysis prepared by the IPCC and the way the non-state and state actors mobilized attention towards problem solving as opposed to a focus on the pedigree of the agreements. The text is ambiguous because the subject matter is complex and the stakes are high. Hard bargaining between actors may have influenced the coherence and determinacy with which the rules have been developed in the Kyoto Protocol, let alone the way it is to be implemented. There is no process to actually control the negotiated text against rules of legal legitimacy before it is finalized. It should be noted here that Franck's definition of legitimacy does not leave much space for the role of non-state actors in the international negotiating process.

3.4 *Non-state actors, legitimacy and the assumptions of international law*

I have argued elsewhere that there are certain implicit and explicit assumptions in international law.[48] When these assumptions are valid in a particular negotiation, there is a high likelihood that the legitimacy of the agreement is high and the compliance pull is therefore high; in other words that the state is likely to implement its obligations in good faith. Let me quickly summarize these assumptions: the state is assumed to be the sole actor in international law;[49] all states are sovereign and equal;[50] states are implicitly assumed to be in agreement about the problem definition (given that problems are social constructs); negotiators are assumed to have a clear mandate and be well informed;[51] adherence to the rules of procedure is expected to guarantee fair negotiations and the rule of law; negotiation outcomes are determinate and clear and legitimate and therefore have normative force.[52] There are also the assumptions of *pacta sunt servanda*, that countries negotiate in good faith, and will (have the insti-

48. Gupta (note 45).

49. Art. 6 of the Vienna Convention on the Law of Treaties, 23 May 1969, in force 27 January 1980; 8 ILM, 1969, 679.

50. Art. 2 of the Charter of the United Nations, (San Francisco) 26 June 1945, and amended on 17 December 1963, 20 December 1965 and 20 December 1971, ICJ Acts and Documents No. 4.

51. Art. 47 and 48 of the Law of Treaties (note 47).

52. Franck (note 41); T.M. Franck, *Fairness in International Law and Institutions*, (Oxford, Oxford University Press, 1995).

tutional capacity to) implement the agreements adopted. When we examine the climate change regime in the light of these assumptions, the evidence indicates that many of these assumptions are not equally valid.[53] Thus, when Tuvalu is arguing for survival, this argument does not hold equal validity with that of the US who is trying to protect its domestic economic interests. Research indicates that countries in the Convention define the problem differently and, hence, see different solutions.[54] Research indicates that the bulk of the negotiating countries send negotiators with minimum mandates and many do not understand the multiple issues involved.[55] The Rules of Procedure are transparent but the process is, in fact, not. Too many meetings are held simultaneously, with the informal sessions mostly in English. Whether such processes are fair can be questioned.[??] There is a heavy bargaining process and the rules are often in favour of powerful countries. When there is difficulty reaching consensus, the language becomes vague. There are also serious questions regarding the ability of states to actually implement the provisions. (This has led to several capacity building processes). In a situation where the non-state actor does not participate in the negotiations, there is already a problem because of the structural differences in knowledge, resources and power of countries. The participation of non-state actors, however, creates further problems. This is because, in general, the participation of non-state actors tends to be mostly from the richer, more powerful, English-speaking countries; the non-state actors themselves also tend to be large and powerful organizations. The interests they represent are also of their own constituencies. But their participation influences the whole process, because of the way they provide both knowledge and information and the way they lobby in the negotiations. If their participation further skews the negotiation outcomes and if as a result, the implicit and explicit assumptions of international law are not valid, and countries are signing and ratifying the agreements because they want to be, 'in the boat', or because they see no other choice, then this will reduce the incentive to comply. This is because, in the perspective of some of the nations, the international agenda has been shaped by transnational forces and

53. Gupta (note 39).

54. J. Gupta, "North-South Aspects of the Climate Change Issue: Towards a Negotiating Theory and Strategy for Developing Countries", 3 *International Journal of Sustainable Development*, 2000, 115–135.

55. Gupta (note 45); Gupta (note 54).

the governments of the countries where these forces have most power and therefore do not reflect the views and positions of other countries. This is elaborated further in the following section.

3.5 *Non-state actors, corporatism and democracy*

Heiskanen explains that the rule of law, or the *rechtsstaat*, aims to curb the power of the state to that supported by the people. However, liberals are afraid that the exercise of such power based on regulations backed by popular support can be abused and needs to be kept in check by civil society.[56] Similarly, at international level, the question is: "are international regimes legitimate by virtue of the fact that states participate in them and thus reflect the popular view?" But does this not hide the fact that a state is not, in fact, able to represent the pluralistic views in society; and that international regimes do not necessarily reflect outcomes that are based on balanced international negotiations.[57] This has led to a number of civil and non-state actors participating in international regimes (*see also* section 3.1).[58]

Ottaway argues that what we are witnessing is the process of corporatism:

> Corporatism is a system that gives a variety of functional interest groups – most prominently business organizations and trade unions – direct representation in the political system, defusing conflict among them and creating instead broad consensus on policies.[59]

Corporatism is expected to correct the democratic deficit in society. The alternative to representative democracy is direct democracy. However, the latter is cumbersome and unpractical. Corporatism provides a happy theoretical middle point between the other two because it limits participation to a few bodies (and it is supposed that key members of society are represented in these bodies). The classic example is labour organizations and business councils. Ottaway explains that in the domestic context, the state provided the setting

56. V. Heiskanen, "Introduction", in Coicaud, Heiskanen (eds.), *The Legitimacy of International Organizations* (Tokyo, United Nations University Press, 2001), pp. 1–44.
57. Gupta (note 39).
58. J. McCormick, "The Role of Environmental NGOs in International Regimes", in Vig; Axelrod (eds.), *The Global Environment: Institutions, Law and Policy* (London, Earthscan, 1999), 52–71, at p. 55.
59. Ottaway (note 37).

for these corporatist bodies to discuss issues and reconcile their differences. She argues that while corporatism may be able to function well at national level, it may not be quite so successful at international level because the institutional structure is so different. She argues that the costs of global corporatism may be higher than the benefits because of the limited legal framework within which it operates and the questionable legitimacy of the system.

Marks[60] also argues that such international regimes are not necessarily more democratic because of the influence of non-state actors. We see global coalitions of environmental, scientific and industry groups participating in international treaties. But when we disaggregate the masses of non-state actors to ask the question: who is, in fact, participating?, the answer is disconcerting and reflects current power politics at state level.

In the climate change negotiations, for example, the primary participants are large mostly international or internationally focused powerful non-state actors, (not small grassroots groups) and large industries (as opposed to the small-scale energy intensive sectors); primarily representing English-speaking countries world-wide, primarily representing the interests of Western Europe and the United States, and to a lesser extent Eastern Europe and the South.[61] The non-state actors focusing on developmental issues are conspicuously absent. Given that southern non-state actors are mostly focused on development and poverty issues, and that these actors are absent in the environmental debate, this creates a further bias.[62] This is in-line with the observation of Helleiner who argues that given the structure of the non-state actors participating in the international arena, including business interests, it is more than likely that these will further the bias in favour of the developed countries.[63]

This does not *per sé* imply that the interests represented by these non-state actors are partisan in nature; but it would be hard to deny that their job is to represent the constituencies that they represent and to remain within their specific mandate.

60. S. Marks, "Democracy and International Governance", in Coicaud; Heiskanen (eds.), *The Legitimacy of International Organizations* (Tokyo, United Nations University Press, 2001), pp. 47–68.

61. *See* the list of participants on the website of the UNFCCC.

62. G.K. Helleiner, "Markets, Politics and Globalization: Can the Global Economy be Civilized?", 7 *Global Governance*, 2001, 243–264, p. 249.

63. Helleiner (note 62), p. 249.

A further question is: "how democratic are these social actors themselves?" The structure of industry, NGOs and epistemic communities are not designed with democracy in mind. Most environmental non-state actors are membership organizations, federations or have universal memberships.[64] Most do not have an internal voting procedure, some are fairly hierarchical and they have to stick to a common standpoint determined by the top of the organization. Not much is known about their organizational structures, management systems and modes of operation.[65] Business and industry NGOs generally do not have democratic decision-making procedures. Nor do scientific organizations. In coming to a common standpoint during international negotiations, it is unclear whether there are specific rules of procedure that guide non-state actors in determining their own common position in relation to the negotiations.

A practical problem is that the mere inclusion of large numbers of non-state actors may also lead to increased bureaucratization. This will possibly be the case when non-state actors demand that they are provided the same information as states and when they call for increased scrutiny of the accreditation process as mentioned earlier.

Large and powerful actors have inordinate amounts of influence behind the scenes in international negotiations. "As all Geneva trade diplomats know, their influence over ostensibly international negotiations is also considerable; witness the role of the pharmaceutical industry in intellectual property debates . . ."[66] In the climate change negotiations, large industry is setting up rules for internal emission trading in order to experiment with the concept; which they will undoubtedly at a subsequent date promote at the international arena. There may even be potential for regulatory capture. On the other hand, many non-profit oriented non-state actors are also generally financially dependent on support from, among others, governments.[67] One could argue that many of these non-state actors are the extended arm of the state and promote the state's long-term interests.

Decision-making is also gradually shifting to other areas; with the full permission of the interstate negotiating process. The Kyoto

64. McCormick (note 58), pp. 63–65.

65. D. Ghai, "Human Solidarity and World Poverty", 7 *Global Governance*, 2001, 237–242.

66. Helleiner (note 62).

67. C. Gough, S. Shackley, "The Respectable Politics of Climate Change: The Epistemic Communities and NGOs", 77 *International Affairs*, 2001, 329–345.

Protocol allows for company contracts to fulfil the national obligations of states. If the Protocol is successful, it is not inconceivable that a number of private sector contracts will be drawn up governed by private international law or relevant bilateral investment treaties. But these private sector contracts will undoubtedly be governed by the rule of confidentiality; where only some parts will be made open for public scrutiny. Such a situation is foreseen and accommodated by Article 4(d) of the Aarhus Convention[68] which states that:

> A request for environmental information may be refused if:. . . . (d) The confidentiality of commercial and industrial information, where such confidentiality is protected by law in order to protect a legitimate economic interest. Within this framework, information on emissions which is relevant for the protection of the environment shall be disclosed.

This might be interpreted to imply that companies merely disclose their emissions or emission reductions, without providing details of the production process or technology or context related conditions, which would make extended scrutiny of the way in which emissions are calculated impossible. If this is indeed the case, then how will national governments and the Executive Board of the Clean Development Mechanism under the Climate Change Convention be able to scrutinize the project proposals to ensure that they are sustainable? Werksman *et al.* even argue that such projects may fall foul of bilateral investment treaties.[69] For example, many bilateral investment treaties do not allow for national screening, restrictions on who may invest, restrictions on the nature of the technology and labour, etc. Under the Kyoto Protocol the projects undertaken by private companies in the developing (and developed) countries need to focus on sustainable development, where sustainable development criteria are defined by the state. Such criteria could include the requirements that the technology be appropriate for the local context, i.e. not be capital intensive, use local labour and local resources and if possible based on an adaptation of local technology. If so, these criteria could potentially conflict with the rules in the bilateral investment treaties. The open question is: how will these two legal worlds be reconciled? It is more difficult to perceive

68. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus) 38, ILM 1999, in force 30 October 2001.

69. J. Werksman, K. Baumert and N. Dubash. *Will Investment Rules Obstruct Climate? International Environmental Agreements: Politics, Law and Economics*, forthcoming.

of a situation in which the private sector actors would agree that the rules under which they develop contracts be changed in a manner that their rights are curbed. It seems more likely that private sector rules will be accommodated by the public international law regime.

Some states and/or non-state actors may wish to develop new procedures to deal with the problems defined by them without reference to any standard rules of procedure. With the increase in power of non-state actors, there is a shift in decision-making fora to politically independent, or non-majoritarian institutions, networks and corridors (since decision-making often calls for confidentiality and informality) but such processes/networks are neither accountable to those affected, legitimate or democratic.[70] There is a growing tension between democratic values and legal values since the international arena is presenting legal answers to problems but these answers are not "legislative" and, hence, globalization will give rise to de-democratization through the process of putting liberal market values first and focusing on issue-specific treaty making.[71]

4. *Conclusion*

This chapter argued that it is not surprising that non-state actors have a major role to play in international treaty making. There is a long history of such influence. Besides, the dynamics of problem solving at international level depends on the way non-state actors support or reject the problem and the instruments to address the problem. Others

70. G. Majone, "International Regulatory Cooperation: A Neo-Institutionalist Approach", in Bermann, Herdegen, Lindseth (eds.), *Transatlantic Regulatory Co-operation: Legal Problems and Political Prospects* (Oxford, Oxford University Press, 2001), pp. 119–143 at p. 142; Marks (note 60); A.M. Slaughter, "Agencies on the Loose: Holding Government Networks Accountable", in Bermann, Herdegen, Lindseth (eds.), *Transatlantic Regulatory Co-operation: Legal Problems and Political Prospects* (Oxford, Oxford University Press, 2001), pp. 521–546.

71. K. Kühnhardt, "Globalization, Transatlantic Regulatory Cooperation and Democratic Values", in Bermann, Herdegen, Lindseth (eds.), *Transatlantic Regulatory Co-operation: Legal Problems and Political Prospects* (Oxford, Oxford University Press, 2001), pp. 481–494. The situation in the environmental world is perhaps to be contrasted with that in the security world. Here too there have been proposals to extend the concept of security beyond the nation-state to individuals. But, as one expert argues, this would lead to a complete paralysis in the system as the potential for prioritizing would be lost and by making all individuals a priority, no one would benefit. T.F. Khong, "Human Security: A Shot Gun Approach to Alleviating Human Misery", 7 *Global Governance*, No. 3, 2001, 231–236.

argue that a dominant criterion in the emerging evolution of the law of sustainable development is the participation of non-state actors and the need for good governance.

This chapter then examines the way in which the climate change regime makes room for the participation of the non-state actor, arguing that four trends are visible. First, non-state actors are permitted to participate as observers in the negotiations, subject to accreditation procedures. Second, the text of the Convention calls on states to actively involve non-state actors by increasing public awareness and education and by allowing their participation in the domestic policymaking process. Third, the Convention and the Protocol actively solicit the participation of private organizations in the so-called flexibility mechanisms which provide a prominent role for such bodies in technology transfer. Fourth, the Convention and Protocol have established mechanisms for two-way communication with the scientific community, so that the negotiations are based on sound science. The other non-state actors are also seeking to establish similar mechanisms. These are, in fact, promising developments and show that the climate change regime meets at least the principle of participation of the emerging law of sustainable development.

This chapter then discusses some of the problems generated by the participation of non-state actors. It argues that although a prime positive role of the non-state actor is to increase the transparency of the international negotiation process, such participation may create more confusion, may reduce the potential to reach compromise, and may be affected by the hidden agenda and diverging interests of the different non-state actors. It also argues that although there is access to scientific information, the bulk of such science is produced in the western world and does not often serve the needs of the developing countries. Thus, such science, especially the science of policy responses, creates the illusion of being objective, when, in fact, such objectivity exists only in so far as that there is internal consistency within the theoretical framework of the science. Another problem is that because of the participation of non-state actors who push novel solutions that could serve to meet the political and economic interests of their governments, the likelihood that these solutions will meet the criteria of legal legitimacy of coherence, determinacy and adherence to a normative hierarchy is low. It is further argued that the implicit and explicit assumptions in international law about how countries negotiate treaties is seriously affected in the global context by the structural

differences in the knowledge, resources and power of different countries. There is a strong chance that this power imbalance is further aggravated by the participation of non-state actors; not because they are partisan in nature, but because they need to represent the views of their constituency and because the process is voluntary, there is no way to ensure that the representation from these constituencies is balanced. Within the domestic context, the rise of non-state actors is seen as a halfway point between representative democracy and direct democracy; and such corporatism functions well within the context of the domestic legal framework. However, transferring this concept to the international level which is characterized by structural imbalances in power and at best a very loose legal framework; might further exacerbate the power imbalances between countries and affect the legitimacy, democracy, transparency and, hence, compliance pull of international regimes and agreements.

Non-state actors have many other roles that they fulfil. For example, they have a major role in enforcing the law which is significantly helped by the growing role of the legal status of NGOs in international relations, but this is out of the scope of this chapter. Thus, while this chapter sees the logical (e.g. in their lobbying role) and legal (e.g. in contributing to sustainable development) necessity of involving non-state actors in international treaty negotiations, it points out some of the pitfalls in the process. This chapter is not arguing for reducing the participation of non-state actors, but is in favour of finding some legal tools that might help to ensure that such participation does not skew the negotiating process in one direction or another and thereby reduce the legitimacy and transparency of international agreements, and hence, the compliance-pull.

CHAPTER TWELVE

NGOs, THE INTERNATIONAL CRIMINAL COURT, AND THE POLITICS OF WRITING INTERNATIONAL LAW

Michael J. Struett*

1. *Introduction*

The creation of the International Criminal Court (ICC) necessarily involves a modification of state sovereignty norms. Analytically, there are three dimensions to this modification. First, establishing a permanent ICC involves expanding the accountability of individuals under international law, lessening the ability of political and military leaders to hide behind the corporate personality of the state. Second, from the perspective of states-as-actors, an ICC imposes effective constraints on the ability of states to use force. Finally, the ICC limits the ability of powerful states to define what conduct violates international criminal law. Instead, the ICC creates an international prosecutor and judges to decide whether or not specific actions violate the laws of war. Left to their own devices, sovereign states likely would not have created an ICC that reduces their effective decision-making power in these ways.

Formally, international law regulates the behaviour of states. Traditionally states have been the dominant players in drafting, adopting, signing, and ratifying international treaties and in developing customary norms. The Rome Statute of the International Criminal Court is constituted as a multilateral treaty.[1] Administratively, the ICC's

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1. R.S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, and Results* (The Hague, Kluwer Law International, 1999); W.A. Schabas, *An Introduction to the International Criminal Court* (New York, Cambridge UP, 2001); The Rome Statute of the International Criminal Court, UN Doc.A/Conf.183/9*

governing body is the Assembly of States Parties made-up of states that have ratified the ICC treaty (Rome Statute, Article 112). Yet non-governmental organizations (NGOs) played a crucial role in the discourse surrounding the drafting and negotiating of the ICC Statute's text.[2] This chapter examines the strategies used by NGOs to insert themselves into the process of drafting the ICC statute. I describe the way that NGOs discursive strategies shaped the elaboration of the substantive law that the International Criminal Court would be empowered to enforce.[3] First, I explain the transformation of sovereignty inherent in the ICC project. I employ a constructivist analytic framework to analyze the interaction between pro-ICC NGOs, States, and the normative structure of treaty law. Briefly, I review the formal legal theory of state practice in treaty drafting, which makes almost no provision for participation of non-state actors. I then describe steps taken by NGOs during the discussion of the ICC Statute in order to contrast NGOs substantial actual role with their limited formal status. NGOs made creative use of the institutional structure of treaty drafting process in order to play a pivotal role in shaping the outcome of the ICC treaty, despite the formal limits on their role.

Analyzing the NGOs' discursive practices allows us to account for NGO success in shaping the statute. Their use of principled discourse appealing to notions of fundamental fairness was persuasive during the ICC negotiations. NGO participation in the ICC dialogue was instrumental in securing a limited but powerful and potentially effective ICC. The Court's statute adopts early proposals from the NGO community on a number of issues that were contentious during the ICC debate. This degree of NGO participation in the creation of a major new institution of international law suggests a quiet revolution is occurring in the social practices of writing international law.

is available at ≤www.un.org/law/icc/statute/romefra.htm> and is reprinted in Schabas and Lee. Schabas also includes the draft Elements of Crimes and the draft Rules of Procedure and Evidence, which were adopted without amendment by the Assembly of State Parties in New York, 3–10 Sept. 2002.

2. W.R. Pace, M. Thieroff, "Participation of Non-Governmental Organizations", in Lee (note 1); F. Benedetti, J.L. Washburn, "Drafting the International Criminal Court Treaty", 5 *Global Governance*, 1999, 1–38.

3. This focus is driven by space limitations. Besides shaping definitions of crimes in the ICC statute, NGOs also contributed to the creation of an independent prosecutor and shaped the Statute's complementarity provisions, as well as most other parts of the statute. *See* M. Struett, "The Politics of Constructing an International Criminal Court", paper presented at the annual meeting of the International Studies Association, New Orleans, 24–27 March 2002.

The judges and prosecutors of the new ICC will have significant powers to determine whether or not particular events can be classified as violations of international criminal law. The sovereign rights of states are not gutted by the ICC Statute. But they are transformed. States remain primarily responsible for enforcing international criminal law under the complementarity provisions of the ICC statute. But in order to ensure that serious atrocities would not continue to go unpunished because the relevant states were unwilling or unable to act, states accepted that the new international institution should have substantial powers.[4] The International Criminal Court will be a permanent standing court and the prosecutor with the permission of judges of the pre-trial chamber is authorized to bring charges on her own authority.[5] This procedural independence means that decisions to prosecute are at least partially isolated from the short-term political pressures of interstate politics.[6] State's behaviour in constructing an ICC with these powers can only be understood in the context of NGO discourse.

The outcome of the Rome ICC treaty conference was driven by a discourse that was oriented towards creating the widest possible normative consensus to support the new court. The relatively disinterested nature of NGOs allowed them to shape and contribute to this discourse in a way that was morally resonant; consequently they were influential. Pro-ICC NGOs oriented their discursive practices towards a universal audience by promoting a court that corresponded with notions of fundamental fairness. By contrast, state governments often are constrained from taking such a universal stance by the need to be responsive to particular interest groups in their national political contexts. During the debate on the Rome statute, many participants understood that they were creating a judicial institution that could potentially endure for generations. In that context the NGOs' choice of a rational, universally oriented discursive strategy was particularly successful.

Antonio Franceschet has noted that the responsiveness of international organizations to the justice claims of non-state actors is

4. For an authoritative review of the provisions of the Rome Statute and the text itself, including a discussion of the central complementarity provisions, *see* Lee (note 1).

5. *See* Article 15, The Rome Statute of the ICC (note 1).

6. Though making arrests and transferring suspects to the ICC may not be so isolated from political pressure, because the court will rely on states for these functions. Judges are not normally eligible for reelection. (Article 36, Paragraph 9, ICC Statute, note 1).

frequently poor, since those organizations are nearly always based on statist organizing principles.[7] The effectiveness of NGOs during the ICC negotiations suggests the possibility that – at least under some circumstances – NGO voices can ameliorate the legitimacy crisis of the institutions of global governance. But caution is warranted; the circumstances that led to successful NGO input into the drafting of the Rome Statute were somewhat unique, and may be difficult to replicate in other issue areas. For example, in the technically complex policy area of global climate change Gupta in this volume notes that sometimes the cacophony of NGO commentaries on the official statements of governments during multilateral negotiations may lead to information overload rather than clarity.[8] Gupta argues that resource advantages of organizations with English speakers and wealthy corporate or Western membership backing may have the effect of biasing the direction of outcome of negotiations in favour of developed countries.[9] Still, the ICC experience suggests that under some circumstances, principled Western-based NGOs may partner with resource poor interests in the developing world, in a way that increases the overall representativeness of international treaty negotiations. NGO access to the negotiation sites and official documents made it easier for any observer, even groups without a delegation to the conference, to follow the issues in the ICC negotiations. The ability of a variety of NGOs to offer multiple public interpretations of proposals in real time increases the transparency of the discussions, even if other groups are unable to participate because of financial, language, or practical barriers. The successful work of NGOs in shaping the Rome Statute for the International Criminal Court provides a model for a way that NGOs might attempt to play a similar role in other international issue areas, thereby increasing the extent to which nominally interstate negotiations reflect a plurality of views from global civil society.

7. A. Franceschet, "Justice and International Organization: Two Models of Global Governance", 8 *Global Governance*, 2002, 19–34.

8. For discussion of another recent case where international NGOs played a role in the construction of a new multilateral institution, the European Monetary Union, *see* F. van Esch, "Defining National Preferences: the Influence of International Non-State Actors", in Arts, Noortmann and Reinalda (eds.), *Non-State Actors in International Relations* (Aldershot, Ashgate, 2001).

9. *See* the contribution by Gupta this volume (Chapter 11).

2. *Sovereignty issues with the International Criminal Court*

The notion that individuals can be held criminally responsible for violations of international law challenges historically predominant conceptions of state sovereignty in world politics. Specifically the old norm that state officials engaged in official acts are always immune from the jurisdiction of foreign states (or supranational courts established by such states) has lost its validity. More broadly, the concept of the ICC modifies the Westphalian conception of political sovereignty that gave states the right to use force internally as they saw fit and externally with nearly as much autonomy when the goal was self-preservation.

International law is generated by states and is primarily a set of rules about how states are to interact with one another. Sovereign states, though, are an abstraction ultimately composed of individual human beings. Because states are composed of people many writers on international law now recognize a more diverse list of subjects of that law.[10] The concept of an ICC brings into full relief the debate about who is obligated under international law norms. In the area of international criminal law, it has long been established that individuals can be held responsible for their acts.[11] Nevertheless, creating a permanent court with jurisdiction over such crimes greatly increases the likelihood that punishment will actually occur.[12]

The international criminal court also modifies political norms of state sovereignty. The four classes of crimes over which the ICC has jurisdiction all restrict the ways states can use force.[13] Holding

10. H. Lauterpacht points out that Grotius recognized that rules governing the conduct of states are necessarily rules that govern the conduct of individuals, this is a logical necessity because "[B]ehind the mystical, impersonal, and therefore necessarily irresponsible personality of the metaphysical state there are the actual subjects of rights and duties, namely, individual human beings." R. Falk, F. Kratochwil, S. Mendlovitz (eds.), *International Law* (Boulder, Colorado, Westview Press, 1985).

11. J.J. Paust *et al.*, *International Criminal Law* (Durham NC, Carolina Academic Press, 2000); S.R. Ratner, J.S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, 2nd ed. (Oxford, Oxford University Press, 2001).

12. *See* the contribution by Amann in this volume (Chapter 7).

13. The four crimes are Genocide, Crimes Against Humanity, War Crimes, and Aggression. Significantly, the Court will not exercise its jurisdiction over the crime of aggression until the states party to the Rome Statute agree on a definition of that crime at a review conference scheduled for 2009 (Articles 5, 121 and 123, the Rome Statute, note 1). Of course, non-state actors can also commit these crimes.

individual state officials responsible for these crimes challenges the ability of states to define the legitimate use of force, a privilege traditionally at the core of the sovereignty idea. Historically, this was the major political barrier to creating a permanent ICC.[14] Because the ICC creates a credible possibility that a state's political or military officials will be individually punished for using force in ways that violate international humanitarian law or international human rights law, it will necessarily alter the decision-making calculus involved in the choice to use force. This will restrict the willingness of states to use force. Viewed from the other side, the ICC will protect the sovereign rights of states not to be the victims of force used in ways that violate international criminal law. This is why the ICC must be understood as *transforming* state sovereignty norms, not destroying them.

Creating international law is a power reserved exclusively for states under formal sovereignty norms, so the process used to establish the ICC raises sovereignty issues as well. How was the ICC created, and who was represented in that constitutional process? The use of a treaty conference to create the ICC, and the fact that the conference was concluded by a vote, was one factor that led the United States initially to oppose the Rome Treaty.[15] The degree of NGO participation in a treaty conference with a mandate to establish a new organ of global governance was unprecedented, and effectively increased the range of voices that were able to participate.[16] The ICC's founders also had to determine what law the court should enforce. There is no formal legislative body in the international system. Both customary and treaty based international law criminalize specific acts. However,

14. B.B. Ferencz, *An International Criminal Court: A Step Toward World Peace-A Documentary History and Analysis*, 2 Vols. (London, Oceana Press, 1980). B.B. Ferencz, "An International Criminal Code and Court: Where They Stand and Where They're Going", 30 *Columbia Journal of Transnational Law*, 1992, 375–399.

15. One reason why an ICC was not proposed as a charter amendment to the UN was the fact that such a process would face Security Council veto. However, even in the context of a multi-lateral treaty conference, the United States felt that decisions should only be taken by unanimity, and the US was somewhat taken aback that 120 countries outvoted the US, China, and five other states and proceeded to open the ICC Statute treaty for signature, L.N. Sadat, S.R. Carden, "The New International Criminal Court: An Uneasy Revolution", 88 *The Georgetown Law Journal*, 2000, 381–474.

16. However some degree of NGO participation is not a new phenomenon, C. Lynch, *Beyond Appeasement: Interpreting Interwar Peace Movements in World Politics* (Ithica, Cornel University Press, 1999); and the contribution by Gupta in this volume (Chapter 11).

these prohibitions were insufficiently specified for use in a criminal court. The Rome Statute addressed that problem by carefully defining a short list of core crimes, and excluding other crimes. This approach was advanced by Amnesty International and other NGOs in the year before the Rome Conference.[17] This outcome in Rome was a sharp departure from the 1993 International Law Commission [ILC] draft for an ICC. The ILC draft did not attempt to define the crimes, instead it sought generally to grant the court power over existing provisions of treaty-based and customary international criminal law.

The traditional sources of international law are controlled by state governments. The International Court of Justice Statute Article 38 formally recognizes four sources of international law: treaties, custom, general principles of law, and the subsidiary role of judicial decisions and the commentary of publicists. Sovereign states have control over the first two, since it is states that conclude treaties and custom refers explicitly to the practice of states. Since the general principles of law change only very slowly, states historically have exercised a virtual monopoly on the legislating of international law. This included the ability to determine in large part through custom what is considered a war crime.

Within the last century, the doctrine that only sovereign states can be the authors of international law has come under challenge.[18] To the extent that the resolutions of international organizations and decisions of international administrative bodies can have binding effects in law, at times by means of parliamentary style voting as in the Security Council, the General Assembly or other international bodies, this introduces an element in the source of law that is not directly controlled by states.[19] Still, states exercise influence here because it is almost invariably state governments that choose representatives to such international organizations.[20] The ICC, as a permanent judicial

17. Amnesty International, "The quest for international justice", London, AI Secretariat, February 1997, AI Index: IOR 40/06/97.

18. Falk, Kratochwil, and Mendlovitz (note 10), p. 205.

19. On the status of UN Resolutions as sources of international law *see*, O. Asamoah, *The Legal Significance of the Declarations of the General Assembly of the United Nations* (The Hague, Martinus Nijhoff, 1966). But compare with O. Schachter, "Resolutions and Political Texts", in *International Law in Theory and Practice* (Dordrecht, Martinus Nijhoff, 1991), p. 88. On the importance of soft law *see* K.W. Abbot, D. Snidal, "Hard and Soft Law in International Governance", 54 *International Organization*, 2000, 421–456.

20. The European Parliament is an important exception.

body, has the potential to exercise considerable influence over the content of international criminal law, and the ICC's decisions will have precedential value, at least for future cases heard under the statute itself.[21] Because the Rome Statute created a strong court that can avoid political interference, it also constituted a significant judicial power to decide what counts as a "war crime" with only minimal and indirect supervision from sovereign states.

States were conscious that the court would have this power, and so they used the statute to carefully define the crimes over which the ICC would have jurisdiction. The United States sought an elaborate specification of the crimes, and insisted on a short list of crimes, excluding drug trafficking, terrorism, and the use of nuclear weapons; crimes that some states would have liked to include within the courts subject-matter jurisdiction.[22]

NGO participation in the ICC debate increased transparency and led to a wide distribution of the legal expertize necessary to follow this technical debate.[23] The result was that while the Rome Statute does offer a careful definition of the crimes the ICC can prosecute, it does so in way that observers consider a progressive, if cautious, elaboration of existing international criminal law.[24] The Statute avoided the problem of powerful states using the definition of the crimes to strictly constrain the authority of the new court.[25]

21. A. Cassese, "The Statute of the International Criminal Court", 10 *European Journal of International Law*, 1999, 144–171. As Cassese makes clear, Article 10 of the Rome Statute, which stipulates that the Rome Statute is not intended to modify any existing provisions of international law for purposes other than those of the statute, does not block the ICC from following its own precedents.

22. *See Comments Received Pursuant GA Resolution 49/53 on the Establishment of an International Criminal Court, Report of the Secretary-General*, U.N. doc. A/AC.244/1/Add.2, 31 March 1995, 7–29), for an early statement of the US position. On the broader debate on the subject matter jurisdiction *see* H. von Hebel, D. Robinson, "Crimes within the Jurisdiction of the Court", in Lee (note 1), pp. 79–126.

23. For instance, Amnesty International (note 17). A summary of a larger report circulated to all governments involved in the ICC negotiations clarifying the issues involved in the definitions of Genocide, Crimes Against Humanity, and War Crimes discussed in more detail below.

24. H. von Hebel, D. Robinson, in Lee (note 1), pp. 79–126; Ratner, Abrams (note 11), p. 212.

25. The attempts made by the United States and other governments to pursue such a strategy in the Preparatory Committee are described in C.K. Hall, "The Third and Fourth Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court", 92 AJIL, 1998, 124–133. C.K. Hall, "The Fifth Session of the UN Preparatory Committee on the Establishment of an International Criminal Court", 92 AJIL, 1998, 331–339. Since the author Christopher

3. *NGOs and the social construction of treaty law practice*

Social constructivist approaches to international politics allow examination of the social processes that permit actors to redefine the meaning of their institutional environments.[26] For constructivists, the task for social science is to understand the historical context and contingent meaning of particular actions.[27] As Ruggie notes, a crucial aspect of that task is to identify ideational factors that are *reasons for actions* as compared with *causes of actions*.[28]

This analysis uses a constructivist framework. The advantage of this approach is the explicit recognition that the social world is composed of intersubjectively constituted social facts.[29] Social norms interpenetrate every aspect of social life, including world politics. It is clear to many observers that the anarchical pattern of relations between states does not mean that norms are unimportant in world affairs.[30] Norms shape the behaviour of all types of actors. Simultaneously, some actors consciously promote certain understandings of emerging norms to promote their own political goals. Institutions themselves are intersubjectively constituted and continually renewed or modified.[31]

While constructivists have used a variety of conceptual strategies for attacking the problem of intersubjectivity,[32] I focus on an analysis of discursive practices. This choice follows from Friedrich Kratochwil's claim that an intersubjective grounding for rule systems can be guided by discursive practices that recognize the rationality of "the other"

Hall was the lead ICC legal advisor for Amnesty International, and a member of the steering committee of the CICC, these publications should be understood as one of the most effective lobbying efforts of the Coalition, notwithstanding the scholarly venue of the publication. P. Kirsch, J.T. Holmes, "The Rome Conference on an ICC: The Negotiating Process", 93 AJIL, 1999; M.H. Arsanjani, "The Rome Statute of the International Criminal Court", 93 AJIL, 1999, 31–36 offer descriptions of the negotiations in Rome that demonstrate that the NGO warnings on this issue were heeded by the vast majority of delegations.

26. J.G. Ruggie, *Constructing the World Polity* (London, Routledge, 1998); A. Klotz, C. Lynch, *Constructing World Politics* (unpublished manuscript).

27. Ruggie (note 26), Chapter 1.

28. F. Kratochwil, *Rules, Norms, and Decisions* (Cambridge, Cambridge University Press, 1989).

29. Klotz, Lynch (note 26).

30. H. Bull, *The Anarchical Society* (New York, Columbia University Press, 1977); Falk, Kratochwil, Mendlovitz (note 10), pp. 45–6.

31. Ruggie (note 26); W. Powell, P. DiMaggio (eds.), *The New Institutionalism in Organizational Analysis* (Chicago, University of Chicago Press, 1991).

32. Klotz, Lynch (note 26).

and the universality of metanorms, such as, "do no harm".[33] Founding an ICC requires reaching intersubjective agreement about how such vague metanorms can be applied to specific human circumstances.

The creation of international treaties is a social practice governed by a range of formal and informal norms. As I describe below, these norms formally restrict treaty-making to the duly accredited representatives of sovereign states. But in the case of drafting the ICC, NGOs played a substantive role in shaping the context of the treaty that far outweighed their formal status.

Treating drafting is a core element of the idea of state sovereignty. However taken for granted state sovereignty seems at the present time, it remains an intersubjectively constituted reality.[34] Biersteker and Weber write:

> Sovereignty provides the basis in international law for claims for state actions, and its violation is routinely invoked as a justification for the use of force in international relations. Sovereignty, therefore, is an inherently social concept.[35]

Thus sovereignty is a social fact. Traditional sovereignty norms did not recognize non-governmental actors as legitimate participants in treaty negotiations. The puzzle is to understand how a group of non-governmental actors were able to create a space for themselves in the sovereignty discourse.

4. *Status of states and NGOs in creating treaty law*

Explaining the ICC's construction requires that we account for the fact that a large number of alike-minded-states[36] came to see it as

33. Kratochwil (note 28).

34. Th.J. Biersteker, C. Weber, *The Social Construct of State Sovereignty* (Cambridge, Cambridge University Press, 1996). *See also* the contribution by Werner in the is volume (Chapter 5).

35. Biersteker, Weber (note 34), pp. 1–2.

36. The group of like-minded states that supported the establishment of a fair and effective international criminal court was formed during the early preparatory meetings at UN headquarters prior to the Rome conference. The group started with several members centered around Canada and Germany and grew to include over sixty states by the time of the Rome conference. They held 18 working luncheons at the German UN mission in New York during the ICC negotiating sessions held before and after Rome and including the first Assembly of States Parties meeting. CICC leaders frequently addressed these meetings.

in their own interest to pursue a strong, independent, ICC.[37] The court went forward in part because the United States and other great powers thought that a court under their control would be useful for strategic purposes. I show that the particular court that emerged was shaped by the civil society discourse of NGOs and not primarily by great power policy. The empirical record in this case suggests that powerful states were not the actors that drove the outcome in Rome. Accordingly, this analysis is at odds with a strictly intergovernmental view of interstate cooperation as well as a positivist, statist view of the creation of international law. The constructivist approach adopted allows for an analysis of the political process that leads to the construction of state interests, rather than assuming those interests are self-evident.[38]

Positivist theories of international law maintain that states are the sole creators and addresses of international law, with the limited exception of international (governmental) organizations. The latter are viewed as having legal personality only to the extent such a result was intended by the states that created the organization.[39] From a legal pluralist view of international law, space is opened up to consider the importance of non-state actors as legal entities.[40] Non-state actors play a vital role by working to implement transnational norms at the level of domestic legal systems, and both IGOs and NGOs play an important role in interpreting and implementing the legal mandates issued by states in the international legal order. Thus from a pluralist perspective, states clearly are forced to interact with other types of actors.[41]

The institutional form of modern treaty law carefully defines the procedures that must be undertaken by sovereign states to create new treaties. Not surprisingly, these mechanisms are designed to ensure that each act creating treaty law, from the proposal and negotiation

37. In the language of rationalist International Relations Theory *see* D. Baldwin (ed.), *Neorealism and Neoliberalism* (New York, Columbia University Press, 1993). The problem is accounting for changes in state's preferences.

38. Ruggie (note 26), p. 19 offers a good brief review of constructivist research efforts that tackle this problem; *see also* H. Nau, *At Home Abroad: Identity and Power in American Foreign Policy* (Ithica, Cornell University Press, 2002).

39. M. Noortmann, "Non-State Actors in International Law", in Arts, Noortmann, Reinalda (eds.), *Non-State Actors in International Relations* (Aldershot, Ashgate, 2001), pp. 60–61.

40. *See* the contribution by Anders in this volume (Chapter 2).

41. Noortmann (note 39), pp. 61–62.

of texts through to the ratification and entry into force, is carried out by formally recognized representatives of sovereign governments. Anthony Aust notes that the Vienna convention defines treaties as international agreements "*concluded between states*" but notes that IGOs also conclude treaties.[42]

Standard practice in treaty drafting shows states are jealous of their authority to negotiate treaties. To demonstrate the authority to negotiate international treaties, representatives are usually required to produce full powers.[43] Full powers are defined by the Vienna Convention on the Law of Treaties as a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting, or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect to a treaty. Full powers are distinct from credentials issued by a state to represent that state at a multilateral conference. Heads of State, Heads of Government, and Foreign Ministers are the *only* individuals with the authority to issue full powers. Credentials permit a state representative to negotiate a treaty in the context of a multilateral conference, but they do not automatically grant the authority to sign treaties. In practice these two documents may be combined.[44]

Thus, states use elaborate procedures to confer the right to participate in the negotiation of treaty texts on their official representatives. No other actors can formally participate in treaty drafting. This formal theory of treaty law contrasts sharply with the informal degree of participation enjoyed by NGO representatives in drafting the Rome Treaty.

5. *Reinterpreting the rules of treaty writing*

The influence of NGOs on state decision-making at the international level has been a growing concern of the political science literature

42. A. Aust, *Modern treaty law and practice* (Cambridge, Cambridge University Press, 2000), p. 15.

43. Aust (note 42), pp. 57–65, pp. 60–62. Heads of state, heads of government, foreign ministers, and heads of diplomatic missions concluding treaties with the state where they are stationed are exempted from the requirement to produce full powers because of the inherent authority of their offices, and states may also mutually agree in some bilateral situations to dispense with requiring the production of full powers.

44. Aust (note 42), pp. 58–60, 62.

in recent years.[45] One aspect of particular interest in this literature is the way that NGOs have aided in the establishment of international organizations that have responsibilities for enforcing global norms.

6. *The power of NGOs*

Why are NGOs powerful? What allows a small group of individuals representing organizations with only very modest budgets and small, often poorly compensated staffs to play such a definitive role in world politics? I argue that their power is a function of the extent to which NGOs are oriented to communicative action rather than strategic action.[46] Habermas' conceptual apparatus is useful because it captures the unique orientation of effective NGOs. Habermas notes that in modern secular society social integration depends on communicative action oriented towards a rational justification for normative rules, however, strategic actors paradoxically are inhibited in their ability to pursue such a normative dialogue oriented to reaching understanding because of their constant tendency to perceive situations in terms of their strategic preferences.[47] The pro-ICC NGO community is oriented towards producing a normative system that can be justified as having universal validity. NGOs discursive practices approach the ideal criteria for Rational Practical Discourse as developed by Robert Alexy based on Habermas' theory of communicative action.[48] The central idea of these criteria is that it is possible to identify forms of normative argument that are objectively rational. Because the NGOs that advocated a permanent ICC were not centrally motivated by the pursuit of interests, they fulfilled a discursive need of modernity that Habermas identifies; producing normatively acceptable consensuses.

Following the same line of reasoning, Boli and Thomas[49] conceptualize the power of NGOs in terms of the authority carried in the

45. J. Boli, G.M. Thomas, *Constructing World Culture* (Stanford, Stanford University Press, 1999); M. Keck, K. Sikkink, *Activists Beyond Borders* (Ithica, NY, Cornell University Press, 1998); W. Sandholtz, A. Stone-Sweet (eds.), *European Integration and Supranational Governance* (Oxford, Oxford University Press, 1998); Lynch (note 16).

46. J. Habermas, *The Theory of Communicative Action*, V.1. and I1 (translation by Thomas McCarthy) (Boston, Beacon Press, 1984/1987).

47. Habermas (note 46), pp. 25–27.

48. R.A. Alexy, *Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification*, R. Adler and N. MacCormick trans. (Oxford, Clarendon, 1989).

49. Boli, Thomas (note 45).

emerging world society by volunteer experts who advance rational arguments to advance their solutions to global political problems.

7. *Institutions, institutional change, and actors*

The adoption of the ICC statute is a case where there is institutionalization of the normative preferences of NGOs. The Rome Statute is not merely a policy outcome, now that it has been ratified it is to become an institution that will structure global politics in the future.

Sovereignty and international law are socially constructed institutions. Sociological institutionalist theories recognize that because actors are embedded in multiple institutional contexts simultaneously they can choose from a number of strategies to pursue a variety of ends.[50] Neither the ends nor the strategies are predominantly determined by the prevailing institutional environments. For example as Friedland and Alford state:

> conceive of institutions as both supra organizational patterns of activity through which humans conduct their material life in time and space, and symbolic systems through which they categorize that activity and infuse it with meaning. . . . These institutions are potentially contradictory and hence make multiple logics available to individuals and organizations. Individuals and organizations transform the institutional relations of society by exploiting these contradictions.[51]

International law, including the law of treaties, is an institution of world politics. NGOs were able to make use of that institutional environment, even though it strictly limits the spaces available for the participation of non-state actors in formal terms. By using the language of international law, and developing technical expertize, NGOs were able to redefine international criminal law in a progressive way. This is similar to the way judges make policy everyday by interpreting existing statutes and previous judicial decisions.[52] Legal prescriptions

50. P. Hall, C.R. Taylor, "Political Science and the Three New Institutionalisms", XLIV *Political Studies*, 1996, 936–957. For an application of such an approach to analyzing international security politics *see* E. Solingen, *Regional Orders at Century's Dawn* (Princeton, NJ, Princeton University Press, 1998).

51. See R. Friedland, R.R. Alford, "Bringing Society Back In; Symbols, Practices, and Institutional Contradictions", in: Powell, Dimagio (note 31), p. 232.

52. C.N. Tate and T. Valinder, *The Global Expansion of Judicial Power* (New York, New York University Press, 1995). A. Stone-Sweet, "Judicialization and the Construction of Governance", 32 *Comparative Political Studies*, 1999, 147–184.

in constitutions, statutes, and treaties, are normally underspecified for use when applied to new specific circumstances. Existing norms have to be extended and elaborated in order to cover situations that were unimagined when particular rules were first developed in the context of treaty negotiations or other legislative processes. NGOs entered this interpretive game by offering well-documented summaries of existing international criminal law in position papers that were distributed to state officials negotiating the text of the Rome Statute. In this way, their interpretations of existing law influenced the agenda of the negotiations and helped to define the terrain for debate about how the crimes should be defined in Articles 5 through 8 of the Statute.

Supporters of a court recognized that in order to create a permanent supranational authority to prosecute war criminals, they would need to get those same state leaders who were protected by the doctrine of sovereign immunity to agree to give up that immunity. In order to do that, NGOs first had to gain access to a diplomatic game that has been limited to states. In doing so, NGOs transformed the institution of sovereignty from an obstacle into a mechanism that permitted them to have access to the discussions and shape the outcome.

8. *NGO tactics: Expanding the discourse and legal expertise*

As a tactical strategy, NGOs sought to expand the discourse to allow the widest possible variety of actors to participate in the development of the ICC. Habermas' discourse principle states that "Just those action norms are valid to which all possibly affected persons could agree as participants in rational discourses".[53] In fact, every effort was made to allow the broadest possible participation in the dialogue that led to the Rome Statute and to proceed by consensus whenever possible.[54] In every session of the preparatory meetings at UN headquarters in New York and at the Rome Conference itself, NGOs were allowed to participate in some capacity. Even when

53. Habermas (note 46), p. 107.

54. Personal communication with Adriaan Bos, Chair of the Preparatory Commission for the ICC Treaty Conference 1996–1998 (14 May 2002, The Hague). *See also* the "Introduction" by Roy S. Lee in Lee (note 1), p. 9 on the thinking within the Bureau that participation should be as broad as possible, which led to the establishment of a trust fund under UN Secretariat auspices which ultimately financed the attendance of 54 delegates from 52 States.

specific meetings were closed to NGO representatives, they often quickly learned of the substance of such meetings from insiders. Frequently NGO summaries of what happened at such meetings came to be relied on as authoritative.[55] NGO reports enabled more states with limited diplomatic resources to follow the multiple interlinked issues during the negotiations.

NGOs also understood that broadening the number of state participants in the ICC negotiations would increase the number of states that would be likely to support the outcome. One NGO that was a leading member of the pro-ICC NGO coalition, No Peace Without Justice (NPWJ) went so far as to place legal scholars with expertize in international criminal law on the delegations of developing states to the Rome meeting. NPWJ organized a zero-budget programme that enabled the foreign ministries of states without adequate legal counsel on ICC issues to review the curriculum vitae of persons with appropriate legal expertize willing to serve on the delegations of such states. In many cases, these legal experts traveled to Rome and stayed at their own expense, but they were fully accredited as the diplomatic representatives of the states in question, and were issued full powers, including even the authority to sign treaties in the name of the state.[56] The effect of this was to allow a large number of states to follow the detailed legal negotiations much more closely than would have been possible without this legal assistance. The negotiations themselves were very complex and took place in various working groups, so delegations needed multiple members just to keep up with what was going on.[57]

This obviously raises the question of how effective such individuals could be at representing states that many of them have never visited, and the related question of how these individuals prioritized the views of the state they represented and the views of the NGOs

55. As with the climate negotiations, states involved in the ICC negotiations found that "informal informal" negotiations were sometimes necessary to promote frank discussion of issues without the constant observance of NGOs or other delegations. However, NGO legal experts who had developed reputations for personal expertise, and who also had extensive knowledge of various delegation's negotiating positions, often were informed subsequently about the substance of such "informal informals", or were able to infer their content from delegates' subsequent behaviour. Compare with Gupta in this volume.

56. Personal communication, Cynthia Fairweather, Legal Advisor for Sierra-Leone, 05/28/02 the Hague.

57. On the complexity and inter-linkages between the many issues, *see* Holmes, "The Principle of Complementarity", in Lee (note 1), pp. 41–43.

that helped bring them to Rome. Anytime one person stands as the legal or political representative of a large group the actual social relationships involved are complex and multifaceted.[58] Limited experience with the group represented is not an automatic bar to being a thorough and comprehensive spokesperson for the interests of that group, but it may create difficulties. The delegates who participated in the Rome Conference through this programme saw themselves as legal counsel for a client, and therefore they felt and strove to fulfill a professional obligation to represent the views of their client notwithstanding their own views or those of their colleagues in the NGO movement.[59] States that participated in this programme broadly favoured the establishment of a fair and effective ICC. That is why NPWJ chose to work with them. Consequently, differences between NGO views and the views of state governments tended to be on questions of detail and not fundamentally different understandings of the goal of the negotiations. Often, government's instructions to these new delegates said only to promote a fair and effective court. This left these legal experts with a wide degree of latitude when working on the specific provisions of the statute. For instance, it enabled some of them to pursue a progressive definition of the crimes in negotiating Part 2 of the Rome Statute.[60]

One crucial aspect of NGO discourse that allowed NGO representatives to attain a respected and legitimate status in these negotiations was their constant efforts to ground their discursive claims in the expert knowledge of the existing state of international law.[61] Leaders within the major NGOs in the pro-ICC coalition were aware that their legal expertize was the key to their being taken seriously as interlocutors in the ICC debate.[62] Delegates from states that played leading roles in the negotiating process in Rome have commented

58. H.F. Pitkin, *The Concept of Representation* (San Francisco, University of California Press, 1967).

59. This is the author's impression based on interviews with three such delegates and others who worked with them during the Rome conference.

60. Personal communication, Eve La Haye, Legal Advisor for Bosnia and Herzegovina, 02/07/02 the Hague, and Cynthia Fairweather, Legal Advisor for Sierra-Leone 28/05/02, the Hague.

61. Many of these papers are available via the internet. *See* for instance <www.igc.org/icc/html/n.g.o..html> and <web.amnesty.org/web/web.nsf/pages/documents>.

62. Personal communication, Lars van Troost, Amnesty International, (3 May 2002, Amsterdam).

that they found the legal provisions of the NGO papers very authoritative and useful during the negotiating process.[63]

Early in the preparatory negotiations prior to Rome, a consensus developed that the ICC should not attempt to create new international criminal law, but that the Statute should focus on specifying the existing provisions of law that the court would be empowered to enforce. NGOs deliberately formed their positions on particular ICC issues in the language of international law with extensive references to existing legal authorities. This discursive practice made them credible participants. While the treaty drafters attempted to avoid writing new law, this complex area of international law has multiple, sometimes conflicting authorities. The fact that the Rome Statute codifies the core crimes under its jurisdiction in a cautious, but ultimately progressive way must be attributed in significant part to NGO interventions in the discourse.[64]

9. *An opening for the ICC? Discourse in the 1990s*

The end of the Cold War reinvigorated the idea of an international court.[65] By 1990, much to the surprise of many observers, a broad consensus had emerged within the International Law Commission that there should be a supranational body with the power to try at least some sorts of international crimes.[66] There was as yet no consensus about what crimes such a court could punish, under what authority it could be constituted, or what powers it should have.

Many analysts were skeptical, even in the later half of the 1990s, that the leaders of the world's states would be willing to consent to the jurisdiction of an International Criminal court once they realized

63. Personal communication, Herman von Hebel, Legal-Counsel, the Netherlands, and Coordinator for the Definition of War Crimes, 17 May 2002 and Fabricio Guariglia, Legal Advisor for Argentina, 21 May 2002.

64. While there is widespread agreement amongst legal experts on this characterization of the substantive law embodied in the Rome Statute, *see* for instance Lee (note 1), p. 38.

65. In the Cold War years a few lonely voices, such as Professors Ferencz and Bassiouni and one or two others held the torch aloft urging the creation of an ICC as a standing body. R. Rosenstock, "Remarks made at Pace University School of Law", 23 October 1993, 6 *Pace International Law Review*, 1994.

66. Ferencz (1992) (note 14), p. 390.

that their own actions might one day be called to account by it.[67] The use of force, both internally and externally is a significant part of what it means to be a state. Often, the bearing of arms by police officials and security forces is benevolent and helps to preserve social order. Government officials are the ones responsible for deciding when force should be used, to quell a violent protest or mob, or to resist an external threat to security. Why would any state officials be willing to subject their own decisions on the use of force to review by a supranational authority that could put those officials in jail?

Many violent acts that history has witnessed in the last 150 years are so morally abhorrent that states in Rome ultimately made the choice to establish a strong court. Michael Perry compellingly cites particularly horrific cases of man's inhumanity to his fellow beings to dispel the argument that standards of what is morally acceptable are hopelessly relative.[68] Such incidents have motivated the vast majority of states to accept the challenge to their own sovereignty inherent in the ICC. A tragic number of states in Africa, Asia, America, and Europe have experienced such atrocities within recent historical memory. Converting this diffuse sentiment into a new functioning global judicial authority was not automatic. NGOs used legal discourse to shape and push the development of the ICC at every turn.

In 1989 a group of Caribbean states in the General Assembly (GA), led by Trinidad and Tobago, initiated an effort to put consideration of an international criminal court before the International Law Commission once again.[69] The main impetus for this proposal was the desire of these states to create an international body that could try drug traffickers those states were too weak to control on their own.[70]

The decision in the United Nations Sixth Committee to schedule a diplomatic conference to consider a statute for a permanent International Criminal Court was taken by consensus. The United States supported the move at the time, and even China did not want

67. B. Broms, "The Establishment of an International Criminal Court", *Israel Yearbook on Human Rights*, 1995, 146.

68. M.J. Perry, *Morality, Politics and Law: a bicentennial essay* (New York, Oxford University Press, 1988), pp. 61–64. This example is from the former Yugoslavia, but the twentieth century list of atrocities is long.

69. T.C. Evered, "An International Criminal Court", 6 *Pace International Law Review*, 1994, 121–158, 127. Perhaps this move was driven by concerns about the US invasion of Panama. Further examination of this linkage would be informative.

70. Interestingly, drug trafficking is not included as crime within the jurisdiction of the court in the Rome statute.

to be seen as the only state opposed to going forward.[71] Of course views on the specific powers and nature of an ICC remained quite varied at that point. At this early stage, the permanent five members of the Security Council continued to insist that the only grounds for an ICC to take jurisdiction over a case would be by Security Council referral, subject to the veto power. In the early years of the negotiations, during the Ad Hoc Committee meetings of 1995 and the first Preparatory Committee meetings in 1996, only around 60 states regularly took part. By Rome, almost every state in the world had representation. The NGO community took full advantage of the numerical increase in the number of states to advocate for what they consistently described as a fair and effective court. Fair meant that residents of states that happened to be permanent members of the Security Council could not automatically be exempted from the Courts jurisdiction.

Western powers, including the United States, had their own strategic reasons for seeking an ICC with jurisdiction over individuals. Throughout the post-war period, the use of force by the United States in the world has been bedeviled by the problem of fighting wars with national groups when the fundamental problem was really with the leadership of a recalcitrant state. Examples include Libya's Muammar Quaddafi, Panama's Manuel Noriega,[72] Iraq's Saddam Hussein,[73] Somalia's Mohammed Aideed and of course, Yugoslavia's Slobodon Milosevic. In October 1990 Bush actually threatened Hussein with another Nuremberg style war crimes trial.[74] Thus for the US government, international prosecutions had some appeal by the early 1990s.

By 1991, conflict erupted in Yugoslavia. As the presidential election in the United States got into full swing in 1992, the crisis unfolded in Yugoslavia. The US and the European powers were reluctant to become involved in the crisis. On 6 October 1992, the Security Council finally adopted a resolution creating a commission of experts

71. Personal communication with Adriaan Bos, Chair of the Preparatory Commission for the ICC Treaty Conference 1996–1998 (14 May 2002, The Hague).

72. After the US invaded Panama in 1989, Noriega was tried and imprisoned in the United States for violating drug trafficking laws. S. Albert, *The Case Against the General* (New York, Charles Scribners & Sons, 1993).

73. During the Gulf War, the Allied leadership emphasized that the conflict was with the "war criminal" Saddam Hussein, and not with the Iraqi people. Indeed, the US administration rhetoric was sometimes criticized for over personalizing the conflict between G.H.W. Bush and Hussein.

74. G.J. Bass, *Stay the Hand of Vengeance* (Princeton, Princeton University Press, 2000), p. 210.

to investigate war crimes in the Yugoslavian conflict, but Britain and France, fearing that such investigations would make a negotiated settlement to the conflict impossible, obstructed the commissions work. Cherif Bassiouni, a member of the commission, was able to expand the commission's documentation of war crimes only by securing outside funds from the Soros and MacArthur foundations and the government of the Netherlands.[75]

1993 was a banner year for advancing the cause of a permanent International Criminal Court that had been stalled for so long. In February, with the urging of the new UN Ambassador Madeline Albright, the Security Council finally agreed to create an International Criminal Tribunal for the former Yugoslavia.[76] While Albright pushed for a strong court, this *ad hoc* court would be hampered for years by relatively weak support from the great powers. Richard Goldstone, the first chief prosecutor for the ICTY, credits NGOs with mobilizing public opinion thereby pressuring governments, and ultimately securing increased funding for the ICTY from the UN General Assembly. Without the public attention, the court would have failed early in its life.[77] Also, in October of 1993, the United States reversed its official position on the International Criminal Court from one of attempting "to prolong without progressing" debate on the ICC to one of committing "actively to resolve the remaining legal and practical issues" with establishing an ICC.[78]

The US never reached a point where it would accept a court that would have jurisdiction over US nationals without the case specific consent of the United States government. Since such a position is fundamentally incompatible with the notion that criminal law should apply to everyone equally, the United States position was ultimately

75. Bass (note 74), pp. 211–2; M.P. Scharf, *Balkan Justice* (Durham, NC, Carolina Academic Press, 1997).

76. Klaus Kinkel, Germany's Foreign Minister, proposed a tribunal for Yugoslavia, to avoid the need for armed intervention by Germany, and to prevent a split that would result between his party and Kohl's Christian Democrats. (Bass (note 74), p. 215 cites Cassesse, *Path to the Hague*, p. 67).

77. R. Gutman, D. Rieff (eds.), *Crimes of War: what the public should know* (New York, Norton, 1999), pp. 14–15.

78. M.P. Scharf, "Getting Serious About an ICC", 6 *Pace International Law Review*, 1994, 103–120. Scharf worked in the US Department of State, Office of the Legal Advisor from 1989–1993. While he argues he was a wordsmith for policy mandates from higher level State and Justice Department officials, others have described him as the "architect" of US policy. *See* Ferencz (1992) (note 14).

rejected by the 120 nations who voted for the Rome Treaty. Explaining this outcome requires that we understand the impact of international non-governmental organizations on shaping the treaty process in Rome.

10. *NGO contributions to the Rome Treaty process*

The NGO community was able to capitalize on the political opening created by the end of the Cold War and conduct a world wide campaign to generate support for a strong court. At the Rome Conference itself, it was a broad based group of states, known as the like-minded group, who pushed the consensus positions of the NGO Coalition for an ICC forward. This group included Canada, Norway, Germany, Argentina, Australia, the Netherlands, Ghana, Egypt, South Korea and Singapore, whose delegates played major leadership roles. The like-minded group grew over time, and ultimately included over 60 states. Those states views had been shaped over the preceding years by members of the NGO Coalition for an ICC. I argue that the key to NGO influence was the nature of the discourse that these non-state actors both participated in and helped to stimulate. Here there is only space to describe a few of their discursive acts to illustrate this point. I conclude by highlighting the way NGO positions on a few key issues were translated into the final text of the statute itself.

In the early 1990s, only a handful of groups and individuals both inside and outside governments were actively working on the ICC issue.[79] In July of 1992, Human Rights Watch called for an international tribunal to punish the perpetrators of war crimes and genocide.[80] The World Federalist Association in the United States and their international umbrella group, World Federalist Movement decided around this time that they would actively advocate a permanent International Criminal Court as their priority issue. The World Federalist Movement has hosted the Coalition for an International Criminal Court since it was founded.

William Pace of the World Federalist Movement invited leaders from 30 NGOs to participate in a meeting held at the United Nations

79. According to Bill Pace, the Convener of the NGO coalition, his legal assistant Bettina Pruckmayr was the only person in the world working full time on the International Criminal Court issue in 1995. Personal communication, 11 November 2000.

80. Bass (note 74), p. 210.

after one of the early GA Sixth Committee debates on the International Law Commission's (ILC) draft ICC statute. These NGOs agreed to form the Coalition for an International Criminal Court (CICC).

The central activity of the NGO CICC was and continues to be to serve as a clearing house for information, proposals, and arguments about the ICC, facilitated by NGOs who favour some type of permanent court. The complexity of the issues involved with specific technical proposals for provisions of the ICC statute made it difficult for many national governments to become aware of the process under way at the United Nations, let alone understand the implications of the decisions for their national positions. Members of the NGO Coalition engaged in direct lobbying efforts, produced position papers issued press releases, and published media editorials in a coordinated effort to inform states and the media on these issues.

There were substantive issues that divided different member organizations within the Coalition. While members in the organization did not always agree on specific proposals about how the court should be constituted and what crimes it should prosecute, they all agreed that some sort of international criminal court was the best way to deal with the impunity that perpetrators of international law crimes have historically enjoyed. In order to facilitate the Coalition's work, an emphasis was placed on consensus. Pace said, "We agree on so much we shouldn't concentrate on what we don't agree on".[81] The result of this policy of the coalition was to facilitate an environment of cooperation and information sharing amongst the various member organizations of the NGO coalition, that magnified the effectiveness of each group.

A crucial element of the NGO coalition's ultimate success was this orientation towards expanding the number of NGOs that took an interest in the ICC issue. For example, in October 1997, Human Rights Watch [HRW] issued an action alert addressed to other NGOs with basic facts about the ICC process underway at the UN, preparations for the Rome conference and HRW's reasons for supporting the ICC. The alert concluded with a specific set of tasks that other groups could undertake to raise awareness of the ICC, and offered strategy guidelines for creating national coalitions of interested organizations. There was a tremendous response to these outreach

81. C. Trueheart, "Clout without a Country: The Power of International Lobbies", *The Washington Post*, 18 June 1998, p. A32.

efforts. The NGO coalition for the ICC grew from its initial 30 member organizations in 1994 to hundreds in the run-up to the Rome Conference and thousands after the statute was adopted and the campaign turned towards focusing on ratification efforts.[82]

The legal position papers produced by the NGO coalition had a tremendous agenda setting effect on the negotiations from the earliest Preparatory Committee discussions, to the Rome Conference and subsequent Preparatory Commission negotiations on the steps needed to make the court a reality. According to one member of the Rome Conference Bureau responsible for preparing the final Statute text, the NGO papers were extensively used, "I can tell you, talking about my own experience in the Dutch delegation, we used them in order to prepare our own views. The quality of many of those documents was extremely high, [they were] well-prepared and well-documented. There was quite a bit of an impact. Without their research the exercise would have been much more complicated".[83] In particular, the legal papers produced by Amnesty International, Human Rights Watch, and Lawyers Committee on Human Rights are most often mentioned by participants in the negotiations as influential, although many other groups also produced documents which were read and used by some government delegations.

It is not the case that any single NGO found every provision that they had sought in the final text of the Treaty. However, in the compromises made in the Statute on the major issues of how the court should be constituted, it is evident that the NGOs arguments were persuasive for the vast majority of delegates at the Rome Conference.

A crucial international law difficulty in creating the ICC was the need to define the crimes with sufficient precision so that those acts that people broadly agree to be inappropriate could be deterred and punished, but without submitting the regular conduct of state officials to undue scrutiny. Of course, there was disagreement amongst states and other analysts about where such lines should be drawn. The discourse in the 1990s dealt with this underlying issue in a variety of ways. The relation of the courts jurisdiction to national courts, the subject matter jurisdiction of the court, and the procedural mech-

82. W.R. Pace, J. Schense, "The Role of NGOs", in Cassesse, *et al.* (eds.), *International Criminal Law: A Commentary on the Rome Statute for an International Criminal Court* (Oxford, Oxford University Press, 2002).

83. Personal communication, Herman von Hebel, 17 May 2002.

anisms for bringing matters before the court were all seen as mechanisms to manage the Court's inherent challenge to state sovereignty. Because these issues are interlinked, it became difficult to move forward on any one of these issues during the PrepCom meetings because governments positions on any one of these issues were contingent on how all the other issues would be resolved.[84] The following illustrations from the position papers produced by the NGO coalition and some of its member organizations illustrate the impact that their arguments had on the final outcome.

Justice in the Balance, published by Human Rights Watch (HRW) in early 1998 in the run-up to the Rome Conference, is one of the more extensive statements of the argument in favour of a strong ICC published by a leading organization of the NGO coalition. It is an example of NGO discourse that identified problems with the fundamental fairness of some of the proposals under discussion for the ICC. The book's introduction includes recommendations to make the ICC an independent, fair and effective judicial institution.[85] The fact that all of these recommendations were implemented in some form in the statute is considerable evidence of NGO efficacy.[86]

Briefly, as an example we can look at how NGO recommendations on the jurisdiction regime for the court impacted the overall negotiations. The first two HRW recommendations from *Justice in the Balance* argued that 1) the jurisdictional regime should eliminate any need for state consent (on a case-by-case basis) and 2) the court must be independent of the Security Council.[87] This was a response to US efforts to create a weak court early on in the negotiations.

The United States used a variety of tactics to attempt to ensure that it could block the prosecution of US nationals if it so desired. One was to give the Security Council control over the ICCs jurisdiction by arguing that such crimes were inherently threats to international peace and security and therefore properly under Security Council authority. Initially, many nations objected that the SC was political

84. J. Holmes, *The Principle of Complementarity*, in Lee (note 1), p. 43.

85. Human Rights Watch, *Justice in the Balance* (New York, 1998), p. 2.

86. *See also* Pace, Schense (note 82) for a summary statement of the NGO position before Rome. While the statute does make distinctions between crimes that can be committed in situations of international versus internal conflicts, it also provides for the ICC's jurisdiction over both types in some circumstances. For an extensive discussion of these issues, *see* Lee (note 1), Chapter 2.

87. Human Rights Watch (note 85).

and should not have such influence over the disposition of individual criminal cases.[88]

At the fourth Prep. Com. meeting held 4–15 August 1997 the Security Council issue was again debated extensively. The United States and France led the charge for Security Council control over initiating prosecutions, but the vast majority of nations rejected the notion. Singapore, a member of the like-minded group,[89] proposed the compromise that was ultimately adopted in the statute, that the Security Council could positively postpone any prosecution if it seemed necessary for the exercise of its UN Charter duties, but only for twelve months at a time and only with nine affirmative votes including all of the permanent five.[90]

As the Rome meeting approached it was clear that the issue of the Security Council's role in referring matters to the Court's jurisdiction was one of the major outstanding issues before the conference of plenipotentiaries. Christopher Hall played a lead role on Amnesty International's delegation to the ICC negotiations. Hall's brief article raised the issue explicitly in his conclusion on the pages of the *American Journal of International Law* only weeks before the conference. The coalition for the ICC was vital on a great number of issues, but it particularly worked to remind the national delegations that Security Council oversight of case referrals could lead to a politicized court, and would be inherently unfair by protecting the permanent five and their friends. Hall noted after the 5th and 6th Prep Com. meetings that the "increasing effectiveness of the coordinated lobbying of the 316 members of the NGO Coalition for an ICC . . . was marked".[91] The ICC coalition directly advocated the Singapore compromise.[92] Louise Arbour, prosecutor for the ICTY and ICTR also made an address to the fifth Prep. Com. that was seen as having a

88. S. Suikkari, "Debate in the United Nations on the International Law Commission's Draft Statute for an International Criminal Court", 64 *Nordic Journal of International Law*, 1995, 205–221, 213–4.

89. Pace, Schense (note 82).

90. Hall (note 25, 1998), pp. 131–33. *See* Article 16, Rome Statute. Security Council Resolution 1422, July 2002, passed at US insistence, exercises this privilege not with respect to a specific conflict of concern, as the Statute's authors intended, but in a blanket way that seems to exceed the Council's own authority under Chapter 7 of the UN Charter.

91. Hall (note 25, 1998b), p. 339.

92. Personal communication, William R. Pace, Convenor, Coalition for an ICC, 10 November 2000.

large impact on many delegations in which she pointed out that a weak court would be a "retrograde development" because it would be unable "to dispense fair justice" and would "exacerbate the sense of legitimate grievance of the disenfranchised".[93] The series of summaries of the preparatory negotiations prepared by Hall are written as learned, objective accounts of the negotiations, but they must also be understood as pieces in Amnesty's overall campaign for the promotion of a fair and effective court. In writing these negotiation summaries for scholarly publication, Hall was able to draw attention to issues that Amnesty continued to feel were important. This also ensured that as the circle of delegates and policy-making officials involved in the process grew larger, consensuses that were reached in earlier stages of the negotiations could be widely explained and thereby preserved.

The United Kingdom was the first permanent member of the Security Council to abandon the idea of strong Council supervision over the ICC. In part this policy change apparently came about because of new Prime Minister Tony Blair's desire to have a strong human rights based foreign policy. This raised the leverage of the human rights NGOs, because Blair, as well as other leaders, could not afford to bring home an ICC treaty from Rome that would not earn NGO support. There was also presumably pressure on both the UK and France to bring their positions into line with the common European foreign policy.[94] Lars Van Troost who attended the Rome Conference with Amnesty's delegation recalled that in 1997 with ten EU members having joined the like-minded group, it was clear to all that the UK and France were holding back the EU consensus.[95] The statements of the EU common position were noticeably weaker than the like-minded position, even though most European states clearly adhered to the stronger like-minded platform. In December 1997 the UK became the first permanent Security Council member to join the like-minded group. Both France and the Russian Federation eventually

93. Hall (note 25, 1998b), p. 339, i.e. those without friends amongst the permanent five.

94. It is interesting in this regard that the European Union does not seem to construct the British and French vetoes on the SC as being "their veto". Instead the majority of European nations seem to favour weakening the SC's role, at least as judged from the perspective of EU positions on the ICC.

95. Personal communication, Lars von Troost, Legal Advisor, Amnesty International, Amsterdam, 3 May 2002.

came to support the Singapore compromise on the issue of the Security Council's relationship to the ICC.

Three weeks into the Rome Conference, the meeting seemed to have reached an impasse over the Security Council role, with near consensus for the Singapore compromise, except for adamant continued opposition by a few nations, including the United States.[96] Only the final vote of the conference would demonstrate how isolated China and the United States had become on this issue.[97]

The other major provision of the statute that was debated in part to protect the sovereign rights of states was the procedural rules for the court to take jurisdiction. Michael Scharf argued that the consent of the state with custody of the alleged war criminal should be required before the ICC's jurisdiction could be exercised in each specific case.[98] This is one of the issues that the United States sought to use to isolate itself from prosecution. Interestingly, Scharf relies on a report of the American Bar Association to argue that few states would be willing to have an ICC at all without this provision.[99] In fact, only the US and China ultimately objected to the Rome Statute on these grounds.[100] Scharf explicitly acknowledged that a provision requiring the consent of the state of the accused might diminish the effectiveness of an ICC, but argued that it was better than nothing. In fact it seems clear that a court that required the state of the alleged criminal's nationality to consent to jurisdiction on a case-by-case basis would have very little authority. The fact that the final statute avoided such a provision has to be seen in light of the rhetorical positions of the CICC members. They argued coherently, in a wide variety of forums, from a stage early on in the negotiating process that any court that required the state of the accused to consent to jurisdiction on a case by case basis could not truly dispense justice because it would be inherently politicized. On this issue, as with the other fundamental features of the Rome Statute, the NGO coalition's arguments prevailed because they were oriented towards

96. Kirsch and Holmes (1999) (note 25), 5.

97. F. Benedetti, J.L. Washburn, "Drafting the International Criminal Court Treaty", 5 *Global Governance*, 1–38, 1999. The US and China along with Israel, Iraq, Yemen, Libya, and Qatar made 7 nations total voting against the statute, there were 21 abstentions, and 120 votes in favour recorded.

98. Scharf (note 78), p. 114.

99. The ABA ultimately urged ratification of the Rome Statute.

100. Lee (note 1), pp. 582–583, 633. These references are to the post-Rome statements of China and the United States.

creating a discourse that could be normatively justified as producing justice for all.

As further examples of the effectiveness of NGOs discursive strategies we can compare two of Amnesty International's legal briefs on the issue of the substantive law to be covered by the ICC, with the final accord reached in the Rome Statute itself. The Amnesty papers particularly relied on a strategy of offering definitive interpretations of the *existing* provisions of international criminal law, based on treaties, custom, and prior court rulings, including those of the *ad hoc* tribunals. Their use of legal discourse is closely analogous to the process used by a common law judge to find precedents and legal authorities that support the conclusions the judge reaches in a specific case.

In *The Quest for International Justice: Defining the Crimes and Defences for the International Criminal Court* laid out Amnesty International's position in favour of including genocide, war crimes, and crimes against humanity under the jurisdiction of the court. Amnesty took no position on including the crime of aggression, hijacking, drug trafficking, and other crimes that some states sought to include under the jurisdiction of the court. They pointed out that it would be difficult if not impossible to reach international consensus on the definitions of such crimes, and that consequently ratification of the ICC statute might be delayed.[101]

Amnesty lawyers warned against an expansion of the definition of genocide beyond what is contained in the 1948 convention to include the destruction of political or social groups. They pointed out this could create two separate but parallel approaches to the crime of genocide in international law, with different standards under the Genocide Convention of 1948 and the new ICC.[102] Fairness dictated that such a situation should be avoided. If the definition of genocide was broadened to include political groups, then a much larger number of incidents would potentially be included under the definition of genocide. Deciding which to pursue and which to ignore would tend to politicize the office of the ICC prosecutor.

By the time of the Rome Conference, there was a broad consensus amongst the delegates that the definition of genocide should be copied unchanged from the 1948 convention. Amnesty also worked to update the definition of crimes against humanity by ensuring that emerging

101. Amnesty International (note 17), p. 4.
102. *Ibid.*, pp. 4–5.

variations of crimes, such as "enforced disappearances" were specifically named in the Statute.[103] More importantly, a consensus was beginning to form around the idea of giving the court some sort of permanent or automatic jurisdiction over the three core crimes; genocide, war crimes, and crimes against humanity. Many states still sought to have other crimes, including aggression, terrorism, hijacking, the use of nuclear weapons, or drug trafficking included in the Statute. But as the meeting wore on, most states came to accept the NGO's pragmatic warning, that to insist on an expansion of the list of crimes would likely result in a failure to create a court at all in Rome. On the final day of the conference, 120 states set aside their desires for changes, and accepted the Bureau's compromise proposal that limited the ICC to the core crimes, but created a court with strong powers.

Another Amnesty International paper published in April 1998, entitled *The International Criminal Court: Ensuring Justice for Women*,[104] called on states to ensure that gender crimes would be specifically enumerated in the ICC Statute. The paper begins with an emotional account by a Kurdish women who was raped by Iraqi soldiers. From there, the paper turns to making a series of legal arguments about how specific acts against women are already criminal under existing provisions of international humanitarian law, with references to the appropriate authorities. The paper argues that rape and forced impregnation can already be acts of genocide if they are undertaken with a genocidal intent. Similar calls were made to specifically list gender based crimes in the definitions of war crimes and crimes against humanity. These calls were based in part on the emerging practice of the *ad hoc* tribunals. The result in the Rome Statute is clear, these provisions were included in the definitions of crimes after vocal NGO insistence.[105] One of the delegates who worked to include the war crimes provision was the legal advisor from Bosnia and Herzegovina who was recommended to the Bosnian Ambassador through the NPWJ programme described above. It is important to note that this person was not an NGO activist prior to or during the Rome meeting. She was a legal expert working on a doctoral dissertation at the London School of Economics on the definitions of crimes under international

103. *Ibid.*, p. 6; Rome Statute Article 7.1 i).

104. Available from <www.amnesty.it>.

105. Rome Statute, Article 6 d-e, Article 7.1 g, Article 7.2 f, Article 8.2 b xxii and Article 8.2 e vi.

humanitarian law.[106] Her own views on the evolution of international criminal law were probably not shaped by the NGO papers circulated during the ICC negotiations. However, she was a state delegate in Rome, speaking on behalf of Bosnia because of an NGO programme, and her arguments carried the day in part because many other delegations had been exposed to these arguments earlier by way of NGO papers circulated by Amnesty and other pro-ICC NGOs.

The principled issues raised by the NGOs in the years and months prior to and during the Rome conference achieved widespread support in the final compromise. It should be clear that the NGO's countless written and verbal interventions, in formal and informal settings decisively shaped the final result on virtually every provision of the statute. Here I have discussed only a few examples.

In hindsight, it is perhaps easy to underestimate the magnitude of what was achieved by the delegates in Rome. Five weeks earlier, it was not clear what law the court could enforce, what judicial procedures it could use and under what circumstances it would have jurisdiction. The technical challenge of merging so many different legal cultures remained immense. Many observers assumed states would not be willing to cede such significant sovereign rights and the negotiations would have to be postponed, as had happened before in the 1950s. The fact that 120 states found common ground, and that the compromise very nearly fulfilled the wish list of the members of the NGO coalition for an ICC must be taken as ample demonstration of the efficacy of these non-state actors in writing new international law.

11. *Conclusions*

NGOs played a crucial role in shaping the text of the Rome Statute for an International Criminal Court. In this case, the degree of agency exercised by individuals and private associations in writing international law is particularly stunning. NGOs defined the issues, prioritized items on the negotiation agenda, advocated text for treaty provisions, and identified the grounds for political compromise more effectively than the delegations from any single state.

106. Personal Communication, Eve la Haye, the Hague, 2 July 2002.

I have argued that the NGOs were successful because of the nature of their normative discourse. That discourse was oriented towards finding a normative solution to the problem of individual impunity in the Westphalian state system. NGO calls for a fair and effective court so shaped the environment of the negotiations that only provisions which could be justified on those grounds had a legitimate chance of being accepted.

NGOs that favoured a strong, independent and universal court recognized the opportunity that the international situation presented in the early 1990s. They developed their own arguments about the legal details of how a court should be created and who it should prosecute. Because their discourse was oriented towards creating a court that would be a truly universal institution, without making any unfair compromises to protect the interests of powerful states, their arguments were ultimately persuasive and compelling for the vast number of national delegations. Many of those national delegations representing minor powers and developing countries had little time to study all the issues and get up to speed on the tactical moves being pursued by the great powers. But the arguments and analysis presented by the NGO coalition allowed such states to follow the day to day developments and participate at decisive moments.

Several characteristics of this issue may have contributed to NGO efficacy. Delegates were conscious that they were establishing a new legal institution that would presumably endure for some time. This probably made state delegates more willing to set aside the short-term interests of their governments to consider the broad normative justifications put forward by NGOs. The context of drafting a supra-national constitution, created an environment where, in the terminology of Habermas' discourse theory, actors may have been particularly open to rational arguments designed to appeal to a universal audience.

NGO's legal expertise, and the general familiarity of standards for legal arguments amongst many of the delegates also contributed to NGO success. Still, the legal issues involved were extremely complex, and considerable disagreement amongst experts existed at the outset regarding the status of international criminal law norms. Given different national legal cultures, and a low level of knowledge about international criminal law amongst many governments, it is easy to imagine that consensus might not have been achieved. NGO discourse educated delegates about the state of international law, but that same discourse also elaborated the meaning of existing law in new ways, creating

consensus where there was none before. In this way, NGOs truly were the authors of new international law.

NGO participation in treaty drafting rightfully leads to questions about who NGOs actually represent, and whether or not their own decision-making procedures are democratic. As NGO participation in global governance expands, pressure to limit the number of NGOs that are allowed to participate will grow. Normatively, however, the theoretical position outlined here suggests that accreditation of NGOs should remain as open as possible to any interested participants. This will tend to enhance the legitimacy of the outcomes. Determinations about the legitimacy of particular organizations and the transparency of their internal decision-making should be made in a decentralized way. States need not heed the recommendations of all NGOs equally; they should assess for themselves the quality of the information provided and the motivations of the speakers. This analysis has focused on a handful of major human rights NGOs that played leadership roles in the CICC. These groups were particularly effective because of their leader's expertise and their organization's established reputations.[107]

The NGO coalition for an International Criminal Court self-consciously sought to bring about fundamental change in some of the most enduring institutions of international politics, including the traditional rules of sovereignty which give states broad, but not limitless, authority to use force as they see fit. States almost certainly would not have taken this step on their own initiative. NGO success in this case suggests that there may be future cases where non-state actors can make use of the state-based institutional structure of international law to bring about transformations in the institutions of global governance. NGOs, through their discursive practices, can play a decisive role in the development of international law.

107. Many smaller NGOs, often organized only nationally in the developing world, also were particularly effective at lobbying their governments and in securing ratification decisions in their home countries. This success was driven in part by their cooperation with the international human rights NGOs that were the focus of this chapter.

CHAPTER THIRTEEN

BALANCING NORMS IN CYBERSPACE: STATE AND NON-STATE ACTOR NORMATIVITY IN CYBERSPACE

Jeanne Pia Mifsud Bonnici and Kees de Vey Mestdagh*

1. *Introduction*

Cyberspace is a ubiquitous presence. It is predominantly a-territorial. It links participants sharing common interests, irrespective of their nationality, country of origin or culture, at a speed and scale that was previously unknown. These interactions are sustained through the widespread availability of technology.

Cyberspace is both a "conceptual space where words, human relationships, data, wealth and power are manifested by people using computer-mediated communications technology"[1] and a mass of technology that supports the conceptual space. Any normative sphere of cyberspace deals with this dual reality within cyberspace. Both the technological side and human presence side of cyberspace need to be regulated.

The above description of cyberspace immediately hints at the difficulties cyberspace pose to traditional systems of state regulation. The notion of territorial jurisdiction as a basis of state sovereignty is only valid for activities that can be linked with a geographical location. An individual state does not have access to the many activities in cyberspace. The link between the participants is not one of location but more related to a particular interest. Cyberspace eases the creation

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1. Reingold quoted in S. Biegel, *Beyond our control? Confronting the limits of our legal system in the Age of Cyberspace* (Cambridge, Massachusetts, United States, The MIT Press, 2001), p. 33.

of communities of shared interest irrespective of the identity or nationality of the participants. The simplicity with which one exchanges information has transformed relationships from a local to global level and from a public to private sphere.

On the technology front, state legislation has been unable to keep up with the rapid technological changes and is, therefore, soon outdated. While in international fora it has often been argued that legislation to regulate cyberspace activities should be technology neutral as much as possible, technology neutral legislation is not always a viable alternative. The activity the legislation intends to control is very often linked to the medium it is being carried on or by. Thus, for example, as will be seen further on in the chapter, due to the present state in technology Internet Service Providers (ISPs) have been assigned a different legal responsibility than telephone companies have with regard to the content and activities that go through their systems.

The chapter examines the current role played by states and key non-state players, in particular ISPs, in cyberspace governance. Whilst "governance" is the main theme of this book each chapter reflects on one or more facets of the concept of governance. This chapter looks at the normative aspect of governance in cyberspace. *Governance*, as Hirst and Thompson argue in their discussions regarding the relationship between globalization, governance and the Nation-state, ". . . is, the control of an activity by some means such that a range of desired outcomes is attained – is not just the province of the state".[2] There are two lines of reasoning why the Hirst and Thompson reference adequately describes the context of cyberspace governance.

First of all, the current situation of cyberspace governance brings to the fore that there are multiple (state and non-state) sources in cyberspace devising, administering and applying the "desired" ordering of activities in cyberspace. We use the term "source" to refer to an organization or institution that regulates behaviour. The underlying assumption here is that a "source" has some kind of procedure to issue norms and follow their compliance.

The second point is that this chapter looks at the attempts being made and the means being used to control some cyberspace activities.

2. P. Hirst, G. Thompson, *Globalization in Question: The International Economy and the Possibilities of Governance* (United Kingdom, Polity Press, 1999), p. 269. See also in this volume the contribution by Jensen.

It can be seen, from the description given in Section 2 of this chapter, that classical and non-classical attempts and means of normativity are being used. The chapter directs the reader's attention to the shifts and interactions in and between spheres of normativity of some cyberspace activities.

A "sphere" is in turn made up of a number of sources. In this chapter we look at four spheres of normativity defined by two dimensions – the local/global dimension and the private/public dimension: (a) the individual state and state organizations within that individual state: this occupies the first sphere on the matrix in figure 1: Local/Public – "State regulation within national boundaries"; (b) States and international governmental organizations acting globally: we refer here to the "Interstate regulation" – Global/Public sphere in figure 1; (c) Non-state actors acting in an individual country: this represents the Local/Private sphere of normativity "Non-state actor normativity within national boundaries" in figure 1; (d) Non-state actors acting across boundaries: this sphere is found in the Global/Private cell called "International non-state actor normativity" in our matrix (figure 1).

The term "shift" is being used to describe two trends:

(a) The movement of a class of norms across the spheres of normativity illustrated in the matrix (figure 1):
   - From state-centred to interstate normativity – this will be discussed in section 2.1.1;
   - From public (or state) to private (or non-state actor) normativity – this will be discussed, *inter alia*, in section 2.1.1 and 2.1.2;
   - From local private to international private normativity – this will be discussed in section 2.2.2; and
   - From global public to global private spheres – this will be discussed in sections 2.1.1, 2.1.2 and 2.2.2.

(b) The change in relative dominance of certain forms of norms within the spheres, for example, accountability norms in the public sphere – this will be discussed in section 2.2.3.

Figure 1 points out the different shifts and interactions that result from the mutual influences of the spheres, that are discussed in the course of this chapter.

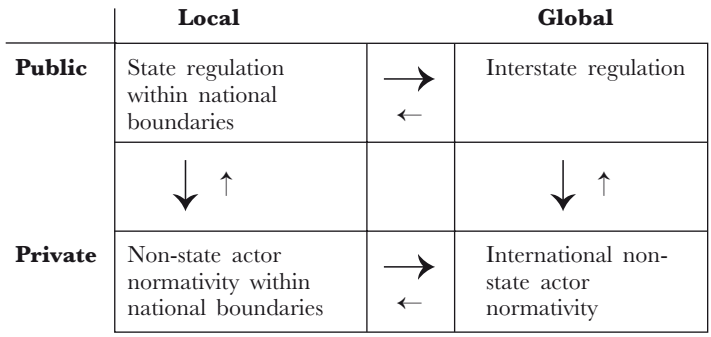

Figure 1

One needs to note further that these shifts occur on a number of levels, *inter alia*, norm creation, norm interpretation and norm enforcement.

State and non-state actors realize that no one sphere of normativity alone can successfully and comprehensively cover all the different areas requiring regulation in cyberspace. Such a realization leads to changes in spheres of normativity. Thus, the different spheres of normativity take up roles of governance previously belonging to other spheres, for example, non-state actors acting as interpreters and enforcers of state normativity. At times, the individual spheres also allocate their resources differently, for example, the increased role of the state as a guardian against non-state actors' lack of accountability. Furthermore, the spheres of normativity complement each other, for example, non-state actors creating norms to regulate situations that are inaccessible to states and states extending their institutions to monitor non-state actors' norms.

The role of ISPs, as non-state actors, is not limited to one specific aspect of governance. ISPs participate in the formation of norms, create norms in spaces where states' regulation is not present, interpret state regulation and act as the actual enforcers. On the other hand, while states are ostensibly relinquishing parts of their sovereignty, other powers are, in fact, taking up new or expanded roles of governance, for instance, as providers of systems of accountability.

These shifts in governance are the result of (a) the particular characteristics of cyberspace activities, (b) the difficulties the cyberspace reality pose on state regulation and (c) globalization (as can be seen in Section 3 of this chapter).

These shifts within and between spheres of normativity are not

independent one from the other. The different sources of normativity co-exist, partly competing and partly complementing each other. State and non-state sources of normativity form a continuum within which different forms of behaviour in cyberspace can be and are, in fact, governed.

The rest of this chapter is structured as follows. Section 2 describes the interaction between State and non-state spheres of normativity in cyberspace. Section 3 discusses the possible explanations for the described trends in governance. Conclusions follow in Section 4.

2. *Governance in cyberspace*

The sources of normativity in cyberspace can be set into two categories: individual states, multilateral relations between states and interstate organizations, on the one hand, and non-state actors on the other. The two categories are not altogether separate. The spheres of normativity are interdependent. Neither of the spheres alone can effectively and comprehensively regulate cyberspace. The different sources depend on the existence of the other sources in the same sphere and in other spheres.

Non-state actors in cyberspace include key players in the provisions of services, non-governmental organizations and other common-interest associations and managers of architecture or producers of code. In this chapter, one category of non-state actors in cyberspace will be considered: ISPs as a source of governance.

As the technology stands today,[3] ISPs are essential actors in cyberspace. ISPs are companies that provide individuals and/or other businesses access to cyberspace and frequently offer other related services, such as email accounts and web-hosting services. ISPs, therefore, provide the link between the on-line world and the off-line world for the majority of customers. Furthermore, ISPs interconnect with other ISPs (through switching centres) to exchange Internet traffic. ISPs vary in size, some aim to provide a service to a local community while others may aim to provide their services to a regional or transnational

3. The state of technology today restricts or designs the present role of ISPs. It is not unimaginable that technology moves on as such that ISPs become redundant as point of access on to the Internet or other networks.

clientele. ISPs are not necessarily strictly territorial: some ISPs offer services across different territorial spaces; and some ISPs exist only virtually.[4] As long as the customer can link up with the ISP via, for example, a telephone line, a satellite link, or any other link, the ISP can be located in any place.

The following sections look at the formal and informal governance by states and the roles of ISPs in the governance of cyberspace. The descriptions given are not meant to be an exhaustive description of all the existing forms of governance in cyberspace. They are merely used and described, in some detail, to illustrate and explore the shifts between spheres of normativity taking place in cyberspace.

2.1 *States and cyberspace governance*

We describe here two main state sources of normativity in cyberspace: formal legislation and informal policies or initiatives. In the exploration of these sources we look at the current interaction between the state/s and ISPs and the shift in spheres of normativity. As the examples will illustrate the non-state actor is gradually being transformed from the subject of regulation into a co-regulator and even regulator in its own right. ISPs participate, in varying degrees, in the legislative, administrative and judicial processes initiated by states. ISPs are consulted before the introduction of new legislation by states, and sometimes participate in the actual drafting of legislation or create "fill-in" rules within framework state legislation. They interpret state rules and enforce these rules in areas where states have no access. ISPs collaborate with state law enforcement agencies by keeping and providing cached information of users' activities. In other instances, ISPs set the actual boundaries for users' activities, set rules and enforce these rules on the users. A simple example can better illustrate this: ISPs are expected to or have agreed to take-down sites that contain illegal content once notified of the existence of the site and retain data for law enforcement reasons.

4. A virtual ISP provides Internet services using the equipment and facilities of a real ISP in order to offer ISP services without the expenses and duties required in providing those services. The virtual ISP does not invest in any network, equipment or backroom/technical support needed to offer ISP services. The third-party provider handles all of the needs of the end user but is invisible to the end user who only sees the virtual ISP.

2.1.1 *Formal legislation*

Three sources of normativity characterize the public sphere of normativity in cyberspace: international initiatives, regional initiatives and local individual state initiatives.

On the interstate level, the Council of Europe's Convention on Cyber-Crime[5] is perhaps the first international law convention to deal with regulation in cyberspace. It attempts to regulate crimes committed via the Internet and other computer networks, dealing particularly with infringements of copyright, computer-related fraud, child pornography and violations of network security.

This convention was predominantly drafted by states and state organizations. While the contribution of non-state actors such as ISPs to the creation of the new norms was limited to the post-drafting stage, the actual putting into practice of the convention requires the assistance of non-state actors for its enforcement. An example can illustrate this point: if enforcement officials of a member state need to act against, for example, a child pornography site, it is the ISP offering services to that particular alleged offender that has the technical means to block or put down the site and retain the necessary evidence that can be used by enforcement officials in the prosecution of the crime.

In other instances states (acting together) are content to simply devise guidelines of behaviour to be followed in cyberspace and leave the actual application and enforcement to non-state actors. Indeed, in data protection law the Council of Europe was content to devise guidelines for privacy protection on the Internet[6] and encourage ISPs to develop and apply norms within an internationally agreed set of guiding principles.

Regional state initiatives have followed suit in using ISPs as sources of law enforcement. The EU Electronic Commerce Directive[7] is a case in point. The directive is in the process of being implemented[8] in

5. Council of Europe Convention on Cybercrime (ETS No. 185) opened for signature in Bulgaria 23 November 2001. (<conventions.coe.int/Treaty/en/Treaties/Html/185.htm>). This convention is also open to non-Council of Europe member states.

6. Council of Europe Recommendation No. R (99) 5 Guidelines for the protection of individuals with regard to the collection and processing of personal data on information highways which may be incorporated in or annexed to codes of conduct

7. Directive 2000/31/EC of the European Parliament and the Council of 8th June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on Electronic Commerce), OJL 178, July 17, 2000.

8. The 17th January 2002 was established as the implementation deadline.

the EU member states. The directive establishes a number of situations where ISPs have (or do not have) liability for activities taking place through their servers (in any of the following situations transmission, access provision, caching and hosting). The role of ISPs is increasingly being one of "enforcer" of legislation by removing or disabling client access, or "take-down" of contents and removal of cache copies.[9]

The implementation process of the directive in the member states involves, in the majority of member states, non-state parties. For example the UK ISP Association (ISPA),[10] among others, submitted its comments to the UK government's call for comments on the implementation of the Electronic Commerce Directive in the UK.[11] In return the UK regulations[12] were amended accordingly. Alongside the non-state actors involved in the drafting of the legislation issued by government, the UK government also chose to "delegate" the power to make regulations on the take-down of sites to sectoral self-regulation. Indeed the official report[13] claims "The Government is happy to play its part in actively encouraging interested parties to participate in the generation of such codes but stresses that their content is primarily a matter for industry itself." Here, non-state actors are acting as regulators of a process that would have in other contexts been regulated by state legislation.[14]

At a state level many states have enacted legislation to control behaviour in cyberspace. Recognizing, however, that state intervention in cyberspace can be somewhat inefficient some states, like the United States and the UK, seek and formally solicit the assistance of non-

9. This role being taken by ISPs is in part a comprise situation following heavy lobbying by ISP Associations: non-liability of ISPs against ISPs responsible for enforcement and retention of evidence.

10. ISPA UK is the trade association for ISPs in the UK. ISPA was founded in 1995, and seeks to actively represent and promote the interests of businesses involved in all aspects of the UK Internet industry. ISPA's membership includes ISPs, backbone providers, cable companies, web design and hosting companies. ISPA represents approximately 90% of the UK Internet access market (accessed at <www.ispa.org.uk> on 12 February 2002).

11. Document dated 1st November 2001 – accessed at <www.ispa.org.uk> on 12 February 2002.

12. The UK Electronic Commerce (EC Directive) Regulations 2002 which came into force on the 21st August 2002.

13. Electronic Commerce (EC Directive) Regulations 2002: Public Consultation – Government Response. Document date 31st July 2002 accessed at <www.dti.gov.uk> on 20 August 2002.

14. E.g. the cease and desist warrants in civil jurisdictions.

state actors in the field, typically ISPs in the regulation of certain activities in a digital context. There are a number of such state initiatives, *inter alia*, the US Digital Millennium Copyright Act. This act requires ISPs to take down sites that *appear* to constitute copyright infringement.[15]

These examples reflect that the shift from the public sphere to the private is predominant in primarily two levels: (a) public actors are more and more dependent on private actors to carry out the actual interpretation and enforcement side of regulation; and (b) there are instances were states expect non-state actors to create norms themselves.

One can also witness a shift from the local sphere to the global sphere of normativity: while independent states still create norms to regulate behaviour in their jurisdiction there are also a number of international or regional initiatives taking place.

2.1.2 *Informal state normativity*

States can also be sources of informal ordering[16] such as the informal collaboration between the Police and ISPs in Belgium or the United Kingdom. For example, since May 1999, the Belgian ISP Association and the Belgian Judicial Police have established a system of informal collaboration to deal with claims of illegal content in cyberspace. The judicial police act as a central decision point for all alleged claims of illegal content. The ISPs have two obligations (a) to provide a link on their site to a 24-hour contact point (funded by the ISP) to report alleged illegal content. The complaint is passed on to the police and the police may request the ISP to take down a site. (b) Upon notification by the judicial police the ISP will take down the site.[17]

Other examples of collaboration include, for instance, for the regulation of child pornography sites in the UK and other European states. The UK collaboration involves the police and ISPs as well as non-state organizations such as Internet Watch Foundation.[18] What

15. Biegel (note 1), p. 348.

16. Here the term "informal ordering" is taken to refer to any form of state governance besides legislation.

17. "Cooperation Protocol in order to combat illegal acts on the Internet" signed on the 28th May 1999 between the Belgian ISPA and the Deputy Belgian Prime Minister and the Belgian Minister for Justice (accessed at <www.ispa.be/en/c040202.html> on 12 March 2002).

18. *See* <www.iwf.org.uk/index.html> accessed on 12 March 2002.

happens here is that the Internet Watch Foundation acts as a watchdog for the presence of illegal child pornography sites, investigates the alleged content and, where necessary, requests ISPs to take down the site, notifies the police to prosecute and may refer the report to a partner hotline in the apparent country of the source where this is possible.[19] ISPs here, as in the Belgian example, provide a contact point or link for its customers to Internet Watch Foundation hotline.

This shift involves greater interaction between individual states and private actors within the state. One can note a number of collaborative processes in governance taking place between state institutions and non-state actors. Non-state actors take over in situations where states do not have physical access to control the behaviour. On the other hand, states, albeit informally in the above examples, relieve non-state actors from potential legal liability.

2.2 *ISPs and cyberspace governance*

As was hinted at in the preceding paragraphs ISPs play a role in cyberspace governance. Their roles are varied. These roles include rule setting, rule following, supervising rule enforcement, punishing infringers and the settling of disputes.

In this sub-section we will look at the role of ISP in self-regulation. Norms formed by ISPs (or associations of ISPs) are meant to complement the existing laws where these are present, or serve as the norms where no formal state regulation exists. ISP regulation is two-fold: ISPs have set norms to regulate their own behaviour and responsibilities; and ISPs set norms of behaviour for their customers and third parties using their services.

One major criticism for sectoral self-regulation is that non-state actors do not commit themselves to the responsibilities of their actions as regulators. The final part of this subsection therefore describes mechanisms with which ISPs can be held accountable for their actions and behaviour.

19. The notice and takedown system works on the principle that if ISPs are provided with actual knowledge of illegal content on their servers, they can then remove it. Ruth Dixon, "Co-operative forms of regulating the Internet", speech given 28 November 2001 at Council Of Europe organized European Forum on Harmful and Illegal Cyber Content: Self-regulation, user protection and media competence (accessed at <www.coe.int/t/e/cyberforum/conference/reports.asp> on 12 February 2002).

2.2.1 *Self-regulation of ISPs*

In many countries[20] associations of ISPs have set up rules within which they could operate and offer services. There are two forms of ISP associations (ISPAs): national ISPAs and regional ISPAs. Regional ISPAs are usually made up of a number of national ISPAs, for example, the Spanish, French, Italian, Austrian, German, Irish, Dutch and UK ISPA are all members of European Internet Service Providers Association (EuroISPA).[21] The self-regulation of ISPs has often come about either as a result of market needs,[22] legal vacuums;[23] or as a result of statutory law encouraging self-regulation of the major players in the market.[24]

Associations of ISPs (ISPAs) act as the "central" self-regulatory authority of ISPs in a number of ways: (i) by establishing codes of practice; (ii) by drawing up guidelines for behaviour in order to reduce ISP liability in collaboration with other organizations; (iii) as a formal and at times informal enforcer of behaviour.

The codes of practice bind the members of the ISPA. No code of practice is deemed to be a stand-alone document, that is, member ISPs are expected to abide with the code of practice as well as any other laws of the state that regulate their behaviour. These codes of practices often include rules requiring members to deal fairly and lawfully with customers and to provide customers with tools to control the content they receive. They also require the members to collaborate with state law enforcement authorities and to follow industry

20. Such as Austria, Belgium, Denmark, The Netherlands, Italy, France, Spain, Ireland, United Kingdom, Japan, United States, South Africa, Hong Kong, Australia, Canada.

21. *See* <www.euroispa.org/> accessed on 12 March 2002.

22. Some ISP associations (ISPAs) (e.g. the one in South Africa) admit that they were partially established in response to a perceived threat to the independent market posed by national telecommunications monopolies. Others were established as lobby groups for market equity.

23. Most ISPAs have been established and promote self-regulation, to promote the progress and expansion of the industry without unnecessary hindrance of government or state regulation (see what is UK ISPA? at<www.ispa.org.uk/html/what_is_ispa. htm> accessed on 13 February 2002).

24. For example, some national broadcasting services legislation (like the Australian Broadcasting Act) and/or national telecommunications legislation give the option to industry players to organize compliance with the legislation either through self-regulation or through direct statutory or government action. Some ISP associations were created in response to this "invitation".

practices in enforcement of customer or third party behaviour through, for example, the use of anti-spamming software.

ISPAs collaborate with other ISPAs, non-governmental organizations or governmental authorities. For example, as previously mentioned, the Belgian ISPA collaborated with the Belgian Judicial Police to establish a protocol for the take-down of sites hosting alleged illegal content by the ISPs members of the Belgian ISPA.

Other instances of collaboration involve, for example, collaboration between two or more ISPAs as in the case of the EuroISPA – the collection of the European ISPAs acting together to regulate behaviour on a regional level.

Most ISPAs have a complaints procedure to handle complaints received from customers on the activity of a member of the ISPA association. The Complaints Board, if it finds that a member has acted in breach, may apply a number of sanctions according to the breach in question including the suspension, expulsion and publication of the decision against the offending ISP.

2.2.2 *ISPs, their customers and third parties*

ISPs have taken upon themselves the role of regulators or gatekeepers, for example, by blocking access or by putting down sites and caches if their customers are using the ISP service to send unsolicited bulk mail or in pursuance of criminal behaviour.

ISPs may also use filtering techniques to "censor" criminal content and prevent it from reaching their customers. To combat cases of Internet fraud ISPs build technological security systems into their systems thus protecting their customers, protecting their own survival and assisting states in combating Internet crime. Even a simple norm – thou shalt not send or receive a virus – is enforced by ISPs in many instances where the ISP's customer has mail or attachments intercepted at the gateway.

All ISPs regulate their relationship with their customers through specific terms and conditions. These terms and conditions are non-negotiable for the customer, that is, the customer, with the exception of large corporate clients, cannot modify or ask to modify any part of the terms and conditions. These terms and conditions generally contain, *inter alia*, user obligations – including the obligation to ensure that no illegal activity takes place by the user through the service of the ISP. These provisions very often prohibit the user from

downloading of illegal[25] or copyrighted material such as music, or sending unsolicited mail and require the user to "behave" lawfully.

It is interesting here to note that ISPs not only create norms and enforce them but also interpret state norms originally legislated for the off-line world, such as laws on defamation or freedom of speech. Following the terms and conditions in the service contract, very often, an ISP may choose to terminate the provision of services if it claims that its customer has been using the services to incite racial hatred or to promote the beliefs of an obscure religious sect. ISPs are being charged with the responsibility of enforcement that has otherwise been left in the hands of the public enforcer. At times, ISPs go beyond what a state enforcer would have been permitted to do. ISPs are allowed to intercept and limit customer communication in a way that states are not allowed because of requirements imposed on the state through the principles of fundamental rights and freedoms in a democratic society. ISP *de facto* enforcement is often accompanied, in some jurisdictions,[26] by a requirement that ISPs keep a copy of cached traffic for judicial authorities.

Of course, this task becomes even more complex when an ISP offers services to customers located within a legal culture different to that of the ISP. What is considered to be illegal in public spaces in one culture can be considered to be legal in others.

A notable aspect of the shift in normativity is that ISPs are involved in the interpretation and enforcement of criminal law, that is, an area of law that has been up to now considered the exclusive responsibility of the state.

2.2.3 *ISPs and accountability*

There are mechanisms in a state to hold that state accountable for its actions or omissions. In contrast, non-state actors have received criticism for alleged non-commitment[27] and for failing to provide systems to ensure accountability.[28] ISPs are not immune to this critique.

25. There is often an explicit list of what content is considered as "illegal" – child pornography, defamation, obscene, abusive. The legal definition of these activities may however be different in different cultures.

26. For example, the Netherlands.

27. *See, inter alia*, R. McCorquodale, "Human Rights and Global Business", in Bottomley, Kinley (eds.), *Commercial Law and Human Rights* (Dartmouth, Ashgate, 2002).

28. *See, inter alia*, P. Wapner, "Defending Accountability in NGOs", 3 *Chicago*

This criticism is, however, not a fair assessment of the current practice. The norms set by ISPs can be challenged and ISPs held accountable by means of non-state and state mechanisms.

Non-state mechanisms revolve around complaints procedures set up by the ISPAs and more importantly through market mechanisms. ISPAs have established complaints boards to hear and investigate complaints against the ISP association members by customers or members of the public. Besides the inherent right of redress being given to customers and members of the public, the publicity surrounding the claim is often "punishment" enough in itself. ISPs, like other commercial enterprises, cannot afford a bad reputation. As has been claimed,[29] reputation is one of the most significant intangible resources any commercial enterprise can have. Reputation and trust in doing business were quoted to be among the factors that lead ISPs to attempt to regulate spamming.[30]

Customers choosing an ISP are free to choose from a wide variety of providers and services offered. This diversity in selection ensures that customers dissatisfied with their provider's practice or norms can change ISP with minimum effort. Furthermore, as a recent study has shown, since internet-related innovation cycles are very short, the ISPs are held in check by the fact that the users could always switch to a better or improved service.[31]

It can be argued that ISPs can, in fact, abuse their position of dominance granted through technology and act as a cartel, effectively limiting the competitive differences between the ISPs, with services becoming more costly and more uniform for customers. States, predominantly the United States and the European Union, have reacted to these situations by interfering in the market to ensure that a free market of ISPs exists.[32] This intervention ensures that consumers

Journal of International Law, 2002, 197; J.D. Nye, "Globalization's Democratic Deficit: How to make International Institutions more accountable", *Foreign Affairs* July/August 2001, 2.

29. S.C. Zyglidopoulos, "The Social and Environmental Responsibilities of Multinationals: Evidence from the Brent Spar Case", 36 *Journal of Business Ethics* 2002, 146.

30. US House of Representatives Commerce Committee meeting 3rd November 1999, as reported in Hillebrand, Mary, (1999) US House Committee Mull Spam Crackdown. *Ecommerce Times* 4th November 1999 accessed at <www.ecommerce-times.com/perl/story/1647.html> on 12 March 2002.

31. J. Schaaf, "Economics: Internet revolution and new economy", *Deutsche Bank Research* No. 24, February 11, 2002.

32. For example, by liberalizing the market. (*See* further Notice by the Commission

have an appropriate choice in the selection of services. States are gradually taking on more responsibility in the maintenance of conditions allowing a competitive free market. Free market conditions need to be and are accompanied by effective consumer protection mechanisms that allow customers to seek redress for situations of abuse.

States offer other systems that impact the accountability of ISPs. The systems range from the requirement of registration or the request for a licence of ISPs from a central authority to the requirement to abide with the laws of the state that were not strictly enacted with the digital world in mind. Some countries,[33] for instance, require that an ISP be licensed to act as an ISP by some governmental authority or independent authority. Some telecommunications authorities have issued guidelines or regulation to ensure a minimum standard of service by ISPs to their customers. For instance, the regulatory scheme established by the Australian Broadcasting Services Amendment (Online Services) Act 1999 applies specifically to the activities of ISPs and their liability in Internet content issues.[34] These guidelines limit the arbitrary behaviour of an ISP.

Other examples of state systems that may impact an ISP include data protection and privacy legislation. In countries where data protection legislation is in force (mostly in European countries and Canada) ISPs are required to register with a data protection authority since ISPs inevitably deal with personal data and are required to ensure that personal information is kept confidential.

The traditional principles of contractual liability also act as a safeguard against capricious behaviour. Since the basis of the relationship for doing business between ISPs and their clients is primarily contractual ISPs are expected to follow the law on contracts in their particular state, whether that contract law is based on the principles found in the civil code or other legislation or through common law principles. This often includes rules on liability of the parties in the contract and rules for the exclusion of liability of one of the parties. Some countries, for instance, do not allow for the complete exemption of liability on the part of any of the parties.

Concerning the Status of Voice on the Internet Under Directive 90/388/EEC accessed at <europa.eu.int/ISPO/infosoc/legreg/docs/InetPhone.html> on 20th August 2002).

33. Like India, Mauritius.

34. <www.aba.gov.au/internet/index.htm> accessed on 8 March 2002.

Formal state institutions like courts can be invoked and have been invoked with some success. In some countries, such as UK, Germany, France and Belgium, private parties and state prosecutors have brought actions ISPs for hosting content material inciting racial or xenophobic hatred or child pornography or human trafficking content.[35]

The change here is the increased importance in the role of the public sphere in using its institutions to ensure private actors' commitment. States have an institutional framework already in place that can be used to check on non-state actor accountability.

3. *Discussion*

The description in the last section supports the position that governance of cyberspace seems to be following the shifts in normativity illustrated in Figure 1. In this section we look at two possible lines of thought to explain the shifts taking place: (i) the particular nature of cyberspace; and (ii) the effects of globalization.

3.1 *Cyberspace*

As we point out in the beginning of this chapter, effective regulation of cyberspace needs to cater for both the technological aspect of cyberspace and cyberspace as a conceptual space. The very nature of cyberspace: its lack of territorial definability; its organizational capacities; and its decentralized structure; plays an important role in cyberspace governance.

3.1.1 *A-territorial nature*

The a-territorial nature of a large number of activities in cyberspace challenges the traditional notions of state territorial jurisdiction. Most spheres of regulation are accustomed to regulate behaviour or activities in a defined geographical space. This in turn requires a shift in normativity.

It is not difficult to see that national legislation regulating behaviour on the Internet, while theoretically effective in that jurisdiction,

35. Perhaps the most famous are the German AOL case, the French case against Yahoo France.

is in practice very limited. The US Digital Millennium Copyright Act 1998[36] is, in theory, effectively limiting breaches of copyright in the US but has been unsuccessful when attempting to control the breaches of copyright in East Asia. Furthermore, the Act in itself would be ineffective even within the boundaries of the US if non-state actors do not carry out the actual enforcement.

One might argue that the transnational limitation could easily be overcome by international law. After all, it is the role of international law to provide a link between states to govern global situations satisfactorily. However, experience has shown, for instance, in the drafting of the Cybercrime Convention, that the process of achieving consensus on an international level is a slow process.[37] The Council of Europe Cybercrime convention took four-years of discussions. Time is a key factor in digital activities. With developments in technology happening so fast, international regulation is sometimes outdated before it comes into effect. Furthermore, the challenge of achieving consensus has often reduced the eventual regulation to a much water-down version of the regulation needed.[38] Additionally, cultural differences in regulation of behaviour are difficult to surpass at a state or interstate level.

A shift from local to global normativity in our matrix in Figure 1 is not enough to govern all the activities in cyberspace effectively. The local to global move does not address the undefinability of cyberspace nor does it reach the technical and cultural problems states face in accessing certain spheres of behaviour in cyberspace. As Brousseau points out[39] cyberspace does not just challenge the legitimacy of state intervention but its efficiency.

3.1.2 *Communities of interest*

Cyberspace is, not only, often not tied to one territory but is also not tied to one space. Cyberspace is many spaces at the same time. The

36. The full text can be found at <frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=105_cong_bills&docid=f:h2281enr.txt.pdf> accessed on 20th August 2002.

37. As the sequence of draft versions of the Convention show – some of these drafts are available at <www.cdt.org/international/cybercrime/> accessed on 11th November 2002.

38. E.g. the dilution of certain content-related clauses (e.g. Article 9(4)) in the Cybercrime Convention.

39. E. Brousseau, *Internet Regulation: Does self-regulation require an institutional framework?* Version 28/07/2001 accessed at <atom2.univ-paris1.fr/FR/membres/eric/eric.htm> on 2 August 2002 at p. 15.

character and identity of these spaces change according to "the people who populate these places."[40] Technology has facilitated the creation of cyberspace communities on a basis of shared interests. The basis of the communities is often not one of shared nationality or culture but just one of interest. Technology allows participants to shed the different dimensions of personality and communicate with other participants solely in one dimension of their shared interests, for instance, a Muslim and a Christian participating in the same group of ice-hockey fans oblivious of the fact that they could belong to different national and cultural communities in the off-line world. The option given through technology to act anonymously, or under a different identity to the one's identity in the physical world, further enhances the coming together of cyberspace communities based exclusively on interest.

This realization that in cyberspace there is no one group of people coming from the same state, where the state attributes nationality or citizenship and in turn expects law-abiding behaviour, accounts for some of the shifts in normativity in cyberspace. One such shift is the horizontal shift from local to global in the private sphere of normativity, that is, the interchange between non-state actors originating in one state and other communities of interest on a global level. An illustration of this shift is, for instance, the collaboration between ISPs and other non-state actors for the governance of illegal content, where a common denominator has to be defined by the non-state actors.[41] The peering agreements and reliability on mutual use of exchange systems of technology and information between ISPs across the globe is another example.

Communities of interest form their own common normativity to regulate their behaviour within that community. This notwithstanding the different legal cultures and traditions the individual members belong to. For example, members of a particular newsgroup abide by the norms created and followed within that newsgroup. Then it is the non-state actors, such as ISPs, that act as intermediaries between the different levels of normativity.

40. L. Lessig, *Code and other laws of Cyberspace* (New York, Basic Books, 1999), p. 63.

41. As the collaboration between e.g. the Internet Watch Foundation and ISPs *see* <www.iwf.org.uk/index.html> accessed on 12 March 2002.

3.1.3 *Technological aspects*

The technological structure of cyberspace also influences the efficiency of normativity. State laws are useless if they are unable to be applied and sanctioned. Often the technological access to the behaviour being regulated rests with non-state parties and only in very limited ways with states.

The issues of technological access favour a vertical shift: from the public to the private sphere of normativity. This can be seen, for example, in the interpretation of norms. We have noted how ISPs are expected to interpret what is considered by state laws to be a copyright infringement or illegal and harmful content and are expected to enforce by putting down a site or blocking access or use. Non-state actors are taking on roles of "judges" and are expected to be held accountable for the decision in areas that have until now been taken care of by states.

However, the shift is not in one direction. While the role of the state may be decreasing on one level new roles are relayed back to the state. The role of the state has shifted to one of ultimate guardian of the rights and liberties of peoples. States are expected to provide the necessary systems of redress to counterbalance the activities of non-state actors. ISPs for instance need to be held in check by state courts or through market practices for decisions taken, for example, in blocking or not-blocking access. The state needs to provide the right conditions for the market to commit to its actions.

Cyberspace is a decentralized structure. Cyberspace does not have one central focal point, be it technologically or conceptually. From a governance point of view, decentralization necessitates that a plurality of sources of normativity co-exist to regulate the space.

The particular nature of cyberspace, therefore, accounts for the interactions on the perimeter of the matrix rectangle, that is, the shifts from the public local to the public global sphere; from the private local to the private global sphere; from the public local to the private local sphere; and from the public global to the private global sphere.

3.2 *Globalization*

Some scholars claim: "Globalization is reconfiguring the modern state".[42] Indeed, the process of globalizing the market economy, the increase

42. K. Jayasuriya, "Globalization and the changing architecture of the state: the

and widespread availability of vital communicative technologies, mass-media and other knowledge-based structures[43] have influenced the relations and standing of the "state".

These changes necessitate a varied response from both a political and legal standpoint. The major shift here is a from a situation where the state is the primary source of behaviour regulation in society to a situation where plural sources regulate the behaviour of the participants. This ties in with the discussion of neo-medievalism, as illustrated by Friedrichs in this volume.[44] The world is once more witnessing a layering of multiple authorities and multiple loyalties.

3.2.1 *Shifting* foci *of control*

Having multiple sources of normativity has led states to shift their focus of control. Government is no longer focused on regulating the behaviour of individuals but is more concerned with "system enforcement".[45] This implies that states focus their attention on monitoring the normativity created and enforced by non-state actors. In cyberspace governance this can explain the importance of the role of states in ensuring accountability of non-state actors such as ISPs. From a state perspective the private sphere can govern the space of their activity as long as this does not have adverse effects on the welfare of the consumers or the wider community. In practice, what we are saying here is that states will allow an ISP to filter its clients' mail as long as the client has an alternative remedy to the situation, for example, a change in ISP. If there is no remedy for the client, then state mechanisms of enforcement of laws on interception, *inter alia*, come into play.

The interchange is not limited to a shift between state and non-state actors in one geographical jurisdiction. As we have seen international and regional legislation (such as the Cybercrime Convention, Council of Europe internet privacy recommendation and the EUE-commerce directive) demand of non-state actors that they participate

regulatory state and the politics of negative co-ordination", 8 *Journal of European Public Policy*, 2001, 101.

43. I-J. Sand, "Understanding the New Forms of Governance: Mutually interdependent, Reflective, Destabilized and Competing Institutions", 4 *European Law Journal*, 1998, 271.

44. J. Friedrichs, "The Meaning of New Medievalism", 7 *European Journal of International Relations*, 2001, 475–502; and Friedrichs contribution in this volume.

45. Jayasuriya (note 42), p. 111.

and take responsibility for the governance of the prescribed activities in cyberspace.

This does not mean however that the international community can simply cast aside its role in international cyberspace governance. The international community has standing experience in shifting concepts of territorial jurisdiction and sovereignty. Thus, it has an important role in easing the jurisdictional problems associated with the redress of cyberspace activities.

3.2.2 *Privatization of markets*

As in any context there are also financial factors to be taken into consideration in the governance shift. The shift brought about by globalization and modernization of the economic markets has resulted in a decrease in the state's financial resources. In an attempt to grapple with the new complex financial reality, states have succumbed to increased pressure to move from nationalization to privatization or to de-nationalization. Privatization policies certainly have not solved all the state's financial woes, cost-cutting exercises on all in the state's functions is being seen as essential.

The process of legislation and effective enforcement of legislation is a costly process and states are content to support alternatives that are less costly for the state. As Sand points out:

> Both the tendencies of globalization and of the dependency on specialized knowledge and technology do pose material, as well as procedural challenges for the more traditional forms of law and politics. Some of the new economic and scientific processes are somehow beyond the scope of each nation state alone or political and legal institutions alone. The old institutions must be supplemented, evolve and learn from other institutions.[46]

Governments are therefore faced with budgeting for the cost of drafting ever more specialized legislation to cover the behaviour of participants in new technologies and new realities; for the operation of these new laws; and for the co-operation with other regulatory authorities in other jurisdictions.[47]

46. Sand (note 43), p. 271.

47. D. Sinclair, "Self-regulation versus command and control? Beyond False Dichotomies", 19 *Law & Policy*, 1997.

3.2.3 *Privatization of normativity*

The state has gradually recognized that supporting other regulatory measures could be a less-costly process. The financial burden of regulation[48] is being shifted to industry or to those on the receiving end of such regulation. States seem to take action when the situation is financially rewarding for the state, for example by promoting safe electronic commerce or in situations that are directly linked with the perception that voters (political constituents) require such regulation: the yielding to the pressure of certain lobby groups and introducing legislation on copyright protection or against child pornography.

On the other hand non-state actors, especially industry actors, favour such a shift in governance. Essentially, certain industries have realized that there are financial incentives to favour alternative methods of regulation over the command and control systems of states.[49]

The issue remains however that in spite of being a cheaper solution, non-state regulation does not work in all situations, for instance, states cannot dispense with the responsibility of providing enabling legislation.

Changes in society, technology and state finances contribute to the vertical shift from public domain to private domain. States have increasingly responded to these changes by delegating governance power to non-state entities to achieve their goals.[50]

On the one hand this delegation of power has been praised[51] in that (a) these new methods of regulation are deemed to be more legally flexible than command and control systems of states; (b) they allow for greater participation of interested parties in the formulation of their regulation against a background of imposed state regulation that allowed little, if any, consultative participation in the formulation of the regulation; (c) this allows for a shift in conflict resolution methods: from adversarial systems to mediation.

On the other hand, privatization of regulation can be seen as an

48. Regulation here is being taken to include the means of channeling conduct, the means of conflict resolution, and the means of organizing this ordering. *See* M. Rehbinder, "The Social Function of Law", 22 *Quaderni di Sociologia*, 1973.

49. J. Wallace, Ironfield, J. Orr (refereed by Dr. J. Fallon), "Analysis of Market Circumstances where industry self-regulation is likely to be most and least effective", report by Tasman Asia Pacific prepared for the Australian Commonwealth Treasury May 2000, p. 5.

50. J. Boyle, "Introduction Thirtieth annual administrative law issue: A non-delegation doctrine for the Digital Age?", 50 *Duke Law Journal*, 5, 2000, 10.

51. N. Gunningham, J. Rees, "Industry Self-Regulation: An Institutional Perspective", 19 *Law and Policy*, 1997, 366.

ultra vires act by the state in delegating powers and responsibilities that have been entrusted to government through democratic elections by the citizens of the state.[52]

3.2.4 *Political inertia*

Some argue that non-state normativity has evolved in response to either political inertia or a political vacuum. Politicians seem to be increasingly reluctant to promote the function of law as moulding the moral and legal conceptions and attitudes of society.[53] Politicians seem to be gradually assuming and retaining the role of the ultimate guardians of society that should only interfere when the equilibrium in society has been seriously disrupted and has not been restored by market sources.

Industry is unlikely to tolerate situations of state inertia for too long. Situations of inertia are unpredictable and create uncertainty in the market. In situations of unpredictable state legal systems, industry is known to have created its own predictable systems in parallel to the state system to restore consumer and client confidence.[54] Some non-state regulation initiatives have, in fact, started to fill a regulatory void in left by State regulation.[55] As Ginsburg points out, "where state-provided rules are unavailable or unenforced, economic actors develop reputation-based alternatives to obtain the crucial predictability in commercial transactions".[56]

While the within these new roles states enjoy less financial flexibility to compete against market forces, states ". . . remain a pivotal institution, especially in terms of creating the conditions for effective international governance".[57] This is a position that ultimately provides

52. Boyle (note 50), p. 13. H. Jung, "The concept of regulated self-regulation: Comments from a Criminal Lawyer's view", 86 *Svensk Jurist Tidning*, 2001, 130. Jung argues, "we should not write off light-handedly [the state's] democratically legitimized responsibilities, unless we conceive of justice as a concept for the rich and the powerful only."

53. Harold J. Berman, William R. Greiner, *The Nature and Functions of the Law* (The Foundation Press, Brooklyn, USA, 1966), p. 33.

54. T. Ginsburg, "Does Law Matter for Economic Development? Evidence from East Asia (Review Essay), 34 *Law & Society Review*, 2002, 834: "The harsh and sometimes unpredictable exercise of law in traditional China led merchants to seek to avoid encounters with the formal legal system. Similarly, societies under colonial rule developed informal orders that paralleled the system of state law."

55. See the Australian Code of practice for Computerized Checkout Systems in Supermarkets (1989).

56. Ginsburg (note 54), p. 834.

57. Hirst, Thompson (note 2), p. 256.

the necessary security and stability[58] for non-state actors to thrive and develop.

4. *Conclusion*

Cyberspace and globalization have brought about definitive changes in international governance. We have seen that the role of the state in governance has been changing in a number of ways, giving wider scope for non-state actors to participate and contribute in the governance task.

In the course of the chapter we have discussed a number of shifts in spheres of normativity in international governance. The description shows that there are two kinds of governance shifts taking place: (a) a shift between spheres of normativity: from state-centred to interstate normativity; from public (or state) to private (or non-state actor) normativity; and from local private to international private normativity; and (b) a shift within some of the spheres: an increase or decrease of importance of specific forms of normativity in a sphere.

These shifts in spheres of normativity are taking place in different areas of international governance: Gupta's description (in this volume) of non-state actor participation in environmental protection seems to indicate shifts similar to those described in this chapter. To some extent, Struett's description (in this volume) of the role of non-state actors in the creation of an International Criminal Court also shows that such changes are indeed taking place. It would be interesting, through future research, to examine the role of technology and globalization in the shifts going on in these fields of international relevance. In a cyberspace context, for instance, cyberspace's particular bundle of characteristics of ubiquity, a-territoriality, diverse digital communities based on specific interests and technological structure, hastens and intensifies the processes set in motion by globalization and privatization.

What is innovative in cyberspace governance, we think, is the crucial interdependence between state and non-state regulation. In the physical world where state regulation is an effective means of regulation, non-state actors choose to participate in regulation in a move towards what can ostensibly seem to be the less "threatening" option.

58. E.g. in upholding the rule of law. See Hirst, Thompson (note 2), p. 277.

When non-state actors opt not to participate state regulation will, at some stage, step in. In cyberspace regulation, non-state actors choose to participate not so much out of apprehension of state regulation but rather as a step towards avoiding anarchy. As the ISP example illustrates, non-state actors have chosen to create norms where formerly none existed and through these means state regulation becomes effective. Norms that cannot be interpreted and enforced by a single state, either because of technical or physical inaccessibility or because of cultural normative differences, are interpreted and enforced by non-state actors. While, in turn, institutional and normative frameworks of states secure the commitment of non-state actors.

The different sources of normativity from these spheres do not replace each other. They complement each other, that is, one sphere fills in where the other does not reach and *vice versa*. Cyberspace is governed through the co-existence of public and private spheres of normativity that "have very different statuses and that partly overlap".[59] Together, however, these different spheres create a continuum of governance: local and global non-state actors in cyberspace often have access to behaviour that states cannot reach, non-state actors often are in a better position to assess the needs for regulation and can react to these needs quicker and in a less rigid way. States, on the other hand, remain an important source of normativity and can offer the necessary mechanisms to hold non-state actors accountable.

59. Brousseau (note 39), p. 14.